

**INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL
PROPERTY AND GENETIC RESOURCES, TRADITIONAL
KNOWLEDGE AND FOLKLORE**

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**WIPO INDIGENOUS PANEL ON FREE, PRIOR AND INFORMED CONSENT: EXPERIENCES
IN THE FIELDS OF GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND
TRADITIONAL CULTURAL EXPRESSIONS: EXPERIENCES FROM NORWAY**

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1. No need to dissect the concept free, prior and informed consent – rather focus on the basic questions

1.1 It is probably not particularly helpful, at this stage of the deliberations, to engage in detailed analysis of the various aspects of the concept free, prior and informed consent (FPIC). Neither is it necessary to dissect the concept into its various pre-fixes, i.e. “free”, “prior” and “informed”. These pre-fixes shall essentially be self-explanatory. The key word is clearly “consent”. Of course, the basic meaning of this term should be in no need of further explanation either. Instead, the Intergovernmental Committee (IGC) should focus its attention on the most relevant questions relating to consent:

(i) Who is the holder of the right to give (or not give) consent?

(ii) Who is the provider of consent? Can it be someone else than the actual holder of the TK/TCE?

(iii) Does the right to give consent apply to all forms of TK and TCEs?

(iv) Does the right to give consent last in perpetuity?

2. Who is the holder of the right to give consent?

2.1 The Policy Objectives and Core Principles for protection of TK and TCEs, respectively (The TK and TCE Instruments), are supposed to extend IPR-similar protection to TK and TCEs. A basic underlying premise for IPRs - and also for IPR-similar protection - is that absent legitimate transfer, the subject matter vest with its creator. This implies that the right as such to consent (or not) consent – per definition - vest with those that have developed the TK and TCEs. In case of TK and TCEs originating from an indigenous people, the right to consent hence belongs to that people.

2.2 This principle is also, as it should, enshrined throughout the TK and TCE Instruments. Here, it is particularly interesting to note the definition of TK/TCEs.

Pursuant to Article 9 of the TK Instrument,

“Protection of [TK] ... should last as long as the [TK] fulfils the criteria of eligibility for protection according to Article 4.”

And Article 4 defines TK protectable under the instrument as knowledge that is

“(i) generated, preserved ... and transmitted in a traditional and intergenerational context; or

(ii) associated with ... a traditional indigenous people ..., which preserves and transmits it between generations; or

(iii) integral to the cultural identity of ... an indigenous people...”.

Similarly, the TCE Instrument Article 6 links the term of protection to the definition of the subject matter of protection, as defined by Article 1. Pursuant to Article 1, to qualify as an TCE, an expression of culture must be

“(b) ... genuine of the cultural and social identity and cultural heritage of indigenous peoples... , and

(c) maintained, used or developed by indigenous peoples...”¹.

In other words, to at all qualify as TK/TCEs, knowledge/expressions must have a distinct cultural connection to a particular indigenous people. Moreover, to remain TK/TCEs, the element must maintain this connection with its originator. If the connection is broken, the knowledge/expression no longer – per definition - constitutes TK/TCE. This definition of TK/TCEs indirectly affirms that TK/TCEs vest with their creator. If not, they no longer constitute TK/TCEs. It is then an ordinary work for IPR-purposes, that can only be protected as an IPR. This way to define TK/TCEs, as well as the manner in which to determine the term of protection makes sense, and shall be retained in the TK and TCE Instruments.

2.3 The TK and TCE Instruments hence clearly rest on the assumption that TK/TCEs developed by an indigenous people vest with that people, and that consequently the right to consent (or not) also belongs to that people. In the TK Instrument, this is most clearly expressed in Article 7.1, which proclaims that

“The principle of prior informed consent should govern any access of traditional knowledge from its traditional holders, subject to these principles and applicable national laws.”

¹ I here disregard the recently added point “(a)”, submitting that TCEs can also be the product of an individual's creativity. The addition does not make sense, as presently worded. Individual creativity, without connection to a community, can hardly constitute a TCE. That would confuse TCEs with conventional IPRs.

The reference to “national law” could be interpreted as rendering the right to consent subject to national legislation. The Commentary clarifies, however, that this is not the intention. Rather, it is underlined that the “TK holders ... should consent to ... proposed use, as a condition for fresh access to TK” and that the reference to national law merely “leaves flexibility to adapt the application of the principle to national legal systems”.² Still, to avoid ambiguity, the actual provision should be amended in accordance with the commentary.

New proposed wording of Article 7.1

“The principle of prior informed consent should govern any access of traditional knowledge from its traditional holders.”

Unlike its TK counterpart, the TCE Instrument does not contain a particular article on FPIC. However, the right still follows from reading Articles 2 and 4 in conjunction. Pursuant to Article 2

“Measures for the protection of [TCEs] should be for the benefit of the indigenous people[s] ... to which a [TCE] is specific [and] (i) in whom the custody ... of the TCE... are existing ... and (ii) who maintain, control and use or develop the [TCE].”

From this provision, it clearly follows that TCE-protection should benefit the holders of TCEs. But it is not explicitly clear that TCEs also vest with the holder, in the sense that it is the holder that grants access to the TCE. Article 4 proclaims, however, that

“Prior authorization to use [TCEs], when required in these provisions, should be obtained either directly from the indigenous people[s], or from a designated national authority acting at the request, and on behalf, of the indigenous people...”.

2.4 From Articles 2 and 4 of the TCE Instrument it hence follows that the right to consent (or not) vest with the indigenous people that has created the TCE. As we have seen above, the TK Instrument Article 7.1 renders it clear that the same principle applies also to TK. Notwithstanding, who TK/TCEs vest with, and hence who is the holder of the right to consent (or not) before access to such subject matter, is clearly the most fundamental issue in any instrument on rights to TK and/or TCEs. The Instruments’ position on this cardinal question

² Commentary on Article 7, WIPO/IGC/GRTKF/IC/16/5, Annex, p. 42

should therefore be spelled out explicitly in the first article of each of the Instruments. The following common Article 1³ is therefore submitted.

ARTICLE 1 (new)

RIGHTS TO TK/TCEs

1. TK/TCEs are the property of the indigenous people that has developed the TK/TCE.
2. The indigenous people having developed TK/TCEs have the right to free, prior and informed consent prior to any access to the TK/TCE.

3. **Who is the provider of consent? Can it be someone else than the actual holder of the TK/TCE?**

3.1 Section 2 has hence concluded that the TK and TCE Instruments are relatively clear on who is the holder of TK and TCEs. As Section 2 has further indicated, however, that the Instruments also foresee that it need not always be the holder of the subject matter who consents to access. Article 7.2 of the TK Instrument reads

“The holder of traditional knowledge shall be entitled to grant prior and informed consent for access to traditional knowledge, or to approve the grant of such consent by an appropriate national authority, as provided by applicable national legislation.”

Further, as we have already seen, pursuant to the TCE Instrument Article 4

“Prior authorization to use [TCEs], when required in these provisions, should be obtained either directly from the indigenous people[s], or from a designated national authority acting at the request, and on behalf, of the indigenous people...”

3.2 Both instruments hence provide for that under certain circumstances, a state authority can act on behalf of the indigenous peoples in consent procedures. This is in itself not inappropriate. Clearly, there might be situations where an indigenous people lack the capacity to handle consent-procedures by itself, or where it for other reasons can benefit from state support in such processes. It is important, however, that it is up to the indigenous people to self-determine whether it wants to involve the state authority (or any other third party) in consent-

³ Obviously, Article 1 of the TK Instrument shall refer only to TK, and vice versa.

procedures. This is correctly articulated in the TCE Instrument Article 4. However, as Section 2 indicated, the present formulation of Article 7.2 in the TK Instrument could give the unintended impression that it is solely up to state legislation to decide whether a state authority shall represent the indigenous people in consent-procedures.⁴ The TK Instrument Article 7.2 should be reformulated in line with the TCE Instrument Article 4 to eliminate this ambiguity.

New proposed wording of Article 7.2

“The holder of traditional knowledge shall be entitled to grant prior and informed consent for access to traditional knowledge, or to approve the grant of such consent by an appropriate national authority, acting at the request of the holder.”

4. Does the right to give consent apply to all forms of TK and TCEs?

4.1 Section 2 has described that the TK and TCE Instruments provide for that in principle, indigenous peoples have the right to consent (or not) before access to TK and TCEs. But does the right apply equally to all forms of TK/TCEs? It would appear not. The TK and TCE Instruments take different approaches to the scope of protection. In neither instrument is the protection absolute.

4.2 If starting with the TCE Instrument, this document takes a multi-layer approach to the scope of protection. Pursuant to Article 3 (c), secret TCEs enjoy complete protection. Measures shall be taken assuring that such TCEs are not accessed, or even disclosed, to third parties. No formalities for protection may apply to such TCEs.

4.3 With regard to non-secret TCEs, the TCE instrument distinguishes between registered and unregistered TCEs. Pursuant to the TCE Instrument Article 7 (b), the Indigenous people have the option to register non-secret TCEs with a designated state authority. If the indigenous people has conformed with this formality, Article 3 (a) (i) proclaims that the indigenous people have the right to FPIC, in respect to TCEs other than signs and symbols, before such TCE is reproduced, published, adapted, broadcasted, performed, communicated, distributed or in other ways made available to the public. With regard to signs and symbols, Article 3 (a) (ii) proclaims that such TCEs shall enjoy protection against uses that disparages, offends or falsely suggest a connection with the indigenous people. Article 3 (a) further provides for negative protection. Non-members shall not be allowed to acquire IPRs over such TCEs.

⁴ It is repeated that the Commentary to Article 7 clarifies that this is not the intention. Rather, it is underlined that it is the TK holder that decides and that the reference to national law merely intends to cater for flexible approaches in different countries.

4.4 With regard to non-secret TCEs that the indigenous people for cultural, spiritual or other reasons opts not to register, the TCE Instrument Article 3 (b) proclaims that such TCEs shall still be protected against uses (i) that fail to identify the indigenous people as the source of the work, (ii) that distort, mutilate or in other ways are derogatory, and (iii) in connection with goods or services that misleadingly suggest an endorsement of the product/service by the indigenous people or linkage with the people.

4.5 If summarizing the TCE Instrument's approach to the scope of protection, one can of course first conclude that secret TCEs are unproblematic. In addition, TCEs other than signs of symbols that the indigenous people see no problem registering in principle enjoy what appears to be an almost complete protection. The list of actions against which such TCEs are protected seems to be almost complete.⁵ Since the protection lasts as long as the TCE is of interest to the indigenous people, there is in addition no risk that the TCE ends up in the public domain, even though registered. However, to prevent misuse, such registers should still be kept confidential from a wider public.

4.6 At first glance, it would hence appear that the distinction between registered and unregistered TCEs make sense. A substantial problem is, however, as indicated above, that indigenous peoples might often, for cultural, spiritual or similar reasons be in a position to register TCEs. And of course, it is often exactly these kinds of TCEs the indigenous people are most eager to protect. In addition, they might hesitate to register the TCE because this exposes the TCE to potential misuse (even though restrictions on access to the register can, as indicated, to some extent mitigate the latter concern).

4.7 For this reason, different level of protection depending on whether TCEs have been registered or not is not a fully workable solution. At the same time, the rationale behind the proposal for a register – legal certainty – is legitimate. However, this aim can be achieved in other ways, without the associated problems registers cause indigenous peoples. As an alternative to a TCE-register, there can be a more general description of areas where there exist TCEs belonging to an indigenous people. The description shall be precise enough to clearly indicate to potential users that they are moving in areas where there exist TCEs that are subject to rights. At the same time, the description need not picture or describe the TCE in such detail that creates problem to the indigenous people. The general description of relevant TCEs can for example be available at the national authority the TCE Instrument envisions, albeit other solutions – such as competent indigenous authorities - are certainly also possible, catering for varying national circumstances. What is important is that once it has been established that there exist relevant TCEs, the national authority (or any other entrusted body) direct the potential user to the relevant authority of the indigenous people to initiate consent-procedures.

⁵ "Reproduction, publication, adaptation, broadcasting, performance, communication, distribution, or other forms of making the TCE available to the public". Two sub-paragraph of Article 3 (a) (i) declares that the TCE shall further be protected against uses that a) do not acknowledge the indigenous people as the source of the work, and b) distort or mutilate the TCE. But given the sweeping first sub-paragraph of Article 3 (a) (i), it is difficult to see what the two additional sub-paragraphs add to the provision.

4.8 Unlike its TCE counterpart, the TK Instrument does not operate with different categories of TK. It offers the same level of – incomplete - protection to all forms of TK. Pursuant to Article 1.1 and 1.2 of the TK Instrument, TK shall be protected against any acquisition, appropriation or utilization by unfair and illicit means. In addition, TK shall be protected against uses by subsequent acquirers of the TK that derive commercial benefits from its use, and that knew, or was negligent in not knowing, that the TK had been originally been acquired by unfair means. Articles 1.3 and 1.4 then proceed to exemplify uses that are particularly unfair and/or illicit. Worth mentioning in this context is Article 1.3 (iv), which proclaims that failure to share benefits of the use with the TK-holder when doing so is fair constitutes an illicit use.

4.9 The scope of protection the TK Instrument offers to TK holders is clearly dependent on the understanding of what constitutes “unfair and illicit means”. However, judging by the exemplifying list in Article 1.3, “unfair and illicit” must be given a fairly restrictive interpretation. Clearly, no right to consent exists when TK has been acquired in good faith. Moreover, it appears that acquiring knowledge fully aware of that it constitutes TK and originates from a particular indigenous people does not amount to unfair or illicit acquisition either. Article 1.3 (i) seems to suggest that for an acquisition to be illicit, the acquirer must in addition have deceived the TK holder, or be guilty of a similar act. This definition of scope of protection is clearly highly inadequate, and essentially nullifies the right to consent we have already established exists. In addition, the defined scope of protection fails to make sense. As stated above, the TK Instrument aims at establishing rights akin to property rights. A property right that exist in principle, but enjoys protection in law essentially only when the acquirer acts actively deceitful or fraudulent is probably unheard of. Clearly, TK, as property rights in general, must as a basic rule enjoy protection against any use not explicitly authorized by the holder. Given the limited application of the right to consent, it is not sufficient, albeit an interesting feature, that the TK Instrument seems to call for mandatory benefit sharing with the indigenous people when TK is used by third parties and sharing is fair.

4.10 In conclusion, the scope of protection outlined in the TK Instrument is completely inadequate, and rejected. The scope of protection the TCE Instrument is workable as a basis for discussions, but the TCE register shall be replaced with a more general description of TCEs, sending potential users to the relevant indigenous peoples to initiate consent-procedures. In addition, there is no reason why signs and symbols should enjoy less protection than other forms of TCEs. The various options for scope of protection clearly need to be discussed further. Therefore, no draft operative articles are presented at this point.

5. Does the right to give consent last in perpetuity?

5.1 The right to give (or not give) consent lasts as long as knowledge/expressions constitute TK/TCEs. Section 2 has described how the TK and TCE Instruments define TK/TCEs essentially through their continuous connection to an indigenous people. This further implies that the right to

the subject matter, including the right to consent before access, is valid as long as this connection exists.

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