

**IGC 19: facilitator's text on traditional cultural expressions (for presentation to plenary)**

Article one: subject matter of protection	<u>Option one: policy approach</u>  To provide a definition of TCEs and eligibility criteria that is as simple as possible, avoids debate about the content and length of the list, and which leaves flexibility in national law or guidelines to list particular examples, if that is considered desirable.	<u>Option two: policy approach</u>  To provide a more detailed definition of TCEs and eligibility criteria that provides greater certainty that particular things are protected through the listing of examples.	Comments:
			<p>As delegations were divided on the issue of examples it was not possible to provide a clean and elegant draft without including two options.</p> <p>The text has been cleaned to remove repetition in existing drafting options, but the different policy approaches remain.</p> <p>In the interests of simplification, the text now cross references to the definition of beneficiaries in article two, which avoids the need to keep repeating the list of beneficiaries.</p> <p>Note also, in the interests of simplicity and building on the approach taken in the TK text, option one starts with a very basic description of TCEs, then lists eligibility criteria.</p> <p>Also in option one, I have tried to deal with the debate on "unique product etc" by borrowing the</p>

			<p>Norwegian approach from the TK text, to say "distinctive of or the unique product of". This provides a choice for national legislation. In option 2, the formulation used is "characteristic of".</p> <p>Note also in option 2 I have removed all square brackets from the lists. It may be that at a future IGC the proponents of the list approach need to consider if they agree with all the matters listed.</p> <p>In paragraph one of option one I have placed square brackets around "traditional knowledge" to highlight that some delegations have difficulty with a definition of TCEs that includes traditional knowledge. This is a matter that will need to be worked through at a future IGC.</p>
	<p><u>Option one: text</u></p> <p>1. Traditional cultural expressions are any form of artistic expression, tangible or intangible, in which traditional culture [and knowledge] are embodied including,</p>	<p><u>Option two: text</u></p> <p>1. Traditional cultural expressions are any form of expressions, tangible or intangible, or a combination thereof, which are indicative of</p>	

	<p>but not limited to:</p> <ul style="list-style-type: none"> <li>(a) Phonetic or verbal expressions;</li> <li>(b) Musical or sound expressions;</li> <li>(c) Expressions by action; and</li> <li>(d) Tangible expressions of art.</li> </ul> <p>2. Protection extends to traditional cultural expressions that are:</p> <ul style="list-style-type: none"> <li>(a) the result of creative intellectual activity;</li> <li>(b) passed from generation to generation;</li> <li>(c) distinctive of or the unique product of the cultural and social identity and cultural heritage; and</li> <li>(d) maintained, used or developed; by the beneficiaries as set out in Article 2.</li> </ul> <p>3. The terminology used to describe the protected subject matter should be determined at the national, regional, and sub regional levels.</p>	<p>traditional culture and knowledge and have been passed on from generation to generation, including, but not limited to:</p> <ul style="list-style-type: none"> <li>(a) phonetic or verbal expressions, such as stories, epics, legends, poetry, riddles and other narratives; words, signs, names, and symbols;</li> <li>(b) musical or sound expressions, such as songs, rhythms, and instrumental music, the sounds which are the expression of rituals;</li> <li>(c) expressions by action, such as dances, plays, ceremonies, rituals, rituals in sacred places and peregrinations, traditional sports and games, puppet performances, and other performances, whether fixed or unfixed;</li> <li>(d) tangible expressions, such as material expressions of art, handicrafts, works of mas, architecture, and tangible</li> </ul>	
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<p><b>Article 2: beneficiaries</b></p>	<p><u>Option one: policy approach</u></p> <p>One policy approach is that the beneficiaries of protection are indigenous peoples and local communities.</p> <p>The proponents of this approach have different views on whether to refer to “indigenous peoples” or “indigenous communities”. As a place holder, acknowledging that this is a matter that requires further work to resolve, I have</p>	<p><u>Option two: policy approach</u></p> <p>Another policy approach is that protection should go beyond indigenous peoples and local communities. There are two sets of concerns here. The first is that the TCEs of nations should be included. There are also countries that do not use the terms indigenous peoples or local communities, but consider that</p>	<p><b>Comments:</b></p> <p>Because the IGC is so divided on this issue it is not possible to draft a single option which would be “clean and elegant”.</p> <p>I have included a “wild card” option 3, which could potentially address the concerns re nations.</p> <p>The need for clear definitions of</p>

	<p>referred to "indigenous peoples/communities".</p> <p>There are also different views on whether to also refer to "traditional" or "cultural" communities. I have left these out of the draft, on the understanding that further work is needed concerning the definition of these terms, and the term "local communities".</p>	<p>individuals or families maintain TCEs and this should be reflected.</p>	<p>terms such as local community, traditional community, cultural community (would this address the issue of communities in diaspora) and nation was raised during my informal consultations. Greater clarity on these definitions may reduce concerns about what is in scope. In the time available I have not been able to draft suggestions or consider what is already in the glossary, but this is a matter to address at a future JGC.</p> <p>Given that there was widespread support for the approach of referring to the "beneficiaries as defined in Article 2" in other articles, I have used a formulation of drafting which starts with "the beneficiaries of protection are..." rather than "protection shall extend to".</p> <p>In option two I have included individuals, and initially qualified this by saying "in accordance with customs of the collective". This language was not supported by the</p>
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			<p>proponents of including individuals, but the concept is something that the IGC may wish to return to.</p> <p>Note: in option one it may be possible to remove the reference to “who develop etc” because this is defined in article one. However I did not have time to complete consultations on this point so I left the language in the draft.</p>
	<p><u>Option one: text</u></p> <p>Beneficiaries of protection for traditional cultural expressions, as defined in Article 1, are indigenous peoples/communities and local communities, who develop, use, hold and maintain the cultural expressions.</p>	<p><u>Option two: text</u></p> <p>Beneficiaries of protection of traditional cultural expressions, as defined in Article 1, are the holders of traditional cultural expressions which may include:</p> <ul style="list-style-type: none"> <li>(a) Indigenous communities;</li> <li>(b) Local communities;</li> <li>(c) Traditional communities;</li> <li>(d) Cultural communities;</li> <li>(e) Families;</li> </ul>	<p><u>Option three: text</u></p> <p>Beneficiaries of protection for traditional cultural expressions, as defined under Article 1, are indigenous peoples, local and traditional communities, including small-island states.</p>

		<p>(f) Nations;</p> <p>(g) Individuals within the categories listed above; and</p> <p>(h) Where traditional cultural expressions are not specifically attributable to or confined to an indigenous or local community or it is not possible to identify the community that generated it, any national entity determined by domestic law.</p>	
<b>Article 3: Scope of Protection</b>	<p><u>Option one: policy approach</u></p> <p>The policy approach underlying this option is that States should have maximum flexibility to determine the scope of protection.</p>	<p><u>Option two: policy approach</u></p> <p>This policy approach is more detailed and prescriptive, but contains two options within it. One is to prescribe the kinds of activities that should be regulated, but leave flexibility concerning the policy measures that would achieve this, and the other is to prescribe a rights based approach.</p>	
	<p><u>Option one: text</u></p> <p>The economic and moral interests of the beneficiaries of traditional cultural</p>	<p><u>Option two: text</u></p> <p>1. Adequate and effective legal, administrative or policy measures</p>	<p>Comments:</p> <p>Note: there were several different formulations of elements concerning</p>



	<p>expressions, as defined in Articles 1 and 2, should/shall be safeguarded as appropriate and according to national law, in a reasonable and balanced manner.</p>	<p>should be provided to:</p> <p>(a) Prevent the unauthorised disclosure, fixation or other exploitation of secret traditional cultural expressions;</p> <p>(b) Acknowledge the beneficiaries to be the source of the traditional cultural expression, unless this turns out to be impossible;</p> <p>(c) Prevent use which distorts or mutilates a traditional cultural expression or that is otherwise offensive, derogatory or diminishes its cultural significance to the beneficiary;</p> <p>(d) Protect against any false or misleading uses of traditional cultural expressions, in relation to goods and services, that suggest endorsement by or linkage with the beneficiaries;</p>	<p>offensiveness, secret TK etc. I have tried to distil the key concepts from these. It was not possible to use the precise language put forward by all delegations but I hope that delegations can see their concepts are reflected. The exact wording could be a matter for future IGCs.</p> <p>Note: in developing the alternatives for para (e) I found it was possible to condense the two parts of Alternative 1, Article B (and the new alternative from Indonesia ), to avoid having two lists (one for signs etc and one for TCEs other than signs) and repeating the protections concerning offensive use and false representation. You will see that the remaining two matters from the second category – use for commercial purposes and acquisition of intellectual property rights – have been added to the first list of exclusive rights.</p> <p>Regarding the alternative for equitable remuneration, while this</p>
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		<p>(e) [there are three options for para (e) ranging from the most flexible to the most prescriptive]</p> <p><u>Alternative one:</u> where appropriate, enable beneficiaries to authorise the commercial exploitation of TCEs by others.</p> <p><u>Alternative two:</u> require equitable remuneration to the beneficiaries for the following uses of traditional cultural expressions:</p> <ol style="list-style-type: none"> <li>i. Fixation</li> <li>ii. Reproduction</li> <li>iii. Public performance</li> <li>iv. Translation or adaptation</li> <li>v. Making available or communicating to the public</li> </ol>	<p>was in the text, I cannot recall any delegation insisting on it. This alternative could be removed at a future IGC.</p>
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		<p>vi. Distribution</p> <p><u>Alternative three</u>: ensure the beneficiaries have exclusive and inalienable collective rights to authorise and prohibit the following in relation to their traditional cultural expressions:</p> <ol style="list-style-type: none"> <li>i. Fixation</li> <li>ii. Reproduction</li> <li>iii. Public performance</li> <li>iv. Translation or adaptation</li> <li>v. Making available or communicating to the public</li> <li>vi. Distribution</li> <li>vii. Any use for commercial purposes, other than their traditional use</li> <li>viii. The acquisition or</li> </ol>	
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		exercise of intellectual property rights	
Article 5: exceptions and limitations	<p><u>Option one: policy approach</u></p> <p>Option one allows for less exceptions than under option two, so when combined with Article 3 on scope of protection, provides more protection overall for TCES than under option two.</p>	<p><u>Option two: policy approach</u></p> <p>Option two allows for more exceptions than under option one, so when combined with Article 3 on scope of protection, provides less protection overall than under option one.</p>	
	<p><u>Option one: text</u></p> <p>1. Measures for the protection of traditional cultural expressions should not restrict the creation, customary use, transmission, exchange and development of traditional cultural expressions by the beneficiaries, within and among communities, in the traditional and customary context [consistent with national laws of the member states].</p> <p>2. Limitations on protection should extend only to the utilization of traditional cultural expressions taking place outside the membership of the</p>	<p><u>Option two: text</u></p> <p>Option one [paragraphs 1 to 4 (a)], plus:</p> <p>4(b). The creation of an original work of authorship inspired by traditional cultural expressions.</p> <p>5. Except for the protection of secret traditional cultural expressions against disclosure, to the extent that any act would be permitted under the national law for works protected by copyright or signs and symbols protected by trademark law, such act shall not</p>	<p>Comments:</p> <p>There seemed to be wide ranging agreement on some elements of the text on exceptions – re not affecting customary use, having a test for developing domestic exceptions, and having some sort of exception for libraries etc. The criteria where there was not agreement concerned derivative works and existing exceptions under copyright and trade mark law.</p> <p>On the test for developing domestic exceptions, I initially merged the two options, but this was not supported</p>

	<p>beneficiary community or outside traditional or cultural context.</p> <p>3. Member States may adopt appropriate limitations or exceptions under national law, provided that the use of traditional cultural expressions:</p> <p><u>Alternative one:</u></p> <ul style="list-style-type: none"> <li>a. acknowledges the beneficiaries, where possible;</li> <li>b. is not offensive or derogatory to the beneficiaries; and</li> <li>c. is compatible with fair practice.</li> </ul> <p><u>Alternative two:</u></p> <ul style="list-style-type: none"> <li>a. does not conflict with the normal utilisation of the traditional cultural expressions by the beneficiaries; and</li> <li>b. does not unreasonably prejudice the legitimate</li> </ul>	<p>be prohibited by the protection of traditional cultural expressions.</p>	<p>by some delegations so the separated the criteria into two alternatives.</p> <p>Another sticking point was the relevance of customary versus domestic law in paragraph one. I have parked this issue for now by square bracketing the reference to national law to reflect that there is not agreement on this matter.</p> <p>Regarding the exception for libraries etc, I had initially amended this to address concerns expressed by delegations of indigenous peoples that libraries etc should not act offensively. There was not widespread support for this (do I have removed it), however this approach could be taken up at a later point.</p> <p>Regarding the exception for derivative works – there was a suggestion during the informal consultations that we do more work on the derivative works issue, and what is meant by “inspired by”. This</p>
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	<p>interests of the beneficiaries.</p> <p>4. Regardless of whether such acts are already permitted under Article 5 (3) or not, the following should be permitted:</p> <p>a. the use of traditional cultural expressions in archives, libraries, museums or cultural institutions for non-commercial cultural heritage purposes, including for preservation, display, research and presentation.</p>		<p>may help us to better gauge the scope of the exception.</p>
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