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**The Protection of Traditional Cultural Expressions:
Draft Articles**

IGC 25 Rev. 1

PREAMBLE

Member States]/[Contracting Parties:

Recognizing that Indigenous People[s] and local communities consider their cultural heritage to have intrinsic value, including social, cultural, spiritual, economic, scientific, intellectual, commercial and educational values.

Being guided by the aspirations and expectations expressed directly by Indigenous People[s] and local communities, respect their rights under national and international law, and contribute to the welfare and sustainable economic, cultural, environmental and social development of such peoples and communities.

Acknowledging that traditional cultures and folklore constitute frameworks of innovation and creativity that benefit Indigenous People[s] local communities, as well as all humanity.

Recognizing the importance of promoting respect for traditional cultures and folklore, and for the dignity, cultural integrity, and the philosophical, intellectual and spiritual values of the Indigenous People[s] and local communities that preserve and maintain expressions of these cultures and folklore.

Respecting the continuing customary use, development, exchange and transmission of traditional cultural expressions by, within and between communities.

Contributing to the promotion and protection of the diversity of cultural expressions.

Recognizing the importance of preservation and safeguarding the environment in which traditional cultural expressions are generated and maintained, for the direct benefit of Indigenous People[s] and local communities, and for the benefit of humanity in general;

Recognizing the importance of enhancing certainty, transparency, mutual respect and understanding in relations between Indigenous People[s] and local communities, on the one hand, and academic, commercial, governmental, educational and other users of traditional cultural expressions, on the other.

OBJECTIVES

1. To provide Indigenous People[s] and local communities with the legal and practical means, including effective enforcement measures, to:
 - a. prevent the misappropriation of their traditional cultural expressions [and adaptations thereof]; and
 - b. control ways in which their traditional cultural expressions [and adaptations thereof] are used beyond the traditional and customary context and promote the equitable sharing of benefits arising from their use;
2. To preclude the grant, exercise and enforcement of intellectual property rights acquired by unauthorized parties over traditional cultural expressions and their [adaptations]
3. To promote intellectual and artistic freedom, research practices and cultural exchange on terms which are fair and equitable to Indigenous People[s] and local communities
4. To protect and reward tradition-based creativity and innovation.

ARTICLE 1

SUBJECT MATTER OF PROTECTION

<p>1. Traditional cultural expressions [are/include] tangible or intangible expressions of any kind, including any form of [creative endeavor such as] artistic and literary [expressions/work], regardless of the form in which they are expressed, illustrated or embodied¹ and are:</p> <p>a. [passed on from generation to generation]</p> <p>b. which is distinctive to or associated with the traditional culture, knowledge, or heritage of the beneficiaries, and</p> <p>c. [held] or maintained, used and developed as part of its cultural or social identity.</p> <p>2. The terminology used to describe the protected subject matter may be determined by national law.</p>	<p><i>Definition of Traditional Cultural Expressions</i></p> <p>1. Traditional cultural expressions are any form of [artistic and literary] expression, tangible and/or intangible, or a combination thereof,</p> <p><i>Alternative 1:</i> in which traditional culture [and knowledge] are embodied <i>Alternative 2:</i> which are indicative of traditional culture [and knowledge]</p> <p>[which pass from generation and between generations]¹,</p> <p><i>Criteria for eligibility</i></p> <p>2. Protection extends to traditional cultural expressions that are:</p> <p>(a) [the result of the creative intellectual activity] of;</p> <p>(b) [distinctive of or the unique product of]/[associated with] the cultural and social identity of; [and/or]</p> <p>(c) [held], maintained, used or developed as part of the cultural or social identity [or heritage] by the beneficiaries as defined in Article 2.</p> <p>3. The terminology used to describe the protected subject matter shall/should be determined in accordance with national law and where applicable, regional law.</p>
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¹ Examples of Traditional Cultural Expressions include but are not limited to:

- (a) Phonetic or verbal expressions, [such as stories, epics, legends, popular stories, poetry, riddles and other narratives; words, signs, names, and symbols];
- (b) [Musical or sound expressions, [such as songs, rhythms, and instrumental music, the sounds which are the expression of rituals];
- (c) [Expressions by action, [such as dances, works of mas, plays, ceremonies, rituals, rituals in sacred places and peregrinations, games and traditional sports, puppet performances, and other performances, whether fixed or unfixed]]; and
- (d) Tangible expressions, [such as material expressions] of art, [handicrafts, handmade carpets, architecture, and tangible spiritual forms, and sacred places];
- (e) [Adaptations of the expressions referred to in the above categories].

ARTICLE 2

BENEFICIARIES OF PROTECTION

2.1 Indigenous People[s] or local communities [or nations] who hold, maintain, use or develop their traditional cultural expressions as part of their cultural or social identity are the beneficiaries of protection in respect of those traditional cultural expressions.

2.2 [Where it is not possible to identify an Indigenous People or local community who holds, maintains, uses or develops a traditional cultural expression, [Member States]/[Contracting Parties] may define [a]/[any] national entity defined by national legislation as a beneficiary.]

ARTICLE 3
SCOPE OF PROTECTION

3.1 Adequate and effective legal, administrative or policy measures shall/should be provided, [as appropriate and according to national law, in a reasonable and balanced manner], to [safeguard the economic and moral interests of the beneficiaries, including but not limited to]:

- (a) prevent the unauthorized disclosure, fixation or other exploitation of [secret] traditional cultural expressions;
- (b) acknowledge the beneficiaries to be the source of the traditional cultural expression, unless this turns out to be impossible;
- (c) prevent use or modification which distorts or mutilates a traditional cultural expression or that is otherwise offensive, derogatory or diminishes its cultural significance to the beneficiary;
- (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; and
- (e) where appropriate, shall/should enable beneficiaries to authorize and prohibit the use² and commercial exploitation of traditional cultural expressions by others.

² Use includes: fixation; reproduction; public performance; translation or adaptation; making available or communicating to the public; distribution; any use for commercial purposes, other than their traditional use; and the acquisition or exercise of intellectual property rights.

[ARTICLE 4

ADMINISTRATION OF RIGHTS/INTERESTS

Option 1 (merger of existing options)

1. Where so requested by the beneficiaries,

Alternative 1: a competent authority (regional, national or local)

Alternative 2: a national competent authority

may, to the extent authorized by the beneficiaries, and in accordance with:

Alternative 1: the traditional-decision-making and governance processes of the beneficiaries

Alternative 2: customary protocols, understandings, laws and practices

Alternative 3: national law

Alternative 4: national procedure

Alternative 5: international law

carry out the following functions (but need not be limited to such functions):

- (a) conduct awareness-raising, education, advice and guidance functions;
- (b) monitor uses of traditional cultural expressions for purposes of ensuring fair and appropriate use;
- (c) grant licenses;
- (d) collect monetary or non-monetary benefits from the use of the traditional cultural expressions and provide them to the beneficiaries [for the preservation of traditional cultural expressions];
- (e) establish the criteria to determine any monetary or non-monetary benefits;
- (f) provide assistance in any negotiations for the use of the traditional cultural expressions and in capacity building;
- (g) [If determined by national law, the authority may, with the consultation and approval of the beneficiary where possible, administer the rights in relation to a traditional cultural expression that fulfills the criteria under Article 1, and is not specifically attributable to a community]

[2. The management of the financial aspects of the rights shall/should be subject to transparency, concerning the sources and amounts of the money collected, the expenditures if any to administer the rights, and the distribution of money to the beneficiaries].

Option 2 (short option)

Where so requested by the beneficiaries, a competent authority may, to the extent authorized by the beneficiaries and for their direct benefit, assist with the management of the beneficiaries' rights/interests under this [instrument].]

ARTICLE 5

EXCEPTIONS AND LIMITATIONS

1. Measures for the protection of traditional cultural expressions shall/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 contracting parties/member States/members where applicable].
2. Limitations on protection shall/should extend only to the utilization of traditional cultural expressions taking place outside the membership of the beneficiary community or outside traditional [or] cultural context.
3. Contracting parties/Member States/Members may adopt appropriate limitations or exceptions under national law, provided that the use of traditional cultural expressions:
 - (a) is limited to certain special cases;
 - (b) does not conflict with the normal utilization of the traditional cultural expressions by the beneficiaries;
 - (c) does not unreasonably prejudice the legitimate interests of the beneficiaries;
 - (d) is not offensive or derogatory to the beneficiaries and acknowledges the beneficiaries, where possible; and
 - (e) is compatible with fair practice.
4. Regardless of whether such acts are already permitted under Article 5(3) or not, the following shall/should be permitted [only with the free prior and informed consent of the beneficiaries]:
 - (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, presentation and education;
 - (b) [the creation of an original work of authorship inspired by or borrowed from traditional cultural expressions].
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/should not be prohibited by the protection of traditional cultural expressions].

ARTICLE 6
TERM OF PROTECTION

Option 1

1. Protection of traditional cultural expressions shall/should endure for as long as the traditional cultural expressions continue to meet the criteria for protection under Article 1 of these provisions; and,

2. The protection granted to traditional cultural expressions against any distortion, mutilation or other modification or infringement thereof, done with the aim of causing harm thereto or to the reputation or image of the beneficiaries or region to which they belong, shall/should last indefinitely.

Option 2

At least as regards the economic aspects of traditional cultural expressions, their protection shall/should be limited in time.

ARTICLE 7
FORMALITIES

[As a general principle], the protection of traditional cultural expressions shall/should not be subject to any formality.

[ARTICLE 8

SANCTIONS, REMEDIES AND EXERCISE OF RIGHTS/INTERESTS

1. (Option 1): Appropriate measures shall/should be provided, in accordance with national law, to ensure the application of this instrument, including legal, policy or administrative measures to prevent willful or negligent harm to the economic and/or moral interests of the beneficiaries sufficient to constitute a deterrent.

1. (Option 2): Accessible, appropriate and adequate enforcement and dispute resolution mechanisms, [border measures], sanctions and remedies including criminal and civil remedies, shall/should be available in cases of breach of the protection for traditional cultural expressions.

2. The means of redress for safeguarding the protection granted by this instrument shall/should be governed by the national law of the country where the protection is claimed.

3. [Where a dispute arises between beneficiaries or between beneficiaries and users of a traditional cultural expression, each party shall/should be entitled to refer the issue to an independent alternative dispute resolution mechanism, recognized by international and/or national law.¹]]

¹ Such as the WIPO Arbitration and Mediation Center.

[ARTICLE 9

TRANSITIONAL MEASURES

1. These provisions apply to all traditional cultural expressions which, at the moment of the provisions coming into effect/force, fulfill the criteria set out in Article 1.

Option 1

2. The state shall/should ensure the necessary measures to secure the rights, acknowledged by national law, already acquired by third parties.

Option 2

2. Continuing acts in respect of traditional cultural expressions that had commenced prior to the coming into effect/force of these provisions and which would not be permitted or which would be otherwise regulated by the provisions, shall/should be brought into conformity with the provisions within a reasonable period of time after they enter into effect/force, subject to respect for rights previously acquired by third parties qualified by paragraph 3.

3. With respect to traditional cultural expressions that have special significance for the relevant communities having rights thereto and which traditional cultural expressions have been taken outside control of such communities, the communities shall/should have the right to recover such traditional cultural expressions.]

[ARTICLE 10

CONSISTENCY WITH THE GENERAL LEGAL FRAMEWORK

Wild card (merger of Options 1 and 2)

Protection under this instrument shall/should take account of, and operate consistently with, other international instruments, including those dealing with intellectual property and with cultural heritage.]

[ARTICLE 11

NATIONAL TREATMENT

The rights and benefits arising from the protection of traditional cultural expressions under national measures or laws that give effect to these international provisions shall/should be available to all eligible beneficiaries who are nationals or residents of a prescribed country/contracting party/member State/member as defined by international obligations or undertakings. Eligible foreign beneficiaries shall/should enjoy the same rights and benefits as enjoyed by beneficiaries who are nationals of the country/contracting party/member State/member of protection, as well as the rights and benefits specifically granted by these international provisions.]

[ARTICLE 12

TRANS-BOUNDARY COOPERATION

In instances where traditional cultural expressions are located in territories of different contracting parties/member States/members, those contracting parties/member States/members shall/should co-operate in addressing instances of trans-boundary traditional cultural expressions.]

Annex A
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The protection of traditional cultural expressions should aim to:

Recognize value

(i) recognize that indigenous peoples and communities and traditional and other cultural communities consider their cultural heritage to have intrinsic value, including social, cultural, spiritual, economic, scientific, intellectual, commercial and educational values, and acknowledge that traditional cultures and folklore constitute frameworks of innovation and creativity that benefit indigenous peoples and traditional and other cultural communities, as well as all humanity;

Promote respect

(ii) promote respect for traditional cultures and folklore, and for the dignity, cultural integrity, and the philosophical, intellectual and spiritual values of the peoples and communities that preserve and maintain expressions of these cultures and folklore;

Meet the actual needs of communities

(iii) be guided by the aspirations and expectations expressed directly by indigenous peoples and communities and by traditional and other cultural communities, respect their rights under national and international law, and contribute to the welfare and sustainable economic, cultural, environmental and social development of such peoples and communities;

Prevent the misappropriation and misuse of traditional cultural expressions

(iv) provide indigenous peoples and communities and traditional and other cultural communities with the legal and practical means, including effective enforcement measures, to prevent the misappropriation of their cultural expressions and [derivatives] [adaptations] therefrom, and [control] ways in which they are used beyond the customary and traditional context and promote the equitable sharing of benefits arising from their use;

Empower communities

(v) be achieved in a manner that is balanced and equitable but yet effectively empowers indigenous peoples and communities and traditional and other cultural communities to exercise in an effective manner their rights and authority over their own traditional cultural expressions;

Support customary practices and community cooperation

(vi) respect the continuing customary use, development, exchange and transmission of traditional cultural expressions by, within and between communities;

Contribute to safeguarding traditional cultures

(vii) contribute to the preservation and safeguarding of the environment in which traditional cultural expressions are generated and maintained, for the direct benefit of indigenous peoples and communities and traditional and other cultural communities, and for the benefit of humanity in general;

Encourage community innovation and creativity

(viii) reward and protect tradition-based creativity and innovation especially by indigenous peoples and communities and traditional and other cultural communities;

(ix) promote intellectual and artistic freedom, research and cultural exchange on equitable terms

(x) promote intellectual and artistic freedom, research practices and cultural exchange on terms which are equitable to indigenous peoples and communities and traditional and other cultural communities;

Contribute to cultural diversity

(xi) contribute to the promotion and protection of the diversity of cultural expressions;

Promote the [community] development of indigenous peoples and communities and traditional and other cultural communities and legitimate trading activities

(xii) where so desired by [communities] indigenous peoples and communities and traditional and other cultural communities and their members, promote the use of traditional cultural expressions for [community based] the development of indigenous peoples and communities and traditional and other cultural communities, recognizing them as an asset of the communities that identify with them, such as through the development and expansion of marketing opportunities for tradition-based creations and innovations;

Preclude unauthorized IP rights

(xiii) preclude the grant, exercise and enforcement of intellectual property rights acquired by unauthorized parties over traditional cultural expressions and [derivatives] [adaptations] thereof;

Enhance certainty, transparency and mutual confidence

(xiv) enhance certainty, transparency, mutual respect and understanding in relations between indigenous peoples and communities and traditional and cultural communities, on the one hand, and academic, commercial, governmental, educational and other users of traditional cultural expressions, on the other.

GENERAL GUIDING PRINCIPLES (to be discussed at a later stage)

- (a) Responsiveness to aspirations and expectations of relevant communities
- (b) Balance
- (c) Respect for and consistency with international and regional agreements and instruments
- (d) Flexibility and comprehensiveness
- (e) Recognition of the specific nature and characteristics of cultural expression
- (f) Complementarity with protection of traditional knowledge
- (g) Respect for rights of and obligations towards indigenous peoples and [other traditional communities] communities and traditional and other cultural communities
- (h) Respect for customary use and transmission of traditional cultural expressions
- (i) Effectiveness and accessibility of measures for protection