

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

**Rev. 2 (April 3, 2014, 9.00 pm)**

[PRINCIPLES/PREAMBLE]

1. [Recognizing]/[to recognize] that the cultural heritage of Indigenous [Peoples], [local communities] [and nations] / beneficiaries has intrinsic value, including social, cultural, spiritual, economic, scientific, intellectual, commercial and educational values.
2. [Being]/[to be] guided by the aspirations [and expectations] expressed directly by Indigenous [Peoples], [local communities] [and nations] / beneficiaries, respect their rights under national and international law, and contribute to the welfare and sustainable economic, cultural, environmental and social development of such [peoples], communities [and nations] / beneficiaries.
3. [Acknowledging]/[to acknowledge] that traditional cultures and folklore constitute frameworks of innovation and creativity that benefit Indigenous [Peoples], [local communities] [and nations] / beneficiaries, as well as all humanity.
4. [Recognizing]/[to recognize] 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 [Peoples], [local communities] [and nations] / beneficiaries that preserve and maintain expressions of these cultures and folklore.
5. [Respecting]/[to respect] the continuing customary use, development, exchange and transmission of traditional cultural expressions by, within and between communities.
6. [Contributing]/[to contribute] to the promotion and protection of the diversity of [traditional] cultural expressions, [and the rights of beneficiaries over their traditional cultural expressions].
7. [Recognizing]/[to recognize] the importance of preservation and safeguarding the environment in which traditional cultural expressions are generated and maintained, for the direct benefit of Indigenous [Peoples], [local communities] [and nations] / beneficiaries, and for the benefit of humanity in general.
8. [Recognizing]/[to recognize] the importance of enhancing certainty, transparency, mutual respect and understanding in relations between Indigenous [Peoples], [local communities] [and nations] / beneficiaries, on the one hand, and academic, commercial, governmental, educational and other users of traditional cultural expressions, on the other.]
9. [Acknowledging]/[to acknowledge] that the protection of traditional cultural expressions should contribute toward the promotion of innovation and to the transfer and dissemination of knowledge to the mutual advantage of holders and users of traditional cultural expressions and in a manner conducive to social and economic welfare and to a balance of rights and obligations.
10. [Recognizing]/[to recognize] the value of a vibrant public domain and the body of knowledge that is available for all to use, and which is essential for creativity and innovation, and the need to protect, preserve and enhance the public domain.

## OBJECTIVES

1. To provide Indigenous [Peoples] and [local communities] [and nations] / [beneficiaries] with the [legal and practical/appropriate] means, [including effective and accessible enforcement measures/sanctions, remedies and exercise of rights], to:
  - (a) [prevent] the [misappropriation and misuse/offensive and derogatory use] of their traditional cultural expressions [and adaptations thereof];
  - (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], as necessary;]
  - (c) [promote [the equitable sharing of benefits arising from their use with prior informed consent or approval and involvement or approval and involvement]/[fair and equitable compensation], as necessary; and]
  - (d) encourage [and protect] [tradition-based] creation and [innovation].
2. [To [prevent/preclude] the [grant], exercise and [enforcement] of intellectual property rights [acquired by unauthorized parties/inappropriately acquired] over traditional cultural expressions [and their adaptations]].
3. [To promote/facilitate intellectual and artistic freedom, research [or other fair] practices and cultural exchange [based on mutually agreed terms which are fair and equitable [and subject to the prior informed consent of] Indigenous [Peoples], [local communities] and [nations/beneficiaries.]]
4. To [secure/recognize] rights [already acquired by third parties] and [secure/provide for] legal certainty [and a rich and accessible public domain.]

## USE OF TERMS

For the purposes of this instrument:

**[Public domain** refers, for the purposes of this instrument, to intangible materials that, by their nature, are not or may not be protected by established intellectual property rights or related forms of protection by the legislation in the country where the use of such material is carried out. This could, for example, be the case where the subject matter in question does not fill the prerequisite for intellectual property protection at the national level or, as the case may be, where the term of any previous protection has expired.]

**Traditional cultural expression** means any form of [artistic and literary], [creative and other spiritual] expression, tangible or intangible, or a combination thereof, such as actions<sup>1</sup>, materials<sup>2</sup>, music and sound<sup>3</sup>, verbal<sup>4</sup> and written [and their adaptations], regardless of the form in which it is embodied, expressed or illustrated [which may subsist in written/codified, oral or other forms].

**["Use"/["Utilization"]** means

- (a) where the traditional cultural expression is included in a product:
  - (i) the manufacturing, importing, offering for sale, selling, stocking or using the product beyond the traditional context; or
  - (ii) being in possession of the product for the purposes of offering it for sale, selling it or using it beyond the traditional context.
- (b) where the traditional cultural expression is included in a process:
  - (i) making use of the process beyond the traditional context; or
  - (ii) carrying out the acts referred to under sub-clause (a) with respect to a product that is a direct result of the use of the process; or
- (c) the use of traditional cultural expression in research and development leading to profit-making or commercial purposes.]

<sup>1</sup> [Such as dance, works of mas, plays, ceremonies, rituals, rituals in sacred places and peregrinations, games and traditional sports/sports and traditional games, puppet performances, and other performances, whether fixed or unfixd.]

<sup>2</sup> [Such as material expressions of art, handicrafts, ceremonial masks or dress, handmade carpets, architecture, and tangible spiritual forms, and sacred places.]

<sup>3</sup> [Such as songs, rhythms, and instrumental music, the songs which are the expression of rituals.]

<sup>4</sup> [Such as stories, epics, legends, popular stories, poetry, riddles and other narratives; words, signs, names and symbols.]

[ARTICLE 1]

[ELIGIBLE]/[ELIGIBILITY CRITERIA FOR] SUBJECT MATTER OF  
[PROTECTION]/[SAFEGUARDING]

The subject matter of [protection]/[this instrument] is traditional cultural expressions:

- (a) that are [created], expressed, [held] [and maintained], in a collective context, by indigenous [peoples] and local communities [or nations] [whether they are widely spread or not];
- (b) that are [the unique product of] [directly] [linked with]/[distinctively associated with] the cultural [and]/[or] social identity and cultural heritage of indigenous [peoples] and local communities [or nations];
- (c) that are transmitted from generation to generation, whether consecutively or not;
- (d) [that have been used for a term as has been determined by each [Member State]/ [Contracting Party] [but not less than 50 years]];
- (e) [that are the result of [creative intellectual activity]/[creative activity of the intellect]]; and
- (f) which are/may be dynamic and evolving.]

## [ARTICLE 2]

## BENEFICIARIES OF [PROTECTION]/[SAFEGUARDING]

2.1 Beneficiaries [of protection] are indigenous [peoples] and local communities [and/or nations] [and nations that are custodians for the beneficiaries as provided for in Paragraph 3] who [create], express, [hold], maintain, use and/[or] develop the [subject matter]/ [traditional cultural expressions] [as part of their collective cultural or social identity] [meeting the criteria for eligibility defined in this [instrument], or as determined by national law.]

2.2 [Notwithstanding Paragraph 1, a [Member State]/[Contracting Party] may act, for the interests of an indigenous or local community, as a beneficiary with regard to traditional cultural expressions that [exclusively] exist within that [Member State's]/[Contracting Party's] territory, provided that the constitution or national law of that [Member State]/[Contracting Party] so requires.]

2.3 [Where the [subject matter]/[traditional cultural expressions] [is not claimed by specific indigenous [peoples] or local communities despite reasonable efforts to identify them,] [Member States]/[Contracting Parties] may designate a national authority as custodian of/for the [benefits]/ [beneficiaries] [of protection under this instrument] where the [subject matter]/[traditional cultural expressions] [traditional cultural expressions meeting the eligibility criteria in this [instrument]] as defined in this [instrument]:

- (a) is expressed within a community [whose] in a territory [is] that is entirely and exclusively coterminous with the territory of that [Member State]/[Contracting Party];
- (b) [is not confined to a specific indigenous [people] or local community; or
- (c) is not attributable to a specific indigenous [people] or local community.]

## [ARTICLE 3]

## [CRITERIA FOR ELIGIBILITY] SCOPE OF [PROTECTION]/[SAFEGUARDING]

## [Scope of Protection]

3.1 Where the [subject matter]/[traditional cultural expressions]/[protected traditional cultural expressions] is [sacred], [secret] or [otherwise known only] [closely held] within indigenous [peoples] or local communities, [Member States]/[Contracting Parties] [should]/[shall] :

- (a) [ensure that beneficiaries have the exclusive and collective right to]/[provide legal, policy and/or administrative measures, as appropriate and in accordance with national law that allow beneficiaries to]:
- i. [create,] maintain, control and develop said [subject matter]/[traditional cultural expressions]/[protected traditional cultural expressions];
  - ii. [discourage] prevent the unauthorized disclosure and fixation and prevent the unauthorized use<sup>5</sup> of [secret] [protected] traditional cultural expressions;
  - iii. [authorize or deny the access to and use/[utilization] of said [subject matter]/[traditional cultural expressions]/[protected traditional cultural expressions] based on prior and informed consent and mutually agreed terms or approval and involvement;]
  - iv. protect against any [false or misleading] uses of protected traditional cultural expressions, in relation to goods and services, that suggest endorsement by or linkage with the beneficiaries; and
  - v. [prevent] prohibit use or modification which distorts or mutilates a protected traditional cultural expression or that is otherwise offensive, derogatory or diminishes its cultural significance to the beneficiary.
- (b) [ensure that]/[encourage] users [to]:
- i. attribute said [subject matter]/[traditional cultural expressions]/[protected traditional cultural expressions] to the beneficiaries;
  - ii. [provide beneficiaries with [a fair and equitable share of benefits]/[fair and equitable compensation], arising from the use/[utilization] of said [subject matter]/[traditional cultural expressions]/[protected traditional cultural expressions] based on prior informed consent or approval and involvement and mutually agreed terms; and]

*Alternative*

- ii. enter into an agreement with the beneficiaries to establish terms of use of the [subject matter]/[traditional cultural expressions]/[protected traditional cultural expressions] with prior informed consent or approval and involvement; and

*[End of alternative]*

- iii. use/utilize the knowledge in a manner that respects the cultural norms and practices of the beneficiaries as well as the inalienable, indivisible and

<sup>5</sup> 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.

imprescriptible nature of the moral rights associated with the [subject matter]/[traditional cultural expressions]/[protected traditional cultural expressions].

3.2 [Where the [subject matter]/[traditional cultural expressions]/[protected traditional cultural expressions] is still [held], [maintained], used [and]/[or] developed by indigenous [peoples] or local communities, and is/are publicly available [but neither widely known, [sacred], nor [secret]], [Member States]/[Contracting Parties] [should]/[shall] [ensure that]/[encourage] that users]/[provide legal, policy and/or administrative measures, as appropriate and in accordance with national law to [ensure] [encourage] users [to]]:

- (a) attribute and acknowledge the beneficiaries as the source of the [subject matter]/[traditional cultural expressions]/[protected traditional cultural expressions], [unless the beneficiaries decide otherwise], or the [subject matter]/[traditional cultural expressions]/[protected traditional cultural expressions] is not attributable to a specific indigenous [people] or local community; and[.].]
- (b) [provide the beneficiaries with [a fair and equitable share of benefits]/[fair and equitable compensation] arising from the use/[utilization] of said [subject matter]/[traditional cultural expressions]/[protected traditional cultural expressions] based on prior informed consent or approval and involvement and mutually agreed terms;]

*Alternative*

- (b) [enter into an agreement with the beneficiaries to establish terms of use of the [subject matter]/[traditional cultural expressions]/[protected traditional cultural expressions] with prior informed consent or approval and involvement];

*[End of alternative]*

- (c) [use/utilize the knowledge in a manner that respects the cultural norms and practices of the beneficiaries as well as the inalienable, indivisible and imprescriptible nature of the moral rights associated with the [subject matter]/[traditional cultural expressions]/[protected traditional cultural expressions]]; and[.].]
- (d) [refrain from any [false] or misleading uses of protected traditional cultural expressions, in relation to goods and services, that suggest endorsement by or linkage with the beneficiaries.]

3.3 [Where the [subject matter]/[traditional cultural expressions]/[protected traditional cultural expressions] is/are [publicly available, widely known [and in the public domain]] [not covered under Paragraphs 1 or 2], [and]/or protected under national law, [Member States]/[Contracting Parties] [should]/[shall] [ensure that]/[encourage] users of said [subject matter]/[traditional cultural expressions] [to]:

- (a) attribute said [subject matter]/[traditional cultural expressions]/[protected traditional cultural expressions] to the beneficiaries;
- (b) use/utilize the knowledge in a manner that respects the cultural norms and practices of the beneficiary [as well as the inalienable, indivisible and imprescriptible nature of the moral rights associated with the [subject matter]/[traditional cultural expressions]/[protected traditional cultural expressions]]];
- (c) [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]
- (d) where applicable, deposit any user fee into the fund constituted by such [Member State]/[Contracting Party].]

ALTERNATIVE [ARTICLE 3]

SCOPE OF [PROTECTION]/[SAFEGUARDING]

3.1 [Member States]/[Contracting Parties] [should]/[shall] safeguard the economic and moral interests of the beneficiaries concerning their traditional cultural expressions, as defined in this [instrument], as appropriate and in accordance with national law, in a reasonable and balanced manner.]

3.2 [Protection does not extend to traditional cultural expressions that are widely known or used outside the community of the beneficiaries as defined in this [instrument], [for a reasonable period of time], in the public domain, or protected by an intellectual property right.]]

[ARTICLE 4]

ADMINISTRATION OF RIGHTS/[INTERESTS]

4.1 [Member States]/[Contracting Parties] [may]/[shall] [establish]/[appoint] a competent authority or authorities, [with the prior informed consent of] [in consultation with] [traditional cultural expressions holders]/[owners], in accordance with their national law [and without prejudice to the right of traditional cultural expression holders]/[owners] to administer their rights/[interests] according to their customary protocols, understandings, laws and practices].

*Alternative 1*

4.1 [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].]

*[End of Alternative 1]*

*Alternative 2*

4.1 [Member States]/[Contracting Parties] may establish a competent authority, in accordance with national law, to administer the rights/[interests] provided [under]/[for by] this [instrument].

*[End of Alternative 2]*

4.2 [The [identity] of any authority established under Paragraph 1 [should]/[shall] be communicated to the International Bureau of the World Intellectual Property Organization.]

## [ARTICLE 5]

## EXCEPTIONS AND LIMITATIONS

## General Exceptions

5.1 [[Member States]/[Contracting Parties] [may]/[should]/[shall] adopt appropriate limitations and exceptions under national law [with the prior informed consent or approval and involvement of the beneficiaries] [in consultation with the beneficiaries] [with the involvement of beneficiaries]], provided that the use of [protected] traditional cultural expressions:

- (a) [acknowledges the beneficiaries, where possible;]
- (b) [is not offensive or derogatory to the beneficiaries;]
- (c) [is compatible with fair use/dealing/practice;]
- (d) [does not conflict with the normal utilization of the traditional cultural expressions by the beneficiaries; and]
- (e) [does not unreasonably prejudice the legitimate interests of the beneficiaries taking account of the legitimate interests of third parties.]]

*Alternative*

5.1 [Member States]/[Contracting Parties] [may]/[should]/[shall] adopt appropriate limitations or exceptions under national law [, provided that [those limitations or exceptions]:

- (a) are limited to certain special cases;
- (b) [do not [conflict] with the normal [utilization] of the traditional cultural expressions by the beneficiaries;]
- (c) [do not unreasonably prejudice the legitimate interests of the beneficiaries;]
- (d) [ensure that the [use] of traditional cultural expressions:
  - i. is not offensive or derogatory to the beneficiaries;
  - ii. acknowledges the beneficiaries, where possible;] and
  - iii. [is compatible with fair practice.]]]

*[End of Alternative]*

5.2 [When there is reasonable apprehension of irreparable harm related to [sacred] and [secret] traditional cultural expressions, [Member States]/[Contracting Parties] [may]/[should]/[shall] not establish exceptions and limitations.]

## Specific Exceptions

5.3 [[Subject to the limitations in Paragraph 1,]/[In addition,] [Member States]/[Contracting Parties] [may]/[should]/[shall] adopt appropriate limitations or exceptions, in accordance with national law and with the prior informed consent or approval and involvement of the beneficiaries or, as appropriate, of the [holders]/[owners] of the original work:

- (a) for learning, teaching and research, in accordance with nationally established protocols, except when it results in profit-making or commercial purposes;

(b) for preservation, display, research and presentation in archives, libraries, museums or other cultural institutions recognized by national law, for non-commercial cultural heritage or other purposes in the public interest;

(c) [for the creation of an original work [of authorship] inspired by, based on or borrowed from traditional cultural expressions;]

[This provision [should]/[shall] not apply to [protected] traditional cultural expressions described in Article 3.1.]

5.4 [Regardless of whether such acts are permitted under Paragraph 1, the following [should]/[shall] be permitted:

(a) the use of traditional cultural expressions in cultural institutions recognized under the appropriate national law, archives, libraries and museums, for non-commercial cultural heritage or other purposes in the public interest, including for preservation, display, research and presentation;

(b) [with the prior informed consent of the [holders]/[owners] of the original work, the creation of an original work [of authorship] inspired by, based on or borrowed from traditional cultural expressions;]

(c) [the use/utilization of a traditional cultural expression [legally] derived from sources other than the beneficiaries; and]

(d) [the use/utilization of a traditional cultural expression known [through lawful means] outside of the beneficiaries' community.]

5.5 [[Except for the protection of secret traditional cultural expressions against disclosure], to the extent that any act would be permitted under the national law, and with the prior informed consent or approval and involvement of the beneficiaries, for works protected by [intellectual property [including]]/[copyright, or signs and symbols protected by trademark, or inventions protected by patents or utility models and designs protected by industrial design rights, such act [should]/[shall] not be prohibited by the protection of traditional cultural expressions].

[ARTICLE 6]

TERM OF [PROTECTION]/[SAFEGUARDING]

*Option 1*

6.1 [Member States]/[Contracting Parties] may determine the appropriate term of protection/rights of traditional cultural expressions in accordance with [this [instrument]/[which may] [should]/[shall]] last as long as the traditional cultural expressions fulfill/satisfy the [criteria of eligibility for protection] according to this [instrument], and in consultation with beneficiaries.]]

6.2 [Member States]/[Contracting Parties] may determine that 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, [should]/[shall] last indefinitely.

*Option 2*

6.1 [Member States]/[Contracting Parties] shall protect the subject matter identified in this [instrument] as long as said subject matter continues to meet the requirements for protection specified in this [instrument].

*Option 3*

6.1 [[Member States]/[Contracting Parties] may determine that the term of protection of traditional cultural expressions, at least as regards their economic aspects, [should]/[shall] be limited.]

[ARTICLE 7]

FORMALITIES

*Option 1*

7.1 [As a general principle,] [Member States]/[Contracting Parties] [should]/[shall] not subject the protection of traditional cultural expressions to any formality.

*Option 2*

7.1 [[Member States]/[Contracting Parties] [may] require formalities for the protection of traditional cultural expressions.]

7.2 Notwithstanding Paragraph 1, a [Member State]/[Contracting Party] may not subject the protection of secret traditional cultural expressions to any formality.

## [ARTICLE 8]

## [SANCTIONS, REMEDIES AND EXERCISE OF [RIGHTS]/[INTERESTS]]

- 8.1 *Option 1* [[Member States]/[Contracting Parties] [should]/[shall] provide appropriate legal, policy, administrative and/or other measures, in accordance with national law, to ensure the application of this instrument.]
- 8.1 *Option 2* [Member States]/[Contracting Parties] [should]/[shall], in accordance with their national law, the necessary legal, policy or administrative measures to prevent willful or negligent harm to the economic and moral rights of the beneficiaries, as well as provide accessible, appropriate and adequate enforcement and dispute resolution mechanisms, [border measures], sanctions and remedies, including criminal and civil remedies, to ensure the application of this instrument.
- 8.2 [Where a dispute arises between beneficiaries, or between beneficiaries and users of traditional cultural expressions, [each party [may]/[shall be entitled to]] the parties may mutually agree to refer the issue to an [independent] alternative dispute resolution mechanism recognized by international, regional or [, if both parties are from the same country, by] national law [, and that is most suited to the holders of traditional cultural expressions].]
- 8.3 The means of redress for safeguarding the protection granted by this instrument [should]/[shall] be governed by the national law of the country where the protection is claimed.]
- 8.4 [Member States]/[Contracting Parties] [should]/[shall], where a third party has misleadingly or unfairly acquired intellectual property rights over traditional cultural expressions without the prior informed consent of the beneficiaries, provide for the revocation of such intellectual property rights.
- 8.5 [[Member States]/[Contracting Parties] [should]/[shall] not apply sanctions or provide for remedies in cases of incidental use/utilization/inclusion of a protected traditional cultural expression in another work or another subject matter.]]

[ARTICLE 9]

[TRANSITIONAL MEASURES]

9.1 This [instrument] [should]/[shall] apply to all traditional cultural expressions which, at the time of the [instrument] coming into effect/force, fulfill the criteria set out in this [instrument].

9.2 *Option 1* [Member States]/[Contracting Parties] [should]/[shall] secure the rights acquired by third parties under national law prior to the entry into effect/force of this [instrument].

9.2 *Option 2* Continuing acts in respect of traditional cultural expressions that had commenced prior to the coming into effect/force of this [instrument] and which would not be permitted or which would be otherwise regulated by the [instrument], [[should]/[shall] be brought into conformity with the [instrument] within a reasonable period of time after its entry into effect/force, subject to Paragraph 3]/[[should]/[shall] be allowed to continue].

9.3 With respect to traditional cultural expressions that have special significance for the beneficiaries and which have been taken outside of the control of such beneficiaries, these beneficiaries [should]/[shall] have the right to recover such traditional cultural expressions.]

[ARTICLE 10]

[RELATIONSHIP WITH [OTHER] INTERNATIONAL AGREEMENTS]

10.1 [Member States]/[Contracting Parties] [should]/[shall] implement this [instrument] in a manner [mutually supportive] of [other] [existing] international agreements.

10.2 Nothing in this [instrument] may be construed as diminishing or extinguishing the rights that indigenous [peoples] or local communities have now or may acquire in the future.]

[ARTICLE 11]

[NATIONAL TREATMENT

Each [Member State]/[Contracting Party] [should]/[shall] accord to beneficiaries that are nationals of other [Member States]/[Contracting Parties] treatment no less favourable than that it accords to beneficiaries that are its own nationals with regard to the protection provided for under this [instrument].]

[ARTICLE 12]

[TRANSBOUNDARY COOPERATION

In instances where [protected] traditional cultural expressions are located in territories of different [Member States]/[Contracting Parties], those [Member States]/[Contracting Parties] [should]/[shall] co-operate in addressing instances of transboundary [protected] traditional cultural expressions., with the involvement of indigenous [peoples] and local communities concerned, where applicable, with a view to implementing this [instrument].]

ARTICLE 13

[CAPACITY BUILDING AND AWARENESS RAISING

13.1 [Member States]/[Contracting Parties] [should]/[shall] cooperate in the capacity building and strengthening of human resources, in particular, those of the beneficiaries, and the development of institutional capacities, to effectively implement the [instrument].

13.2 [In this context, [Member States]/[Contracting Parties] [should]/[shall] provide for the full participation of the beneficiaries and other relevant stakeholders, including non-government organizations and the private sector.]

13.3 [Member States]/[Contracting Parties] [should]/[shall] take measures to raise awareness of the [instrument,] and in particular educate users and holders of traditional cultural expressions of their obligations under this instrument.

[End of Document]