

The Protection of Traditional Cultural Expressions: Draft Articles

Rev. 1 (April 1, 1.00 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.]

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 free, prior and 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

Traditional cultural expression means any form of [artistic and literary], [creative and other spiritual] expression, tangible or intangible, or a combination thereof, such as actions¹, materials², music and sound³, verbal⁴ and written [and their adaptations], regardless of the form in which it is embodied, expressed or illustrated.

¹ [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 unfixed.]

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

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

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

[ARTICLE 1]

SUBJECT MATTER OF PROTECTION

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 [directly] [linked]/[distinctively associated] with the cultural [and]/[or] social identity and cultural heritage of indigenous [peoples] and local communities [or nations];
- (c) [that are the result of [creative intellectual activity]/[creative activity of the intellect]];
- (d) that are transmitted from generation to generation, whether consecutively or not[, and has been used for a term as has been determined by each [Member State]/[Contracting Party] [but not less than 50 years]];
- (e) which may subsist in codified, oral or other forms; and [or]
- (f) which may be dynamic and evolving.

[ARTICLE 2]

BENEFICIARIES OF PROTECTION

2.1 Beneficiaries [of protection] are indigenous [peoples] and local communities⁵ [and/or nations] who create, express, [hold], maintain, use and/[or] develop the [subject matter]/[traditional cultural expressions] [meeting the criteria for eligibility defined in Article 1]/[3].]

2.2 [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 the [benefits]/[beneficiaries] [of protection under this instrument] where the [subject matter]/[traditional cultural expressions] [traditional cultural expressions meeting the eligibility criteria in Article 1] as defined in Article 1:

- (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;
- (c) is not attributable to a specific indigenous [people] or local community; or
- (d) [is not claimed by a specific indigenous [people] or local community.]] despite reasonable efforts to identify them.

⁵ 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. [Note: This footnote is to be read as part of the alternative to Paragraph 1.]

[ARTICLE 3]

SCOPE OF PROTECTION

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 Articles 1 and 2, as appropriate and in accordance with national law, in a reasonable and balanced manner.]

Scope of Protection

3.2 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 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 the unauthorized disclosure and fixation and prevent the unauthorized use 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]
 - iv. 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.
- (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] based on mutually agreed terms;]

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];

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

3.3 [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 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] is not attributable to a specific indigenous [people] or local community;
- (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 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];

[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 traditional cultural expressions, in relation to goods and services, that suggest endorsement by or linkage with the beneficiaries.

3.4 [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 2 or 3], and 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

3.4 [Protection does not extend to traditional cultural expressions that are widely known or used outside the community of the beneficiaries as defined in Article 2.1, [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 free, prior and 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 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 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.]]

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

Specific Exceptions

5.3 [[Subject to the limitations in Paragraph 1, [Member States]/[Contracting Parties] may adopt appropriate limitations or exceptions, in accordance with national law, for the following purposes:

- (a) teaching, learning, but not research resulting in profit-making or commercial purposes;
- (b) for preservation, display, research and presentation in archives, libraries, museums or cultural institutions, for non-commercial cultural heritage or other purposes in the public interest; and
- (c) [the creation of an original work of authorship inspired by traditional cultural expressions.]

This provision [should]/[shall] not apply to [protected] traditional cultural expressions described in Article 3.2.]

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 should be permitted; and
- (b) [the creation of an original work of authorship inspired by traditional cultural expressions.]

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 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

6.1 [Member States]/[Contracting Parties] may determine the appropriate term of protection/rights of traditional cultural expressions in accordance with [Article 3/[which may [should]/[shall] last as long as the traditional cultural expressions fulfill/satisfy the [criteria of eligibility for protection] according to Article [1]/[3].]]

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

[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 [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.]

[ARTICLE 8]

SANCTIONS, REMEDIES AND EXERCISE OF RIGHTS/INTERESTS

8.1 *Option 1* [Member States]/[Contracting Parties] [should]/[shall] provide appropriate legal, policy or administrative measures, in accordance with national law, to ensure the application of this instrument.

8.1 *Option 2* [Member States]/[Contracting Parties] 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] 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.

[ARTICLE 9]

TRANSITIONAL MEASURES

9.1 This [instrument] [should]/[shall] apply to all traditional cultural expressions which, at the moment of the [instrument] coming into effect/force, fulfill the criteria set out in Article 1.

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.

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

11.1 The rights and benefits arising from the protection of traditional cultural expressions under national measures or laws that give effect to this [instrument] [should]/[shall] be available to all beneficiaries that meet the criteria outlined in Article 2 who are nationals or residents of a [Member State]/[Contracting Party to this instrument].

11.2 Foreign beneficiaries that meet the criteria outlined in Article 2 [should]/[shall] enjoy the same rights and benefits enjoyed by beneficiaries who are nationals of the [Member State]/[Contracting Party] of protection.

[ARTICLE 12]

TRANS-BOUNDARY COOPERATION

In instances where 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 trans-boundary 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, capacity development and strengthening of human resources and institutional capacities to effectively implement the [instrument] in developing countries, in particular least developed countries. In this context, [Member States]/[Contracting Parties] should facilitate the involvement of Indigenous [Peoples] and [local communities] and relevant stakeholders, including non-government organizations and the private sector.

13.2 [Member States]/[Contracting Parties] [should]/[shall] take measures to raise awareness of the [instrument], and in particular educate users and owners of traditional cultural expressions of their obligations under this instrument. Such measures may include, *inter alia*:

- (a) promotion of the [instrument];
- (b) organization of meetings of indigenous and local communities and relevant stakeholders;
- (c) establishment and maintenance of a help desk for indigenous and local communities and relevant stakeholders;
- (d) promotion of voluntary codes of conduct, guidelines and best practices and/or standards in consultation with indigenous and local communities and relevant stakeholders;
- (e) promotion of, as appropriate, domestic, regional and international exchanges of experience;
- (f) involvement of indigenous and local communities and relevant stakeholders in the implementation of this Instrument; and
- (g) awareness raising of community protocols and procedures of indigenous and local communities.

[End of Document]