

The Protection of Traditional Cultural Expressions: Draft Articles

Facilitators' Rev. 2 (March 3, 2017, at 11am)~~1 (March 1, 2017, at 10am)~~

[PRINCIPLES/PREAMBLE/INTRODUCTION]

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 protection, 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.]
11. [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 and approval and involvement of] Indigenous [Peoples], [local communities] and [nations/beneficiaries.]]
12. [To [secure/recognize] rights [already acquired by third parties] and [secure/provide for] legal certainty [and a rich and accessible public domain].]
13. [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 1
POLICY OBJECTIVES

Alt 1

This instrument should aim to:

1. Provide beneficiaries with the means to:
 - (a) prevent the misappropriation and misuse/offensive and derogatory use of their traditional cultural expressions;
 - (b) control ways in which their traditional cultural expressions are used beyond the traditional and customary context, as necessary;
 - (c) promote the equitable compensation/sharing of benefits arising from their use with free prior informed consent or approval and involvement/fair and equitable compensation, as necessary; and
 - (d) encourage and protect tradition-based creation and innovation.

Option

- (d) encourage and protect creation and innovation.

2. Aid in the prevention of the grant of erroneous intellectual property rights over traditional cultural expressions.

Alt 2

This instrument should aim to:

- (a) [prevent the [misuse]/[unlawful appropriation] of protected traditional cultural expressions];
- (b) encourage creation and innovation;
- (c) promote/facilitate intellectual and artistic freedom, research [or other fair] practices and cultural exchange; and
- (d) secure/recognize rights already acquired by third parties and secure/provide for legal certainty and a rich and accessible public domain.

Alt 3

The objective of this instrument is to support the appropriate use and protection of traditional cultural expressions within the intellectual property system, in accordance with national law, recognizing the rights of [beneficiaries][indigenous peoples and local communities].]

[ARTICLE 2]

USE OF TERMS

For the purposes of this instrument:

[Traditional] cultural expression means any form of [artistic and literary], [other creative, and 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 [which may subsist in written/codified, oral or other forms], that are [created]/[generated], expressed and maintained, in a collective context, by indigenous [peoples] and local communities; that are the unique product of and/or [directly linked with and the cultural [and]/[or] social identity and cultural heritage of indigenous [peoples] and local communities; and that are transmitted from generation to generation, whether consecutively or not. Traditional cultural expressions ~~are~~ may be] dynamic and evolving.

Alternative

Traditional cultural expressions comprise the various dynamic forms which are created, expressed, or manifested in traditional cultures and are integral to the collective cultural and social identities of the indigenous local communities and other beneficiaries.

[Public domain] refers, for the purposes of this instrument, to tangible and 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.]

Alternative

Public domain means the public domain as defined by national law.

[Publicly available] means [subject matter]/[traditional knowledge] that has lost its distinctive association with any indigenous community and that as such has become generic or stock knowledge, notwithstanding that its historic origin may be known to the public.]

[["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.

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.]

(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.]]

[ARTICLE 3

| [ELIGIBILITY CRITERIA FOR PROTECTION/~~AND~~ [SAFEGUARDING]/SUBJECT MATTER OF
THE INSTRUMENT*Alt 1*

This instrument applies to traditional cultural expressions.

Alt 2

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

- (a) that are [created]/[generated], expressed and maintained, in a collective context, by indigenous [peoples] and local communities; }
- (b) that are the unique product of and/or [directly linked with and the cultural [and]/[or] social identity and cultural heritage of indigenous [peoples] and local communities;
- (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/or a period of five generation; and
- (e) that are the result of creative and literary or artistic intellectual activity.

Alt 3

This instrument applies to traditional cultural expressions. In order to be eligible for protection under this instrument, traditional cultural expressions must be distinctively associated with the cultural heritage of beneficiaries as defined in Article 4, and be created, generated, developed, maintained, and shared collectively, as well as transmitted from generation to generation, and which may be dynamic and evolving.]

[ARTICLE 4

BENEFICIARIES OF PROTECTION/~~AND~~ [SAFEGUARDING]

Alt 1

Beneficiaries of this instrument are indigenous [peoples] and local communities who hold protected traditional cultural expressions.

Alt 2

The beneficiaries of this instrument are indigenous [peoples], local communities, [and]/[and] where there is no notion of indigenous peoples ~~and local communities~~, other beneficiaries as may be determined under national law.

Alt 3

The beneficiaries of this instrument are indigenous [peoples], local communities, and other beneficiaries as may be determined under national law.]

[ARTICLE 5

SCOPE OF PROTECTION/~~AND~~ [SAFEGUARDING]

Alt 1

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

5.2 [Protection under this instrument 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.]]

Alt 2

5.1 Member States should/shall protect the economic and moral rights and interests of beneficiaries in secret and/or sacred traditional cultural expressions as defined in this instrument, as appropriate and in accordance with national law, and where applicable, customary laws and in consultation with the beneficiaries.

5.2 Beneficiaries shall enjoy the exclusive rights of authorizing the use of their traditional cultural expressions to third parties on such terms as may be determined under national laws, and where applicable, customary laws.

5.3 Independently of the economic rights and even after the transfer of those rights, beneficiaries shall, as regards their traditional cultural expressions, have the right to be identified as the owners of those and object to any distortion, mutilation or other modification of their traditional cultural expressions that would be prejudicial to the integrity of their traditional cultural expressions.

Alt 3

5.1 Member States should/shall protect the economic and moral rights and interests of beneficiaries in secret and/or sacred traditional cultural expressions as defined in this instrument, as appropriate and in accordance with national law, and where applicable, customary laws. In particular, beneficiaries shall enjoy the exclusive rights of authorizing the use of such traditional cultural expressions.

5.2 –Where the subject matter is still held, maintained, and used in a collective context, but made publicly accessible without the authorization of the beneficiaries, Member States should/shall provide administrative, legislative, and/or policy measures, as appropriate, to protect against false, misleading, or offensive uses of such traditional cultural expressions, to provide a right to attribution, and to provide for appropriate usages of their traditional cultural expressions. In addition, where such traditional cultural expressions have been made available to the public without the authorization of the beneficiaries and are commercially exploited, Member States should/shall use best endeavors to facilitate remuneration, as appropriate.

5.3 Where the subject matter is not protected under 5.1 or 5.2 Member States should/shall use best endeavors to protect the integrity of the subject matter in consultation with beneficiaries where applicable.

5.1—Where the subject matter is ~~secret and/or, whether or not it is sacred~~, Member States should/shall take administrative, legislative, and/or policy measures, as appropriate, with the aim of granting beneficiaries the exclusive and collective right to:

- a. ~~create, maintain, control and develop said subject matter;~~
- b. ~~authorize, based on informed consent, or prohibit access to, use,⁵ or disclosure of, said subject matter;~~
- c. ~~protection of traditional cultural expressions against any false or misleading uses in relation to goods and services, that suggest endorsement by or linkage with the beneficiaries;~~
- d. ~~prohibit 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;~~
- e. ~~receive a fair and equitable share of benefits arising from its use; and~~
- f. ~~attribution, and to the use of their traditional cultural expressions in a manner that respects the integrity of such traditional cultural expressions.~~

5.2—Where the subject matter is still held, maintained, used and/or developed by beneficiaries, and is publicly available but neither widely known, sacred, nor secret, Member States should/shall provide administrative, legislative, and/or policy measures, as appropriate, with the aim of granting beneficiaries the exclusive and collective right to:

- (a) ~~protection of traditional cultural expressions against any false or misleading uses, in relation to goods and services, that suggest endorsement by or linkage with the beneficiaries;~~
- (b) ~~prohibit use or modification which distorts or mutilates a traditional cultural expression or that is otherwise offensive, derogatory or diminishes its cultural significance to the beneficiaries;~~
- (c) ~~receive a fair and equitable share of benefits arising from its use; and~~
- (d) ~~attribution, and the use of their traditional cultural expressions in a manner that respects the integrity of such traditional cultural expressions.~~

5.3—Where the subject matter is not protected under 5.1 and 5.2, Member States should/shall use best endeavors to protect the integrity of the subject matter in consultation with beneficiaries where applicable.

Alt 4

3

Option 1

⁵ [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.]

5.1 Where the 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]/~~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 protected traditional cultural expressions;
 - ii. [discourage] prevent the unauthorized disclosure and fixation and prevent the unlawful use of secret protected traditional cultural expressions;
 - iii. [authorize or deny the access to and use/[utilization] of said protected traditional cultural expressions based on prior and informed consent or approval and involvement and mutually agreed terms;]
 - 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 otherwise diminishes its cultural significance to the beneficiary.
- (b) ~~[ensure that]~~ encourage users [to]:
- i. attribute said protected traditional cultural expressions to the beneficiaries;
 - ii. use best efforts to enter into an agreement with the beneficiaries to establish terms of use of the protected traditional cultural expressions; and
 - 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 protected traditional cultural expressions.

5.2 [Where the protected traditional cultural expression 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]/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 protected traditional cultural expressions, [unless the beneficiaries decide otherwise], or the protected traditional cultural expressions is not attributable to a specific indigenous [people] or local community; and][.]
- (b) use best efforts to enter into an agreement with the beneficiaries to establish terms of use of the protected traditional cultural expressions;
- (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 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.]

5.3 [Where the 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/}~~~~{shall}~~ ~~{ensure that/}~~~~{encourage}~~ users of said protected traditional cultural expressions [to], in accordance with national law:

- (a) attribute said 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}~~.

Option 2

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

5.2 {Protection under this instrument 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.}}

5.3 Protection/safeguarding under this instrument(s) does not extend to uses of protected traditional cultural expressions: (1) for archival, uses by museums, preservation, research and scholarly uses, and cultural exchanges; and (2) to create literary, artistic, and creative works that are inspired by, borrowed from, derived from, or ~~adopted~~-adapted from protected traditional cultural expressions.]

2.2. Where the protected traditional cultural expressions listed in paragraph 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

(a) outline said protected traditional cultural expressions to the public;

(b) utilize the knowledge in a manner that respects the cultural norms and practices of the community (as well as the intellectual, artistic and intangible) nature of the traditional cultural expressions; and

(c) protect against any (false or misleading) use of traditional cultural expressions in goods and services that might mislead or be linked with the community;

(d) where applicable, deposit any material into the fund controlled by such authority;

Option 2

2.1. Member States shall designate the economic and moral rights of the community concerning their protected traditional cultural expressions as defined in this instrument, as appropriate and in accordance with national law, in a reasonable and balanced manner;

2.2. Protection under this instrument shall extend to traditional cultural expressions that are widely known or used outside the community of origin as defined in this instrument, for a reasonable period of time, in the public domain, or recorded by audio-visual means;

2.3. Protection regarding their intellectual property shall be provided to the community of origin by means of a reservation, which shall be subject to the following conditions: (1) for activities, (2) for artistic and creative works that are widely known or used outside the community of origin, and (3) for traditional knowledge derived from nature or culture from the community of origin.

[ARTICLE 6]

ADMINISTRATION OF [RIGHTS]/[INTERESTS]

*Alt 1**Option 1*

6.1—[Member States]/[Contracting Parties] [may]/[shall] [establish]/[appoint] a competent authority or authorities, [with the prior informed consent or approval and involvement 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].

Option 2

6.1—[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].]

*Alt 2**Alt 1*

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

Alt 2

6.1 [Member States]/[Contracting Parties] may establish or designate a competent authority, in accordance with national law, with the explicit consent of the beneficiaries, to administer the rights/interests provided for by this [instrument].

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

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 by the Member State 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.]~~

2.4 ~~[The identity of the [competent] national or regional authority or authorities [should]/[shall] be communicated to the Secretariat of the World Intellectual Property Organization.]~~

[ARTICLE 7]

EXCEPTIONS AND LIMITATIONS

Alt 1

In complying with the obligations set forth in this instrument, Member States may in special cases, adopt justifiable exceptions and limitations necessary to protect the public interest, provided such exceptions and limitations shall not unreasonably conflict with the interests of beneficiaries, and the customary law of indigenous peoples and local communities, nor unduly prejudice the implementation of this instrument.

Alt 2

~~In complying with the obligations set forth in this instrument, Member States may adopt exceptions and limitations as may be determined under national and customary law~~

Alt 3

In complying with this instrument, Member States may adopt exceptions and limitations as may be determined under national legislation including incorporated customary law.

1. To the extent that any act would be permitted under national law for works protected by copyright, signs and symbols protected by trademark law, or subject matter otherwise protected by intellectual property law, such acts [shall/should] not be prohibited by the protection of TCEs.
2. Regardless of whether such acts are already permitted under paragraph (1), Member States [shall/should] have exceptions for:
 - (a) learning teaching and research;
 - (b) preservation, display, research, and presentation in archives, libraries, museums or other cultural institutions;
 - (c) the creation of literary, artistic, or creative works inspired by, based on, or borrowed from traditional cultural expressions.

Alt. 3

General Exceptions

7.1 [[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.]]

EXCEPTIONS AND LIMITATIONS

All 1

In complying with the obligations set forth in this instrument, Member States may in special cases adopt justified exceptions and in those cases necessary to protect the public interest, provided such exceptions and limitations shall not unreasonably conflict with the interests of beneficiaries. The validity law of residence, nationality and other provisions that unreasonably prejudice the implementation of this instrument.

All 2

In complying with the obligations set forth in this instrument, Member States may in special cases adopt justified exceptions and in those cases necessary to protect the public interest, provided such exceptions and limitations shall not unreasonably conflict with the interests of beneficiaries.

All 3

In complying with this instrument, Member States may adopt exceptions and limitations as may be determined under national legislation that is not inconsistent with this law.

1. To the extent that any provision in this instrument is inconsistent with the law of the residence, nationality and other provisions that unreasonably prejudice the implementation of this instrument, such provision shall not be binding on the beneficiary of this instrument.

2. The purpose of this instrument is to ensure that the beneficiaries of this instrument are not disadvantaged by the provisions of this instrument.

(a) Member States and persons

(b) Member States, persons, institutions and associations in the field of social security or other social institutions

(c) The provisions of this instrument shall not be applied to persons who are not covered by the provisions of this instrument.

All 4

General Exceptions

1.1 [Member States/Contracting Parties (hereinafter "States") may in special cases adopt justified exceptions and limitations and derogations under national law with the prior informed consent or approval and involvement of the beneficiaries (in consultation with the beneficiaries) with the understanding of beneficiaries in order that the use of (protected) traditional cultural expressions is:

- (a) [not derogate the beneficiaries' rights];
- (b) [is not offensive or derogatory to the beneficiaries];
- (c) [is compatible with fair trade practices];
- (d) [does not conflict with the non-derogation of the traditional cultural expressions by the beneficiaries]; and]

Alternative

7.1 [[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]

7.2 [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

7.3 [[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 5.1.]

7.4 [Regardless of whether such acts are already 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 or approval and involvement 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.]]

7.5 [[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 rights [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 86]

[TERM OF [PROTECTION-]/[SAFEGUARDING]

Option 1

86.1 [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.]]

86.2 [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

86.1 [Member States]/[Contracting Parties] shall protect the subject matter identified in this [instrument] as long as the beneficiaries of protection continue to enjoy the scope of protection in Article 3.

Option 3

86.1 [[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 97]

FORMALITIES

Option 1

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

Option 2

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

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

[ARTICLE 108]

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

- | 108.1 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.]
- | 108.1 Option 2 [Member States]/[Contracting Parties] [should]/[shall], in accordance with their national law, provide 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.
- | 108.2 [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].]
- | 108.3[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.]
- | 108.4[[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.]
- | 108.5[[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, or in cases where the user had no knowledge or reasonable grounds to know that the traditional cultural expression is protected.]]

[ARTICLE 119]

[TRANSITIONAL MEASURES]

- | 119.1 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].
- | 119.2 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]].
- | 119.2 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].
- | 119.3 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 120]

[RELATIONSHIP WITH [OTHER] INTERNATIONAL AGREEMENTS]

- | 120.1 [Member States]/[Contracting Parties] [should]/[shall] implement this [instrument] in a manner [mutually supportive] of [other] [existing] international agreements.
- | 120.2 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 134]

[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 142]

[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 153

[CAPACITY BUILDING AND AWARENESS RAISING

- 153.1 [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].
- 153.2 [Member States]/[Contracting Parties] [should]/[shall] provide the necessary resources for indigenous [peoples] and local communities and join forces with them to develop capacity-building projects within indigenous [peoples] and local communities, focused on the development of appropriate mechanisms and methodologies, such as new electronic and didactical material which are culturally adequate, and have been developed with the full participation and effective participation of indigenous peoples and local communities and their organizations.
- 153.3 [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.]
- 153.4 [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.]

ARTICLE 164NON-DEROGATION

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.