

The Protection of Traditional Cultural Expressions: Draft Articles

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[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:

1.1 Provide beneficiaries with the means to:

- (a) prevent the misappropriation and misuse/offensive and derogatory use/unauthorized 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.

1.2 Aid in the prevention of the erroneous grant or assertion of 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.
- (e) aid in the prevention of the erroneous grant or assertion of intellectual property rights over traditional cultural expressions.

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, and to recognize the rights of [beneficiaries] [indigenous peoples and local communities].

Alt 4

The objective of this instrument is to prevent misappropriation, misuse, or offensive use, and to promote the protection, of traditional cultural expressions within the intellectual property system, and to recognize 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,] [creative and literary or artistic] 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 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]/[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 directly linked with, 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]/[SAFEGUARDING]

Alt 1

Beneficiaries of this instrument are indigenous [peoples] and local communities who hold, express, create, maintain, use, and develop 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], 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.

Alt 4

The beneficiaries of this instrument are indigenous peoples, as well as local communities and other beneficiaries, as may be determined by national law, who hold, express, create, maintain, use, and develop protected traditional cultural expressions.]

[ARTICLE 5]

SCOPE OF [PROTECTION]/[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. 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.

*Alt 3**Option1*

5.1 Where the protected traditional cultural expression is [sacred], [secret] or [otherwise known only] [closely held] within indigenous peoples or local communities, Member States should/shall:

- (a) 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) 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 should/shall encourage that users]/[provide legal, policy and/or administrative measures, as appropriate and in accordance with national law to 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 should/shall 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 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.]

Option 2

5.1 Member States 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.

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 adapted from protected traditional cultural expressions.]

[ARTICLE 6]

ADMINISTRATION OF [RIGHTS]/[INTERESTS]

6.1 [Member States]/[Contracting Parties] may establish or designate a competent authority, in accordance with national law, with the explicit consent of/in consultation with 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.]]

[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 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/may] have exceptions, such as:
 - (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

In complying with the obligations set forth in this instrument, Member States may in special cases, adopt exceptions and limitations, provided such exceptions and limitations shall not unreasonably prejudice the legitimate interests of beneficiaries, taking account of the legitimate interests of third parties.

Alt 4

In complying with the obligations set forth in this instrument, Member States may in special cases, adopt exceptions and limitations, provided such exceptions and limitations shall not unreasonably prejudice the legitimate interests of beneficiaries, taking account of the legitimate interests of third parties, provided that the use of 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; and*
- (d) *does not conflict with the normal utilization of the traditional cultural expressions by the beneficiaries.]*

[ARTICLE 8]

[TERM OF [PROTECTION]/[SAFEGUARDING]]

Option 1

8.1 [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.]]

8.2 [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

8.1 [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

8.1 [[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 9]

FORMALITIES

Option 1

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

Option 2

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

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

[ARTICLE 10]

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

[10.1 Member States shall put in place appropriate, effective, dissuasive, and proportionate legal and/or administrative measures, to address violations of the rights contained in this instrument.

10.2 If a violation of the rights protected by this instrument is determined pursuant to paragraph 10.1, the sanctions may include restorative justice measures, according to the nature and effect of the infringement.]]

[ARTICLE 11]

[TRANSITIONAL MEASURES]

11.1 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].

11.2 *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]].

11.2 *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].

11.3 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 12]

[RELATIONSHIP WITH [OTHER] INTERNATIONAL AGREEMENTS]

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

[ARTICLE 13]

[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].]

[ALTERNATIVES TO ARTICLES 8, 9, 10, 11 and 13
NO SUCH PROVISIONS]

[ARTICLE 14]

[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 15

[CAPACITY BUILDING AND AWARENESS RAISING]

15.1 [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].

15.2 [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.

15.3 [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.]

15.4 [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 16
NON-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.]

[End of document]