

**ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION**



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**EXPRESSIONS OF FOLKLORE AND ITS INTERNATIONAL PROTECTION**

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## **EXPRESSIONS OF FOLKLORE AND ITS INTERNATIONAL PROTECTION**

### **I. INTRODUCTION**

1. Folklore has always been considered as part of the common heritage of the community without individual ownership and there were no formal or informal laws in many developing countries which specifically bestowed ownership rights of folklore on any community or group of persons and prohibit its exploitation without their consent. This led to widespread exploitation of folklore inside and outside the nation concerned.

2. The need for a strong legal mechanism for the protection of folklore has been a subject of discussion at the national and international level since 1960's and the two main international fora where most of the discussions were held were the World Intellectual Property Organization (WIPO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO). While WIPO is concerned with the intellectual property protection of folklore and UNESCO is concerned with the general protection of folklore. Apart from this, regional organizations such as the African Intellectual Property Organization (OAPI) reflect the collective thought of the like-minded nations for the legal protection of creations of folklore.

3. The WIPO General Assembly, at its Twenty-Sixth Session, held in Geneva from September 26 to October 3, 2000, established an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore ("the Committee" or "IGC") in order to analysis inter alia intellectual property issues that arise in the context of the protection of expressions of folklore.<sup>1</sup> The WIPO General Assembly extend the mandate of the WIPO IGC and the mandate requires the IGC to accelerate its work and to focus in particular on the international dimension of folklore protection.<sup>2</sup>

4. The Secretary-General of AALCO realizing the extreme importance of the work undertaken by the WIPO IGC for the Asian and African countries, and the possible role AALCO could play in formulating an international instrument, proposed to the AALCO Member States through an Explanatory Note dated 27 April 2004, to include the "Expressions of Folklore and its International Protection" as an item on the Agenda of the 43<sup>rd</sup> Session of AALCO held in Bali (Indonesia) from 21-25 June 2004. This proposal was in line with Article 4(a) of the AALCO's Statutes which provides for exchange of views and information on matters of common concern having legal implications. The AALCO member States welcomed the proposal and the item was deliberated upon at the 43<sup>rd</sup> and 44<sup>th</sup> Sessions. At these Sessions the Member States through a resolution requested the Secretary-General to monitor and report the outcome of the IGC Sessions and directed the Secretariat to follow-up the developments within the WIPO and submit a report at the next Session.

5. As a follow-up, this report provides an overview of the work of the WIPO Intergovernmental Committee since its inception in 2001, focusing its attention on the

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<sup>1</sup> WO/GA/26/6, paragraph 13, and WO/GA/26/10

<sup>2</sup> WO/GA/20/8, paras. 94 and 95

recently concluded Eighth Session of the Committee and the documents circulated at the Session for the consideration of the Member States. As the work is also underway with in UNESCO on the topic the report also provides a brief overview of the UNESCO Convention for Safeguarding the Intangible Cultural Heritage 2003. The draft Provisions on the Protection of Expressions of Folklore as revised in the Seventh Session has also been annexed.

## **II. WIPO INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE**

### **(i) Introduction**

6. In the early 1978 when WIPO in cooperation with the UNESCO initiated its work on “expressions of folklore,” it was considered as a subset of traditional knowledge. Since then the work on expression of folklore has progressed to a more advanced stage than the work on traditional knowledge in general. Apart from the piecemeal amendments in the existing IPR regime for the protection of folklore, the major achievement was the adoption in 1982 of the Model Provisions on the Protection of Expressions of Folklore.

7. The Model Provisions were the result of several joint meetings convened by the WIPO and UNESCO to study the draft model provisions. The outcome of the meeting was submitted to the Committee of Governmental Experts, convened by the WIPO and UNESCO at Geneva in 1982, which adopted the famous “Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and other Prejudicial Actions (Model Provisions).” The Model Provisions have attempted to achieve a balance between protection against abuses of expressions of folklore, on one hand and the freedom, and encouragement of folklore, on the other.

8. While the WIPO had been attempting to protect the “expressions of folklore” through piecemeal amendments in various international instruments, no comprehensive attempt was made to draft an international instrument for its protection. In this regard, WIPO and UNESCO met at Phuket, Thailand in April 1997 and was attended by 180 participants from approximately 50 countries. The major outcome of the meeting was the recognition of the need for preservation and conservation of folklore throughout the world, legal means of protection of expressions of folklore within national regimes, economic repercussions of exploitation and international protection of expressions of folklore.

9. In 1999, WIPO and UNESCO conducted four Regional Consultations on the Protection of Expressions of Folklore, each of which adopted resolutions or recommendations with proposals for future work. The consultations recommended that WIPO should increase and intensify its work in the field of folklore protection and recommended the establishment within WIPO of a separate committee on folklore and traditional knowledge to facilitate future work in this area. Recommendations for the legal protection of folklore focused on the development of a *sui generis* form of legal protection at the international level (Asia/Pacific, Arab, Latin American Countries Recommendations) and also considered the UNESCO-

WIPO Model Provisions to be an adequate starting point and relevant groundwork for future work in this direction. The African countries recommended developing, in the shortest possible time, a broad consensus among States in favor of an international regime.<sup>3</sup>

10. Following the recommendations of the regional consultations on folklore, the WIPO General Assembly, at its Twenty-Sixth Session, held in Geneva from September 26 to October 3, 2000, established an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (“the Committee” or “IGC”) in the following general terms:

The Intergovernmental Committee would constitute a forum in which discussions could proceed among Member States on the three primary themes which they identified during the consultation: intellectual property issues that arise in the context of: (i) access to genetic resources and benefit sharing; (ii) protection of traditional knowledge, whether or not associated with those resources; and (iii) the protection of expressions of folklore.<sup>4</sup>

11. In September 2003, the WIPO General Assembly at its thirtieth session decided to extend the mandate of the WIPO IGC and the mandate requires the IGC to accelerate its work and to focus in particular on the international dimension of folklore protection.<sup>5</sup> The new mandate excludes no outcome of the IGC’s work, including the possible development of an international instrument or instruments in this field.<sup>6</sup>

## **(ii) Work of the Committee on Folklore from First to Seventh Sessions**

12. The Committee’s work programme focused on an ongoing technical analysis of the use of existing intellectual property and *sui generis* approaches for the protection of expressions of folklore. The Committee’s work has so far resulted in draft Provisions on Objectives and Principles for the Protection of the Expressions of Folklore.

13. The Committee has built its work on the existing basis of consultations and earlier works done by its various bodies. An active programme of consultation and dialogue has complemented the formal proceedings of the Committee, with emphasis on the fostering of regional dialogue, and the enhanced participation of indigenous and local communities in WIPO activities. The Committee has also provided a framework for interaction with other international processes concerned with IP aspects of Expressions of Folklore. Also a coordinated series of case studies and presentation on national experiences provides an additional source of practical information for holders of Expressions of folklore and for policymakers alike.

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<sup>3</sup> See documents WIPO-UNESCO/FOLK/ASIA/99/1, page 4, paragraph 4; WIPO-UNESCO/FOLK/ARAB/99/1, paragraph II(b)6; WIPO-UNESCO/FOLK/LAC/99/1, page 3). *Matters Concerning Intellectual Property And Genetic Resources, Traditional Knowledge And Folklore*, WIPO General Assembly Twenty-Sixth (12<sup>th</sup> Extraordinary) Session Geneva, September 25 to October 3, 2000, WO/GA/26/6.

<sup>4</sup> WO/GA/26/6, paragraph 13, and WO/GA/26/10

<sup>5</sup> WO/GA/20/8, paras. 94 and 95

<sup>6</sup> WIPO Press Release PR/2003/362, 29 September 2003

14. The Committee's work has already led to a much greater understanding of the concept and issues it has addressed, and has clarified how to deal with concerns and inadequate recognition and protection of Expressions of Folklore. The discussions highlighted the expectation of a number of countries that specific steps should be taken to strengthen protection, including the development of specific new international instruments; others pointed out that the significance of the issue and their complexity, meant that further analysis and clarification was needed before crystallizing formal outcomes; there is a view that more work needs to be done to explore the full potential of existing IP rights and systems to protect Expressions of Folklore.

15. At its sixth session of the IGC held in March 2004, the Committee had also decided that the WIPO Secretariat should prepare drafts of an overview of policy objectives and core principles for protection of Expressions of Folklore; and, an outline of the policy options and legal mechanisms for the protection of Expressions of Folklore subject matter, based on the full range of approaches already considered by the Committee, together with a brief analysis of the policy and practical implications of each option.<sup>7</sup>

16. At its seventh session in November 2004, the Committee took note of the detailed comments and drafting suggestions made on the draft objectives and core principles as set out in Annex I of document WIPO/GRTKF/IC/7/3; called for further comments on the draft objectives and core principles, including specific suggestions for wording, before February 25, 2005; and requested the Secretariat to produce, on the basis of that Annex and all subsequent inputs and comments from Committee participants, a further draft of objectives and principles for the protection of Expressions of Folklore for consideration by the Committee at its eighth session.

### **III. THE EIGHTH SESSION OF THE WIPO IGC ON FOLKLORE ASPECTS**

#### **(i) The Protection of Expressions of Folklore: Revised Objectives and Principles**

17. The WIPO IGC at its Eighth Session considered the draft provisions embodying policy objectives and core principles for the protection of traditional cultural expressions (TCEs)/expressions of folklore (EoF). The Annex to the document WIPO/GRTKF/IC/8/4 provides a revised version of the draft provisions for the Committee's further review. The draft has been revised in line with a commentary and review process established by the Committee at its seventh session. The draft provisions reflect the essence of the Committee's work on protection of TCEs/EoF since 2001. The provisions are based on the statements, comments and proposals by Committee participants, and national and regional approaches to protection of TCEs/EoF described and discussed in the Committee's sessions. The latest draft is guided especially by the comments and specific suggestions made at the Committee's seventh session and during the commentary and review process since then.

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<sup>7</sup>

Report of Sixth Session, WIPO/GRTKF/IC/6/14, par. 66.

18. The draft provisions set out substantive standards which may provide the content of international standards for the protection of TCEs/EoF against misappropriation and misuse, without requiring the assertion of new exclusive property rights over TCEs/EoF, but accommodating this option should TCEs/EoF holders elect to take it up. The provisions focus on protection against misappropriation and misuse of TCEs/EoF as a complement to international instruments and processes which deal with the preservation, safeguarding and promotion of TCEs/EoF.

19. The draft provisions concern most directly the protection of TCEs/EoF in a legal sense, that is, protection against the kinds of illicit uses and misappropriations that IP protection usually addresses, while taking into account the particular nature and characteristics of traditional creativity and cultural expression, including its communal quality, and the preference many have expressed to avoid new distinct property rights. “Protection” in this sense is distinguishable from the “safeguarding” or “preservation” of cultural heritage and expressions, and complements it within the broader policy and legal environment. This approach is consistent with the “protection ... against illicit exploitation and other prejudicial actions” that was the objective of earlier norm-setting activities conducted by WIPO and UNESCO.<sup>8</sup>

20. The revised draft provisions have been divided in to three sections: (a) Objectives; (b) General Guiding Principles; and (c) Substantive Provisions. The provisions are accompanied by a brief commentary.

### **Objectives**

21. Protection of TCEs/EoF should not be undertaken for its own sake, as an end in itself, but as a tool for achieving the goals and aspirations of relevant peoples and communities and for promoting national, regional and international policy objectives. The way in which a protection system is shaped and defined will depend to a large extent on the objectives it is intended to serve. A key initial step, therefore, of the development of any legal regime or approach for the protection of TCEs/EoF is to determine relevant policy objectives.

22. Accordingly, the draft Provision recognizes that the protection of traditional cultural expressions, or expressions of folklore, should aim to: (i) Recognize value; (ii) Promote respect; (iii) Meet the actual needs of communities; (iv) Prevent the misappropriation of traditional cultural expressions/expressions of folklore; (v) Empower communities; (vi) Support customary practices and community cooperation; (vii) Contribute to safeguarding traditional cultures; (viii) Encourage community innovation and creativity; (ix) Promote intellectual and artistic freedom, research and cultural exchange on equitable terms; (x) Contribute to cultural diversity;

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<sup>8</sup> However, several Committee participants have expressed various concerns with the use of the term “protection”, which, according to one Member State, “leave[s] the strong impression of favoring a specific policy direction” and led to concern about “the exclusion of the important concepts of ‘preservation’ and ‘conservation’ from the definition of protection” and about “the failure to mention the concept of ‘promotion.’” Furthermore, some Committee participants, especially indigenous peoples, have argued that the approach to protection in the work of the Committee is too narrow and limited.

(xi) Promote community development and legitimate trading activities; (xii) Preclude unauthorized Intellectual Property rights; and (xiii) Enhance certainty, transparency and mutual confidence.

23. Several changes have been made to the original draft objectives during the Sessions. Some of the previous objectives which were more in the nature of general guiding principles rather than objectives as such, had been transferred to that section. Further, some new objectives have been added to the existing list.

### **General Guiding Principles**

24. The general guiding principles seek to give legal expression to certain general guiding principles which have underpinned much of the discussion within the Committee since its inception and in international debate and consultations before the Committee's establishment. The general guiding principles identified with the Committee include:

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

### **Substantive Principles**

#### **1. Subject Matter of Protection**

25. Article 1 defines "traditional cultural expressions" or "expressions of folklore" as any forms, whether tangible and intangible, in which traditional culture and knowledge are expressed, appear or are manifested, and comprise the following forms of expressions or combinations thereof: Verbal expressions; musical expressions; expressions by action; and tangible expressions.

26. This article describes the subject matter covered by the provisions. Paragraph (a) of the article sets out both a description of the subject matter itself ("traditional cultural expressions" or "expressions of folklore") as well as the substantive criteria which specify more precisely which of those expressions would be protectable. In the Committee the distinction between descriptions of the subject matter in general, and the more precise delimitation of those TCEs/EoF that are eligible for protection under a specific legal measure was also clarified. As has been pointed out, not every expression of folklore or of traditional cultures and knowledge could conceivably be the subject of protection within an IP framework.

#### **2. Beneficiaries**

27. Article 2 states that measures for the protection of traditional cultural expressions/expressions of folklore should be for the benefit of the indigenous



peoples and traditional and other cultural communities in whom custody, care or safeguarding of the folklore are entrusted and who maintain, use and develop the folklore.

TCEs/EoF are generally regarded as collectively originated and held, so that any rights and interests in this material should vest in communities rather than individuals. Some laws for the protection of TCEs/EoF provide rights directly to concerned peoples and communities. On the other hand, many vest rights in a Governmental authority, often providing that proceeds from the granting of rights to use the TCEs/EoF shall be applied towards national heritage, social welfare and culture related programs. The suggested provision is sufficiently flexible to accommodate both approaches at the national level – while the beneficiaries of protection should directly be the concerned peoples and communities, the rights themselves could be vested either in the peoples or communities, or in an agency or office.

### **3. Acts of Misappropriation (Scope of Protection)**

28. This draft article addresses a central element of protection, that is, the misappropriations of TCEs/EoF covered by the provisions and the rights and other measures that would apply in each case. These provisions are without prejudice to protection for TCEs/EoF already available under current IP law. The suggested provision seeks to address the kinds of IP-related uses and appropriations of TCEs/EoF which most often cause concern to indigenous and local communities and other custodians and holders of TCEs/EoF. In brief, the draft provision suggests three “layers” of protection, intended to provide supplementary protection that is tailored to different forms of cultural expression and the various objectives associated with their protection, reflecting a combination of exclusive and equitable remuneration rights and a mix of legal and practical measures. The provisions are broad and inclusive, and intended to give flexibility to national and regional authorities and communities in relation to which precise legal mechanisms may be selected at the national or regional levels to implement them.

### **4. Management of Rights**

29. This provision deals with how and to whom authorizations to use expressions of folklore are applied for and related questions. It provides that “prior authorizations to use traditional cultural expressions/expressions of folklore..., should be obtained either directly from the community concerned where the community so wishes, or from an agency acting at the request, and on behalf, of the community”. The matters dealt with in this provision should apply regardless of whether communities or State-appointed bodies are the rights holders.

30. The provisions as a whole envisage the exercise of rights by the relevant communities themselves. However, in cases where the relevant communities are not able or do not wish to exercise the rights directly, this draft article suggests a role for an “Agency”. A role for such an “Agency” is entirely optional, and only necessary and appropriate if the relevant communities so wish.

## **5. Exceptions and Limitations**

31. This provision puts forward certain exceptions and limitations for consideration. Many stakeholders have stressed that any IP-type protection of TCEs should be subject to certain limitations so as not to protect them too rigidly. It has been suggested that overly strict protection may stifle creativity, artistic freedom and cultural exchanges, as well as be impracticable in its implementation, monitoring and enforcement. In addition, the protection of TCEs/EoF should not prevent communities themselves from using, exchanging and transmitting amongst themselves expressions of their cultural heritage in traditional and customary ways and in developing them by continuous recreation and imitation, as has been emphasized.

## **6. Term of Protection**

32. In order to balance the view as to whether to provide definite or indefinite protection to the expressions of folklore, this provision embodies a trademark-like emphasis on current use. It means that once the community that the TCE is characteristic of no longer uses the TCE or no longer exists as a distinct entity (analogous to abandonment of a trademark, or a trademark becoming generic), protection for the TCE would lapse. Such an approach draws upon the very essence of the subject matter of protection, it being recalled that at the heart of TCEs/EoF is that they are characteristic of and identify a community. When a TCE ceases to do so, it ceases by definition to be a TCE and it follows that protection should lapse.

## **7. Formalities**

33. This provision is intended to reduce administrative burdens in the acquisition and maintenance of protection of expressions of folklore. This provision states that as a general principle, the protection of traditional cultural expressions/expressions of folklore should not be subject to any formality. Traditional cultural expressions/expressions of folklore as referred to in Article 1 are protected from the moment of their creation.

## **8. Sanctions, Remedies and Exercise of Rights**

34. This provision concerns civil and criminal sanctions and remedies made available in cases of breach of the protection for traditional cultural expressions/expressions of folklore. Remedies may include accessible, appropriate and adequate enforcement and dispute-resolution mechanisms, border-measures, sanctions and remedies, including criminal and civil remedies.

## **9. Transitional Measures**

35. This provision concerns whether protection should operate retroactively or prospectively, and in particular how to deal with utilizations of TCEs/EoF that are continuing when the provisions enter into force and which had lawfully commenced before then. The provision neither adopts retroactivity or prospectivity, but provides an intermediate solution, in terms of which utilizations which become subject to authorization under the law or regulation but were commenced without authorization

before the entry into force, should be brought to an end before the expiry of a certain period (if no relevant authorization is obtained by the user in the meantime, as required).

## **10. Relationship with Intellectual Property Protection and Other Forms of Protection, Preservation and Promotion**

36. These provisions are intended to provide forms of protection for TCEs/EoF not currently available under conventional and existing IP laws. It provides that protection for traditional cultural expressions/expressions of folklore in accordance with these provisions does not replace and is complementary to protection applicable to traditional cultural expressions/expressions of folklore and derivatives thereof under other intellectual property laws, laws and programs for the safeguarding, preservation and promotion of cultural heritage, and other legal and non-legal measures available for the protection and preservation of traditional cultural expressions/expressions of folklore.

## **11. International and Regional Protection**

37. This provision deals with the technical question of how rights and interests of foreign holders of rights in TCEs/EoF would be recognized in national laws. In other words, on what conditions and in what circumstances foreign rights holders would have access to national protection systems, and what level of protection would be available to the benefit of foreign right holders. For present purposes, and *simply as a starting point for discussion*, a provision based generally upon national treatment as is found in Article 5 of the Berne Convention is included as a basis for further consideration and analysis.

### **(ii) Deliberations at the Eighth Session of WIPO IGC**

38. The Traditional Cultural Expressions/Expressions of Folklore was taken up as agenda item 8 of the Eighth Session. After the introduction of the document for deliberations by the Secretariat,<sup>9</sup> many States, including many AALCO Members took the floor, which include Japan, Republic of Indonesia, Peoples Republic of China, Islamic Republic of Iran, India, Singapore, Nigeria, Arab Republic of Egypt, Pakistan, South Africa. The subject of the deliberation was the draft Provisions on the Protection of Expressions of Folklore.

39. Most delegations appreciated that the draft provisions in WIPO/GRTKF/IC/8/4 were based on the principles of flexibility and comprehensiveness. However, delegates recognized that it was unlikely that protection of TCEs could be achieved by a “one size fits all” or a “universal international template”. It was also expressed that the draft provisions should “continue to be neutral in so far as, and entirely without prejudice to, the legal nature of the instrument in or through which they might be contained and expressed”. However, one delegate stated that they were still disappointed to see that there was not much tangible progress in the discussions but felt that the document was a first step.

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Secretariat Documents: WIPO/GRTKF/IC/8/4 and WIPO/GRTKF/IC/8/6

40. One delegate felt that while TCEs should be protected in a way that was respectful of and consistent with relevant international and regional instruments and without prejudice to specific rights and obligations under binding legal instruments, the draft Provisions have also included some aspects which the Delegation believed were not appropriate in light of these principles. Some delegates expressed strong concerns about recent steps that might be viewed as an attempt to develop a premature consensus within the Committee around a particular approach, namely the establishment of a single, legal regime, to address the extremely diverse issues and concerns of Member States. These articles were presented in a treaty-like format and set out extremely detailed “substantive” or “legal” standards. The Delegation believed that a multi-faceted approach was appropriate, spanning a wide range of distinct national legal mechanisms, including IP law, unfair competition law, contract law, *sui generis* approaches and customary law.

41. Some delegates pointed out that the draft articles should be in accordance and balanced with the concerns of developing countries. However, the present document had been prepared with an emphasis on the national approach and this was not consistent with the requirements of developing countries. The delegate added that the approach of the document should focus on defining the framework of an international legally binding instrument as the first priority. One delegate viewed that the customary practices of communities would also have to be taken into account and so it was proposed that the substantive articles should leave room for governments to formulate their own legislation. Another delegate pointed out that in his country the expression “indigenous people” might not be appropriate. Further he said that it was necessary to adopt common principles for protection of both TK and TCEs/EoF since there was a fairly strong interface between the two.

42. Some delegates affirmed that as long as there was not an international legally binding instrument which would protect TCEs/EoF against misappropriation, the Delegation would not be satisfied. However, the international system should be based on fundamental principles, particularly “prior informed consent” and benefit-sharing, and should not be limited to material compensation and it should also take into account the technological aspect. If at the international level these expressions were not protected, national measures were insufficient. One delegate also wished to emphasize the significance of further discussion, debate and capacity-building at regional or interregional levels in relation to the underlying issues, before pursuing comprehensive consideration of core principles and policy objectives. A dispute settlement mechanism which would work in different countries following the example of the WTO was also desirable.

### **(iii) Decisions Adopted by the Eighth Session of the IGC, July 2005**

43. At the eight session of the WIPO IGC, the members were unable to agree on proposals that could form the basis of an international agreement on traditional knowledge and folklore. There was clear disagreement between the developed and the developing countries over the move to creating a legally binding international instrument. The lack of progress in the IGC led some developing countries to call for a narrowing of the IGC’s mandate, which was due for expiry or renewal by WIPO’s

General Assembly in September 2005. However the developed countries defeated this move.

44. The Committee finally adopted a composite decision on this item in conjunction with its decision on agenda item 9 (Traditional Knowledge). The Committee agreed that there was broad support for the process and work being undertaken within the Committee on Expressions of Folklore. The Committee will continue its work based on the renewed mandate established by the General Assembly, and will consider revised texts of policy objectives and principles for the protection of traditional knowledge and traditional cultural expressions/folklore.

45. On 26 September 2005 meeting of the WIPO General Assembly, it was decided to extend the mandate of the IGC for another two years, renewing their 2003 directions to the IGC to accelerate its work, particularly with a focus on the international dimension.

#### **IV. WORK OF THE UNESCO ON CULTURAL HERITAGE**

##### **(i) UNESCO Convention for the Safeguarding of Intangible Cultural Heritage, 2003**

46. The UNESCO Convention for the Safeguarding of Intangible Cultural Heritage was adopted by the General Conference of the UNESCO on 17 October 2003.<sup>10</sup> The adoption of the Convention marks an important achievement as it is the first legally binding multilateral instrument for the safeguarding of the intangible cultural heritage. The Convention also assumes significance as its adoption took place in the backdrop of efforts by other intergovernmental organizations working towards formulating legal mechanisms on the same topic but for different purposes.

47. With regard to the cultural heritage in general a distinction is made between tangible and intangible cultural heritage. In fact this classification is the *raison d'être* for this Convention. Though these two categories overlap, this distinction in many ways is helpful for safeguarding cultural heritage in its various manifestations. Therefore the adoption of the present Convention extends the safeguard measures to the intangible cultural forms.

##### **(ii) Historical background**

48. Prior to the adoption of this Convention, efforts were made at various levels for the protection of intangible cultural heritage. The initial efforts for the protection of intangible cultural heritage were focused on through the use of intellectual property

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<sup>10</sup> 32<sup>nd</sup> session of the General Conference of UNESCO adopted the Convention on 17 October 2003 in its plenary, with 120 votes in favour and eight abstentions. There were no votes against the adoption of the text. In accordance with its Article 34, this Convention shall enter into force three months after the date of the deposit of the thirtieth instrument of ratification, acceptance, approval or accession, but only with respect to those States that have deposited their respective instruments of ratification, acceptance, approval, or accession on or before that date. It shall enter into force with respect to any other State Party three months after the deposit of its instrument of ratification, acceptance, approval or accession. 19 States have so far have become parties by either, ratifying, approving or accepting the Convention.

rights mechanisms by way of copy rights protection. This has been primarily due to the negative impacts of commercialization of intangible cultural heritage. The first specific attempt to provide for the international protection of expressions of folklore through the use of copyright law was made at the diplomatic conference of the Stockholm in 1967 for the revision of the Berne Convention for the Protection of Literary and Artistic Works. It was felt that the conceptual and definitional difficulties relating to folklore as a subject for the protection made it impossible to elaborate a new convention at that time. Accordingly, a new article was added to the Berne Convention (Article 15 (4) (a) of the Stockholm and Paris Acts of 1967 and 1971) providing some guidelines for the protection of folklore.

49. Subsequently, in 1976, UNESCO adopted the Tunis Model Law on Copyright for Developing Countries, with a specific article dedicated to the protection of national folklore (Article 6). In 1977, the Convention concerning African Intellectual Property (Bangui text) was adopted by the African Intellectual Property Organization. This text, revised in 1991, dedicates part of its Annex VII to the Protection of folklore: (i) through copyright, and (ii) through the protection and promotion of cultural heritage. Further it treats ‘creations of folklore’ as a separate category from the artistic and literary works traditionally protected by copyright and, interestingly, makes reference to its creation by communities rather than a single author.

50. Be that as it may, in 1973 the Government of Bolivia requested that UNESCO examine the question of drafting a protocol to be added to the Universal Copyright Convention (adopted in 1952; amended in 1971) for the protection of the popular arts and cultural patrimony of all nations. This matter was referred to the cultural sector of UNESCO in 1975 for further study of all aspects related to the protection of folklore on the grounds that it was a question of much broader scope than simply a copy right issue.

51. In 1978, UNESCO and WIPO formally agreed on an approach to the international protection of folklore whereby UNESCO would examine the question of its safeguarding on an interdisciplinary basis while WIPO would concentrate on the intellectual property aspects for protection. This distinction between the intellectual property aspects of folklore protection and the wider issues of protection led to the eventual development of the 1982 Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit and other Prejudicial Actions, adopted by both UNESCO and WIPO, and UNESCO’s 1989 Recommendation. The former provided for IP type protection of expressions of folklore while the latter addressed the safeguarding of traditional culture and folklore from an interdisciplinary standpoint.

## **V. SUMMARY OF THE DELIBERATIONS AT THE FORTY-FOURTH SESSION OF AALCO HELD IN NAIROBI, KENYA, 27 JUNE –1 JULY 2005**

52. It may be recalled that at the Sixth Session of the WIPO IGC which was held in Geneva, March 2004, Amb. Dr. Wafik Z. Kamil, the Secretary-General of AALCO had proposed to the AALCO Member States in his statement and through an Explanatory Note dated 27 April 2004, to include the “Expressions of Folklore and its International Protection” as an item on the Agenda of forthcoming 43<sup>rd</sup> Session of

AALCO which will be held in Bali (Indonesia) from 21-25 June 2004. Accordingly, at the 43<sup>rd</sup> Session of AALCO, the item was included and the AALCO Member States welcomed the same.

53. Many AALCO Member States expressed their view on the item. They informed the meeting about the national and cultural importance of folklore and expressed their concern over the emergence of various types of exploitation of expressions of folklore. All the delegates highlighted their national experiences and actions taken by them at the national level, apart from the provisions in the national copyright law, for the protection of folklore. The delegates also appreciated the efforts of WIPO and UNESCO in developing a legal framework for the protection of folklore. All the countries felt that the forum provided by AALCO should be utilized to converge the experience of both Asian and African regions. They also called upon the AALCO Secretariat to participate in the WIPO IGC and explore cooperative mechanism with WIPO for a fuller study of this item and organize workshop/seminars.

## **VI. CONCLUDING REMARKS**

54. One of the most important achievements of the WIPO Intergovernmental Committee so far was that it was successful in drafting Provisions for the Protection of Expressions of folklore. Though still in the drafting stage, these Provisions present a strong framework for a future convention. It is also welcoming that WIPO General Assembly had decided to extend the mandate of the IGC for another two years, renewing their 2003 directions to the IGC to accelerate its work, particularly with a focus on the international dimension.

55. Another important development in the protection of traditional cultural expressions was the adoption of the UNESCO Convention for the Safeguarding of Intangible Cultural Heritage, 2003. The adoption of this Convention is a step forward from the legal protection point of view as it, if not comprehensive, provides for the general safeguard measures for the protection of intangible cultural heritage. However, it needs to be assessed in the light of the developments that may take place under other organizations like WIPO and also the developments under the TRIPS and biological diversity convention. The implementation of the Convention is going to depend much on the initiatives of the Intergovernmental Committee that is going to come into existence once the Convention comes into force.

56. The WIPO IGC, until its Seventh Session had made considerable progress in formulating a flexible policy objectives and core principles for the protection of traditional cultural expressions/folklore. However, there were still many outstanding issues where the Committee was yet to evolve a consensus formula. States expressed their concerns about the relationship between protection of folklore and the existing intellectual property system. The question of international versus national approaches was another issue that was central to the meeting. It was also pointed out that the desire to create a harmonized, predictable international system could risk the creation of an inappropriate "one size fits all" approach to protection of folklore, approaches that would ignore the diversity of meanings around the world of "Expressions of folklore" and "protection". Another important issue was that the holders of expressions of folklore are mostly developing countries. This is one of the reasons

why there is lesser enthusiasm from the part of the developed countries to provide a strong framework for the protection of folklore.

57. At the Eighth Session of the IGC, a clear disagreement between developing countries and some developed countries emerged. While both sides agreed to move forward on general guidelines and statements of principles for the protection of folklore, some developed countries (the US and Canada) were unwilling to continue work on drafting substantive provisions for a possible international treaty. They maintain that these articles were presented in a treaty-like format and set out extremely detailed “substantive” or “legal” standards. The Delegation believed that a multi-faceted approach was appropriate, spanning a wide range of distinct national legal mechanisms, including IP law, unfair competition law, contract law, *sui generis* approaches and customary law. Most of the developing countries participants were of the view that the approach of the document should focus on defining the framework of an international legally binding instrument as the first priority.

58. Even though it would be extremely unrealistic to expect the countries to agree on the substance of the international protection on this issue overnight, it is crucial for at least the developing countries which are the owners of the resources to be able to agree among themselves on a best possible model. The Member States should also utilize all available options, whether inside or outside the Intellectual Property system, preventive or defensive, national or international, to seek the objective of effective protection of our expressions of folklore. In this context, AALCO an intergovernmental legal organization with representation from almost all major countries from Asia and Africa, could be a suitable forum for further discussion and deliberation on the protection of folklore. This would help in consolidating the position of the Asian-African countries on the substantive aspect of the future international instrument for the protection of folklore. AALCO also feels that a joint AALCO-WIPO seminar on folklore matters, in order to find a common ground, would be pertinent at this juncture.



## ANNEX

### **SUMMARY OF DRAFT POLICY OBJECTIVES AND CORE PRINCIPLES FOR THE PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS/FOLKLORE\***

#### **Revised provisions for the Protection of**

#### **TRADITIONAL CULTURAL EXPRESSIONS/EXPRESSIONS OF FOLKLORE POLICY OBJECTIVES AND CORE PRINCIPLES**

##### **I. OBJECTIVES**

The protection of traditional cultural expressions, or expressions of folklore,<sup>11</sup> should aim to:

##### **Recognize value**

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

##### **Promote respect**

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

##### **Meet the actual needs of communities**

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

##### **Prevent the misappropriation of traditional cultural expressions/expressions of folklore**

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

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<sup>11</sup> In these provisions, the terms “traditional cultural expressions” and “expressions of folklore” are used as interchangeable synonyms, and may be referred to simply as “TCEs/EoF”. The use of these terms is not intended to suggest any consensus among Committee participants on the validity or appropriateness of these or other terms, and does not affect or limit the use of other terms in national or regional laws.

### **Empower communities**

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

### **Support customary practices and community cooperation**

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

### **Contribute to safeguarding traditional cultures**

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

### **Encourage community innovation and creativity**

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

### **Promote intellectual and artistic freedom, research and cultural exchange on equitable terms**

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

### **Contribute to cultural diversity**

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

### **Promote community development and legitimate trading activities**

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

### **Preclude unauthorized IP rights**

(xii) preclude the grant, exercise and enforcement of intellectual property rights acquired by unauthorized parties over traditional cultural expressions/expressions of folklore and derivatives thereof;

### **Enhance certainty, transparency and mutual confidence**

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

## **II. GENERAL GUIDING PRINCIPLES**

- (a) Principle of responsiveness to aspirations and expectations of relevant communities
- (b) Principle of balance
- (c) Principle of respect for and consistency with international and regional agreements and instruments
- (d) Principle of flexibility and comprehensiveness;
- (e) Principle of recognition of the specific nature and characteristics of cultural expression
- (f) Principle of complementarity with protection of traditional knowledge
- (g) Principle of respect for rights of and obligations towards indigenous peoples and other traditional communities
- (h) Principle of respect for customary use and transmission of TCEs/EoF
- (i) Principle of effectiveness and accessibility of measures for protection

## **III. SUBSTANTIVE PROVISIONS**

### **ARTICLE 1: SUBJECT MATTER OF PROTECTION**

(a) “Traditional cultural expressions” or “expressions of folklore” are any forms, whether tangible and intangible, in which traditional culture and knowledge are expressed, appear or are manifested, and comprise the following forms of expressions or combinations thereof:

- (i) verbal expressions, such as: stories, epics, legends, poetry, riddles and other narratives; words, signs, names, and symbols;
- (ii) musical expressions, such as songs and instrumental music;
- (iii) expressions by action, such as dances, plays, ceremonies, rituals and other performances,

whether or not reduced to a material form; and,

- (iv) tangible expressions, such as productions of art, in particular, drawings, designs, paintings (including body-painting), carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewelry, baskets, needlework, textiles, glassware, carpets, costumes; handicrafts; musical instruments; and architectural forms;

which are:

- (aa) the products of creative intellectual activity, including individual and communal creativity;
- (bb) characteristic of a community’s cultural and social identity and cultural heritage; and

– (cc) maintained, used or developed by such community, or by individuals having the right or responsibility to do so in accordance with the customary law and practices of that community.

(b) The specific choice of terms to denote the protected subject matter should be determined at the national and regional levels.

## **ARTICLE 2: BENEFICIARIES**

Measures for the protection of traditional cultural expressions/expressions of folklore should be for the benefit of the indigenous peoples and traditional and other cultural communities:<sup>12</sup>

(i) in whom the custody, care and safeguarding of the TCEs/EoF are entrusted in accordance with their customary law and practices; and

who maintain, use or develop the traditional cultural expressions/expressions of folklore as being characteristic of their cultural and social identity and cultural heritage.

## **ARTICLE 3: ACTS OF MISAPPROPRIATION (SCOPE OF PROTECTION)**

### **Traditional cultural expressions/expressions of folklore of particular value or significance**

(a) In respect of traditional cultural expressions/expressions of folklore of particular cultural or spiritual value or significance to a community, and which have been registered or notified as referred to in Article 7, there shall be adequate and effective legal and practical measures to ensure that the relevant community can prevent the following acts taking place without its free, prior and informed consent:

(i) in respect of such traditional cultural expressions/expressions of folklore other than words, signs, names and symbols:

- □ the reproduction, publication, adaptation, broadcasting, public performance, communication to the public, distribution, rental, making available to the public and fixation (including by still photography) of the traditional cultural expressions/expressions of folklore or derivatives thereof;
- □ any use of the traditional cultural expressions/expressions of folklore or adaptation thereof which does not acknowledge in an appropriate way the community as the source of the traditional cultural expressions/expressions of folklore;
- □ any distortion, mutilation or other modification of, or other derogatory action in relation to, the traditional cultural expressions/expressions of folklore; and
- □ the acquisition or exercise of IP rights over the traditional cultural expressions/expressions of folklore or adaptations thereof;

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<sup>12</sup> The broad and inclusive term “indigenous peoples and traditional and other cultural communities”, or simply “communities” in short, is used at this stage in these draft provisions. The use of these terms is not intended to suggest any consensus among Committee participants on the validity or appropriateness of these or other terms, and does not affect or limit the use of other terms in national or regional laws.

(ii) in respect of words, signs, names and symbols which are such traditional cultural expressions/expressions of folklore, any use of the traditional cultural expressions/expressions of folklore or derivatives thereof, or the acquisition or exercise of IP rights over the traditional cultural expressions/expressions of folklore or derivatives thereof, which disparages, offends or falsely suggests a connection with the community concerned, or brings the community into contempt or disrepute;

**Other traditional cultural expressions/expressions of folklore**

(b) In respect of the use and exploitation of other traditional cultural expressions/expressions of folklore not registered or notified as referred to in Article 7, there shall be adequate and effective legal and practical measures to ensure that:

(i) the relevant community is identified as the source of any work or other production adapted from the traditional cultural expression/expression of folklore;

(ii) any distortion, mutilation or other modification of, or other derogatory action in relation to, a traditional cultural expression/expression of folklore can be prevented and/or is subject to civil or criminal sanctions;

(iii) any false, confusing or misleading indications or allegations which, in relation to goods or services that refer to, draw upon or evoke the traditional cultural expression/expression of folklore of a community, suggest any endorsement by or linkage with that community, can be prevented and/or is subject to civil or criminal sanctions; and

(iv) where the use or exploitation is for gainful intent, there should be equitable remuneration or benefit-sharing on terms determined by the Agency referred to in Article 4 in consultation with the relevant community; and

**Secret traditional cultural expressions/expressions of folklore**

(c) There shall be adequate and effective legal and practical measures to ensure that communities have the means to prevent the unauthorized disclosure, subsequent use of and acquisition and exercise of IP rights over secret traditional cultural expressions/expressions of folklore.

**ARTICLE 4:  
MANAGEMENT OF RIGHTS**

(a) Prior authorizations to use traditional cultural expressions/expressions of folklore, when required in these provisions, should be obtained either directly from the community concerned where the community so wishes, or from an agency acting at the request, and on behalf, of the community (from now on referred to as “the Agency”). Where authorizations are granted by the Agency:

(i) such authorizations should be granted only in appropriate consultation with the relevant community, in accordance with their traditional decision-making and governance processes;

(ii) any monetary or non-monetary benefits collected by the Agency for the use of the traditional cultural expressions/expressions of folklore should be provided directly by it to the community concerned.

(b) The Agency should generally be tasked with awareness-raising, education, advice and guidance functions. The Agency should also:

(i) where so requested by a community, monitor uses of traditional cultural expressions/expressions of folklore for purposes of ensuring fair and appropriate use as provided for in Article 3 (b); and,

(ii) establish the equitable remuneration referred to in Article 3 (b) in consultation with the relevant community.

## **ARTICLE 5: EXCEPTIONS AND LIMITATIONS**

(a) Measures for the protection of TCEs/EoF should:

(i) not restrict or hinder the normal use, transmission, exchange and development of TCEs/EoF within the traditional and customary context by members of the relevant community as determined by customary laws and practices;

(ii) extend only to utilizations of TCEs/EoF taking place outside the traditional or customary context, whether or not for commercial gain; and,

(iii) not apply to utilizations of TCEs/EoF in the following cases:

- by way of illustration for teaching and learning;
- non-commercial research or private study;
- criticism or review;
- reporting news or current events;
- use in the course of legal proceedings;
- the making of recordings and other reproductions of TCEs/EoF for purposes of their inclusion in an archive or inventory for non-commercial cultural heritage safeguarding purposes; and
- incidental uses,

provided in each case that such uses are compatible with fair practice, the relevant community is acknowledged as the source of the TCEs/EoF where practicable and possible, and such uses would not be offensive to the relevant community.

(b) Measures for the protection of TCEs/EoF could allow, in accordance with custom and traditional practice, unrestricted use of the TCEs/EoF, or certain of them so specified, by all members of a community, including all nationals of a country.

## **ARTICLE 6: TERM OF PROTECTION**

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

(i) in so far as TCEs/EoF referred to in Article 3 (a) are concerned, their protection under that sub-article shall endure for so long as they remain registered or notified as referred to in Article 7; and,

(ii) in so far as secret TCEs/EoF are concerned, their protection as such shall endure for so long as they remain secret.

## **ARTICLE 7: FORMALITIES**

(a) As a general principle, the protection of traditional cultural expressions/expressions of folklore should not be subject to any formality. Traditional cultural expressions/expressions of folklore as referred to in Article 1 are protected from the moment of their creation.

(b) Measures for the protection of specific traditional cultural expressions/expressions of folklore of particular cultural or spiritual value or significance and for which a level of protection is sought as provided for in Article 3(a) should require that such traditional cultural expressions/expressions of folklore be notified to or registered with a competent office or organization by the relevant community or by the Agency referred to in Article 4 acting at the request of and on behalf of the community.

(i) To the extent that such registration or notification may involve the recording or other fixation of the traditional cultural expressions/expressions of folklore concerned, any intellectual property rights in such recording or fixation should vest in or be assigned to the relevant community.

(ii) Information on and representations of the traditional cultural expressions/expressions of folklore which have been so registered or notified should be made publicly accessible at least to the extent necessary to provide transparency and certainty to third parties as to which traditional cultural expressions/expressions of folklore are so protected and for whose benefit.

(iii) Such registration or notification is declaratory and does not constitute rights. Without prejudice thereto, entry in the register presumes that the facts recorded therein are true, unless proven otherwise. Any entry as such does not affect the rights of third parties.

(iv)

(v) The office or organization receiving such registrations or notifications should resolve any uncertainties or disputes as to which communities, including those in more than one country, should be entitled to registration or notification or should be the beneficiaries of protection as referred to in Article 2, using customary laws and processes, alternative dispute resolution (ADR) and existing cultural resources, such as cultural heritage inventories, as far as possible.

## **ARTICLE 8: SANCTIONS, REMEDIES AND EXERCISE OF RIGHTS**

(a) Accessible, appropriate and adequate enforcement and dispute-resolution mechanisms, border-measures, sanctions and remedies, including criminal and civil remedies, should be available in cases of breach of the protection for traditional cultural expressions/expressions of folklore.

(b) The Agency referred to in Article 4 should be tasked with, among other things, advising and assisting communities with regard to the enforcement of rights and with instituting civil, criminal and administrative proceedings on their behalf when appropriate and requested by them.

## **ARTICLE 9: TRANSITIONAL MEASURES**

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

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

**ARTICLE 10:**  
**RELATIONSHIP WITH INTELLECTUAL PROPERTY PROTECTION AND**  
**OTHER FORMS OF PROTECTION, PRESERVATION AND PROMOTION**

Protection for traditional cultural expressions/expressions of folklore in accordance with these provisions does not replace and is complementary to protection applicable to traditional cultural expressions/expressions of folklore and derivatives thereof under other intellectual property laws, laws and programs for the safeguarding, preservation and promotion of cultural heritage, and other legal and non-legal measures available for the protection and preservation of traditional cultural expressions/expressions of folklore.

**ARTICLE 11:**  
**INTERNATIONAL AND REGIONAL PROTECTION**

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