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A Critical Analysis of the Protection of Traditional Knowledge within the Namibian  
Legal System

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## LIST OF ABBREVIATIONS

ARIPO	African Regional Intellectual Property Organization
CBD	Convention on Biological Diversity
IK	Indigenous Knowledge
IP	Intellectual Property
IPLAA	Intellectual Property Laws Amendment Act
IPR	Intellectual Property Rights
OAPI	Organisation Africaine de la Propriété Intellectuelle
PTK Bill	Protection of Traditional Knowledge Bill
TCE	Traditional Cultural Expressions
TK	Traditional Knowledge
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UN	United Nations
WIPO	World Intellectual Property Organisation

## CHAPTER ONE - INTRODUCTION

Namibia is well known for its unique climate and ecological profile hence its biodiversity, which comprises wild and cultivated species and varieties.<sup>1</sup> The country's relative isolation has contributed to the maintenance of a unique genetic resource base.<sup>2</sup> There are many naturally occurring plants and animals that have been used since time immemorial by local people as a source of food security, primary health and for their general livelihood, which could be exploited for commercial purposes.<sup>3</sup> There is a growing international interest in bio trade with, and bio prospecting in, Namibia.<sup>4</sup>

This paper examines Traditional Knowledge (TK)<sup>5</sup> and Intellectual Property Rights (IPR's)<sup>6</sup> within the Namibian context. It further examines whether the protection under the current Namibian intellectual property (IP)<sup>7</sup> framework sufficiently protects all types of indigenous TK against exploitation.

The rationale for the examination stems from a draft policy on 'Access to Genetic Resources and the Protection of Associated Traditional Knowledge'.<sup>8</sup> There is little knowledge about the genetic resources that have left Namibia, those that are still here, and their biological and conservation status. The associated problems, concerns and threats underscore the need for policies and legislation to regulate access to genetic resources, to protect TK and practices, and to facilitate the equitable sharing of benefits from the use of genetic resources.

It has been stated that one of the possible reasons for the protection of indigenous TK is to prevent the knowledge from being exploited by appropriation for financial gain 'by third parties'.<sup>9</sup> There is no express protection of TK under the

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<sup>1</sup> H Krugmann, *Namibia's thematic report on the Benefit-sharing mechanisms for the use of biological resources* (2001) 5-6.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> Hereinafter referred to as TK.

<sup>6</sup> Hereinafter referred to as IPR.

<sup>7</sup> Hereinafter referred to as IP.

<sup>8</sup> Draft Policy on Access to Genetic Resources and the protection Of Associated Traditional Knowledge 2000.

<sup>9</sup> C Masango *Indigenous traditional knowledge protection: prospects in South Africa's intellectual property framework* (2010) 74-75.

Namibian Law as of yet. IP issues are governed by the Industrial Property Act 1 of 2012 and the Copyright and Neighbouring Rights Protection Act 6 of 1994, but it has been argued that generally, existing IPR regimes are inappropriate for the protection of TK.

This paper takes a critical look at the issues surrounding TK, access to genetic resources and IPR protection as it relates to traditional and/or indigenous knowledge systems, from a Namibian perspective. Over the last decades there has been a surging interest in TK, especially by pharmaceutical companies, as the value of TK for bio-prospecting has been more widely recognised.<sup>10</sup> However, TK is often held by rural community members and entire communities, who often do not benefit from any of the uses of their knowledge, if commercialised.<sup>11</sup> A great number of questions arise as to how to protect knowledge that is communally held, how benefits could be shared and how access to knowledge and resources could be regulated. This paper aims to give a short survey of some of the most important issues that centre on those questions.

Namibia has developed the draft policy on Access to Genetic Resources and the Protection of Associated TK in a participatory fashion, with the active involvement of relevant stakeholder groups.<sup>12</sup> The draft policy explicitly recognises that ‘current forms of intellectual property protection, such as patents and plant breeders’ rights, cannot be applied to TK for either technical reasons or because they are contrary to the practices and beliefs of some communities’<sup>13</sup>. The draft policy therefore proposes the creation of a *sui generes*<sup>14</sup> system on the basis of traditional resource rights and ‘IPR’s to protect the knowledge, innovations and practices associated with genetic resources separate from existing intellectual property rights systems’.

This study aims to investigate the laws that are currently in place under the Namibian legal system for the protection of TK. The establishment of this is necessary

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<sup>10</sup> Masango *Indigenous traditional knowledge protection: prospects in South Africa’s intellectual property framework* 75-76.

<sup>11</sup> *Ibid.*

<sup>12</sup> Krugmann, *Namibia’s thematic report on the Benefit-sharing mechanisms for the use of biological resources* 11-12.

<sup>13</sup> *Ibid.*

<sup>14</sup> Krugmann, *Namibia’s thematic report on the Benefit-sharing mechanisms for the use of biological resources* 15-16.

to determine whether such legislation adequately protects TK in Namibia in order to prevent its loss and misappropriation.

This dissertation is structured around the following themes:

#### Chapter Two

This chapter takes a brief look at the historical development of TK. It also briefly looks at the economic contribution and value of TK as a result of globalisation, and the need for *sui generes* legislation for the protection of TK and the approaches under such a system. The chapter also discusses some important international instruments that have had a huge impact on the need to protect TK.

#### Chapter Three

The purpose of this chapter is to critically examine the kind of protection offered for TK under the current Namibian legal system. The chapter will also look at the proposed Draft Policy on Access to Genetic Resources and the Protection of Associated Traditional Knowledge.

#### Chapter Four

This chapter will include a comparative study with South Africa, which has elected to use the conventional IP system through the Intellectual Property Laws Amendment Act of 2013 (IPLAA)<sup>15</sup> and the Patents Amendment Act of 2005. The chapter will further analyse the Protection of Traditional Knowledge Bill (PTK)<sup>16</sup> which was tabled as a substitute of the IPLAA.

#### Chapter Five

This Chapter concludes the paper by discussing the findings of the various chapters.

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<sup>15</sup> Hereinafter referred to as IPLAA.

<sup>16</sup> Hereinafter referred to as PTK Bill.



## CHAPTER TWO – TRADITIONAL KNOWLEDGE DEFINED

Before the 1980s, museum curators, archivists and anthropologists had no concerns regarding ownership of the information they collected.<sup>17</sup> It was only after the late 1980s that issues relating to the protection of TK started to emerge, but even during this time, discussions on the intellectual creativity of indigenous people was primarily focused on folklore.<sup>18</sup> Subsequently in recent years, indigenous peoples, local communities, and governments, mainly in developing countries, have demanded equivalent protection for TK systems<sup>19</sup>.

It has since then become much broader. At the end of the 1980's discussions concerning the protection of biodiversity, a growing number of ethno biologists, anthropologists, and conservation development agencies began to consider the ecological, medical and other TK of indigenous people and other ethnic groups, as a valuable source for the elaboration of concepts for sustainable development.<sup>20</sup>

It was during this time that major multinational chemical and pharmacological companies began to intensify the quest for genetic and intellectual resources in the biodiversity rich areas of the world; also by benefiting from the traditional lifestyles of the indigenous people.<sup>21</sup> Since then, there has been misuse of the knowledge and practices of indigenous communities, which occasioned unfounded claims in the international community that TK and resources are free for all to exploit and belonging to no-one.<sup>22</sup>

Traditional communities in Africa came up with tradition-based techniques and products as a way of survival.<sup>23</sup> However, over the years there has been a significant shift towards commercial rewards and competition for these products and techniques.<sup>24</sup>

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<sup>17</sup>O Hinz "The Swakopmund Protocol on the Protection of TK and Expressions of Folklore" (2012) *Namibia Law Journal* Volume 3 Issue 1.

<sup>18</sup> See discussion below for definition of folklore.

<sup>19</sup> Hinz *The Swakopmund Protocol* 101.

<sup>20</sup> S Lewinski S *Indigenous Heritage and Intellectual Property* (2004).

<sup>21</sup> Ibid.

<sup>22</sup> Ayoyemi Arowolo, *Intellectual Property rights, Traditional Knowledge systems and jurisprudence in Africa* (2012).

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

Subsequently this has resulted in the participation of both developing and developed countries coming together on an international forum to seek solutions to the protection of TK.<sup>25</sup> The solutions that are being sought are aimed at giving recognition to an appropriate system of protecting TK holders' access to biological, genetic and cultural resources.<sup>26</sup>

The debates over the protection of TK can all be linked to economic globalisation. As the world is going global, there is an increase in economic interdependence, international trade, etc.<sup>27</sup> Hence, whether it is a developed or developing country, no state can function in isolation to other states. The aim of this chapter is therefore to define the scope of TK, and examine international initiatives aimed at protecting TK. In addition to this, the chapter will discuss the economic importance of TK, the need to protect TK and the different methods of rendering such protection.

### 1.1 What is Traditional Knowledge?

An in-depth understanding of TK is important for various reasons. Understanding its nature, how it is acquired and held is of great importance as it gives an insight of how TK can be protected, preserved and utilised for the benefits of all.<sup>28</sup>

Although there is no internationally accepted definition of it, TK is said to encompass the beliefs, knowledge, practices, innovations, arts, spirituality and other forms of cultural experience and expression that belong to indigenous communities worldwide.<sup>29</sup>

The Swakopmund Protocol defines TK as<sup>30</sup>

any knowledge originating from a local or traditional community that is the result of intellectual activity and insight in a traditional context, including know-how, skills, innovations, practices and learning, where the knowledge is embodied in the traditional lifestyle of a community, or contained in the codified knowledge systems passed on from one generation to another. The term shall not be limited to a specific technical

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<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid.

<sup>28</sup> S Tonina *Indigenous Traditional Knowledge and Intellectual Property* (2004) 1-2 available at <http://www.parl.gc.ca/content/lop/researchpublications/prb0338-e.htm> last accessed 20 August 2014.

<sup>29</sup> Ibid.

<sup>30</sup> s2 of the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore, 2010.

field, and may include agricultural, environmental or medical knowledge, and knowledge associated with genetic resources.<sup>31</sup>

There is no internationally accepted definition of TK as it can vary depending on the region and the traditional community from which the definition emanates although definitions from international organisations such as African Regional Intellectual Property Organisation (ARIPO)<sup>32</sup> are used as references.

At this juncture, it is important to make a distinction between TK and Traditional and Cultural Expressions (TCE)<sup>33</sup> also referred to as expressions of folklore. Although indigenous and traditional communities often regard expressions of their traditional culture folklore as inseparable from systems of TK, in the discussions about IP protection, TCE's and TK are generally discussed distinctly.<sup>34</sup> In light of this, TCE's/Expressions of Folklore are defined as 'productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community or by individuals reflecting the traditional artistic expectations of such a community'.<sup>35</sup> This includes verbal expressions, musical expressions, expressions by actions and tangible expressions.<sup>36</sup>

The term 'traditional' does not denote that the knowledge is old or static in nature, but that it is 'tradition-based'.<sup>37</sup> It is referred to as traditional because it is created in a manner that reflects the traditions of the communities. Hence, the term 'tradition' does not denote the nature of the knowledge itself, but the way in which the knowledge is created, preserved and disseminated.<sup>38</sup> The basic characteristics of TK are that it is a complex, multifaceted phenomenon that is constantly evolving in human interaction with the environment and is therefore regarded as dynamic and current.<sup>39</sup>

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<sup>31</sup> s2 of the Swakopmund Protocol.

<sup>32</sup> Hereinafter referred to as ARIPO.

<sup>33</sup> Hereinafter referred to as TCE's.

<sup>34</sup> WIPO *Intellectual Property and Traditional Cultural Expressions/Folklore* Booklet No.1 available at [http://www.wipo.int/export/sites/www/freepublications/en/tk/913/wipo\\_pub\\_913.pdf](http://www.wipo.int/export/sites/www/freepublications/en/tk/913/wipo_pub_913.pdf) last accessed 20 May 2014.

<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

<sup>37</sup> Stephen A Hansen and Justin W Van Fleet *Traditional Knowledge and Intellectual Property: A Handbook on Issues and Options for Traditional Knowledge Holders in Protecting their Intellectual Property and Maintaining Biological Diversity* (July 2003) 3-4.

<sup>38</sup> Ibid.

<sup>39</sup> Ibid.

In addition to this, the World Intellectual Property Organisation<sup>40</sup> fact-finding report has come up with examples of what can be considered to be TK and states that:

Traditional Knowledge is not limited to any specific field of technology or the arts. Traditional Knowledge systems in the fields of medicine and healing, biodiversity conservation, the environment and food and agriculture are well known. Other key components of Traditional Knowledge are the music, dance, and ‘artisanat’ (i.e. designs, textiles, plastic arts, crafts, etc.). Although there are creations which may be done purely to satisfy the aesthetic will of artisans, many such creations are symbolic of a deeper order or belief system. When a traditional singer performs a song, the cadence, melody, and forms all follow rules maintained for generations. Thus, a song’s performance entertains and educates the current audience, but also unites the current population with the past.<sup>41</sup>

Furthermore, TK is wide and covers the spectrums of agriculture, science, technology, medicine and biodiversity.<sup>42</sup> In fact there has been a growing demand in recent decades for natural products and methods in the fields of biotechnology and pharmaceuticals. Consequently, this has led to a renewed interest in TK.<sup>43</sup> This is as a result of the significance of TK as a prime factor in advancing the development of science and technology. TK has been significant in acquiring insightful understanding about the inter-relatedness of ecological systems<sup>44</sup>.

## 1.2 Traditional Knowledge and the Global Economy

As stated earlier, due to globalisation the protection of TK has become an international point of interest. Undeniably, TK is increasingly contributing to production in modern economies.<sup>45</sup> This is due to the inter-dependence of states across the world. The importance of TK today has given growth to what has been termed the ‘the knowledge economy’<sup>46</sup> where there is a significant shift towards knowledge-oriented products and services.

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<sup>40</sup>Hereinafter referred to as WIPO.

<sup>41</sup>World Intellectual Property Organisation *Intellectual property needs and expectations of Traditional Knowledge holders*. WIPO report on fact-finding missions on intellectual property and Traditional Knowledge (1998–1999). Main Program 11, Program and Budget 1998–1999; WIPO (2001) Geneva: WIPO, 16.

<sup>42</sup> KA Sackey and Ossy MJ Kasilo ‘Intellectual property approaches to the protection of Traditional Knowledge in the African Region’ (14 August 2010) *African Traditional Medicine Day*, Special Issue 14.

<sup>43</sup>Ibid.

<sup>44</sup>Ibid.

<sup>45</sup>M Tawanda *Knowledge and Power: Law, Politics and Socio-cultural Perspectives on the Protection of Traditional Medical Knowledge Systems in Zimbabwe* (2006) available at <http://www.copyright.bbk.ac.uk/contents/publications/workshops/theme4/magaisa.pdf> last accessed on 14 July 2014.

<sup>46</sup> Ibid.

Interestingly, it is estimated by the World Health Organisation that 80% of the world's population depend on traditional medicine for their primary health needs<sup>47</sup>. In addition to this, 90% of food in sub-Saharan Africa is produced using customary farming practices. Beyond Africa, in countries like China for example, traditional herbal preparations account for 30% - 50% of the total medicinal consumption.<sup>48</sup> Furthermore, in many African countries such as Zambia, Mali, Ghana and Nigeria, it is stated that the first line of treatment for 60% of children with high fever resulting from malaria is traditional medicine<sup>49</sup>.

TK about plants, in particular their medicinal facilities, holds extreme societal value.<sup>50</sup> Moreover, this knowledge is in high demand by industrial manufacturers of pharmaceutical products. This is a clear indication of how TK plays a vital role not only in the lives of traditional communities, but also in identifying the biological material and medicinal uses for research.

It is undeniable that TK has a massive economic impact on the world as a whole. However, traditional communities should benefit from the use of their knowledge and resources in order to develop themselves economically.

### 1.3 The need to protect Traditional Knowledge

IPR's were first developed under European and North American law as a mechanism to protect individual and industrial inventions. In addition to this, since the adoption of the Universal Declaration of Human Rights in 1948, IP has been considered a fundamental human right of all peoples.<sup>51</sup> For a number of years, it was considered unlikely that IPR's could pertain to TK. It was only in recent years that the need to protect, preserve and provide for the fair use of traditional IP formed part of the international discourse.<sup>52</sup> This development can be attributed to the fact that the traditional lifestyles, knowledge and biogenetic resources of indigenous, traditional

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<sup>47</sup> African Regional Intellectual Property Organisation/ARIPO *Why traditional Knowledge?* (2006) Available at [www.aripo.org/index.php?option](http://www.aripo.org/index.php?option) last accessed on 15 April 2014.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid.

<sup>50</sup> Ibid.

<sup>51</sup> Tonina *Indigenous Traditional Knowledge and Intellectual Property* 3-4.

<sup>52</sup> Ibid.

and local communities have been considered by governments and other stakeholders to be of some commercial value.<sup>53</sup>

A particular concern to TK holders has been the unlicensed use by non TK holders, such as companies, of TK that has been developed over centuries.<sup>54</sup> Although TK protection is progressing, the current instruments for the protection of TK are seen to be insufficient. There have been differing views on how to approach the protection of TK. Some are advocating for the codification of customary law, while there has been a call to rather adapt the existing IP law, but the most prominent view is the enacting *sui generes* legislation for the protection of TK.<sup>55</sup>

The biggest concern by TK holders is economic exploitation. They encounter problems in preventing or even controlling the commercial use of their TK by non-holders. Conversely many traditional communities depend on their TK as a way of generating income and they fear that commercial use of their TK may deprive them of a source of income and may even bar them from future use of their own TK.<sup>56</sup>

Furthermore, TK holders worry about the offensive and inappropriate use of TK. The inappropriate or offensive use of TK may include distortion, disclosure and sacred nature, false connection and derogatory, libellous or defamatory use<sup>57</sup>. Distortion usually takes place when TK is used for marketing purposes without the consent of the traditional community. Traditional communities are also concerned about the use of sacred TK outside their traditional contexts in ways that are not in line with their customary laws.<sup>58</sup> Another concern is the promotion of non-indigenous products by using indigenous or traditional names or signs as brand names or trademarks.<sup>59</sup> TK holders worry that this may mislead the public into thinking that there may be a connection between the business and the community or that the benefits

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<sup>53</sup>Darrell Adison Posey and Graham Dutfield *Beyond Intellectual Property: Towards Traditional Resource Rights for Indigenous Peoples and Local Communities* (1996).

<sup>54</sup>Tonina *Indigenous Traditional Knowledge and Intellectual Property* 3-4.

<sup>55</sup>T Romero *Sui generes systems for the protection of Traditional Knowledge* (2005) available at [http://www.javeriana.edu.co/juridicas/pub\\_rev/international\\_law/ultimo\\_numero/9.pdf](http://www.javeriana.edu.co/juridicas/pub_rev/international_law/ultimo_numero/9.pdf) last accessed on 28 April 2014.

<sup>56</sup>Zografos, *Intellectual property* 1-2.

<sup>57</sup>Ibid.

<sup>58</sup>Ibid.

<sup>59</sup>Ibid.

flow back to the traditional community.<sup>60</sup> Another concern relates to the right of attribution. TK holders want to be attributed for their TK and have the right to object to any false attribution.<sup>61</sup>

Lastly, one of the biggest concerns to TK is the identification; preservation and promotion of TK. <sup>62</sup>TK holders are concerned that with the steady integration of TK into the cultures of others, their distortion from their original form might have potentially detrimental effects<sup>63</sup>. They fear that this integration may hinder its continued evolution.<sup>64</sup>

#### 1.4 Traditional Knowledge and Intellectual Property

Concern over the growing interest in TK and the economic importance of TK as well as the loss of this knowledge, has generated a wide range of public policy issues including those associated with IP protection. The relationship of TK to IP protection has been one of the most complex and controversial, yet dynamic issues at the centre of debates in recent years.

There has been much debate about whether TK should be protected by IPR's. The relationship between TK and IP raises legal questions involving copyright, patents, trademarks, designs and/or confidential information.<sup>65</sup> Furthermore, there have been concerns regarding who owns the rights to IP in TK and who should have access to TK. In addition to this, concerns over who owns this knowledge and who has the right to its use have been a major issue. Protection under IP is offered under trademarks, design, patents or copyrights. For numerous reasons, it has been argued that the current IPR protection mechanisms are not sufficient or well equipped to offer extensive protection to TK. This is due to the fact that the current models for the protection of IP were crafted during the age of industrialisation in the West.<sup>66</sup> During this time developing countries lacked political and economic strength to advocate for

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<sup>60</sup>Ibid.

<sup>61</sup>Ibid.

<sup>62</sup>Ibid.

<sup>63</sup>Ibid.

<sup>64</sup>Ibid.

<sup>65</sup>J Anderson *Indigenous / Traditional Knowledge & intellectual property* (2010) 1-2.

<sup>66</sup> WIPO *Traditional Knowledge and Intellectual Property – Background Brief* (UNDATED) available from [http://www.wipo.int/pressroom/en/briefs/tk\\_ip.html](http://www.wipo.int/pressroom/en/briefs/tk_ip.html) last accessed 20 May 2014.

the protection of their TK. Consequently, it was developed by the technologically advanced states in accordance with their needs. Subsequently, indigenous peoples, local communities and governments mostly from developing countries started petitioning for equivalent protection for TK.<sup>67</sup> These concerns are what led to certain instruments aimed at the protection of TK.

#### 1.5 International initiatives aimed at protecting Traditional Knowledge

Although the Convention on Biological Resources (CBD)<sup>68</sup> only dealt with the conservation and sustainable use of biodiversity it is also one of the first instruments that dealt with the protection and use of an aspect of TK. The CBD stated in Article 8 that:

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<sup>67</sup> Ibid.

<sup>68</sup> Hereinafter referred to as CBD.

subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity.

Article 29 of the Draft UN Declaration on the Rights of Indigenous People of 1999 is more elaborate in its protection of TK and other traditional resources of the people. It states that indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and IP.

It further states that special measures should be developed to control, develop and protect their sciences, technologies, and cultural manifestations; including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literature, designs and visual and performing arts.

In addition to this, Article 27.3(b) of The Agreement on Trade Related Intellectual Property Rights (TRIPS),<sup>69</sup> this permits member states to adopt sui-generis legislation for the protection TK.

The year 2009 was a milestone for WIPO as its General Assembly instructed The Intergovernmental Committee on intellectual Property Genetic Resources, Traditional Knowledge and Folklore (IGC)<sup>70</sup> to fast track its work towards developing an international instrument, or instruments, to protect genetic resources, TK and TCE's. IGC was established by WIPO in 2000. The aim of this legal instrument was to give protection to TK, genetic resources and TCE's. Ever since its inception, there has been a lot of progress concerning the drafting of legal language to accommodate different views and perceptions of member states.<sup>71</sup>

At the regional level, we have The African Regional Intellectual Property Organization (ARIPO) and Organisation Africaine de la Propriété Intellectuelle (OAPI), TK and TCE and Folklore instrument for protection of TK, TCE and Folklore aims at providing a legal framework to protect them, and is formalised into a protocol (Swakopmund protocol) for protection of TK. The Swakopmund Protocol has been

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<sup>69</sup>Hereinafter referred to as TRIPS.

<sup>70</sup> Hereinafter referred to as IGC.

<sup>71</sup>David Vivas-Eugui *Bridging the Gap on Intellectual Property and Genetic Resources in WIPO's Intergovernmental Committee (IGC) (2012).*

described as a historic step in adopting a legal framework for the protection of TK and cultural expressions. The protocol was adapted in August 2010, and is underpinned by the principle that the knowledge, technologies, biological resources and cultural heritage of traditional and local communities are the result of tested practices of past generations. These resources are held in trust by today's custodians for future generations. In addition The Swakopmund Protocol has been described as a milestone as it affirms the principle that traditional or local communities are the custodians of their TK, its associated Genetic Resources and TCE's; and empowers them to exercise rights over their knowledge and resources.

As the debate on the protection of TK intensified, it was acknowledged that current forms of IPR's cannot adequately protect TK. This is what led to the call for *sui generes* protection of TK.

### 1.6 Arguments against the protection of Traditional Knowledge through Intellectual Property

Many traditional communities hold valuable knowledge and traditions that have been passed on from generation to generation. These can range from practices, artworks and medicines amongst others. To these communities, such knowledge is of great importance, however, IP law does not essentially protect knowledge relating to medicinal uses of plants, reproduction of communal works or spiritual rituals.<sup>72</sup> This is due to the fact that either a lot of this knowledge is not new or that it cannot be recognised as having been created by a particular individual.<sup>73</sup> Furthermore, IP could have fostered the taking and commercialisation of this TK by individuals who are not members of the community.<sup>74</sup> Consequently, the knowledge is used for commercial purposes without attribution or compensation to the knowledge generating community.<sup>75</sup>

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<sup>72</sup>J Oseitutu 'Emerging Scholars Series: A Sui Generis Regime for Traditional Knowledge: The Cultural Divide in Intellectual Property Law' *Marquette Intellectual Property Law Review* (2012) Volume 12, Issue 1.

<sup>73</sup> Ibid.

<sup>74</sup> Ibid.

<sup>75</sup> Ibid.

Another obstacle for the protection of TK under IP is the fact that the main forms of IP, such as patent and copyright, are subject to limited terms of protection, whereas TK is thought by its very nature to require indefinite protection.<sup>76</sup>

In the current debates, there has been immense acknowledgment that there is a great need to value the contributions of indigenous communities. Furthermore, the goal is to try and maximise the benefits of TK holders while simultaneously minimising the harmful effects of the misappropriation of their knowledge.

Be that as it may, it is possible to protect some forms of TK under the existing IP laws. For instance, TK holders make use of trademark systems to identify goods as originating from a particular community.<sup>77</sup> Another example is that trade secret law can be used to protect TK that has not been publically disclosed, and geographical indications enable groups to identify goods in relation to a specific territory or community.<sup>78</sup> Geographical indicators have been seen as a more suitable mechanism of protecting TK due its territorial and cultural characteristics. In addition to this, unlike other forms of IP regimes, which offer limited time protection, there is no limited term of protection for geographical indications.<sup>79</sup>

In recent years, there have been a lot of heated debates regarding TK and how it should be protected. IP law has been seen as the driving force for technological innovation and industrial change.<sup>80</sup> It is regarded as a mechanism for promoting the conservation of biological diversity and more importantly, the sustainable use of its components. In addition, it is also used as a tool for safeguarding the fair and equitable sharing of genetic resources and TK.<sup>81</sup>

As stated earlier, IP can, to a certain extent, be protected under IP laws, but there are concerns as to how effective this protection is.<sup>82</sup> One of the concerns is that Western intellectual regimes are premised on individual property ownership, which is

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<sup>76</sup> Ibid.

<sup>77</sup>J Janewa OseiTutu 'An International Instrument to Protect Traditional Knowledge: Is Perpetual Protection a Good Idea?' (2013) *IDEA: The Journal of Law and Technology*, Volume 50, Issue 4.

<sup>78</sup> Ibid.

<sup>79</sup> Ibid.

<sup>80</sup>J Mugabe *Intellectual property protection and TK: An exploration in international policy discourse* (1999).

<sup>81</sup>Ibid.

<sup>82</sup>Oseitutu *Sui Generis* 154.

meant to enable private benefits and encourage creativity and innovation.<sup>83</sup> On the other hand, in an indigenous community this kind of property right is extended to the whole community. This is essential for maintaining and developing group identity and more importantly, for group survival, as opposed to promoting individual economic benefit.<sup>84</sup>

The criteria required for protection under the present IPR's regime is exactly what makes them inadequate to protect TK. This pertains to the fact that the rights offered under IPR's are individual in nature and affords individual ownership based on time and labour exercised in creating the new invention.

On the other hand, TK is not owned by any one individual, but belongs to the community as a whole. The knowledge is therefore in the public domain, but is limited to certain families. Due to the fact that TK is complex, a *sui generes* protection is needed. There have been various efforts at both the international and national levels to come up with *sui generes* legislation for the protection of TK.

### 1.7 Defensive and positive protection

In an effort to deal with the shortcomings levelled against the protection of TK under the current IP systems, there has been a call from indigenous groups and governments from both developing and developed countries for much wider protection of TK under IP. The protection sought is twofold.

#### 1.7.1 Defensive protection

The first type of protection is known as defensive protection.<sup>85</sup> Defensive protection deals with provisions adopted in the law or by the regulatory authorities to prevent IPR claims to knowledge, TCE's or a product being granted to unauthorised persons or organisations.<sup>86</sup> The whole idea behind this kind of protection is to stop people from outside the community from acquiring IPR over TK held by a specific community.<sup>87</sup> In addition, the defensive protection may also be used to protect sacred cultural

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<sup>83</sup> Hansen et al, *Traditional Knowledge* 3-4.

<sup>84</sup>Ibid.

<sup>85</sup>WIPO, *Traditional Knowledge and Intellectual Property* 5-7.

<sup>86</sup>G Dutfield *Protecting Traditional Knowledge and Folklore: A review of progress in diplomacy and policy formulation* (2003) 28-29 UNCTAD available at [http://www.ictsd.org/downloads/2008/06/cs\\_dutfield.pdf](http://www.ictsd.org/downloads/2008/06/cs_dutfield.pdf) last accessed 21 August 2014.

<sup>87</sup>Ibid.

manifestations, which are used for trademarks such as sacred symbols or words.<sup>88</sup> A good example of a country that used this kind of protection is India. India has compiled a searchable database of all its traditional medicine, which can be used as evidence of prior art by patent examiners when accessing patent applications.<sup>89</sup> This database was used to revoke a patent granted for the use of turmeric to treat wounds, which is a property well known to traditional communities in India that is also documented in ancient Sanskrit texts. This case was a landmark case in the jurisprudence of TK as this was the first time that a patent based on the TK of a developing country was successfully challenged.

### 1.7.2 Positive Protection

The other form of protection is referred to as positive protection.<sup>90</sup> Unlike defensive protection, positive protection refers to the acquisition by the TK holders themselves of an IPR such as a copyright or an alternative right provided in a *sui generes* system.<sup>91</sup> This form of protection aims at granting of rights to communities. In turn, these rights empower communities to promote their TK, control its use and benefit from its commercial exploitation.<sup>92</sup> In addition to this, numerous countries and non-governmental organisations deem defensive protection necessary due to the fact that the IP system, especially patents, is considered defective in certain ways and allows companies to unfairly exploit TK.<sup>93</sup> Furthermore, defensive protection is considered to be more achievable than positive protection because some of the most commonly-discussed defensive protection measures are basically enhancements to or modifications of existing IPR's.<sup>94</sup> Another reason is the fact that an effective positive protection mechanism is likely to require the very active and committed participation of many governments.<sup>95</sup>

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<sup>88</sup>Ibid.

<sup>89</sup>The Lifeintellect Blog, 'Traditional Knowledge and Intellectual Property: Case of Turmeric' (2013) 4-5 available at <http://lifeintellect.com/blog/2013/10/24/traditional-knowledge-and-intellectual-property-case-of-turmeric/> last accessed 21 August 2014.

<sup>90</sup>Ibid.

<sup>91</sup>Dutfield *Protecting Traditional Knowledge and Folklore* 29-30.

<sup>92</sup>Ibid.

<sup>93</sup>Ibid.

<sup>94</sup>Ibid.

<sup>95</sup>Ibid.

These two approaches have been very useful in the protection of TK. Globalisation has led to a vast misappropriation of TK for monopolistic rights and no benefits for TK holders. Hence, the steps taken by India in a bid to protect its TK through documentation are commendable.

### 1.8 Sui Generes Protection

Advocates of the establishment of a sui generes system have argued that the existing IP mechanisms cannot provide for the recognition and protection of TK due to the differences between TK and conventional IPR's. In light of the fact that the existing IP system does not fully protect TK, a number of communities and governments have called for an international legal instrument providing for *sui generes* protection.<sup>96</sup> The *sui generes* system is the modification of some features of the IP system so as to properly accommodate the special characteristics of its subject matter and the specific policy needs which led to the establishment of a different system.<sup>97</sup> Subsequently, in an effort to extend protection to TK, various countries have adopted existing IP systems to the needs of TK through *sui generes* measures.<sup>98</sup> A *sui generes* system might consist of some standard forms of IP protection combined with other forms of protection, or not at all for protecting TK.<sup>99</sup> An important feature of a sui generes system according to the CBD<sup>100</sup> is that any person interested in gaining access to a community's TK would need to obtain prior informed consent from the relevant community.<sup>101</sup> A *sui generes* system also has a few important elements. One of the elements is that it includes elements of benefit sharing.<sup>102</sup> In addition to this, *sui generes* laws include elements of disclosure of the country of origin.<sup>103</sup> Another important feature of a *sui generes* system is that it usually includes provisions of customary laws.<sup>104</sup>

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<sup>96</sup> WIPO, *Traditional Knowledge and Intellectual Property* 8.

<sup>97</sup> B S Kalaskar 'Traditional Knowledge and Sui-Generis Law' (2012) *International Journal of Scientific and Engineering Research* Volume 3, Issue 7.

<sup>98</sup> Kalaskar *Traditional Knowledge and Sui-Generis Law* 2.

<sup>99</sup> Ibid.

<sup>100</sup> Article 8 (j).

<sup>101</sup> Kalaskar *Traditional Knowledge and Sui-Generis Law* 3.

<sup>102</sup> Ibid.

<sup>103</sup> Ibid.

<sup>104</sup> Ibid.

## 1.9 Conclusion

This chapter has revealed the importance of TK on the global economy and has shown that the interest in TK has increased over the years. The increase in TK has come from major pharmaceutical companies and research institutions.<sup>105</sup> Of particular concern to TK holders has been the unlicensed use of TK by non-holders. Although there has been notable progress in the effort to protect TK, there has been differing views on the best mode of protection. This chapter further revealed that the protection of TK raises issues relating to IP and has been controversial. There has been much debate on issues such as who owns the rights to IP in TK and who should have access to it.

In addition to this, there has been much debate on whether the convention methods of trademarks, patents copyright can adequately protect the sensitive nature of TK. These is due to the fact that IP laws are aimed at promoting innovation, they are individualistic in nature and afford individual ownership based on time and labour exercised in creating the new invention and protect monopolistic rights, while TK by its very nature is not new and cannot be regarded as having been created by a particular individual. The chapter further revealed that many countries have tried to deal with the issues around TK and IP by using the positive or defensive approaches, which offer much wider protection of TK under IP laws. Defensive protection basically deals with provisions adopted by law to prevent IPR claims to knowledge, TCE's or a product being granted to unauthorised persons or organisations. Positive protection on the other hand, involves the granting of TK rights to communities.

The paper further revealed that the international community has agreed on the need to establish a *sui generis* system for the protection of TK due to that fact that it has been recognised that the existing IP laws are inadequate for the protecting of the holistic nature of TK.<sup>106</sup> WIPO has for instance called for a *sui generis* system for the protection of TK.<sup>107</sup> *Sui generis* protection of TK involves an acquisition of an alternative right that is separate from the rights that are recognised by the formal IP

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<sup>105</sup>Tawanda *Knowledge and Power* 1-2.

<sup>106</sup>SK Verma 'Protecting Traditional Knowledge: Is a Sui Generis System an Answer?' *The Journal of the World Intellectual Property* (2004) 7 (6) 765-805.

<sup>107</sup>The Secretariat, WIPO *Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore: Elements of a sui generis system for the protection of Traditional Knowledge*. Third Session Geneva (June 2002).

system, by the TK holders, as provided for under the system. Lastly, this chapter further revealed that this system seems to be more favoured as it is tailor made for the holistic nature of TK.

## CHAPTER THREE - THE PROTECTION OF TRADITIONAL KNOWLEDGE WITHIN THE NAMIBIAN LEGAL SYSTEM

Due to a lack of proper legislation in the past, traditional communities have lost not only their means of survival and livelihood, but they have lost millions of dollars in revenue accruing from the use of their TK by international companies who have used these IPR's, TK and resources without any control or permission.<sup>108</sup> Consequently, the rate at which TK about biodiversity is eroding is alarming, hence the need for the development of incentives for the protection and promotion of TK.<sup>109</sup>

In a bid to protect TK rights and give recognition to TK holders, Namibia is in the process of drafting the Draft Policy on Access to Genetic Resources and Protection of Associated TK (hereinafter to be referred to as 'Draft Policy').<sup>110</sup> The Draft Policy unequivocally acknowledges that the current forms of IPR's cannot be applied to TK. In the light of this; the draft policy suggests the creation of a *sui generes* system for the protection of genetic resources and the associated TK. To this end, this chapter will investigate the current IP laws in Namibia with the aim of ascertaining whether or not such laws adequately protect TK. In order to achieve this, the chapter will briefly discuss the requirements for eligibility for protection under the current IP statutes. Thereafter obstacles that TK will experience in satisfying these requirements will be highlighted. In addition to this, the chapter will look at the draft policy, which proposes a *sui generes* system for the protection of TK. Furthermore, the chapter will explore Namibia's international obligations. This will be done by briefly looking at the international instruments ratified by Namibia, which deal with the protection of TK and how such instruments can be used as a tool to protect TK in the absence of domestic legislation.

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<sup>108</sup>T Shikongo *Intellectual Property, Traditional Knowledge and Genetic Resources, Access to Genetic Resources: Will Traditional Knowledge Survive This Millennium?* (2001) 5-6.

<sup>109</sup>*Ibid.*

<sup>110</sup>The Draft Policy on Access to Genetic Resources and Protection of Associated Traditional Knowledge is an initiative of the Ministry of Environment and Tourism. Attempts to get hold of the Draft Policy proved futile, as it is not publically available. Therefore, all the information used in this paper relating to the Draft Policy has been sourced from articles authored by people who were actively involved in formulating the Draft Policy.

## 2.1 Commercial use of Namibian Traditional Knowledge

Biotechnology, pharmaceutical and human health industries have in recent years increased their interest in natural products as sources of new biochemical compounds for drugs, chemicals and agro-products.<sup>111</sup> This interest is what has led to the exploitation of TK. Therefore, before dissecting the Namibian IP law in relation to TK, it is imperative to give a brief overview of some of the notable TK uses that require protection, either because they have been commercialised without the proper consent or because they have been commercialised without any benefits accruing to the concerned communities.

The wild plants in Namibia have considerable genetic diversity and development potential, especially in the fields of agriculture and pharmaceuticals. I will discuss a few plant varieties from Namibia that have commercial success, which are used by outsiders without the appropriate consent of the concerned communities.

### 2.1.1 The Hoodia Plant

Perhaps the most well-known example of the use and commercialisation of TK was the case of the Hoodia. Hoodia was used by the San of the Namib dessert and Nama people to treat illnesses such as high blood pressure, diabetes and gout, but it was mostly used for hunger suppression during hunting times and hardships such as drought.<sup>112</sup> The active ingredient in Hoodia (P53) was patented as a hunger suppressant by South Africa's Council for Scientific and Industrial Research (CSIR). This was, however, done without recognising the San and Nama people's traditional claims to the TK of the Hoodia and its uses.<sup>113</sup> CSIR further licensed the patent to a British company for development. The licence was further sold by the British company to Pfizer and later to Unilever.<sup>114</sup> After a long battle, the San people and the CSIR finally reached an agreement to share any royalties arising from sales of any drugs or products derived from the Hoodia.<sup>115</sup> This case is of great importance as it was one of the first agreements that gave the holders of TK a share of the potential profits of products derived from their knowledge.

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<sup>111</sup>Mugabe *Intellectual Property Protection* 7-8.

<sup>112</sup>WHO 'Protecting Traditional Knowledge: the San and hoodia' *Bull World Health Organ.* (May 2006) Vol 84 n.5 Geneva.

<sup>113</sup>Ibid.

<sup>114</sup>Ibid.

<sup>115</sup> Ibid.

### 2.1.2 Devil's Claw

The Devil's claw is commercially used for the treatment of rheumatism and arthritis.<sup>116</sup> However, this plant has for many years been used for its medicinal properties by indigenous groups in Namibia, Botswana and South Africa.<sup>117</sup> The San people originating from Eastern Namibia overwhelmingly hold the TK regarding the medicinal properties and application of the Devil's Claw.<sup>118</sup> However, the rights pertaining to the medicinal usage of this plant have unfortunately been lost by the San people. This is due to the fact that patents relating to the extraction and processing methods have already been granted to commercial companies in Germany and the United Kingdom.<sup>119</sup>

### 2.1.3 Watermelon (Citrillusanatus)

This plant is commercially being used to manufacture sun screen, skin care products, conditioning hair care and soaps.<sup>120</sup> This plant is used in the northern communal areas of Namibia and has at least four traditional uses. Since it is used by a number of communities, the custodians of the knowledge relating to its cultivation and use is vested in all ethnic groups within Namibia.<sup>121</sup> Commercially, an American company and the US Department of Agriculture have requested to screen Namibian species of watermelon for natural resistance to fungi attacking cultivated species, which are of commercial interest to the US.<sup>122</sup>

### 2.1.4 Succulents

These plants are usually found in the south west of the Namib Desert. According to Krugmann<sup>123</sup>, this plant has for many years been sought for research and taken out of Namibia by collectors for their novelty value. This is yet another example of how the lack of proper legal mechanisms leads to the exploitation of TK and Namibian biodiversity without the required consent and lack of adequate compensation.

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<sup>116</sup>UNEP 2012 *Green Economy Sectoral Study: BioTrade - A catalyst for transitioning to a green economy in Namibia* (2012) Windhoek.

<sup>117</sup>Ibid.

<sup>118</sup>H Krugmann, *Namibia's thematic report on the Benefit-sharing mechanisms for the use of biological resources* (2001) 6-7.

<sup>119</sup>Ibid.

<sup>120</sup>UNEP *Green Economy* 10-11.

<sup>121</sup>Ibid.

<sup>122</sup>Ibid.

<sup>123</sup>Ibid.

### 2.1.5 The marula fruit

The marula fruit and its uses is a good example of how adequate legal mechanisms can go a long way in protecting and preserving TK in Namibia. The San and the Owambo communities have for many years been using the marula fruit as a food supplement.<sup>124</sup> It is interesting to note that some marula fruit germplasm has left Namibia for South Africa and Israel.<sup>125</sup> Genetic improvements have been made on marula fruit trees by South Africa. Commercially, South Africa uses the improved version with a view to juice and liqueur productions.<sup>126</sup> In return, South Africa has offered Namibia free access to the enhanced varieties. Currently, Namibia is trying to commercialise marula oil by improving the existing TK on the extraction of marula oil.<sup>127</sup>

These are but a few examples of how Namibian TK is being used by non-holders without any benefits flowing to the holders. ‘Strangers’ have come to indigenous communities inquiring about their medicinal plants and these communities have provided seeds and samples of trees and plants without being aware that they are giving away crucial resources from which they themselves can derive millions of dollars.<sup>128</sup> This shows that there is a great need to create awareness about the importance of protecting and preserving TK in order to create an incentive for the development of TK.

## 2.2 Intellectual Property Rights Legislation in Namibia

Like many other jurisdictions, the protection of IPR, such as patents, industrial designs, trademarks to mention but a few, falls within the ambit of municipal law.<sup>129</sup> In addition to this protection, international, regional and multilateral bodies are also legal instruments for the protection of IPR. In Namibia, international agreements form part of the domestic law virtue Article 144 of the Namibian Constitution<sup>130</sup> which reads as follows:

Unless otherwise provided by this constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.<sup>131</sup>

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<sup>124</sup>Ibid.

<sup>125</sup>Ibid.

<sup>126</sup>Krugmann *Namibia's Thematic Report* 6-7.

<sup>127</sup>Ibid.

<sup>128</sup> Ibid.

<sup>129</sup>Ibid.

<sup>130</sup>The Namibian Constitution, Act 1 of 1990.

<sup>131</sup>Ibid.

Namibia is a signatory to numerous international treaties and Namibian IP laws are therefore highly influenced by international instruments governing IP.

Rights pertaining to IP in Namibia are primarily dealt with under the Industrial Property Act, No. 1 of 2012<sup>132</sup> and the Copyright and Neighbouring Rights Protection Act No.6 of 1994.<sup>133</sup> The Industrial Property Act deals with the registration, maintenance, protection and administration of industrial property rights. These include patents, utility models, industrial designs, certification marks, trademarks and collective marks.<sup>134</sup> This Act repealed the Patents Designs, Trade Marks and Copyright Act No. 9 of 1916, the Patents, Designs and Trade Marks Proclamation No. 17 of 1923; the Patents, Trade Marks and Copyright Proclamation No. 33 of 1940; and the Trade Marks in South West Africa Act No. 48 of 1973.

The case of *Gemfarm Investments v Trans Hex Group 2009 (2) NR 477* is one of the very few cases wherein the Namibian Courts were called upon to deal with IPR's. The case refers to patent legislation as 'probably the most neglected areas of statutory regulation in Namibia'. In addition, the court stated that:

In a world increasingly driven by globalised economies and markets, in an age where more technological advances have been made in a single century than in all the centuries which have preceded it combined; at a time when commerce and industries are increasingly based on and benefiting from the power of knowledge converted into ideas, inventions and technologies for the benefit of humankind its environment, it should be a serious legislative concern that our statutory laws designed to record, preserve and protect those ideas, inventions and technologies are marooned in outdated, vague and patently inadequate enactment passed by colonial authorities in this country about a century ago.<sup>135</sup>

Although, the case only dealt with patents, it has been heavily relied on as evidence that intellectual property rights are some of the most neglected areas of regulation in Namibia.

**2.3 The Namibian Constitution, Property Rights and Traditional Knowledge**  
It is important to take cognizance of Article 100 of the Namibia Constitution, which vests ownership of all natural resources not privately owned in the State. In the Context of TK, it is imperative to state Article 95(1) of the Constitution, which obliges the state

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<sup>132</sup>Hereinafter referred to as the 'Industrial Property Act'.

<sup>133</sup>Hereinafter referred to as the 'Copyright Act'.

<sup>134</sup>Preamble, Industrial Property Act of 2012.

<sup>135</sup>*Gemfarm Investments v Trans Hex Group 2009 (2) NR (HC) at 481J-482C.*

‘to adopt policies aimed at the maintenance of ecosystems, essential ecological processes and biodiversity, and the utilisation of living natural resources on a sustainable basis for the benefit of all Namibians, both at present and in the future’.<sup>136</sup>

In addition, Article 16 of the Namibian Constitution deals with property rights and states that:

All persons shall have the right in any part of Namibia to acquire, own and dispose of all forms of immovable and movable property individually or in an association with others.

Although there is no explicit reference to IP made, Amoo<sup>137</sup> is of the opinion that this provision can be interpreted to include IP as a form of ‘incorporeal property’<sup>138</sup>, included in the phrase ‘all forms of property, movable or immovable’<sup>139</sup>.

In addition to this, Article 66 of the Namibian Constitution recognises the importance and existence of customary law. These provisions have made issues surrounding ownership, access and use of TK much clearer.

Namibia is a party to the World Trade Organisation (WTO and the TRIPS Agreements) since 1995.<sup>140</sup> This means that Namibia is under an obligation to comply with the minimum standards set by TRIPS for the protection of IPR. In addition to this, Namibia is a party to various international agreements and conventions concerning the protection of IP such as:

- Banjul Protocol since 2004
- Berne Convention since 1990
- Hague Agreement on Designs since 2004
- Harare Protocol of ARIPO since 2004
- Lusaka Agreement (ARIPO) since 2003
- Madrid Agreement on Marks since 2004
- Madrid Protocol on Marks since 2004

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<sup>136</sup> Ibid.

<sup>137</sup>S Amoo *Intellectual property under the Namibian Constitution* (2010) 16-17 available at [http://www.kas.de/upload/auslandshomepages/namibia/constitution\\_2010/amoo\\_harring.pdf](http://www.kas.de/upload/auslandshomepages/namibia/constitution_2010/amoo_harring.pdf) accessed 20 June 2014.

<sup>138</sup>Ibid.

<sup>139</sup>Ibid.

<sup>140</sup>WIPO, <http://www.wipo.int/wipolex/en/profile.jsp?code=na> last accessed on 8 July 2014.

- Paris Convention since 2004
- Patent Cooperation Treaty since 2004
- WIPO Convention since 1991
- WTO/TRIPS since 1995

#### 2.4 Traditional Knowledge and Intellectual Property Rights in Namibia

There is no express mention of TK in the Industrial Property Act except in terms of s12 where TK is regarded as forming part of prior art under patent law. The Copyrights Act also does not make mention of TK. It is not clear whether it was the intention of the legislature to intentionally exclude TK from the protection offered under the current statutory law. I will briefly look at the definitions and requirements of various IPR with the aim of ascertaining whether or not TK can indeed fit within the protection offered by the statutes under discussion.

##### 2.4.1 Patents

Section 13 of the Industrial Property Act<sup>141</sup> states that patents are available for any invention, whether products or process, in all fields of technology, provided the invention is new, involves an inventive step and is industrially applicable.

Section 14(1) of the Act, states that an invention is new if it is not anticipated by prior art. In terms of s12 ‘anticipated’ means forming part of or disclosed by prior art. This includes:

- i) all matters disclosed to the public, anywhere in the world, by publication in any form, or by oral disclosure, by use or in any other way
- ii) matters contained in a pending application for a patent as contemplated in s14(3)
- iii) knowledge developed by, or in possession of, a local or indigenous community and which originated at a date prior to the priority date of the relevant invention.<sup>142</sup>

Furthermore, for an invention to be patentable, it must involve an inventive step.<sup>143</sup>

A patent involves an inventive step when, having regard to the entire relevant prior art, it is not obvious to a person skilled in the art. In this regard an invention is deemed obvious when the prior art provides motivation to try the invention, or when the

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<sup>141</sup>Act No. 1 of 2012.

<sup>142</sup>Ibid.

<sup>143</sup>s15 (1).

method of making a claimed product is disclosed in, or rendered obvious by, a single piece or a combination of pieces of prior art. In terms of s45, patent protection expires 20 years after the filing date of the application for a patent.

#### 2.4.2 Trademarks

Over the past few decades, there has been an increase in the use of traditional words, designs and symbols by indigenous and non-indigenous entities.<sup>144</sup> This increase has come as a result of a growing trend in ‘ethnicity’.<sup>145</sup> There are various examples of how traditional words, designs and symbols have been used in the course of trade. In Canada for example, names of the first Nations such as Algonquin, Mohawk, Haida and Cherokee, as well as symbols such as Indian heads and tepees are used as trademarks by a number of non-Aboriginal companies.<sup>146</sup> They were used to market products such as cars and firearms. In Namibia for example, *Omaere* is a registered trademark, but it has its origins as traditional milk made by the Ovaherero people.<sup>147</sup>

Traditional communities have, as a result, become concerned about the use of their traditional marks and symbols as trademarks, without proper consent.<sup>148</sup> In addition to this, some of the traditional marks and symbols are used in ways that are offensive and degrading to traditional communities. A further concern is the fact that the use of traditional marks and symbols in the course of trade may lead to the traditional communities being barred from the use of their own marks and symbols.<sup>149</sup>

Consequently, it has become appropriate to examine the protection of TK, especially cultural expressions within the trade mark law system.

A trademark is defined in s131 of the Industrial Property Act as

a trade mark other than a certification or a collective trademark means a mark used or proposed to be used by a person in relation to goods or services for the purpose of distinguishing those goods or services from the same kind of the same kind of goods or services connected in the course of trade with any other person.

The Act further defines a ‘mark’ as

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<sup>144</sup>Zografos *Intellectual property and Traditional Cultural Expressions* 67-69.

<sup>145</sup>Ibid.

<sup>146</sup>Ibid.

<sup>147</sup> M Nunuhe *Namibia: Protecting Your Intellectual Property*. New Era Newspaper 26 April 2013 available at <http://allafrica.com/stories/201304260909.html?viewall=1> last accessed 14 September 2014.

<sup>148</sup>Ibid.

<sup>149</sup>Ibid.

any sign capable of being represented visually, including a device, a name, signature, word, letter, numeral, figurative element, shape, colour or container for goods, or any combination of such signs.<sup>150</sup>

Section 134 deals with the requirements that a trademark must meet in order to be deemed registrable. In order for a trademark to be considered registrable, it must be possible to distinguish the goods and services from other goods and services. A trademark may be distinguished if at the date of application for registration, it is distinguishable or if it became distinguished by reason of prior use thereof.<sup>151</sup>

As can be seen from the definition, the essential and primary function of a trademark is to indicate the origin of the goods or services in respect of which manner it is being used.<sup>152</sup> This function of a trademark has also been stated in case law where the courts have stated that a trademark is a badge of origin.<sup>153</sup> Once an application for a trademark has been granted, it is valid for a period of 10 years from the date of the application for registration.<sup>154</sup>

Furthermore, s139 stated deals with who may apply for the registration of a trademark. The section stated that any person who has a bona fide claim to proprietorship of the mark may apply. The person must also have bona fide uses or intend to use the mark as a trademark.

#### 2.4.4 Copyright

There are four arguments that can be advanced to justify the protection of copyright. The first one is the natural-justice argument,<sup>155</sup> which states that authors, like any worker, are entitled to the fruits of their labour.

The second argument is known as the economic argument.<sup>156</sup> This argument is premised on the principle of a just return on labour. Hence; authors must be remunerated for the exploitation of their work.

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<sup>150</sup> s131 Industrial Property Act.

<sup>151</sup> s134 (2).

<sup>152</sup> Zografos *Intellectual property and Traditional Cultural Expressions* 56-57.

<sup>153</sup> Varimark (Pty) Ltd v BMW AG (2007) SCA 53 (RSA) at para13.

<sup>154</sup> s157.

<sup>155</sup> H Klopper *Law of Intellectual Property in South Africa* (2011) 144.

<sup>156</sup> *Ibid.*

The third argument is the cultural argument.<sup>157</sup> This argument is of the opinion that rewarding creativity is in the best interest of the public, which will subsequently lead to enhanced national culture.

Lastly, the social argument<sup>158</sup> states that dissemination of copyright work to the public advance society. In addition, this argument states that wide dissemination of works leads to social cohesion and is ultimately viewed as a social service. This is what leads to the protection of copyright works.

Copyright law protects the material expression of ideas apart from the physical embodiment of the work in which they are expressed.<sup>159</sup>

Namibia has been a party to the Berne Convention relating to copyright ever since 1990; hence it affords copyright protection to any work eligible for such protection. The Berne Convention sets out minimum standards of copyright protection, which members are obliged to incorporate into their national legislation and defines the protection to be extended by member states to works of others.<sup>160</sup> This is known as the principle national treatment.

Section 2 of the Copyright and Neighbouring Rights Protection Act<sup>161</sup> outlines the works eligible for copyright as

- Literary works
- Musical works
- Artistic works
- Cinematograph films
- Sound recordings
- Broadcasts
- Programme-carrying signals
- Published editions and

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<sup>157</sup>Ibid.

<sup>158</sup>Ibid.

<sup>159</sup>Galago Publishers (Pty) Ltd v Erasmus 1989 (1) SA 276 (A) 283-285.

<sup>160</sup>International Copyright law – ‘The Berne Convention. Fact sheet - 08: The Berne Convention’ (5<sup>th</sup> July 2004) [http://www.copyrightservice.co.uk/copyright/p08\\_berne\\_convention](http://www.copyrightservice.co.uk/copyright/p08_berne_convention) last accessed on 10 July 2014.

<sup>161</sup>Act No. 6 of 1994.

- Computer programmes

In addition to this, s2 (1) further requires that for a work to be eligible for copyright, it must be original.

Furthermore, s2 (2) requires that for a work to be eligible for copyright protection, it must have been written down, recorded or otherwise reduced to material form. Broadcasts or programme-carrying signals are exempted from this requirement.

In short, for there to be copyright, there must be a work; the work must be original; it must be in material form and lastly, the work must fall into one of the categories listed in s2(1). Section 6 states that copyright shall subsist during the life of the author and for a period of 50 years from the end of the year in which the author dies.

The Act does not define what ‘original’ means, but according to Dean<sup>162</sup> ‘original’ in this context does not mean the work must be in any way unique or inventive. ‘Original’ in the context of copyright means that the work must be a product of the author’s own labour and should have not been copied. In *Accessco cc v Allforms (Pty) Ltd case no 11 at 469* it was held that originality is a matter of degree depending on the skill, judgement or labour involved in the making of the work.

## 2.5 Shortcomings of the Industrial Property Act and the Copyrights and Neighbouring Rights Protection Act

The current IPR system has been said to be inappropriate for the protection of TK, as they are based on monopolistic rights whereas TK is collectively owned by the community.<sup>163</sup> Another major shortcoming is that IP laws differ in nature and scope from one country to another. The major differences in the IP laws have been the centre of much of the debate on the IPR of traditional communities.<sup>164</sup>

On the other hand it is undeniable that one of the greatest benefits of protecting TK through the IP regime is the fact that it prevents third parties from misusing and exploiting it.<sup>165</sup> Unfortunately, this kind of protection comes with a few shortcomings. One of the shortcomings is the fact that it makes TK inaccessible to the holders.

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<sup>162</sup>O Dean *Handbook of South African Copyright Law* (2006).

<sup>163</sup>Mugabe ‘Intellectual Property Protection and Traditional Knowledge’.

<sup>164</sup>Ibid.

<sup>165</sup>Shikongo *Intellectual Property* 5-6.

Another shortcoming is the fact that the protection of TK through the IP regime does not warrant the preservation and or safeguarding of such knowledge.<sup>166</sup> Although TK is not expressly excluded from protection under the Namibian IP statutes (except for patents), TK faces many obstacles in satisfying the requirements for protection. The obstacles that TK faces under the Industrial Property Act and the Copyrights Act are discussed below.

### 2.5.1 Patents

The main purpose of a patent is to provide the holder with the exclusive right to make, use, offer for sale, sell or import the patented invention.<sup>167</sup> Article 27(1) of the TRIPS Agreement provides that ‘patents shall be available for any inventions, whether products or process, in all fields of technology’. The Namibian requirements for patentability are premised on the TRIPS requirements and are therefore more or less the same. Be that as it may, it seems as though any invention based on TK qualifies to be patented provided that the invention is new, imaginative and capable of industrial application.

As can be seen from the definition of a patent, novelty and inventiveness lie at the heart of patent law. As discussed earlier, for an invention to be patentable, it needs to be new. ‘New’ means that the invention should not be anticipated by prior art. In terms of Namibian patent law, TK is regarded to be part of the prior art and is therefore not patentable. This exclusion is provided for in terms of s12 (1) (c) of the Industrial Property Act, which states that prior art includes ‘knowledge developed by or in possession of a local or indigenous community and which originated at a date prior to the priority date of the relevant invention’.

In addition to this, TK often relates to naturally occurring properties of biological resources and is holistic in nature as opposed to focusing on the reduction of the properties of plants or animals in their particular useful characteristic.<sup>168</sup> In this regard, s17 of the Industrial Property Act explicitly excludes naturally occurring

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<sup>166</sup>Ibid.

<sup>167</sup>Klopper et al *Law of Intellectual Property* 267.

<sup>168</sup>Klopper et al *Law of Intellectual Property*, 376.

organisms that have not been isolated. This is yet another obstacle for the patenting of TK.

As stated in chapter 2, TK is developed over time and is passed on from generation to generation, and for this reason TK is not regarded as being new. Patent law on the other hand requires that the invention should involve an inventive step and should not be obvious to a person skilled in the art.<sup>169</sup> In other words, the invention must be more than a mere discovery of what already exists in nature. In this regard, it is clear that Namibian patent law as it stands cannot adequately protect TK, not only because TK is regarded as forming part of the prior art, but also due to the fact that TK might not be able to meet the requirements of inventiveness and non-obvious due to its complex nature.

Lastly, another great shortcoming is the fact that patent rights are time-limited. In terms of the Industrial Property Act, a patent is only valid for 20 years. TK on the other hand, has existed for many years and is passed on from generation to generation; this means that it is perpetual in nature. This is a cause for concern due to the fact that TK holders seek protection of their TK from third parties. It would serve no purpose to protect TK that has existed since time memorial for a mere 20 years after which it forms part of the public domain and non TK holders will be allowed access to it without consent from the indigenous and local communities.

Dutfield<sup>170</sup> on the other hand states that although patents are individualistic in nature as opposed to communal ownership of TK, TK holders may be able to register new inventions whereby they register individual people as the 'inventors'. He, however, warns of the renewal costs that might be associated with this.

### 2.5.2 Trademarks

In recent years, there has been an increasing use of traditional words, designs and symbols belonging to indigenous and local communities in the course of trade. This is usually done without any consent from the owners. For this reason, TK holders may wish to protect their traditional words, designs and symbols from use by outsiders.

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<sup>169</sup>Section 15(1).

<sup>170</sup>Posey and Dutfield *Beyond Intellectual Property* 245 .

Unlike the case with patents, there is no provision that excludes traditional marks from being registered as a trademark.

Taking the definition of trademark into account, the Act defines a trademark as any sign used or proposed to be used for the purposes of distinguishing those goods/services from the same kind of goods or services connected in the course of trade.<sup>171</sup> The main reason TK holders wish to register their traditional marks is to prevent 3<sup>rd</sup> parties from using them without proper consent from the indigenous communities.<sup>172</sup> Another reason for registration would be the fact that indigenous and local communities are worried about the offensive and degrading manner in which their traditional marks and symbols are used and that they themselves might be restricted in their use of trade marks to protect their TK.<sup>173</sup> Clearly, what indigenous and local communities are seeking, is a form of defensive protection. Unfortunately, the Act requires that trademarks must be used commercially. This might render trademark an unsuitable mechanism whereby the indigenous and local community does not wish to see their traditional words, marks and symbols used in the course of trade. This is, however, a matter of fact and will depend on whether the concerned TK holders wish to seek protection as a means of benefiting from commercialization or whether it is a matter of restricting unauthorized use.<sup>174</sup>

In order for an indigenous or local community to be able to register a trademark, it must do so with the aim of using that trademark on a commercial basis. In addition to this, they must register the trademark as a means of distinguishing goods and services from other goods and services. In this regard s137 (d) states that a mark is not considered registrable and cannot be validly registered if, 'it consists exclusively of a sign or indication which serves, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin, or time or mode of production of the goods or rendering of the services'. This is yet another obstacle as marks that traditional communities wish to protect are usually indicators of source and origin, which would be a breach of s137 (d) as they would not be regarded as valid trademarks.

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<sup>171</sup>s131.

<sup>172</sup>Zografos, *Intellectual property* 50.

<sup>173</sup>Ibid.

<sup>174</sup>D Varadarajan 'A Trade Secret Approach to Protecting Traditional Knowledge'. (2011) *The Yale Journal of International Law*, Volume 36:371.

### 2.5.3 Geographical Indication

The hurdles that TK holders may face in trying to register a trademark may be overcome with the use of geographical indications.

Under Article 22(1) of the TRIPS Agreement, a geographical indicator identifies ‘a good as originating in the territory of a member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin’. As can be seen from the definition under the TRIPS Agreement, the purpose of geographical indicators is to identify goods as being of a particular class, quality and originating from a particular region.<sup>175</sup>

In terms of Namibian Law, geographical indications are provided for in terms of s187 (2) and a geographical indicator may be registered as a certification or collective trademark. A certification mark indicates that its proprietor certifies the marked goods or services as being of a certain standard.<sup>176</sup> On the other hand, the purpose of collective mark is to distinguish the goods and services of members of an association from the goods or services of non-members.<sup>177</sup>

TK holders can protect their marks, words and symbols through collective marks. A certification mark is a form of collective mark.<sup>178</sup> They would, however, need to form an association that would have the exclusive right to use the collective mark.<sup>179</sup> In turn, a mark, work or symbol can then be used as a means of authenticating products bearing it as originating from the community of the TK holders.<sup>180</sup> The great advantage of using certification marks is the fact that the Act does not require it to be used for trading, as it is merely a guarantee that the product displays certain characteristics. In the context of TK, such characteristics can be that the product was made by a particular traditional method or originates from a particular region.<sup>181</sup>

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<sup>175</sup>Klopper *Law of Intellectual Property* 381.

<sup>176</sup>Klopper *Law of Intellectual Property* 82.

<sup>177</sup>*Ibid.*

<sup>178</sup>*Ibid.*

<sup>179</sup>*Ibid.*

<sup>180</sup>*Ibid.*

<sup>181</sup>*Ibid.*

#### 2.5.4 Copyright

For a work to be eligible for copyright protection, it must be original<sup>182</sup>, it must be reduced to material form<sup>183</sup> and the work must fall into one of the listed works that are eligible for copyright protection.<sup>184</sup> For many years, indigenous art has been copied onto carpets and T-shirts and traditional music has been fused with techno-house dance rhythms to produce best-selling music, to mention but two examples of how traditional expressions have been used commercially.<sup>185</sup> It is no secret that expressions of traditional folklore identify and reflect the values, traditions and beliefs of indigenous and other communities.

One of the biggest issues around the protection of TK through copyright is identification of the author. Copyright protection is said to be centered on the individual author. The Act in s1 defines who an author is in terms of all the kinds of work eligible for copyright protection. In addition to this, the duration of copyright protection is based on the existence of an identifiable author. In terms of s6, copyright protection shall endure during the life of the author and for a period of 50 years from the end of the year in which the author dies. On the other hand, TK is created over long periods of time and has been passed from generation to generation. Furthermore, most traditional innovations of local and indigenous communities are as a result of a collective process of freely sharing ideas, knowledge and practices, which cannot be owned by an individual.<sup>186</sup> It is therefore hard to identify an individual author.

Another major obstacle for the protection of TK through copyright is the requirement that the work be reduced to material form. In terms of the Act, a work will not be eligible for copyright unless it has been written down, recorded or otherwise reduced to a material form.<sup>187</sup> TK cultural expressions are a way of life and may be expressed through dance or carvings on rocks. Presenting such art in an oral or visual manner might be problematic.

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<sup>182</sup>s2(1).

<sup>183</sup>s2(2).

<sup>184</sup>s2(1).

<sup>185</sup>WIPO, *Intellectual Property and Traditional Cultural Expressions/Folklore* available at [http://www.wipo.int/export/sites/www/freepublications/en/tk/913/wipo\\_pub\\_913.pdf](http://www.wipo.int/export/sites/www/freepublications/en/tk/913/wipo_pub_913.pdf) accessed 24 July 2014.

<sup>186</sup>Shikongo *Intellectual Property* 5.

<sup>187</sup>s2 (2).

## 2.6 Draft Policy on Access to Genetic Resources and the Protection of Associated Traditional Knowledge

As can be seen from the above, much of the statutes dealing with IPR do not make provision for TK. In an attempt to effectively protect TK and genetic resources, Namibia developed a Draft Policy<sup>188</sup>, which directs access to genetic resources and the protection of associated TK. The regulation has been welcomed by many traditional and local communities, as it is seen as the long-awaited legislation, which will ensure that these communities will benefit from their TK. In addition to this, the draft policy unequivocally recognises that ‘current forms of IP protection, such as patents and plant breeders rights, cannot be applied for either technical reasons or because they are contrary to the practices and beliefs of some communities’.<sup>189</sup> In view of this, the draft policy therefore suggests the creation of a *sui generes* system. The *sui generes* legislation would be the foundation of traditional resource rights and community intellectual rights to protect the knowledge, innovations and practices associated with genetic resources separate from existing IPR systems. The Namibian Draft Policy provides in this regard provides that:

- The ownership of all genetic resources rests with the State.
- The ownership of all TK and technologies associated with any genetic resource s rests with the indigenous or local community that holds such knowledge.<sup>190</sup>

The main aim of this Bill is to make sure that anyone seeking to access TK related to genetic resources from rural communities, requires permission from the Chief of the area and should follow certain procedures to access the genetic resources through a prior-informed consent.<sup>191</sup> The Bill is guided by the following principles:<sup>192</sup>

- Namibia has sovereign rights over genetic resources in areas within its jurisdiction;
- Ownership of genetic resources rests with the State;

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<sup>188</sup> Ministry of Environment and Tourism, Directorate of Environmental Affairs. (2002) *Policy Proposals: Draft Policy on Access to Genetic Resources and the Protection of Associated TK in Namibia*.

<sup>189</sup>Krugmann, *Namibia's thematic report* 8.

<sup>190</sup> Ibid.

<sup>191</sup>A Shigwedha, *Regions want traditional authorities consulted on ABS and TK issues*. The Villager Newspaper, 5 September 2011 – 11 September 2011 available at <http://www.thevillager.com.na/articles/176/Regions-want-traditional-authorities-consulted-on-ABS-and-TK-issues/> accessed 26 July 2014.

<sup>192</sup>Krugmann, *Namibia's thematic report* 12.

- The State and its people have the right to regulate access to resources and to associated knowledge, innovations and practices of local and indigenous communities;
- Access to genetic resources must be subject to prior informed consent (PIC) and mutually agreed terms;
- Access determination process must be transparent;
- Local communities have collective rights over genetic resources, as well as over their associated knowledge;
- Access to genetic resources must conform with existing sustainable use legislation and reflect a precautionary approach;
- Benefit-sharing shall include financial benefits, technology transfer and capacity building;
- Co-operation with other states.<sup>193</sup>

In addition to this, the objectives of the Bill are:

- Conservation of biodiversity and sustainable use of genetic resources;
- Establishment of permanent participatory planning process to address access and benefit-sharing;
- Protection of the rights of local communities to regulate access to genetic resources and associated knowledge;
- Equitable benefit-sharing and distribution of benefits with providers;
- Capacity building;
- Economic and social development;
- International co-operation

Regarding the scope of protection, Article 2 (2) of the draft policy states that ‘this legislation shall not affect the following:’<sup>194</sup>

- The traditional systems of access, use and exchange of biological resources;
- Access, use and exchange of knowledge technologies by and between local communities;

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<sup>193</sup>Ibid.

<sup>194</sup>Ibid.

- The sharing of benefits based upon the customary practices of the concerned local communities, provided that the provisions of this subsection shall not be taken to apply to any person or persons not living in the traditional and customary way of life relevant to the conservation and sustainable use of genetic resources.

It is clear from Article 2(2) that the draft policy aims to protect TK and genetic resources without hindering use, access and exchange between traditional and local communities.

One of the most notable provisions regarding the protection of TK can be found in Article 3 and 4 of the draft policy. These Articles deal with the requirements of an application for the necessary prior informed consent and written permit by the user. They further deal with reaching a tripartite (state, provider, user) benefit-sharing agreement prior to the granting of access to biological resources by the appropriate authorities.<sup>195</sup>

Regarding the issue of benefit sharing and *sui generis* protection of TK, the draft policy has made the following provisions:

- Contractual arrangements within appropriate legal and institutional framework;
- Tripartite contractual arrangements: state, providers and users;
- Features of contracts
  - Legal fund for community;
  - Independent monitor to evaluate agreement;
  - Joint planning for change, income sharing and distribution.
- Establishment of a fund, jointly administered by state and community, to ensure equitable sharing of benefits.<sup>196</sup>

The draft policy has also made provision for the institutions that will be regulating and implementing the objective of the policy.

The National Competent Authority (NCA) will have the responsibility to:

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<sup>195</sup>Ibid.

<sup>196</sup> Ibid.

- Create and operate a regulatory mechanism for the protection of community IPR and the regulation of access to genetic resources;
- Carry out a process of consultation and participation with local communities;
- Identify and define types of, and procedures necessary for the recognition of, community intellectual rights;
- Develop system of registration of items protected by community intellectual rights, according to their customary practices and law;
- Issue licences for the exploitation and commercialisation of genetic resources;
- Identify relevant technical instructions that will assist local communities in the categorisation and characterisation of genetic resources, knowledge, innovations, practices and technologies.<sup>197</sup>

## 2.7 Namibian and International Obligations

As stated in earlier, Article 144 of the Namibian Constitution international agreements binding upon Namibia ‘shall form part of the law of Namibia’. This means that Namibia has an obligation to make sure that it fulfils any obligations it has in terms of an international, multilateral or regional agreement. International agreements are another way that TK can be protected, although it must be noted that they are only truly effective when the country enacts the relevant legislation.

### 2.7.1 The Convention on Biological Diversity

The (CBD) is the first binding international instrument which acknowledges the importance of TK. It was signed at the Rio Summit in 1992. Namibia became a party to the CBD through ratification since 1997. The main objectives of the CBD are the conservation of biodiversity.

The CBD states in Article 8(j) that:

Each contracting Party shall, as far as possible and as appreciate [...] (j) Subject to national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encouragement the equitable sharing of the benefits arising from the utilization of such knowledge innovations and practices.

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<sup>197</sup> Ibid.

Furthermore, Article 10 (c) requires parties to ‘protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with the conservation and sustainable use requirements’.

Another important provision is found in Article 18.4, which states that parties must ‘encourage and develop methods of cooperation for the development and use of technologies, including indigenous and traditional technologies’.

Ratification of the CBD seeks to suggest that Namibia recognises the importance of TK and has since 1997 committed herself to protecting TK.

### 2.7.2 The Nagoya Protocol on access and benefit-sharing

This is a new treaty that builds on and supports the implementation of the CBD. The Nagoya Protocol<sup>198</sup> is said to have been conceived to respond to the major criticisms voiced against the CBD regarding the Access and Benefit-Sharing provisions. One of the criticisms is related to the protection afforded to indigenous TK. Thus the purpose of this Protocol is to effectively implement the fair and equitable sharing of benefits arising from the utilisation of genetic resources.

More importantly, the protocol contains noteworthy provisions relating to TK in relation to genetic resources held by indigenous and local communities. It also contains provisions relating to genetic resources held by indigenous and local communities where the rights of these communities over these resources have been recognised.<sup>199</sup>

Furthermore, the protocol sets out clear obligations to seek the prior informed consent of indigenous and local communities.<sup>200</sup> In addition, the Protocol makes provision for the sharing of benefits arising from the use of TK associated to genetic resources, as well as benefits arising from the use of genetic resources in accordance with domestic legislation.<sup>201</sup>

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<sup>198</sup>The Nagoya Protocol on Access to Genetic Resources and the fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on biological Diversity, 2012.

<sup>199</sup>Article 5.

<sup>200</sup>Article 7.

<sup>201</sup>Article 5.

Member states must also ensure that their national laws comply with the domestic legislation and regulatory requirements of provider states related to access and benefit.<sup>202</sup> The Nagoya Protocol will also provide incentives for the promotion and protection of TK by encouraging the development of community protocols, minimum requirements for mutually agreed terms and model contractual clauses related to access and benefit-sharing of TK associated with genetic resources.<sup>203</sup>

Namibia has acceded to the Nagoya Protocol by depositing an instrument of accession to the United Nations Headquarters on the 15 May 2014.<sup>204</sup> According to the report, the instrument has been accepted and Namibia is officially a party to the said protocol. Kauna Schroeder, who is the Principal Coordinator and Adviser to the Office of the Environmental Commission was quoted by the local newspaper stating that Namibia opted to become a party to the Nagoya Protocol by way of accession due to the fact that a decision was taken that Namibia should only become party to the Nagoya Protocol once the country has a domestic law dealing with access and has benefit-sharing issues in place.<sup>205</sup> She further states that although the Draft Policy on Access to Genetic Resources and Protection of Associated TK is still under development and while endorsement by Cabinet and Parliament is still ongoing, she hopes that accession to the Nagoya Protocol will speed up the process.<sup>206</sup>

### 2.7.3 The Swakopmund Protocol

The Swakopmund Protocol<sup>207</sup> was adopted in August 2010 by ARIPO member states and recognises in its Preamble the significance of TK. It also acknowledges that the knowledge, technologies, biological resources and cultural heritage of traditional and local communities are the result of tested practices of past generations. The preamble further emphasises that ‘legal protection must be tailored to the specific characteristics of TK and expressions of folklore, including their collective or community context,

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<sup>202</sup>Article 15.

<sup>203</sup>Article 12.

<sup>204</sup>A Shigweda ‘Nam: Namibia Accedes to the Nagoya Protocol’ *The Namibian News Paper*, 20 May 2014, available at <http://allafrica.com/stories/201405200773.html?viewall=1> last accessed on 15 July 2014.

<sup>205</sup>Ibid.

<sup>206</sup>Ibid.

<sup>207</sup>The Swakopmund Protocol on the protection of Traditional Knowledge and Expressions of Folklore, 2010.

the intergenerational nature of their development, preservation and transmission, their link to a community's cultural and social identity, integrity, beliefs, spirituality and values, and their constantly evolving character within the community concerned.'

In addition to this, the Protocol further states that the purpose of the Protocol is 'to protect TK holders against any infringement of their rights as recognised by this Protocol; and to protect expressions of folklore against misappropriation, misuse and unlawful exploitation beyond their traditional context.'<sup>208</sup>

It is interesting to note that the Protocol makes a distinction between TK and folklore and defines them separately.

Section 2 deals with the definitions of TK and folklore. The former is defined as 'any forms, whether tangible or intangible, in which traditional culture and knowledge are expressed, appear or are manifested, and comprise the following forms of expressions or combinations thereof'. This includes verbal expressions, musical expressions, expressions by movement and tangible expressions.<sup>209</sup>

TK is defined as follows:

[It] shall refer to any knowledge originating from a local or traditional community that is the result of intellectual activity and insight in a traditional context, including know-how, skills, innovations, practices and learning, where the knowledge is embodied in the traditional lifestyle of a community, or contained in the codified knowledge system passed on from one generation to another. The term shall not be limited to a specific technical field, and may include agricultural, environmental or medicinal knowledge, and knowledge associated with genetic resources.<sup>210</sup>

The Protocol grants automatic protection for TK that meets the requirements as stated in s4. Section 5(1) further states that the protection of TK shall not be subject to any formality.

The Protocol affirms the principle that traditional and local communities are custodians of their TK<sup>211</sup> and confers upon the owners of the rights, the 'exclusive

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<sup>208</sup>Article 1.

<sup>209</sup>s2.

<sup>210</sup>Ibid.

<sup>211</sup>s 6.

right' to authorise the exploitation of their TK.<sup>212</sup> In this regard, the protocol gives TK owners the right to assign and conclude licensing agreements.<sup>213</sup> The exception to this is that TK that belongs to a local or traditional community may not be assigned.<sup>214</sup>

Section 15 is also of great importance as it makes it clear that authorised access to TK associated with genetic resources does not imply the right to access such resources.

Section 12 is also an important provision as it states that 'where protected TK is not being sufficiently exploited by the rights holder, or where the holder of rights in TK refuses to grant licences subject to reasonable commercial terms and conditions, a Contracting State may, in the interest of public security or public health, grant a compulsory licence in order to fulfil national need'. Ultimately, the rights to exploit TK are held by the local and traditional communities. It is only when they refuse to grant a licence when it would be in the interest of public security or health that the State may compulsorily grant such licence.

In dealing with issues surrounding trans-boundary TK, the protocol makes provision for the registration of multicultural and trans-boundary TK and traditional and cultural expressions to resolve uncertainties relating to ownership of this knowledge, which may be held by more than one community within the same or neighbouring countries.<sup>215</sup>

Furthermore, in dealing with the controversies surrounding benefit-sharing, s9 states that the protection offered under the Protocol entails that benefits arising from the commercial or industrial use of their knowledge shall be fair and equitable. The benefits shall be determined by mutual agreement between the parties.

Regarding the period of protection, the Protocol grants protection in perpetuity. This, however, does not apply where TK belongs exclusively to an individual.<sup>216</sup> In

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<sup>212</sup>s7 (1) and (2).

<sup>213</sup>s8 (1).

<sup>214</sup>Ibid.

<sup>215</sup>s5 (4).

<sup>216</sup>s13.

this instance, the protection lasts for 25 years following the exploitation of knowledge beyond its traditional context by the individual.<sup>217</sup>

Part III deals with the protection of folklore. As with TK, s17 (1) states that the protection of folklore shall not be subject to any formalities.

Section 18 states that the beneficiaries of the protection offered under the Protocol shall be the local and traditional communities:

- (i) to whom the custody and protection of the expressions of folklore are entrusted in accordance with the customary laws and practices of those communities; and
- (ii) who maintain and use the expressions of folklore as a characteristic of their traditional cultural heritage.

Furthermore, s19 lays out obligations for State Parties to provide adequate and effective legal and practical means for the protection of folklore. Regarding the duration of protection, s21 provides for perpetual protection against misappropriation, misuse or unlawful exploitation.

The Swakopmund Protocol has been regarded as a major milestone in the protection of TK and folklore, as it conceptualises the idea of *sui generes* protection. In light of this, the Namibian legislature can use the Protocol as a model when developing and drafting the Policy on Access to Genetic Resources and the Protection of Associated TK as it is also based on a *sui generes* approach. One of the notable principles found in both the Protocol and the draft regulation is the principle of prior informed consent. The Draft Policy aims to ensure that no one will gain access to TK without the consent of the concerned community. This is in line with the Swakopmund Protocol, which allows the owners of TK to prevent anyone from exploiting their TK without their prior informed consent.<sup>218</sup> Although well-drafted, the Swakopmund Protocol vests ownership of TK in local or traditional communities,<sup>219</sup> but does not define them. This can be problematic as it is unclear as to which communities can be regarded as local or traditional. However, in the course of applying the Swakopmund Protocol within Namibia, the lack of a definition can be cured by applying the

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<sup>217</sup>Ibid.

<sup>218</sup>Article 7.2.

<sup>219</sup>Article 6.

Traditional Authorities Act 25 of 2000, which defines a traditional community to mean ‘an indigenous homogeneous, endogamous social grouping of persons comprising of families originating from exogamous clans, of whom share a common ancestry, language, cultural heritage, customs and traditions, who recognise a common traditional authority and inhabit a common communal area, and may include the members of that traditional community residing outside the common communal area’.<sup>220</sup>

Another factor worthy of notice is that the Swakopmund Protocol does not extend its protection to genetic resources that are derived from the TK. This is an issue that the Namibian Legislators should bear in mind when drafting the draft policy.

## 2.8 Conclusion

The purpose of this chapter was to examine the current IP laws currently in place in Namibia with the aim of ascertaining whether the protection offered under these statutes can cater for TK. The chapter revealed that the Namibian legal system does have laws in place for the protection of IPR’s, namely patents, copyright, trademarks and geographical indicators, amongst others. The chapter analysed the requirements to be satisfied under the various Acts and found that although TK is not expressly excluded from the protection offered under the Industrial Property Act and the Copyrights Act, TK holders would have difficulty in satisfying the requirements due to its complex nature. Under copyright for example, the duration of copyright protection is dependent on the existence of an identifiable author<sup>221</sup>, while TK is knowledge that has been, created over long periods of time and is a collective process of freely shared ideas, knowledge and practices that cannot be owned by an individual.<sup>222</sup> Another lack of proper protection for TK is found in s12 (1) (c)<sup>223</sup> which states that TK is regarded as part of prior art, this means that by virtue of this section, TK has failed the test of newness. Another shortcoming is found under trademarks whereby a registered trademark may be removed from the Register for non-use. In the instance where a community merely wishes to register its TCE’s with no intention of

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<sup>220</sup>s1 of the Traditional Authorities Act 25 of 2000.

<sup>221</sup>s6 of the Copyright and Neighbouring Rights Protection Act 6 of 1994.

<sup>222</sup>Shikongo *Intellectual Property* 5.

<sup>223</sup>Industrial Property Act 1 of 2012.

commercial use, their trademark may be at risk of being removed from the Register for non-use. This is yet another barrier for protecting TK under the current IP laws.

The chapter thus concluded that the current IP laws in Namibia are inadequate to protect TK due to its complex nature. However, Namibia has shown commitment towards protecting TK. This commitment is evidenced by The Draft Policy on Access to Genetic Resources and Associated TK. The Draft policy is a good initiative as it suggests the creation of *sui generes* protection of TK as it takes into consideration the complex nature of TK. Furthermore, the Draft Policy recognises that ownership of all TK and technologies associated with any genetic resource vests in the indigenous or local community who hold such knowledge. The vesting of this ownership with indigenous and local communities will not only prevent unauthorised use of TK, but will also ensure that indigenous and local communities benefit from the use of their TK. In addition to this, Namibia is a party to various important international instruments dealing with the protection of TK. These international instruments coupled with the Draft policy can offer TK the protection it requires. One of these international instruments is the Swakopmund Protocol which Namibia has signed. This Protocol also adopts the *sui generes* approach to the protection of TK. In light of the above, it is highly recommended that the Namibian Legislature speed up the process of endorsing the draft policy.

## CHAPTER FOUR – A COMPARATIVE STUDY OF THE PROTECTION OF TRADITIONAL KNOWLEDGE WITHIN THE SOUTH AFRICAN LEGAL SYSTEM

Many developing countries have acknowledged the dire need for the protection of their TK, which has been used without their consent. Subsequently, there have been heated debates on the need to provide protection for the TK of indigenous and local communities at both an international and national level. Furthermore, finding an appropriate mechanism for providing such protection has proved difficult.

As a result, South Africa through the Ministry of Trade and Industry drafted a document dealing with the protection, recognition and commercialisation of Indigenous Knowledge (IK)<sup>224</sup>. South Africa has provided for the protection of indigenous knowledge through the existing IPR's system. These policy considerations are what lead to the Intellectual Property Laws Amendment Act 2013 (IPLAA), which amends South Africa's four existing IP statutes to incorporate indigenous intellectual knowledge as a form of IP.

Subsequently, in terms of the IPLAA, the South African Copyright Act 1978, the Performers Protection Act 1967, the Trade Mark Act 1993 and the Design Act 1993 have been amended to include certain forms of TK protection under the premise of these particular Acts. This chapter will analyse the approach that South Africa has adopted for the protection of IK in the light of the IPLAA. The chapter will also look at some of the criticisms levelled against the IPLAA. In addition, the chapter will look at the PTK Bill, which was tabled in parliament as a substitution to the IPLAA. The PTK Bill adopts the *sui generes* approach to the protection of TK. Lastly, the chapter will discuss some of the lessons that Namibia can learn from the approach taken by South Africa and which approach Namibia should follow when adopting the new legislation.

The statutes have been amended as follows:

The Performers' Protection Act<sup>225</sup> has been amended to

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<sup>224</sup> Hereinafter referred to as IK.

<sup>225</sup> Performers Act of 1967.

- i) Provide for the recognition and protection of traditional performances having an indigenous origin

The Trademarks Act has been amended to

- i) Provide for the further protection of geographical indications
- ii) Provide for the recognition of terms and expressions of indigenous origin and for the registration of such terms and expressions as trade marks
- iii) Provide for the recording of traditional terms and expressions

The Copyright Act has been amended to

- i) Provide for the recognition and protection of copyright works of an indigenous character
- ii) Provide for the establishment of a National Council in respect of indigenous IP
- iii) Provide for the establishment of a national trust and trust fund in respect of indigenous IP.

The Designs Act has been amended to

- i) Provide for the recognition and registration of indigenous designs
- ii) To create for this purpose a further part of the designs register.

The IPLAA further makes provision for the introduction of statutory provisions, which establish a National Council in respect of IK, a National Database for the recording of IK and a National Trust and Trust Fund for the purpose of IK.

### 3.1 The Intellectual Property Amendment Act of 2014

The amendments to the statutes will now be discussed in more detail.

### 3.2 The Copyrights Act No. 98 of 1978

The IPLAA starts off by amending s1 of the Copyrights Act for the purposes of including the definition of traditional works, indigenous works and derivative indigenous works. The IPLAA further provides for the insertion of Chapter 2A into the Copyright Act.

According to Section 1 (i) (j) a derivative indigenous work means ‘the person who first made or created the work, a substantial part of which was derived from an indigenous work’.

Further, an indigenous work is defined as ‘the indigenous community from which the work originated and acquired its traditional character’.<sup>226</sup>

Section 1 (j) defines traditional work as work that ‘includes a derivative indigenous work and an indigenous work’.

### 3.2.1 Eligibility for copyright protection

The requirements that a traditional work must meet to satisfy the requirements for copyright protection are stated in s28B. These requirements are as follows:

- i) The traditional work must be written down, recorded, represented in digital data or signals, or otherwise reduced to a material form that is capable of substantiation from the collective memory of the relevant indigenous community.
- ii) The traditional work must be a derivative work and the indigenous community from which the work, or a substantial part thereof originated, is or was an indigenous community when the work was created
- iii) The traditional work is an indigenous work.<sup>227</sup>

As can be seen from s28B, for a traditional work to qualify for copyright protection, it needs to be in material form, and the Act states that the TK can be registered if it is ‘capable of substantiation from the collective memory of the relevant indigenous community’.<sup>228</sup> It is unclear what this means and how this description could be applied in reality.

In relation to derivative indigenous work, the Act provides that copyright will only be granted where there is

- i) Prior informed consent from the indigenous community of relevant authority
- ii) Disclosure of indigenous cultural expressions or knowledge to the Commission; and
- iii) Benefit sharing agreements between the parties have been concluded.<sup>229</sup>

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<sup>226</sup>Section 1 (i) (j).

<sup>227</sup>s28B.

<sup>228</sup>Ibid.

<sup>229</sup>s28B (4).

### 3.2.2 Ownership of traditional works

In terms of s28D 9(2) copyright in a traditional work shall be owned by its author, which will be a traditional community. The IPLAA deems such communities to be juristic persons for the purposes of the Copyright Act.<sup>230</sup> Further, IPLAA makes provision for community protocols which will be administered by traditional communities. The Act further requires community protocols to clearly stipulate the person who is authorised to act as a representative of the community when an application for registration is being made.<sup>231</sup> This applies to applications for licensing as well.<sup>232</sup>

By virtue of s28J (1), it is only possible to assign copyright for an indigenous work to a collecting society or to a duly appointed community representative. This representative will have the right to bequeath the copyright to another person. In this regard, the community protocol must state how the copyright will be transmitted to a succeeding community representative upon the death or liquidation of the concerned community representative.<sup>233</sup> Upon the death of the last living member of the indigenous community, the copyright will revert to the National Trust.<sup>234</sup>

### 3.2.3 Licensing

The IPLAA makes provision for the licensing of IK under s28H. The traditional community is tasked with the responsibility of negotiating these licenses. However, the licenses will still be scrutinized by the National Council for Indigenous Knowledge, which ensures that the license complies with the community protocol and IP laws.<sup>235</sup> In the event that the Council finds the terms in the licence to be disadvantageous to the indigenous community or its members, the Council has an obligation to ensure that the clause is renegotiated and provides such assistance to the community where necessary.<sup>236</sup>

The royalties or benefits accruing from the license to the indigenous community are paid under the following circumstances:

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<sup>230</sup>s28 D (2).

<sup>231</sup> s28C (8).

<sup>232</sup> s28H (4).

<sup>233</sup> s28J (2).

<sup>234</sup> s28J (3).

<sup>235</sup> s28H (4).

<sup>236</sup> Ibid.

- a) The broadcasting or transmission of a sound recording of a traditional work
- b) The showing, broadcasting or transmission of a cinematograph film recording a traditional work, or the inclusion of a traditional work in a cinematograph film or a television broadcast.<sup>237</sup>

### 3.3 The nature of Traditional Copyright

Section 28E (1) deals with the exclusive rights that are granted to the holder of a traditional work. These exclusive rights include copying or reproducing the work in any way; publishing unpublished works; public performance; broadcasting; adaptation of the work; distribution, sale and lease of copies of the work. The fact that IK holders are granted ‘exclusive rights’<sup>238</sup> is interesting because there is some doubt internationally that exclusive property rights are suitable, serve goals usually identifiable in respect of IK protection and advance other policy goals such as maintaining a rich accessible public domain, stimulating creativity, promoting cultural diversity and safeguarding freedom of expression

In this regard, any person who uses IK or TK to perform any of the above acts must comply with the requirements that are stipulated in s28B (4). Furthermore, the Act has made an exception to the requirement that a person wishing to use a traditional work must obtain prior consent from the copyright owner.<sup>239</sup> A person using a traditional work need not get prior consent from the copyright owner if it is for the purpose of:

- a) private study or private use;
- b) professional criticism or review;
- c) reporting on current events;
- d) education;
- e) scientific research;
- f) legal proceedings; or

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<sup>237</sup>s28H (2).

<sup>238</sup>WIPO *Comments of the World Intellectual Property Organization on the Intellectual Property Amendment Bill, 2010* (2011) available at <http://blogs.sun.ac.za/iplaw/files/2013/04/WIPO-Report-on-IP-Bill-15-Sept-20112-copy.pdf> last accessed 20 May 2014.

<sup>239</sup>s28G (7).

- g) the making of recordings and other reproductions of indigenous cultural expressions or knowledge for purposes of their inclusion in an archive, inventory, dissemination for non-commercial cultural heritage safeguarding purposes and incidental uses.<sup>240</sup>

The Act, however, requires that any person using a traditional work under these circumstances must use it in reasonable portions and that the copyright holder must be acknowledged by name.<sup>241</sup> The act has not defined what reasonable portions means, this provision may lead misinterpretations.

### 3.3.1 Terms of Protection

Section 28F (1) provides for the duration of copyright protection for traditional works. A derivative indigenous work is protected 50 years from the end of the year in which the work was first communicated to the public with the consent of the author or authors.<sup>242</sup> Or 50 years from the end of the year, in which the date of the death of the author or all authors concerned, whichever expires first.<sup>243</sup>

On the other hand, the duration of protection for the indigenous work referred to in terms of s 28B (3) (b) is perpetual.<sup>244</sup> This is the same for any indigenous work that vests in the State.

### 3.3.2 Royalties

In terms of the IPLAA, unless there has been an agreement, no person may broadcast, cause the transmission of or play a sound recording of,<sup>245</sup> or show, broadcast or cause the transmission of a cinematograph film recording a traditional work or include a traditional work in a cinematograph film or television broadcast<sup>246</sup> without payment of a royalty or benefit to the owner of the concerned copyright.<sup>247</sup>

Regarding the amount of royalty payable, or the benefit that shall accrue to the copyright holder, the Act states that royalties and benefits shall be decided as between the copyright owner and any person so wishing to use the traditional work, i.e. the

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<sup>240</sup>Ibid.

<sup>241</sup>Ibid.

<sup>242</sup>s28 (F) (1) (i).

<sup>243</sup>Ibid.

<sup>244</sup>s28 (F) (2).

<sup>245</sup>As contemplated in s9 (c), (d) or (e).

<sup>246</sup>As contemplated in s28E (1).

<sup>247</sup>s28H (2) (a) and (b).

person wishing to use the IK and the owner of the copyright to the work or between the collecting societies that act on their behalf.<sup>248</sup>

Alternatively, in the absence of such an agreement, the amount or value of the royalty, benefit, or both, such royalty or benefit shall be determined by an institution accredited by the Commission<sup>249</sup>; the Copyright Tribunal<sup>250</sup> or the arbitration in terms of the Arbitration Act, 1965<sup>251</sup>. In addition to this, the Agreement concluded between the parties must be submitted to the Council to make sure that it complies with IP laws, the community protocol and the Act.<sup>252</sup> In the event that the Council finds the agreement to be unbeneficial to the indigenous<sup>253</sup> community or the members thereof, the Council may require re-negotiation of the concerned clause.

### 3.4 Trademarks

Regarding trademarks, s7 and s8 of the IPLAA amend s1, s2 and s69 of the Trademarks Act of 1993. Further, s9 inserts Part XIIA after s43 thereof for the purpose of recognizing indigenous terms and expressions, and for the registration and recoding of such terms and expressions as trademarks; and to provide for further protection of geographical indications.

#### 3.4.1 Definitions

Section 2 of the Trade Marks Act<sup>254</sup> has been amended to provide for indigenous cultural expressions or knowledge.

Indigenous cultural expressions or knowledge means ‘any form, tangible or intangible, or a combination thereof, in which traditional culture and knowledge are embodied, passed on between generations, and tangible or intangible forms of creativity of indigenous communities including, but not limited to phonetic or verbal expressions, music or sound expressions, expressions by actions or tangible expressions.’<sup>255</sup>

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<sup>248</sup>§28H 3 (a).

<sup>249</sup>As contemplated in s28K 9(1).

<sup>250</sup>As contemplated in s29(1).

<sup>251</sup>Act No. 42 of 1965.

<sup>252</sup>§28H (4) (a).

<sup>253</sup>§28H (4) (b)

<sup>254</sup>Act No 194 of 1993

<sup>255</sup> s2 (f)

In addition to this, indigenous terms or expressions are defined as ‘literary, artistic or musical terms or expression with an indigenous or traditional origin and a traditional character, including indigenous cultural expressions or knowledge which was created by persons who are or were members, currently or historically, of an indigenous community and which is regarded as part of the heritage of the community.’<sup>256</sup>

A derivative indigenous term or expression ‘means any term or expression forming the subject of this Act, applied to any form of indigenous term or expression recognized by an indigenous community as having an indigenous or traditional origin, and a substantial part of which was derived from indigenous or traditional origin, and a substantial part of which was derived from indigenous cultural expressions or knowledge irrespective of whether such derivative indigenous term or expression was derived before or after the commencement of the Intellectual Property Laws Amendment Act, 2013.’

#### 3.4.2 Requirements for registration

The requirements for trademark eligibility are dealt with under Part 12A, which states that traditional terms or expressions are not capable of constituting a trademark. Subsequently, any person who has rights in respect of a traditional term or expression prior to commencement of the Act shall not be able to hold trademark rights in the term or expression. Hence, in the instance that a traditional term of expression was registered as a trademark before the commencement of the Act, it will be liable for removal from the register.<sup>257</sup> On the other hand, in terms of s43b (2), a traditional term of expression is capable of being a certification, collective trademark or a geographical indication. However, in order to qualify as such, ‘the traditional term of expression shall be capable of distinguishing the goods and services of an indigenous community in respect of which it is registered or proposed to be registered, from the goods or services of another community or person, either generally or where the traditional term or expression is registered or proposed to be registered subject to limitations, in relation to use within those limitations.’<sup>258</sup>

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<sup>256</sup>Ibid.

<sup>257</sup>s43C 91).

<sup>258</sup>s43B (3).

Geographical indications may be registered as certification or collective marks on condition that it is clearly indicated as such in the register.<sup>259</sup>

It is quite unclear what this provision is saying because it suggests that a traditional term or expression cannot constitute a trademark and then it continues in sub-section 2 to state that a traditional term of expression can be a certification of, collective trademark or geographical indicator. This seems to imply that it shall not be registrable as a trademark. Section 43C creates further confusion, listing the traditional terms and expressions that are unregistrable.

The provisions relating to prior informed consent, benefit sharing and community protocols for the registration of derivative terms or expressions are the same as those discussed under copyright and as such the author will therefore not go into further detail.<sup>260</sup>

Traditional terms and expressions that merely serve as an indication of the kind, quality, quantity, intended purpose, value or other characteristic of the goods or services or mode or time of production shall not be eligible for registration.<sup>261</sup> In addition to this, traditional marks or expressions that have become generic shall also be ineligible for registration as trademarks.<sup>262</sup>

### 3.4.3 Terms of Protection

Indigenous terms, expressions and geographical indications are perpetually protected.<sup>263</sup> On the other hand, the duration and renewal of derivative traditional terms, expressions and geographical indications is valid for a period of 10 years, but may be renewed from time to time.<sup>264</sup> The term of protection for indigenous terms or expressions is perpetual. There seems to be a conflict between this provision and s27 of the Trademark Act, which states that a trademark may be removed from the register for non-use. This is confusing because traditional communities do not register trademarks with the aim of litigation, but rather to deter third parties from using them.

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<sup>259</sup>s43B (4) and (5).

<sup>260</sup>These requirements are provided for under s243B (6).

<sup>261</sup>s43C (1) (a).

<sup>262</sup>s43C (1) (b).

<sup>263</sup>s43E (2).

<sup>264</sup>s37 of the Trade Marks Act of 1993.

#### 3.4.4 Exceptions, Licensing and Benefits

The provisions relating the exceptions, licensing and benefits of using traditional terms and expressions are similar to the provisions relating to Copyright and shall therefore not be discussed.<sup>265</sup>

#### 3.5 The Patent Act 57 of 1978

The Patents Act was amended by the Patents Amendment Act No. 20 of 2005 for inventions that are derived from IK with the aim of recognizing the contributions of IK holders.

Act defines traditional use as ‘the way in which or the purpose for which an indigenous community has used an indigenous biological resource or a genetic resource’.<sup>266</sup> In addition to this, in the context of patents, TK is limited to ‘knowledge that an indigenous community has regarding the use of an indigenous biological resource or a genetic resource’.<sup>267</sup>

Section 30 (3A) requires that any applicant who lodges an application for a patent accompanied by a complete specification, must state whether or not the claimed invention is

- i) based on or derived from an indigenous biological resource, genetic resource or an indigenous genetic resource; or
- ii) based on or derived from an indigenous biological resource or an indigenous genetic resource and also based on or derived from TK or use; and
- iii) the invention is based on or derived from TK or use, whether it is co – owned by the owners of the TK or use.<sup>268</sup>

In the event that the invention is derived from any of the above stated resources, the applicant is required to prove his or her title or authority to make use of the indigenous biological resource, genetic resource, or of the TK or use.<sup>269</sup> In the instance that an applicant makes a false declaration or representation that is material, the patent may be revoked.<sup>270</sup>

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<sup>265</sup>s43F and s42H.

<sup>266</sup>s1 of the Patents Act.

<sup>267</sup>Ibid.

<sup>268</sup>Footnote needed

<sup>269</sup> s30 (3B).

<sup>270</sup> s61 (1) (g).

### 3.6 Criticisms of the IPLAA

While there has been widespread agreement that IK is in need of adequate protection, there have been varying views on the best method of protection. Although the President recently signed the IPLAA and it is now law, it has been heavily criticised. The aim of this chapter is to look at the approach taken by South African in protecting TK and what lessons Namibia can learn from it. It is therefore imperative to examine the criticisms voiced against the IPLAA.

Owen Dean heavily criticized the IPLAA. Dean is of the opinion, that the incorporation of IK into the existing IP system is unrealistic as it does not meet the criteria for the registration of IP.

Dean describes the bill as ‘ill-conceived, fundamentally flawed and poorly executed’ and recommends that it should have been *sui generes* legislation, which protects IK as a separate and distinct species of IP.<sup>271</sup> Dean drafted a separate bill, the PTK Bill, which was introduced to the National Assembly by Wilmot James. The Bill is popularly referred to as ‘Wilmot’s Bill’.<sup>272</sup>

Unlike the IPLAA, Wilmot’s Bill recognises TK as a separate form of IPR. This approach seems to internationally accept, as WIPO has also advocated, that TK be protected as a distinct species of IP. WIPO’s comments of the IPLAA shall be discussed later on in this dissertation.

One of the major justifications for the protection of IP is to encourage innovation and creative works because society benefits from these innovations and creative works.<sup>273</sup> In return, the author of the work is financially rewarded to compensate him/her time, labour and money invested.<sup>274</sup> On this premise, Dean criticizes the IPLAA for treating TK as a form of IP right under copyrights, trademarks and patents. He states that the protection of TK ‘does not and cannot serve as an

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<sup>271</sup>L Ensor *Proposal to protect Traditional Knowledge ‘doomed’*. Business Day Live (2012) available at <http://www.bdlive.co.za/articles/2010/05/20/proposal-to-protect-traditional-knowledge-doomed.jsessionid=B00AFBAE3142E6B3D21797F9D4D58080.present1.bdfm> last accessed 17 August 2014.

<sup>272</sup>Ibid.

<sup>273</sup>J Wilmot ‘Protection of Traditional Knowledge Bill’ (2013) available at <http://www.pmg.org.za/files/130912protection.pdf> last accessed 4 August 2014.

<sup>274</sup>Ibid.

incentive for the creation of new works'.<sup>275</sup> This is due to the fact that TK works already exist and are already being used by others. Furthermore the nature of TK makes it difficult to identify the creator. Some of the notable criticisms levelled against the IPLAA by Dean will be discussed below.<sup>276</sup>

Another criticism relates to the amendment of the existing IP law. Dean is of the opinion that the IPLAA will not be able to achieve its objectives through the existing IP laws.<sup>277</sup> In addition, Dean considers the current IP laws to be inappropriate for the protection of TK. He is also of the opinion that the current IP laws are an inappropriate mechanism for the protection of TK and that amending these Acts raises fear that the IPLAA will not be implementable.<sup>278</sup> Lastly, the amendments give rise to a great deal of uncertainty, which will be appalling.<sup>279</sup>

He further criticizes the licensing provisions under the IPLAA, which he thinks are subject to onerous formalities and conditions. Dean states that the circumstances under which are licenses may be obtained are not in accordance with the realities of the market place in the licensing of works of IP.<sup>280</sup> The formalities and conditions are likely to discourage anyone wishing to get a license.<sup>281</sup>

Another criticism is based on the fact that the IPLAA has a system which in certain circumstances will confer ownership of property created in the State as opposed to vesting ownership in the communities.<sup>282</sup> In addition, the property will be commercially exploited by the State and the royalties flowing to the State from the use of the works will accrue to a trust fund administered by the State.<sup>283</sup> Dean heavily critiques the fact that the Trust Fund has the discretion to decide on how the money should be spent or allocated. Furthermore, there is no obligation placed upon the fund to transfer any of the money to the concerned community.<sup>284</sup> He states that the approach taken by the PTK is better as protected TK is owned by the community from

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<sup>275</sup>Ibid.

<sup>276</sup>Ibid.

<sup>277</sup>Ibid.

<sup>278</sup>Ibid.

<sup>279</sup>Ibid.

<sup>280</sup>Ibid.

<sup>281</sup>Ibid.

<sup>282</sup>Ibid.

<sup>283</sup>Ibid.

<sup>284</sup>Ibid.

which it originated and such community may exploit the works for their own advantage.<sup>285</sup> As with the IPLAA, the payment of royalties for the use of the property can be paid to the trust fund operated by the State, but such royalties will be paid to the relevant community.<sup>286</sup> The PTK, however, does have provisions in place for the enforcement of rights for protected work, but this is done at the election, and on behalf of, the owner.

WIPO described South African's approach to the protection of TK as 'novel and unusual' due to the fact that many forms of IK are already protected by the existing IP systems.<sup>287</sup> WIPO is of the opinion that South Africa's approach may not fully respond to the specific characteristics of IK and this could lead to unwanted uncertainty in the interpretation and implementation of the existing IP legislation.<sup>288</sup> In this regard, WIPO states that the international trend is that due to the complex nature of TK, *sui generes* legislation is best suited for TK protection; hence South Africa should try and keep in line with international trends.

### 3.7 The Protection of Traditional Knowledge Bill

The IPLAA has been criticized by many legal experts saying that it was cumbersome and unenforceable. It was against this background that the PTK was drafted and presented to parliament by a Member of Parliament, Wilmot James. The PTK Bill recognizes TK as a different form of IP and proposes a *sui generes* approach to the protection of TK. Wilmot states that there has been universal support for a *sui generes* approach for the protection of TK.<sup>289</sup> Wilmot motivates this by stating that WIPO too favours a *sui generes* approach.<sup>290</sup> Another example is ARIPO's Swakopmund protocol which adopted a *sui generes* approach.<sup>291</sup> Although South Africa is not a member of ARIPO, the Swakopmund Protocol applies to her due to the fact that she shares borders with ARIPO member states whose traditional communities have a close

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<sup>285</sup>Ibid.

<sup>286</sup>Ibid.

<sup>287</sup>WIPO 'Comments of the World Intellectual Property Organization on the Intellectual Property Amendment Bill, 2010' (2011) Available at <http://blogs.sun.ac.za/iplaw/files/2013/04/WIPO-Report-on-IP-Bill-15-Sept-20112-copy.pdf> last accessed 20 May 2014.

<sup>288</sup> Ibid.

<sup>289</sup>O Dean *Synopsis of the Protection of Traditional Knowledge Bill* (2010) Doc: 20D2012 available at <http://blogs.sun.ac.za/iplaw/files/2012/02/20D2012.pdf> last accessed on 4 August 2014.

<sup>290</sup>J Wilmot *Protection of Traditional Knowledge Bill* (2013) available at <http://www.pmg.org.za/files/130912protection.pdf> accessed 4 August 2014.

<sup>291</sup> Ibid.

affinity with South African communities. Wilmot James therefore encouraged South Africa to stay in line with international trends by implementing *sui generes* legislation.<sup>292</sup>

The aim of the bill is to provide adequate, financially viable, legally enforceable protection for TK. This protection is expected to:

- Comply with South Africa's international obligations,
- Give effect to the principles for the protection of IK advocated by WIPO
- Safeguard our existent IP statutes from irreparable harm
- Establish a more sophisticated system for the protection of TK in South Africa that far exceeds the level of protection anywhere else in the world, to mention but a few.

The PTK bill is premised on three categories<sup>293</sup>:

- a) Traditional works
- b) Traditional Designs
- c) Traditional Marks

### 3.7.1 Traditional Works

A traditional work is defined as 'a literary, musical or artistic work... which evolved in, or originated from a traditional community, and in respect of which no individual is known'.<sup>294</sup> This definition is quite different from the definition of indigenous work in terms of the IPLAA, which defines it in relation to the community in which the work originated from.

In order for a traditional work to be eligible for protection, the traditional work must be reduced to a material form<sup>295</sup> by or for the community,<sup>296</sup> and it must be recognized as being derived from, and characteristic of, that community by the people outside that community.<sup>297</sup>

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<sup>292</sup> Ibid.

<sup>293</sup> Ibid.

<sup>294</sup> s1 PTK Bill, 2013.

<sup>295</sup> s2(a).

<sup>296</sup> s2(b).

<sup>297</sup> s2(c).

Furthermore, in terms of s3 (1), the owner has the exclusive right to perform the traditional work in public, and to broadcast, and make adaptations and distribute copies.

By virtue of s3 (2), the rights to the traditional work can only be infringed if the person who commits the unauthorised act has knowledge of the right and had no license. In this regard, the exceptions relating to copyright apply here.<sup>298</sup>

Published traditional works are protected for a period of 50 years from the date of its first publication.<sup>299</sup> The TK right is protected indefinitely in the case where it is not published.<sup>300</sup>

### 3.7.2 Traditional Design

Regarding the protection of traditional designs, the PTK Bill defines a traditional design as ‘an aesthetic design that is applied to an article and which evolved in, or originated from, a traditional community and in respect of which the owner is not known.’<sup>301</sup>

To qualify for protection, the design must be reduced to material form<sup>302</sup> by the community<sup>303</sup> and it must be considered as being derived from, or characterized of, that community by people outside the community.<sup>304</sup>

The owner of a traditional design is vested with the rights to make, use or dispose of any article embodying the protected design.<sup>305</sup> It therefore follows that a traditional design cannot be infringed without the knowledge that the design in relation to which the Act is performed is a protected traditional design.<sup>306</sup>

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<sup>298</sup>s4.

<sup>299</sup>s5(1).

<sup>300</sup>s5(2).

<sup>301</sup>s1.

<sup>302</sup>s8(a).

<sup>303</sup>s8(b).

<sup>304</sup>s8 (c).

<sup>305</sup>s9(1).

<sup>306</sup>s9(2).

### 3.7.3 Traditional Marks

The PTK defines a traditional mark to ‘include a trade mark, collective mark or certification mark which evolved within, or originated from, a traditional community.’<sup>307</sup>

To meet the criteria for protection, the traditional mark should be represented graphically by, or on behalf of, the originating community and should be recognized as being derived from that community and branded by outsiders as their own.<sup>308</sup>

The owner of a traditional mark has the right to register it as a certification mark, a collective mark or a trademark under the Trade Marks Act.<sup>309</sup> Section 9(1) vests the owner with the exclusive right to make, import, use or dispose of the design. In addition, this mark is deemed to enjoy repute for the purposes of bringing a passing of case.<sup>310</sup> Traditional Marks can only be infringed with the necessary knowledge of the right, coupled with lack of authority from the traditional mark owner.<sup>311</sup>

### 3.7.4 Ownership of TK under the Protection of Traditional Knowledge Bill

In a nutshell, ownership of TK is vested in what the PTK refers to as a ‘community proxy’<sup>312</sup> who is designated by the community to hold ownership of the TK in a representative capacity.<sup>313</sup> Unlike the IPLAA, under the PTK a traditional community is not regarded as a juristic person, hence the designation of the community proxy. The PTK defines a community proxy as someone ‘a person that is duly delegated from time to time to represent, and to act and to own a TK right for and on behalf of, a particular traditional community.’<sup>314</sup> Ownership of TK is not transmissible by assignment or by operation of law.<sup>315</sup>

## 3.8 Notable Provisions

One of the most notable provisions in the PTK Bill is s41 (1), which makes provision for the protection of moral rights. The IPLAA has no such provision. In terms of this section, where any work, design or mark is derived from an item of protected TK, the

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<sup>307</sup>s1.

<sup>308</sup>s13 (a) (b) (c).

<sup>309</sup>s14(1).

<sup>310</sup>s14(2) of the PTK and s10(12) of the Trade Marks Act of 1993.

<sup>311</sup>s9(2).

<sup>312</sup>s38(1).

<sup>313</sup>s38(1).

<sup>314</sup>s1.

<sup>315</sup>Ibid.

owner has the right to object to any distortion, mutilation or other modification thereof where such action is or would be prejudicial to the owner or public esteem, of the originating traditional community.

Another notable provision of the PTK Bill is s38 (1), which makes provision for the licensing of traditional works and designs subject to a payment.<sup>316</sup>

Furthermore, s22 provides for the registration of TK in a Register of TK, and it creates a National Council for TK and a National Trust Fund for TK.<sup>317</sup>

Another notable provision is s44 (1), which provides ad hoc protection for foreign TK. This is done through a special proclamation in the Government Gazette. However, protection of foreign TK will only be offered in cases where that foreign country gives reciprocal protection to South African TK.<sup>318</sup>

### 3.9 Lessons to be learned by Namibia

There is indeed a general consensus that TK needs to be protected. What is unclear is what type of protection will adequately protect the complex nature of TK. It seems as though the international community is leaning towards *sui generes* protection, which is tailored to cater for the special nature of TK. This means that TK will be regarded as a different species of IPR. South Africa has elected to protect TK through its existing IPR's system. Namibia on the other hand, has opted for a *sui generes* approach with plans of adopting the Access to Genetic Resources and Associated TK Bill. After a careful consideration of the IPLAA and the PTK Bill, I have come to the conclusion that Namibia's decision to rather adopt a *sui generes* approach is well informed. This opinion is shaped by the fact that taking an approach similar to that of South Africa will mean that traditional communities will have to acquaint themselves with the complexities of the existing IP legislation. If the bulk of the holders of TK do not understand the law as it relates to the protecting their TK, the purpose behind the Act will be defeated. Furthermore, apart from the fact that it has been internationally accepted that *sui generes* is best suited to protect TK, embodying the law relating to the protection of TK in one document to make it more comprehensive will circumvent the complexities that come with will trying to fit TK into the existing IP laws. Namibia

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<sup>316</sup>s38(6).

<sup>317</sup>s33.

<sup>318</sup>s44(2).

has also signed the Swakopmund Protocol, which adopted the *sui generes* approach to protecting TK. It will thus be a great stride for Namibia to enact *sui generes* legislation to complement the Swakopmund Protocol because a *sui generes* approach will not only deal with the concerns relating to the identification of the TK to be protected, it will also deal with the issues relating to the scope and limits of the collective rights belonging to the holders of TK, which have proved to be controversial issues.

### 3.10 Conclusion

This chapter formed the basis of a comparative study with South Africa who has elected to protect TK through the conventional system by amending the IP Acts. The chapter reviewed how the amendment has managed to accommodate TK into the existing IP laws of South Africa. The chapter revealed that although amendments were made to try and fit TK into the existing IP laws, TK was still expected to comply with some of the cumbersome provisions of the various Acts. The chapter also revealed some contradictions between the IPLAA and the various amended Acts. One of these was between s43E (2), which states that indigenous terms and expressions shall be protected in perpetuity. On the other hand, s27 of the trademarks Act states that a trademark may be removed from the Register for non-use. This is conflicting because when indigenous communities register their trademarks, they usually do not do so with a commercial purpose in mind, but rather to deter third parties from using them. The chapter also looked at the PTK Bill, which was tabled as a substitute for the IPAA. The PTK Bill adopted the *sui generes* approach and treated TK as separate form of IP. The chapter revealed that the approach adopted by the PTK bill is less cumbersome because it is one separate document wholly committed to protecting TK and does not subject TK holders to the complicated provisions of the conventional act. After analysing the PTK Bill, it was concluded that a *sui generes* approach offers more effective and comprehensive protection to TK because it is tailor-made and sensitive to the special needs of indigenous communities and TK.

## CHAPTER FIVE - CONCLUSION

The use and importance of TK has increased considerably in the last decades, to an extent where TK has played a significant role in areas such as food security and agriculture, human rights, resource management, sustainable development and conservation of biological diversity, health and economic development to mention but a few.<sup>319</sup> However, the increased interest in TK has led to the exploitation, appropriation and misuse of TK by outsiders. Traditional and local communities, especially in developing countries, have in recent years demanded protection of their TK to prevent third parties from using their TK without their consent and without any benefits reaching the concerned communities. It is against this background that TK is at the forefront of international debates.

TK cannot be adequately protected under the conventional IPR system such as trademarks, copyright and patents due to the inherent conflicts between TK and IPR's. One of the reasons for this is the fact that the conventional IPR system generally protects individual property rights as opposed to TK where ownership is collective.

Protecting TK through the conventional method has been heavily criticised due to the fact that the system is individualistic in nature and affords individual ownership based on time and labour exercised in creating the invention while TK is as a result of collective ownership, is passed on from generation to generation and can therefore not be regarded as having been created by a particular person.

In view of the criticisms levelled against the IP regime, there is a general consensus on the international front that the TK can only be adequately achieved through a *sui generes* approach, which is 'tailored' to cater for the complex nature of TK. Many countries have enacted, or are in the process of enacting, legislation for the protection of TK either through the conventional method or through adopting a *sui generes* approach.

Like so many other developing countries, Namibia lacks a legal IP framework for the adequate protection of TK. As revealed in Chapter 3, Namibia does not have comprehensive and appropriate mechanisms for the protection of TK. The Namibian

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<sup>319</sup>Tonina *Indigenous Traditional Knowledge* 4-5 available at <http://www.parl.gc.ca/content/lop/researchpublications/prb0338-e.htm> last accessed 20 August 2014.

IP system protects IPR's through the conventional system of patents, trademarks, and copyright and geographical indication amongst others. This system has proved to be inadequate for the protection of TK for a number of reasons. For instance, TK cannot be protected under Patents as TK is regarded as forming part of the prior art and will therefore not qualify to be registered. Although TK is not excluded from registration as is the case with patents, due to its complex nature, it would be difficult to meet the requirements and the protection will be limited. Be this as it may, Namibia has shown that it is committed to protecting TK. This commitment is evidenced by the fact that Namibia is in the process of developing a Draft Policy on Access to Genetic Resources and the Protection of TK. Although very little has been revealed about the provisions contained in it, the Draft Policy has unequivocally acknowledged that the current forms of IP laws do not adequately protect TK either due to certain technicalities or because they go against the beliefs of certain traditional and local communities. In view of this, the Draft Policy has adopted the *sui generes* approach. This is commendable as this approach is in line with the international trend in the protection of TK. Apart from this; Namibia has signed the Swakopmund Protocol which also adopted the *sui generes* approach to the protection of TK. The provisions of the Swakopmund Protocol can be complemented by the enactment of the Draft Policy. Namibia is also a party to various other international instruments dealing with the protection of TK. This shows that at an international level, Namibia has shown commitment to protecting TK, but at a national level Namibia still has to implement National legislation. It is therefore recommended that Namibia speed up the finalising of the Draft Policy, which will give adequate protection to TK in Namibia.

As revealed in the comparative study with South Africa, who adopted a conventional approach by amending the existing IP laws to cater for TK, trying to fit TK into the existing IP laws is cumbersome. Many critics, such as Dean, are against the IPLAA stating that TK simply does not comply with the requirements for IP protection under the conventional system. The study also looked at the PTK Bill, which was tabled in Parliament by Wilmot James as an alternative to the IPAA. The PTK Bill takes a *sui generes* approach and treats TK as a different form of IPR. After looking at the IPLAA and the PTK Bill, the study concludes that IPLAA is indeed cumbersome as TK holders are expected to understand the technical provision

contained in the conventional acts. In addition to this, one of the major criticisms is that forcing TK within the conventional IP system may end up changing the general principles of IP in South Africa. On the other hand, the PTK Bill is quite clear and does not contain technical provisions.

Furthermore, WIPO has published templates for custom *sui generes* legislation. This legislation treats IK as a distinct form of IP. This is also the approach that Namibia has elected to follow, in light of the above. Namibia's plans of enacting the Draft Policy are welcomed as it will not only give TK holders the right to prevent third parties from using the TK without the necessary prior informed consent, but it will also go a long way in making sure that TK holders reap benefits from the use of their TK. Adopting a *sui generes* approach will also make sure that Namibia stays in line with international trends.

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