Acknowledgement

To my parents, thank you for your patience and support during this journey and to my friends, the check-ins, pep talks and support kept me going, thank you.

To Blane, you got me to my final page. Thank you for the endless support, the hours of proof reading and all the advice that you have given me while writing this paper.

And lastly, to my supervisor, Marumo Nkomo, your guidance has been invaluable, thank you.

Abstract

For centuries, indigenous communities have survived the harshest of environments and conditions by living off the land and relying on valuable knowledge which has been passed down from generation to generation. This way of life and cultural practice has impacted, not only the lives and livelihoods of the communities from where the knowledge has originated, but it has also been instrumental and inspirational in the development of products and innovation in various economic sectors. This knowledge, which has been termed indigenous or traditional knowledge, has been used by developed and developing countries in a variety of ways and has been vital in bringing global awareness to issues such as the protection of biodiversity and sustainable use of natural resources.

Indigenous knowledge is more than a farming practice or a tribal design, it is knowledge which is intrinsically linked to the spirit and identity of its people. Unfortunately, just as biodiversity and the world's natural resources have come under threat, so to, has indigenous knowledge. Across the globe, indigenous knowledge is being harvested from communities and used in a manner where the indigenous communities themselves have received little or no benefit. In many instances the indigenous communities have not authorised the use of their knowledge or it is used in a manner which is culturally offensive and harms the belief systems of these communities.

This paper will focus on the importance of recognising and protecting the valuable resource which is indigenous knowledge. By examining the challenges faced at international and regional level with regard to the appropriate protection for indigenous knowledge and the instruments created by the South African government, this paper aims to address the debate on what an appropriate method of protection is, not only in the protection offered to indigenous knowledge, but by assessing which approach will be more compatible with certain regional instruments which have been proposed and implemented and further, which legislative framework will be more suitable once an international approach is adopted.

While the recognition and protection of indigenous knowledge is of paramount importance, the way in which it is recognised and protected plays a role in how effective the protection will be. Aligning the protection offered in South Africa to proposed regional and international approaches will ensure a broader and more effective method of recognition and protection and will ensure that the objectives of protecting this resource are met.

This paper will highlight the challenges and different approaches adopted in the South African legislation and offer an opinion on which approach will be more adaptable and aligned with future regional and international instruments created to recognise and protect indigenous knowledge.

LIST OF ACRONYMS

AEC	African Economic Community
AfCFTA	African Continental Free Trade Area Agreement
ARIPO	African Regional Intellectual Property Organization
AU	African Union
CBD	Convention on Biological Diversity
DST	Department of Science and Technology
DTIC	Department of Trade and Industry and Competition
GI	Geographical Indications
IGC	Intergovernmental Committee of Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore
IK	Indigenous Knowledge
IKSA	Protection, Promotion, Development and Management of Indigenous Knowledge Systems Act
IKS	Indigenous Knowledge Systems
IP	Intellectual Property
IPLAA	Intellectual Property Laws Amendment Act
NEMBA	National Environmental Management: Biodiversity Act
OAPI	Organisation Africaine de la Propriété Intellectuelle
OAU	Organisation of African Unity
TCE	Traditional Cultural Expression

TK	Traditional Knowledge
TRIPs	Agreement on Trade-Related Aspects of Intellectual Property Rights
UNDRIP	The United Nations Declaration on the Rights of Indigenous Peoples
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

Table of Contents

I. INTRODUCTION

a. Introductory Remarks

The purpose of this research is to critically discuss the two very different legislative frameworks which have been created in South Africa with regard to the recognition and protection of traditional knowledge (TK), indigenous knowledge (IK) and traditional cultural expressions (TCEs). Both approaches differ greatly, and the aim of this research is to analyse and compare the approaches to ascertain which, if any, is better suited for the protection of this valuable resource. In assessing which legislative framework is more efficient and better suited, this paper will undertake a comparative investigation on the South African approaches and those which are being utilised by the international community as well as those currently being implemented in regional communities such as Namibia and Cameroon.

The importance of South Africa implementing an appropriate and effective legislative framework for the protection of TK is not only vital for the country and indigenous communities from whom the knowledge originates, it will allow us to be at the forefront of creating and implementing legal instruments which could at a later stage be adopted and utilised internationally as a standardised approach has not yet been agreed on nor created.

b. Background Information

In 2004 the Indigenous Knowledge Systems (IKS) Policy was adopted by the South African cabinet and has been an instrumental tool in the creation of our current legal protection of TK and IK.[1] The IKS Policy will be discussed in greater detail further on. It is however important to note that the IKS Policy led to the creation of two task teams, from different governmental departments with arguably very different views on how TK should be classified and protected.[2] These task teams were given the arduous task of creating a legislative framework capable of protecting TK and being progressive enough that it may in the future serve as a foundational instrument for international communities in the protection and regulation of TK.

[1] The Department of Trade and Industry 'The Protection of Indigenous Knowledge through the Intellectual Property System: A policy framework' available at *http://www.rci.uct.ac.za/usr/rcips/resources/policy.pdf* accessed on 02 February 2021.
[2] Ibid.

It is important to recognise that although South Africa has been innovative and often internationally praised for its efforts in legislating and regulating the exploitation of TK, there is still a great debate on whether the legal frameworks created are best suited for the protection of TK.

Since the adoption of the IKS Policy in 2004, two very different approaches and pieces of legislation have been created, those being the Intellectual Property Laws Amendment Act[3] (IPLAA) and the Protection, Promotion, Development and Management of Indigenous Knowledge Systems Act[4] (IKSA). As South Africa prepares to welcome the IKSA into operation it is important to critically look at the steps and processes which led to this point, and which also led to the creation of two very different legal approaches. Bearing in mind that there have also been several ancillary pieces of legislation which have been and will be further amended and affected.

This thesis will investigate the international recommendations and standards which have been created and applied in foreign territories for the protection of IK as a starting point to assess whether South Africa is following a similar approach or one which deviates greatly from what is being suggested internationally. After an overview of the international standards and recommendations, this paper will then critically analyse, discuss and compare the two competing legislative frameworks which are currently being considered in South Africa to deal with the protection and regulation of TK.

The purpose of this paper is to examine the regulations and recommendations made at an international level and to then assess if these recommendations have been considered and implemented in the South African legal frameworks which have been created. This paper will objectively compare the IPLAA and the IKSA and attempt to establish which, if any, of these pieces of legislation most fairly and effectively protects TK.

Intellectual property and the need to protect this type of resource is widely recognised across the world. This is not only because intellectual property is incredibly valuable, but more importantly, offering this resource protection ensures that we continue to incentivise creativity and growth. If products of the mind are not given an economic value, then there will be no

[3] The Intellectual Property Laws Amendment Act 28 of 2013 (Hereinafter referred to as the IPLAA).
[4] The Protection, Promotion, Development and Management of Indigenous Knowledge Systems Act 6 of 2019 (Hereinafter referred to as the IKSA).

motivation for the creators to continue creating. One could even state that the incentive to create is the fundamental principle on which intellectual property laws are created and the reason why they are enforced globally.[5]

TK and IK are notoriously difficult to define, with a variety of definitions provided both internationally and nationally. Dr John Mugabe in his work 'Intellectual Property and Traditional Knowledge: An Exploration in International Policy Discourse'[6] has drawn a distinction between indigenous and traditional peoples, thereby distinguishing the concepts of TK and IK.[7] It is offered that IK 'is that knowledge held and used by a people who identify themselves as indigenous of a place'[8], where TK is said to be 'that which is held by members of a distinct culture and/or sometimes acquired by means of inquiry peculiar to that culture, and concerning the culture itself or the local environment in which it exists'.[9] It is understood then that the concept of TK is one which acts as an umbrella under which IK will fall and while similar, TK and IK are not necessarily interchangeable.[10] Where appropriate, this paper will use the term traditional knowledge (TK) as an overall reference to both of these sources as it is a broader term for the resource.

TK is an invaluable resource in a cultural sense, but it is also a resource which is capable of holding an economic value.[11] The recognition of this resource as being worthy of legal protection against exploitation and biopiracy is a vital step in developing disadvantaged communities and creating a revenue stream which will be capable of uplifting such communities as well as being beneficial to the national economy.[12] While there is agreement amongst states that TK is a valuable resource and that there is a need for protection of TK, there is unfortunately no international framework to date which can be incorporated into national law to assist in the protection or regulation of TK.

---

[5] Owen Dean & Alison Dyer (eds) Tertia Beharie, Dina Biagio, Herman Blingnaut, Lodewyk Cilliers, David Cochrane, Mikhalien Du Bois, John Foster, Tyron Grant, Cobus Jooste, Sadulla Karjiker, Mohamed Khader, Megan Reimers, Tshepo Shabangu, Marco van der Merwe, Eben van Wyk 'Dean & Dyer Introduction to Intellectual Property Law' (2014) 3.
[6] Dr John Mugabe ' Intellectual Property Protection and Traditional Knowledge: An Exploration in International Policy Disclosure' available at *https://www.wipo.int/edocs/mdocs/tk/en/wipo_unhchr_ip_pnl_98/wipo_unhchr_ip_pnl_98_4.pdf* accessed on 28 October 2022.
[7] Ibid at 2.
[8] Ibid.
[9] Ibid at 3.
[10] Ibid.
[11] The Department of Trade and Industry op cit note 1.
[12] Ibid.

South Africa has been recognised as being one of the most biodiverse countries in the world.[13] With an abundance of natural resources and with global trends moving towards becoming more socially and environmentally responsible as well as an emphasis on promoting and uplifting indigenous communities globally, it is important that the systems being put in place protect not only the biological resources but the TK of how these resources can be utilised efficiently and maintained. At the same time, there is a responsibility on governments to ensure that the communities who hold this knowledge are not being exploited and are fairly compensated for the use of their knowledge.[14]

c. Justification and relevance of this research

To date, no unanimous agreement from the member states of the World Intellectual Property Organization (WIPO) has been reached on how to effectively structure a protective legal instrument for the protection of TK.[15] The member states of WIPO have been in negotiations on how to regulate the use of TK for over a decade without any regulations being agreed upon, however, the establishment of an Intergovernmental Committee (IGC) to specifically deal with this issue shows the importance and willingness to create a cohesive framework to protect TK in the future.[16]

Although recommendations have been made by WIPO on the introduction of a legal instrument, the organisation is still far from drafting guidelines. States have for the most part been left to devise their own regulations. South Africa is arguably one of the most progressive nations with regard to addressing the need for a legal framework to be implemented.[17] This has in essence placed the South African legal system in the spotlight, in that if an effective framework is created and implemented, South Africa will be a trailblazer in this field. However, should we implement regulations which do not adequately recognise or protect IK, TK and TCE then the legal framework may be used as an example in international communities on how

[13] Convention on Biological Diversity 'South Africa' available at *https://www.cbd.int/countries/profile/?country=za#:~:text=While%20it%20occupies%20only%202,up%20to%2070%25%20for%20invertebrates* accessed on 30 January 2021.
[14] Ibid.
[15] Wend Wendland 'Protecting Indigenous Knowledge: A Personal Perspective on International Negotiations at WIPO' available at *https://www.wipo.int/wipo_magazine/en/2019/06/article_0004.html* accessed on 928 January 2021.
[16] Ibid.
[17] Ibid.

not to regulate this resource.[18] Further to this, the implementation of an inadequate form of protection for TK would inevitably lead to a costly overhaul of the legal system and would be detrimental to the communities it seeks to protect.

The greatest point of difference, internationally and nationally (as will be seen by South Africa's two very different approaches) is the manner in which one approaches the protection of TK. There are arguments for the inclusion of TK into existing intellectual property laws. Others are of the opinion that a *sui generis* form of protection is better suited to this resource. Although there are aspects of certain TK 'works' which can be protected under intellectual property laws, there are arguably flaws in this approach. The concept that intellectual property should be protected so as to encourage creativity is one which does not encompass the nature of TK. TK is knowledge which is effective and valuable because of its history and culture. It is a resource that is essentially only valuable because it has not been recently created and is instead a tried and tested method which has proven itself over time with very little interference from the modern world.

Again, there are arguments against creating a new legislative framework to protect TK which may lead to 'locking up' the resource for perpetuity which would undoubtedly have a crippling effect on how our society goes about creating new forms of intellectual property and innovations. As is the case in Cameroon, precautions in South Africa need to be taken in order to ensure that we do not make TK completely inaccessible and defeat the purpose of stimulating economic growth from this resource and more importantly, for the benefit of the communities who are the guardians of this valuable knowledge.[19]

d. Research Question

The purpose of this thesis is to examine the two pieces of proposed legislation in South Africa which have been created for the purpose of recognising, regulating, and protecting IK, TK and TCEs.

---

[18] Sadulla Karjiker 'A Better Second Attempt – Protection Of Indigenous Knowledge' The Anton Mostert Chair of Intellectual Property available at *https://blogs.sun.ac.za/iplaw/2015/04/08/a-better-second-attempt-protection-of-indigenous-knowledge/* accessed on 19 April 2021.

[19] Stephen Collins 'Ghana's Copyright Law For Folklore Hampers Economic Growth' available at *https://theconversation.com/ghanas-copyright-law-for-folklore-hampers-cultural-growth-123550* accessed on 23 March 2021.

One legislative instrument has adopted the approach that this type of knowledge should be seen as an additional *genus* of intellectual property and have reworked existing legislation in order to 'fit' this resource into the legislative framework of existing intellectual property laws and the other follows an approach which recognises that TK is a unique resource and in order to protect this resource and encourage the sharing of this resource, a new form of protection needs to be created and implemented to regulate and it.

This thesis will examine the proposed IPLAA and the IKSA and will offer a critical analysis of both legislative frameworks as well as a discussion on which of the two would be better suited to protect and regulate TK.

There are crucial sub-questions which will be addressed in order to fully understand the research topic and to effectively answer the question of whether South Africa has created a legislative framework which can be implemented to fully protect TK and how that protection compares to international and regional instruments. These are as follows:

1. How are TK, IK and TCEs defined and why is protection of this knowledge needed?
2. What are the international and regional approaches on the recognition and protection of TK?
3. Are the international and regional approaches applicable and relevant in South Africa and have they been considered in the drafting of the South African legislative instruments for the protection of TK?
4. What are the two approaches proposed in South Africa and how do they affect the current protection of intellectual property?
5. Is there a possibility of combining the approaches or is only one approach viable?
6. Which piece of South African legislation allows for better integration into the regional and international landscape?

e. Methodology

Due to the nature of this research the methodology used in researching this paper will be that of desktop research. The main sources used in this paper will be national and international instruments such as legislation and treaties while the secondary sources relied on will be academic articles, scholarly reviews and policy documents discussing the various viewpoints and arguments on the protection of TK.

There are numerous academic pieces which highlight and analyse a variety of discussions and arguments on the recognition of this resource. These sources will be used in substantiating the research for this paper and are readily available on various online sources. The same can be said for all the National and International instruments which will be relied on to carry out the research needed to answer the question of which legislative framework, created in South African will be the most efficient and effective in protecting TK, IK and TCEs.

f. Presentation of this Thesis

This paper is divided into five chapters. This first chapter sets out the background and reason for the research as well as the methodology which will be used in completing this research.

The second chapter will address the development of the recognition of TK at an international level and the international approach which is currently being considered with regard to the recognition of TK and the form that appropriate protection will take, as well as the proposed legal instruments which may be implemented to protect this resource.

The third chapter will discuss the development of the recognition of TK in the African Region and the existing legal approaches and instruments which have been created and implemented in Africa. This chapter will analysis the two different approaches adopted by ARIPO and OAPI and provide examples of how those instruments have been implemented in member states, namely, Namibia (as a member state to ARIPO) and Cameroon (as a member state to OAPI). The chapter will also discuss the implications of the AfCFTA Agreement on the recognition and protection of TK. The objective of the third chapter is to provide an overview of the existing instruments to ascertain whether the legislative instruments drafted in South Africa and discussed in chapter four align with the regional approach.

The fourth chapter will focus on the approach adopted in South Africa with regard to how TK should be identified protected and regulated. A brief synopsis will be provided on the history of how it came to be that two very different pieces of legislation were drafted as well as provide an in-depth discussion on how each legislative instrument will affect the current legal landscape. This chapter will also provide a comparison of the two legal frameworks and offer an opinion on which may be more suitable and beneficial to the

indigenous communities and for the protection of TK in South Africa. An attempt will be made to investigate whether both pieces of legislation can be utilised effectively together or if only one is necessary.

The fifth and final chapter will conclude this research paper by providing a summary of the findings and offering an opinion on which if any of the two pieces of legislation successfully recognises and protects TK and whether the form of protection introduced to protect TK will align with the regional and international approaches.

II. THE INTERNATIONAL PROTECTION OF TRADITIONAL KNOWLEDGE

a. A call for international recognition of traditional knowledge

With over more than five per cent of the world's population falling into the category of indigenous peoples, comprising 370 million individuals,[20] it is not surprising that there has been movement by these communities and the nations from where they originate to create a legal framework which will recognise and protect the valuable knowledge they hold. The indigenous and traditional knowledge held by these communities is a valuable resource which can be used for global innovation and is a means for the upliftment of indigenous communities. This knowledge has over the years fallen prey to biopiracy and needs to be protected from misuse, misappropriation and at times offensive usage. In order for this knowledge to be utilised in a manner that will encourage economic growth among the indigenous communities and further innovation, a protective instrument and minimum standards created at an international level are required.

While IK and TK are yet to be given an internationally recognised definition,[21] it is however, currently accepted and understood to be knowledge which is created and sustained by a community which has developed the knowledge and passed it on from generation to generation, much like living customary law.[22] The knowledge itself is more than a way or method of innovating but instead, has an element of cultural and spiritual identity which is unique to the indigenous community to which it belongs.[23] It is widely recognised that indigenous communities have for centuries relied on and developed this knowledge for their survival and to preserve the biodiversity and natural resources which sustain them.[24] As the world's industries continue to develop and move towards a more holistic, sustainable and environmentally conscious product based industry, it has become increasingly relevant and important to ensure that these resources are internationally recognised and protected as the use of this knowledge in major economic sectors increases.

---

[20] Amnesty International 'Indigenous Peoples' available at *https://www.amnesty.org/en/what-we-do/indigenous-peoples/* accessed on 02 December 2021.
[21] Dean & Dyer op cit note 5 at 332.
[22] World Intellectual Property Organization 'Traditional Knowledge and Intellectual Property – Background Brief' available at *https://www.wipo.int/pressroom/en/briefs/tk_ip.html* accessed on 14 June 2021.
[23] Ibid.
[24] Fulvio Mazzocchi 'Western Science and Traditional Knowledge – Despite Their Variations, Different Forms of Knowledge Can Learn From Each Other' available at *https://www.embopress.org/doi/full/10.1038/sj.embor.7400693* accessed on 14 June 2021.

Conventional intellectual property law was created and implemented with the sole purpose of protecting creations of the human mind and with the goal being to further encourage creativity and innovation on a global scale while allowing for the maximum benefit of this product to be derived by producers in developed countries. While the instruments used to protect works such as patents and copyright are effective for those forms of creations, it has been argued that the traditional approach falls short when used to protect the various forms of TK.[25] From the outset, TK, and intellectual property such as patents, trade marks and copyright protected are easily distinguishable. Where the latter is the creation of a human mind requiring creativity, originality and in some cases, novelty, the former is a construct developed over centuries by a collective of human minds or a community and forms part of the 'common or general knowledge' of that indigenous community.

With regard to the concepts of geographical indications, certification marks and collective marks, the differences between this form of intellectual property and TK are less distinguishable. Under intellectual property law, a certificate trade mark and collective trade mark are not owned by an individual, but it is instead a mark which is attributed to an identifying feature of particular goods or services or which identifies a product as belonging to an association.[26] This form of intellectual property protection may only be registered by a certifying body or association which illustrates that there are certain forms of intellectual property which recognise and allow collective rights as opposed to individual rights holders exclusively.[27] It is possible that an indigenous community may in regard to a goods or service, register and apply certificate and collective marks to forms of TK. A geographical indicator (GI) is a 'sign used on products that have a specific geographical origin and possesses qualities or a reputation that are attributed to that origin'.[28] The use of GIs as a form of protection for TK appears to be the most suitable form of intellectual property rights protection for TK. The protection itself has been created to protect products which originate from a particular region of origin and allow for collective ownership.[29]

---

[25] Dean & Dyer op cit note 5 at 3.
[26] Dean & Dyer op cit note 5 at 99.
[27] Ibid at 3.
[28] World Intellectual Property Organization 'Geographical Indication' available at *https://www.wipo.int/geo_indications/en/#:~:text=What%20is%20a%20geographical%20indication,originating%20in%20a%20given%20place* accessed on 04 November 2022.
[29] Rajesh B.L, Anagha S. Beedu, Varsha S. 'Geographical Indication As a Tool For Protecting Traditional Knowledge' (2018) (Volume 3) ISSN 2581-5504 available at *http://www.penacclaims.com/wp-content/uploads/2018/09/Rajesh-BL-new.pdf* accessed on 04 November 2022.

A stark difference however in the overall nature of intellectual property law and TK, is that in terms of IP law the owner or author of the product or work is granted exclusive rights in respect of their creation which they may then exercise for their own benefit for a limited amount of time before the work is made available in the public domain.[30] Traditionally, TK is passed on from generation to generation within an indigenous community and is collectively owned where the community members are free to make use of this knowledge as they see fit and appropriate protection for this knowledge is one which is not suitable for a fixed period of protection. Due to this knowledge being inherently linked to the spirit and identity of the community it should remain that of the community indefinitely.

Although different, the two concepts do however overlap. In certain circumstances products of intellectual property such as trade marks, designs and patents are constructed using TK as the foundation, and it is for this reason particularly that the two resources need to be managed in a way which will, firstly, protect the right holders of the TK and secondly, which will aid in the development of knowledge, products and technology in terms of the objectives of intellectual property.[31] This interplay between IP and TK has caused growing concern among international communities and has led to a call from many nations to properly recognise and protect TK.[32]

b. International recognition of traditional knowledge

The international community has long recognised that IP should be protected and while it can be said that developed countries benefit from more strenuous IP regimes it has also been acknowledged that in developing and least developed countries, a rigid IP regime may hinder innovation and development as opposed to stimulating it.[33] Regardless of the level of industrialisation of a nation though, it became apparent that as western countries developed and became more advanced, an international body was needed to regulate the protection of intellectual property.[34] WIPO as well as the World Trade Organization (WTO) became the overseers and watchdogs of IP, ensuring that international instruments and minimum standards

[30] Dean & Dyer op cit note 5 at 3.
[31] Ibid at 343.
[32] Ibid at 333.
[33] Dr Rob Davies 'Keynote Address: World Intellectual Property Organization, International Conference on Intellectual Property and Development' (2016) available at *https://www.wipo.int/edocs/mdocs/mdocs/en/wipo_ipda_ge_16/wipo_ipda_ge_16_t3.pdf* accessed on 02 November 2022.
[34] World Intellectual Property Organization op cit note 22.

were formulated to aid technologically advanced societies and ensure that they would benefit financially from IP.[35]

The question of whether IP regimes in fact strengthen and promote innovation and industrialisation is a contentious one, but relevant when considering if it is truly the best form of protection for TK. There are many examples where the non-implementation of IP instruments has in fact allowed and encouraged innovation as was the case in Switzerland, Germany, France, Japan, Singapore and India.[36]

Concerns have been raised that rigid IP regimes are beneficial to developed nations as a monopoly is created and in turn the revenue generated is returned to that particular country; where in developing and less-developed countries the application of strict IP protocols prevents industries from fully performing, developing and contributing to the economy.[37] A less stringent application of IP laws has been seen to allow developing countries to 'learn from, absorb and experiment with foreign technology at a low cost'.[38]

TK by its very nature is a resource predominantly borne from the cultural life and spirit of under-developed communities. Even in a developed country, the indigenous communities from where TK originates are communities which are not technologically advanced and even though these communities hold valuable traditional knowledge they have not until recently been recognised nor protected by IP regimes. Yet, their knowledge has been used in a number of lucrative patent applications without any acknowledgement of the indigenous communities involvement and without any benefits being derived by these communities.[39]

In 1995, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) came into force, establishing minimum standards which were to be implemented at a domestic level when protecting IP in states who are members of the WTO.[40] Interestingly, as has been the case with various other IP instruments, TK was not included or recognised under these minimum standards. Yet, developed nations continued to make use of TK in a variety of

[35] Dean & Dyer op cit note 5 at 332.
[36] Dr Rob Davies op cit note 33.
[37] Ibid.
[38] Ibid.
[39] Sue Farran 'Access to Knowledge and the Promotion of Innovation: Challenges for Pacific Island States' in Elmien du Plessis & Caroline B Ncube (eds) *Indigenous Knowledge & Intellectual Property: Contemporary Legal and Applied Research Series* (2016) 8 – 9.
[40] Dean & Dyer op cit note 5 at 332.

products, technologies, and innovations. This practice has led to many indigenous communities being sceptical of the protection that may be offered to them under existing IP laws as the opinion of some of these communities, which will be discussed in chapter four, is that the very laws being suggested to protect their knowledge are the laws protecting those who have misappropriated their TK in the past.[41]

It was only in 2000 that WIPO, after pressure from developing member states, began canvassing the need to recognise and protect TK through an international instrument.[42] It is apparent from the concerns raised by developing and least developed member states that this resource needs to be protected as well as the need to educate role-players on the importance of understanding its value, not only economically but culturally too. The issue however lies with how the resource should be recognised and protected.[43]

To date, WIPO is yet to solidify guidelines or recommendations on what approach should be followed.[44] In 2000 the Intergovernmental Committee of Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) was established and tasked with creating guidelines on how TK should be classified and eventually protected.[45] In 2009, the IGC agreed that an international legal instrument such as recommendations or a treaty should be drafted and implemented in countries which choose to ratify it,[46] such an instrument is again, yet to be created. The obstacle that WIPO faces is whether to recognise TK as its own unique form of knowledge and or 'know-how' or to recognise it under existing intellectual property laws.[47] Another point of contention is the differing views of least developed, developing and developed countries, as developing countries with a stronger indigenous influence are more concerned about the protection of TK than the developed countries.[48]

WIPO will need to decide on how TK is to be classified and which types of protection should be afforded to the resource. Most agree that two forms of protection should be created,

---

[41] Pamela Andanda and Hojjat Khademi 'Protecting Traditional Medical Knowledge Through the Intellectual Property Regime Based on the Experiences of Iran and South Africa' in Elmien du Plessis & Caroline B Ncube (eds) *Indigenous Knowledge & Intellectual Property* (2016) 59.
[42] World Intellectual Property Organization op cit note 22.
[43] Dean & Dyer op cit note 5 at 332.
[44] Ibid.
[45] World Intellectual Property Organization op cit note 22.
[46] Ibid.
[47] Dean & Dyer op cit note 5 at 343.
[48] World Intellectual Property Organization op cit note 22.

that which offers defensive protection and that which offers positive protection.[49] While defensive protection will prevent people outside of the indigenous community from acquiring intellectual property rights over traditional knowledge by misappropriation or biopiracy, positive protection seeks to grant actual rights in respect of the resource to indigenous communities so that they may benefit from the commercialisation of their TK.[50] There are arguably a few forms of TK which can be recognised and protected under existing intellectual property laws such as traditional designs and folklore, however the nature of TK does not often satisfy the requirements of conventional intellectual property with respect to copyright and patents.[51] Due to its unique nature, the growing opinion is that TK should be protected under a *sui generis* instrument which is an amalgamation of customary laws and the human rights associated with indigenous peoples. At the 'sixty-third series of Meetings of the Assemblies' held in July 2022, WIPO reached consensus to convene a Diplomatic Conference on Genetic Resources, Traditional Knowledge and Folklore. This Diplomatic Conference will be convened in 2023.

While individual nations are free to legislate and regulate how TK should be recognised and protected in their own states as there are currently no binding agreements or minimum standard requirements because of the value the resource holds, it would be more practical to have an international instrument which could be applied by all concerned states. The developing countries which arguably have a richer collection of TK require the assistance of developed countries and international bodies when it comes to the drafting of said instruments and the enforcement of such. Not only will this approach assist in uniform protection, but it will also assist developing countries on which approach should be followed and the enactment of suitable standards for the protection of TK so that it is a marketable commodity as opposed to one which becomes locked up due to heavily regulated national law. In turn, the creation of an international instrument will ensure that conflicts with other legal frameworks which are independently created are minimised.[52]

The reality and importance of globalisation must also be taken into account when deciding on how TK should be recognised and regulated; the more countries develop and rely

[49] Ibid.
[50] Ibid.
[51] Ibid.
[52] Ibid.

on TK for advancements and innovation, the more vital it will become to have an international standard which can be applied, as was the case with IP.[53]

To date, WIPO has been able to identify three categories of TK. The first being traditional knowledge which encompasses technical know-how, specialised practices, skills developed by the people of the indigenous community and innovations developed by these communities with regard to biodiversity, agriculture or health.[54] The second category recognised is the concept of traditional cultural expressions and expressions of folklore which may consist of music, art, designs, symbols and performances unique to a specific indigenous community.[55] The last category is that of genetic resources which involves the knowledge a particular community may hold with respect to genetic material, and the potential or actual value which can found in plants and the surrounding environment.[56] The reason for WIPO categorising TK into these three categories is that although similar and related, each category poses its own unique problems which require an individualistic approach when designing effective protection for the content.[57]

Although as stated above, nations are free to recognise and regulate the protection of TK as they see fit, there are obvious advantages of having a uniformed approach created. Several countries such a Peru, Namibia, Cameroon, South Africa and Kenya have taken the initiative to create their own legislative framework under which TK is protected, but as will be discussed in chapters three and four, the approaches adopted often lack conformity with one another.[58] One of the disadvantages of not having an international instrument such as a treaty or at the very least minimum international standards is very simply that the principle of national treatment cannot be compelled and this may lead to one state offering a degree of protection for TK depending on the nationality of the community claiming the protection.[59] Article 3(1) of the TRIPs Agreement states that:

> Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property, subject

[53] Dr Marisella Ouma 'Traditional Knowledge: The Challenges Facing International Lawmakers' available at *https://www.wipo.int/wipo_magazine/en/2017/01/article_0003.html* accessed on 3 September 2021.
[54] World Intellectual Property Organization op cit note 22.
[55] Ibid.
[56] Ibid.
[57] Ibid.
[58] Dr Marisella Ouma 'Why and How to Protect Traditional Knowledge at the International Level – Keynote Address' available at *https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=359156* accessed on 3 September 2021.
[59] Ibid.

> to the exceptions already provided in, respectively, the Paris Convention (1967), the Berne Convention (1971), the Rome Convention or the Treaty on Intellectual Property in Respect of Integrated Circuits. In respect of performers, producers of phonograms and broadcasting organizations, this obligation only applies in respect of the rights provided under this Agreement. Any Member availing itself of the possibilities provided in Article 6 of the Berne Convention (1971) or paragraph 1(b) of Article 16 of the Rome Convention shall make a notification as foreseen in those provisions to the Council for TRIPs.

Should an international instrument for the protection of TK be created and incorporated into existing instruments, national treatment would be applicable in states who were signatories to the TRIPs Agreement or where a similar provision such as article 3(1) of the TRIPs Agreement is incorporated into *sui generis* protection for TK. States which provide protection for TK would then be bound by the notion of national treatment. The concept of national treatment would therefore allow for transboundary protection of TK in jurisdictions that provide for the protection of TK and would ensure that indigenous communities who do not necessarily identify themselves according to official borders, would be afforded protection of their TK in states which offer protection of TK.[60]

As will be discussed further on, the nature of TK allows for the knowledge to be held by several people or communities, some who have moved from one state to another or those who have been displaced. The holders of the knowledge may also be spread in multiple states. National treatment will allow for some form of protection for TK across borders in states which recognise and protect TK.[61] An international instrument will also allow for the setting of minimum standards in the protection afforded to TK.[62]

The creation of various legal frameworks for the protection of TK could arguably take away from the very important legal principle of uniformity and certainty as well. While some nations may recognise that the indigenous communities rightfully own TK, others may feel that the state itself is entitled to decide on how that information is used, distributed and most importantly, that the state is entitled to the profits of the TK as opposed to the communities in which it originated as is the case in some African states already and which will be highlighted in the discussion on how TK is protected in Cameroon.

One of the greatest examples of how effective international standards can be is the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind,

[60] Ibid.
[61] Ibid.
[62] Ibid.

Visually Impaired or Otherwise Print Disabled (Marrakesh Treaty). This treaty was created in order to facilitate how such persons may access material and the importance of creating an international framework was recognised due to the shortcomings of national and regional efforts.[63] It is exactly this type of intervention which is needed when protecting TK.

c. International approach on the protection of traditional knowledge

Although an international instrument for the protection of TK has not yet been created, the mere fact that the IGC was formed and that there are currently discussions being held on how to adequately protect TK can be seen as a step forward. Further to this, the creation of the Convention on Biological Diversity (CBD) in 1992 has been instrumental in the recognition of how important it is to protect resources which come from or are developed by indigenous communities.[64]

The CBD aims to create equitable relationships between parties seeking to make use of genetic resources or TK by setting minimum international standards which are then implemented in signatory states.[65] In terms of the CBD, parties must ensure that they not only comply with the regulations set out by the CBD but that they adhere to the national laws of a particular state when it comes to the use of these resources, most importantly the aim of the convention is to ensure that no community is misled and that all interactions with that particular community are driven by the common goal of preservation and respect for the practices and innovations of that community.[66] Under the CBD, parties must 'protect and encourage customary use of biological resource and in accordance with traditional practices'.[67] The CBD further goes on to extend recognition to indigenous communities and their knowledge.[68] The overarching idea behind the CBD was to ensure that when stakeholders are engaging with indigenous communities that there is an understanding of the importance of preserving the knowledge of that particular community and that where information from said community is utilised that there is a benefit-sharing agreement entered into by all parties concerned which

[63] Ibid.
[64] Michael Heinrich, Francesca Scotti, Adolfo Andrade-Cetto, Monica Berger-Gonzalez, Javier Echeverría, Fabio Friso, Felipe Garcia-Cardona, Alan Hesketh, Martin Hitziger, Caroline Maake, Matteo Politi, Carmenza Spadafora & Rita Spadafora 'Access and Benefit Sharing Under the Nagoya Protocol-*Quo Vadis*? Six Latin American Case Studies Assessing Opportunities and Risk' available at *https://www.frontiersin.org/articles/10.3389/fphar.2020.00765/full* accessed on 22 June 2021.
[65] Dr Marisella Ouma op cit note 58.
[66] Ibid.
[67] The Convention on Biological Diversity of 5 June 1992, Article 10 (Hereinafter referred to as the CBD).
[68] Dr Marisella Ouma op cit note 58.

acknowledges the economic value of the information and renumerates the community fairly for their involvement in the process and the role which they have played.[69]

In 2010, the Nagoya Protocol, a supplementary agreement to the CBD was introduced which created the necessary framework which member states could incorporate and implement into their national legislation for the further protection of genetic resources. Effective from 2014, the Nagoya Protocol has become instrumental in achieving a form of protection for resources which are protected under the CBD,[70] and has been even more vital for the protection of genetic resources and TK.[71] While TK in its various forms is not protected under the CBD or Nagoya Protocol, what these international agreements have managed to create is the awareness that resources which stem from indigenous and traditional communities cannot simply be used or misappropriated. These instruments have set out guidelines for the use of TK and genetic resource which belong to indigenous communities. The guidelines call for proper, fair, and equitable discussions to be had with the community members from where the resource originates and to fully engage with these members. Where TK and genetic resources are used, even if solely for the purpose of research, these communities should be viewed as collaborators and should be compensated for the use of their genetic resources and knowledge.[72]

The Nagoya Protocol builds on from the progressive steps taken by the CBD and further regulates the use and protection of genetic resources and TK.[73] The Nagoya Protocol aims to provide all nations who have ratified the agreement with a framework to assist with the implementation of benefit-sharing agreements and clear guidelines on how these resources are to be handled.[74] The creation of this framework once again illustrates the importance of having an international instrument which may be implemented by member states for transactions involving biological and traditional resources. The Protocol itself is successful in creating certainty and transparency when parties engage with traditional communities and more importantly, it is not just a framework which is created, but has introduced various measures to fairly deal with disputes and alleged misappropriations of resources.[75] The spirit of the CBD and Nagoya Protocol are at all times to promote engagement with indigenous communities and

[69] Ibid.
[70] Michael Heinrich et *al* op cit note 64.
[71] Dr Marisella Ouma op cit note 58.
[72] Michael Heinrich *et al* op cit note 64.
[73] Dr Marisella Ouma op cit note 58.
[74] Convention on Biological Diversity 'About the Nagoya Protocol' available at *https://www.cbd.int/abs/about/default.shtml/* accessed on 3 September 2021.
[75] Ibid.

to encourage the use of materials from these communities all the while ensuring that the relationship created between the parties is fair, respectful and profitable.[76]

d. The Universal Declaration of Human Rights and The United Nations Declaration on the Rights of Indigenous Peoples – Appropriate Protection of Traditional Knowledge

A recent criticism made towards the intellectual property laws approach for the protection of TK has been the disconnect between conventional intellectual property laws and a balancing of the human rights of indigenous peoples. While intellectual property laws seek to balance rights and obligations as stated in Part I of the TRIPs Agreement:[77]

> The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to balance rights and obligations.

This approach is not one which is entirely applicable to indigenous communities or one that is favoured by the holders of TK. The IGC, in their efforts to develop an appropriate instrument for the protection of TK, IK and TCEs requested that in light of the humans rights issues which have been raised as a concern, that an indigenous expert undertake and submit a technical review on how intellectual property rights protection for TK may or may not undermine the human rights of indigenous people.[78] The interplay of the human rights associated with indigenous people and the creation of a legal international instrument for the protection of TK was initially investigated in 2014 by Professor James Anaya and an updated review on his findings was presented at the forty-fourth session of the IGC held in September 2022.[79] The review highlights the concerns which have been raised by indigenous people regarding conventional intellectual property rights and its appropriateness as a protective tool for TK.

---

[76] Ibid.
[77] Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) available at *https://www.wto.org/english/docs_e/legal_e/trips_e.htm#part1* accessed on 01 November 2022 (Hereinafter referred to as the TRIPs Agreement).
[78] World Intellectual Property Organization 'Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore' Forty-Fourth Session September 2022 (WIPO/GRTKF/IC/44/INF/8) available at *https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_44/wipo_grtkf_ic_44_inf_8.pdf* accessed on 26 October 2022.
[79] Ibid.

In terms of the opinions offered in the review, it is obvious that while intellectual property rights are incredibly beneficial to individual right holders, they are often unsuitable as a form of protection for TK.[80]

When viewing TK holistically, it is evident that not only is this resource one which involves knowledge and skill but it is also knowledge which at its core encompasses the spirit and identity of each community who collectively holds and protects this knowledge.[81] While there are many benefits to the commercialisation of TK, there are parts of this resource such as ceremonies, protocols and ways of life which were never intended to be commercialised and if so, would be offensive to the indigenous communities.

A further argument put forward is that each indigenous community has the inherent right to self-determination which is protected at an international level in terms of the United Nations Declaration on the Rights of Indigenous People[82] (UNDRIP) and that this right allows for indigenous people to choose how they are regulated in terms of their language, culture, and knowledge.[83]

While the existing intellectual property law regimes have the capability of introducing new instruments such as the Nagoya Protocol and CBD to cater for the aspects of access and benefit sharing agreements as well as prior informed consent, the nature of intellectual property law is that is it economically driven which is at times in conflict with the nature of TK. Although many forms of TK are a resource which is capable of holding economic value, it is intrinsically linked to customary law and the human rights of the indigenous people and to their spirituality.[84] Proffered in the review was the opinion that based on the inherent right of indigenous people to self-determination and the right to in essence regulate themselves in terms of their culture and customary laws, the approach that is most appropriate for the protection of TK is one which is *sui generis* with a human rights and customary law foundation.[85]

---

[80] Ibid at 2.
[81] Ibid.
[82] United Nations General Assembly 'United Nations Declaration on the Rights of Indigenous Peoples', 2007 (A/RES/61/295) available at *https://documents-dds-ny.un.org/doc/UNDOC/GEN/N06/512/07/PDF/N0651207.pdf?OpenElement* accessed on 26 October 2022.
[83] World Intellectual Property Organization op cit note 78 at 2.
[84] Ibid.
[85] Ibid at 3.

Article 31(1) and (2) of the UNDRIP elaborates on the principle that indigenous people have the right to manage how their TK is regulated and used and states the following:

> 1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge, and traditional cultural expressions, as well as the manifestations of their sciences, technologies, and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports, and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.
>
> 2. In conjunction with indigenous peoples, States shall take effective measures to recognise and protect the exercise of these rights.

It is evident that based on the UNDRIP and the technical reviewed presented to the IGC that many feel that a move in the direction of a *sui generis* approach for the protection of TK will be more pragmatic than a reworking of the current IP law framework. While including TK as a form of IP may have its benefits, changes made at an international and a national level to accommodate TK as a form of IP will have financial implications which many developing and least developed countries may not be able to afford. Overhauling the existing legal infrastructures may not be viable, which would in turn render the inclusion of TK into existing IP laws a futile exercise causing unnecessary burdens on developing and least developed countries as well as altering the nature of IP rights.

III. THE REGIONAL PROTECTION OF TRADITIONAL KNOWLEDGE IN AFRICA

a. The African Legal Framework and Instruments used for the Protection of Traditional Knowledge

With some of the most socio-economically disadvantaged indigenous communities in the world, the African region has recognised not only the cultural importance of TK, but the economic benefit that regulating TK could bring to the improvised communities who are knowledge holders. While WIPO and the IGC are yet to conclude their recommendations on how TK should be protected, the African Region must be commended for its proactive approach in recognising TK by the introduction of regional instruments aimed at unifying the protection of TK on the continent.

This chapter will discuss the current and developing approaches which have been formulated across the African continent by looking at the formation of the African Regional Intellectual Property Organisation (ARIPO) and the regional instrument created by it to protect TK, as well as the approach followed by the Organisation Africaine de la Propriété Intellectuelle (OAPI) and their formulation of a regional instrument which aims to regulate the use of TK. This chapter will also provide a brief explanation on how the two, vastly different, regional instruments have affected the protection of TK by giving an account on how they are applied in a member state of each organisation, namely Namibia and Cameroon. This chapter will also discuss the formation and objectives of the newly implemented African Continental Free Trade Area Agreement (AfCFTA) and will assess the proposed regulations aimed at achieving a unified approach to the protection of intellectual property and TK on the continent.

The purpose of this chapter is to examine whether an effective tool exists on the continent for the protection of TK which could be used as the foundation to assist WIPO and the IGC in its attempts to find an effective way of protecting TK and one that could be mirrored in South Africa.

b. The African Regional Intellectual Property Organization

The African Regional Intellectual Property Organization (ARIPO) was founded in 1976,[86] at a seminar held in Nairobi. The organisation, made up of 18 member states, sought to create a regional intellectual property organisation for all member states of the African Union. Coincidentally though, only English-speaking African states joined the organisation.[87]

The objective of ARIPO was to unify intellectual property laws in the region while bearing in mind that most African states were already party to WIPO and WTO and in turn parties to various international agreements. The concerns of ARIPO were that many of the signatory countries did not have the resources or infrastructure to incorporate the international instruments into their national legislation. ARIPO proposed that a regional legal instrument which would aid in providing a unified approach on the African continent would therefore be far more beneficial for the developing and least developed member states as opposed to a fragmented approach. South Africa is not a member state of ARIPO. It has been suggested that this is due to South Africa being classified as a developed country by the WTO.[88] In terms of the TRIPs Agreement, deferments regarding a country's obligations under the Agreement, are granted to countries which are classified as developing or least developed countries. These deferments allow a state to deviate slightly from the obligations created under the TRIPs Agreement.[89] The Harare Protocol on Patents and Industrial Designs[90] which is discussed below is an example of an ARIPO instrument which does not satisfy certain obligations set out by the TRIPs Agreement.[91] As a developed country, South Africa is not afforded the same leniency as developing and least developed countries and therefore, may not adopt systems which are not in line with the obligations created by the TRIPs Agreement.[92]

---

[86] African Regional Intellectual Property Organization 'Explanatory Guide to the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore' available at *https://www.aripo.org/wp-content/uploads/2020/04/Explanatory-Guide-to-the-Swakopmund-Protocol.pdf* accessed on 3 December 2021.
[87] Marumo Nkomo ' Regional Integration In The Area Of Intellectual Property: The Case For Southern African Development Community Involvement' available at *http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S2077-49072014000100016* accessed on 17 December 2021.
[88] Owen Dean ' The future of South African trade marks' available at *https://blogs.sun.ac.za/iplaw/files/2012/08/The-future-of-South-African-trade-marks.pdf* accessed on 19 May 2023.
[89] Ibid.
[90] The Harare Protocol on Patents and Industrial Designs within the Framework of the African Regional Industrial Property of 1982 (Hereinafter the Harare Protocol).
[91] Owen Dean 'The Future of South African trade marks' op cit note 88.
[92] Ibid.

During its existence, ARIPO, has authored a number of regional instruments such as: the Harare Protocol, the Banjul Protocol[93] and most importantly for this paper, the Swakopmund Protocol.[94] Member states of ARIPO have the same flexibility which is granted by WIPO in that although being member states, they do not need to implement each and every protocol created by the organisation, this is an important point to note when comparing the approaches of ARIPO and OAPI, which will be discussed later on.

The Harare Protocol sought to streamline the patent application process and in turn ease the process for inventors in signatory states. Of the eighteen member states to ARIPO, seventeen are signatories to the Harare Protocol.[95] In terms of the Harare Protocol, an applicant for a patent application may choose to file their application via the ARIPO head office and to designate all or a desired member state in their patent application.[96] Where the applicant has designated a member state in the patent application the patent examination will be conducted via the ARIPO head office. Should the applicant meet the necessary patent requirements, and subject to a successful examination, the application will be granted as successful. The member states designated on the patent application will be afforded a 6-month period in which they may declare the granting of the patent as invalid in terms of their domestic laws.[97] Where the patent application is undisputed by the designated member states, the patent will become enforceable in the filing and designated states.[98]

For developing and least developed countries, this process is a step forward in making the process of patent applications more accessible and feasible to inventors. The mechanism which has been put in place is one which if applied to the protection of TK, would benefit, and assist indigenous communities seeking protection for their knowledge. This approach is one which recognises that one of the greatest downfalls of intellectual property protection which requires registration, is the expense that the applicant needs to incur in order to receive such protection. The assistance of governments to indigenous communities for the protection of TK

[93] The Banjul Protocol on Marks of 1993 (Hereinafter the Banjul Protocol).
[94] The Swakopmund Protocol on the Protection of Traditional Knowledge, and Expressions of Folklore, ARIPO, 2010 (Hereinafter referred to as the Swakopmund Protocol).
[95] Marumo Nkomo op cit note 87 at 320.
[96] The Harare Protocol, s 1.
[97] The Harare Protocol, s 3.
[98] Marumo Nkomo op cit note 87 at 320.

is vital, not only for the upliftment and economic development of these communities, but for the developing and least developed countries economies as well.[99]

The Banjul Protocol, whose mandate it is to facilitate the registration of marks, follows the same process applied in the Harare Protocol. An application may be filed in a signatory state and with the ARIPO head office. An application filed with the ARIPO head office may designate other signatory states in the application.[100] Should the requirements under all applicable regional and national laws be met, the mark will be registered. Signatory states retain the right to exclude the application if their national laws are not complied with.[101] The approach of streamlining the application process achieves the aim of providing protection in multiple jurisdictions with a single application. This in turn allows applicants who were previously unable to seek such protection due to financial constraints to truly benefit from the protection offered.[102] Not as successful as the Harare Protocol, the Banjul Protocol has only nine signatory states.[103]

In 2000, ARIPO began its process of researching and formalising a uniformed approach for the protection of TK, two months before the IGC was formally created.[104] The consensus by the Council of Ministers for ARIPO was that proactive measures needed to be taken to begin the process of protecting TK and thereby benefitting from the resource. The Council ensured that all recommendations and findings could be linked back to the proposals of WIPO and the IGC in an effort to not only have a uniformed African approach to the protection of TK but one which would mirror any proposals and instruments created at an international level.[105]

In under two years, ARIPO managed to do what the IGC is still attempting to accomplish. After a comprehensive and in-depth investigation into the protection of TK, ARIPO gathered all necessary evidence and research and began drafting the first legal instrument which would be introduced to protect TK in its member states.[106] The progressive steps made by ARIPO were closely monitored by the international community, and while the

---

[99] Frieda Shifotoka 'An Analysis of the Applicable Laws on the Protection of Traditional Knowledge and Cultural Expressions in Namibia' *The Pretoria Student Law Review* (Volume 15) 2021 available at *https://upjournals.up.ac.za/index.php/pslr/article/view/3680* accessed on 7 January 2022 at 151.
[100] The Banjul Protocol, s 2.
[101] The Banjul Protocol, s 5.
[102] Marumo Nkomo op cit note 87 at 320.
[103] Ibid.
[104] African Regional Intellectual Property Organization op cit note 86 at 11.
[105] Ibid at 12.
[106] Ibid.

instrument was being drafted, various studies and papers were shared between ARIPO and WIPO with guidance given where possible.[107] The opinion of the Council of Ministers for ARIPO was that due to the unique nature of TK, an approach which attempts to embed TK into the existing legal framework of intellectual property would not be the best suited one and that instead, TK should be recognised as an entirely new *genus* with its own protection.[108] This was achieved by ARIPO in 2010, after many years of drafting and negotiating. The final instrument was adopted at the Diplomatic Conference held at Swakopmund in Namibia and was named after the city in which it was finalised,[109] the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore.[110]

i. Swakopmund Protocol

The Swakopmund Protocol recognises that although certain aspects of TK may satisfy the requirements of copyright, trade marks and in certain circumstances, patents, more often than not TK does not meet the threshold requirements for intellectual property rights protection. The requirements of novelty and originality, the fact that ownership is ultimately communal and joint as opposed to an individual right holder and the duration that protection is sought for, being perpetuity as opposed to a fixed period of time before the material moves into the public domain, are but a few of the glaring differences between the two.[111]

In terms of the Swakopmund Protocol, unique protection is given to all forms of TK to aid in the prevention of misappropriation and biopiracy. ARIPO adopted the approach of incorporating traditional customary laws with human rights law and existing intellectual property laws in order to create the tailored protection it offers to TK and thereby following the *sui generis* route of protection.[112] The main objectives of the Swakopmund Protocol are to ensure that the indigenous communities are recognised as the rights holders in terms of this resource and that they are effectively given a legal framework that can be used to enforce their rights as the recognised owners of the TK.[113]

[107] Ibid.
[108] Ibid at 13.
[109] Ibid.
[110] Ibid at 12.
[111] Ibid at 13.
[112] Ibid at 14.
[113] Ibid.

The Swakopmund Protocol creates statutory offences for the unlawful use of TK and provides guidelines which will introduce bodies and organisations who will be tasked with assisting the indigenous communities. Part of the assistance offered is an undertaking to aid in educating the indigenous communities of their rights and to assist in the development of the knowledge held by the communities to uplift them economically. The Swakopmund Protocol seeks to create a database which is 'transboundary' and ensures that there is standardisation of benefit sharing agreements and that such agreements are equitable and in the best interest of the community and further aims to preserve the cultural heritage of the communities who are the holders of this knowledge.[114]

The Swakopmund Protocol further undertakes to empower the holders of TK, which are invariably indigenous communities and to give them the tools needed to defensively protect TK and to positively establish their rights.[115] While defensive protection as previously discussed is used to prevent unauthorised use, the positive protection which is created by the Swakopmund Protocol essentially creates the rights that are afforded to the communities and allows for them to enforce these rights.[116]

The Swakopmund Protocol goes further to establish a difference between TK and TCEs, recognising that they are not subjected to the same types of infringements and thereby offers a multifaceted form of protection which is precisely what is needed to effectively protect these resources.[117] The approach followed by ARIPO and its member states was to separate TK and TCEs under the definitions given in the Swakopmund Protocol. As such all member states of ARIPO follow the definition for TK and TCEs which is given below and the member states draw a distinction between TK and TCEs.[118] It is widely acknowledged that TCEs may fall under the wider umbrella of TK and that both are fundamentally important to the cultural identity of the indigenous communities from where they originate.[119] As will be discussed in the approach followed by OAPI, it is interesting to note that the member states of OAPI do not

[114] Ibid.
[115] Ibid at 15.
[116] Ibid.
[117] Ibid.
[118] World Intellectual Property Organization '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* accessed on 12 February 2022.
[119] African Regional Intellectual Property Organization op cit note 86 at 14.

draw such a distinction, but instead TK is categorised as folklore which is an incredibly broad category that caters for the protection of folklore and cultural heritage.

In terms of the Swakopmund Protocol, TK is recognised very similarly to that of customary law and is defined as:

> 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 field, and may include agriculture, environmental or medical knowledge, and knowledge associated with genetic resources.[120]

In terms of the Swakopmund Protocol, TCEs are 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:
>
> i. verbal expressions, such as but not limited to stories, epics, legends, poetry, riddles, and other narratives; words, signs, names, and symbols;
> ii. musical expressions, such as but not limited to songs and instrumental music;
> iii. expressions by movement, such as but not limited to dances, plays, rituals, and other performances; whether reduced to a material form; and
> iv. tangible expressions, such as productions of art drawings, designs, paintings (including bodypainting), carvings, sculptures, pottery, terracotta, mosaic, woodwork, metal ware, jewellery, basketry, needlework, textiles, glassware, carpets, costumes; hand-crafts; musical instruments; and architectural forms.[121]

Section 4 of the Swakopmund Protocol sets out the requirements that must be satisfied in order for particular knowledge to be considered as TK and grants automatic protection to any content which satisfies the following requirements:

> Generated, preserved, and transmitted in a traditional and intergenerational context; distinctly associated with a local or traditional community; and integral to the cultural identity of a local or traditional community that is recognised as holding TK through a form of custodianship, guardianship or collective and cultural ownership or responsibility. Such a relationship may be established formally or informally by customary practices, laws, or protocols.[122]

The protection of TK in terms of the Swakopmund Protocol mirrors that which is afforded to copyright protected works in that the mere act of satisfying the above requirements

[120] The Swakopmund Protocol, s 2.
[121] The Swakopmund Protocol, s 8(1).
[122] The Swakopmund Protocol, s 4.

will grant automatic protection to the 'work' without any formal registration process needing to be followed.[123]

The Swakopmund Protocol encourages member states of ARIPO to introduce a record keeping system of all material which satisfies the requirements of TK which is not only incredibly beneficial for the communities when dealing with the economic aspect of who is entitled to renumeration, but from a preservation standpoint as well. The keeping of records and documenting of TK is vitally important as in most instances, TK is not recorded or written down which may result in the knowledge being lost, either due to disuse or the migration of indigenous people from their communities. By facilitating the documentation of various knowledge which forms part of TK, the organisations and states are ensuring the preservation of this knowledge.

Under the Swakopmund Protocol, the communities themselves retain all rights to their TK, they are the sole owners and have the authority to authorise and consent to any use of the TK.[124] This empowers the indigenous communities and is a mechanism which gives them the power to authorise certain uses while allowing them to prohibit culturally offensive use of their knowledge. Although the indigenous communities retain ownership and have exclusivity over how their knowledge is used, the regulations allow for the government of a member state to protect and assist these communities from being taken advantage of. Section 8 of the Swakopmund Protocol states that communities are entitled to conclude licensing agreements with third parties. These agreements, however, must be written and are subject to approval by the national competent authority.[125] Any industrial or commercial use of the TK must be subject to a fair and equitable benefit sharing agreement in line with the recommendations made in the Swakopmund Protocol.[126]

For the most part, the rights associated with TK vests with the indigenous community that they belong to, but this is not an entirely exclusive set of rights and there are limitations which have been created. Section 12 of the Swakopmund Protocol is an important provision which allows for the contracting state to issue out a compulsory license if it would be in the

[123] African Regional Intellectual Property Organization op cit note 86 at 24.
[124] The Swakopmund Protocol, s 7(2).
[125] The Swakopmund Protocol, rule 12.
[126] The Swakopmund Protocol, s 9(1).

interest of the public to make use of the TK held by an indigenous community, where this indigenous community is unreasonably withholding the rights to make use of this knowledge.

As previously stated, although TK originates in an indigenous community not all indigenous communities are found in one state or confined by borders. There are many circumstances in which indigenous communities have split up, separated and crossed borders to reside in other nations. The Swakopmund Protocol takes transboundary TK into account and allows for multi-cultural and transboundary registrations to occur.[127]

Unlike intellectual property laws there is no duration placed on the protection of TK in terms of the Swakopmund Protocol. TK is afforded protection and exclusivity for as long as the work satisfies the requirements set out in the provisions of the Swakopmund Protocol. This is in stark contrast to the setting of a fixed duration which occurs in terms of intellectual property laws.[128] This difference is an important one as it illustrates the vast differences between TK and intellectual property. An important aspect of intellectual property protection is the promotion of innovation by granting the creator or owner exclusive rights so that they may benefit from their work while at the same time, ensuring that after a certain amount of time the work is released into the public domain to further stimulate innovation.[129] The approach adopted in the Swakopmund Protocol is one which affords protection to TK and therefore enforceable rights to the community indefinitely. This allows the indigenous community to prevent the unauthorised use of their knowledge and to ensure that members of the community will continue to benefit from their cultural heritage long after the elders of the community have passed. Indefinite duration of protection has obvious economic benefits for the indigenous community but equally as important, it allows for the preservation of a way of life. An exception is however made with regard to an individual rights holder. Where the TK is found to belong to an individual, the protection of this knowledge and the exclusivity of rights will only be for the duration of 25 years.[130]

The Swakopmund Protocol not only sets out the regulations and framework that should be used to recognise and protect TK, but it also further sets out the obligations on the member states with regard to the role that they play in the conservation and protection of TK and the

[127] The Swakopmund Protocol, s 5(4).
[128] Frieda Shifotoka op cit note 99 at 156.
[129] Dean & Dyer op cit note 5 at 3.
[130] African Regional Intellectual Property Organization op cit note 86 at 16.

indigenous communities. In terms of section 22 of the Swakopmund Protocol, the regional office and the national competent authority, which act on behalf of contracting states, will not only be responsible for documenting and recording TK, but must further endeavour to educate, monitor, guide and raise awareness with regard to TK within their communities and borders.[131]

One of the shortcomings of the Swakopmund Protocol is the criticism that while the rights and exclusivity of TK lie with the local and traditional communities, no set definition is given with regard to what constitutes a local or traditional community. Member states are able to incorporate the regulations of the Swakopmund Protocol in varying forms, but the success of achieving the objectives of ARIPO relies heavily on how the regulations are applied and most importantly, to whom the regulations are applied. Not having a unified definition for a local or traditional community has the potential to undo the steps taken by the organisation.

ii. Protection of Traditional Knowledge in Namibia

Namibia is situated in the southern part of the African continent and holds a wealth of TK. The country is home to several indigenous communities which include the Damara, Nama, Ovatjimba, Ovatue, Ovahimba and the San.[132] As a member state of ARIPO and considering that the regional instrument of ARIPO for the protection of TK was concluded in the city of Swakopmund, it is only fitting to assess the protection offered to TK originating from Namibia.

Namibia has an abundance of valuable TK which covers an array of sectors such as plant varieties, genetic resources and TK which relates to the uses of their natural resources and surrounding biodiversity. As in all indigenous communities, this knowledge is steeped in tradition and culture and has been the reason many of these communities have been able to exist in the harshest of conditions for centuries. Namibia, however, is still developing its system to trade in TK and has not yet reached the capability of being able to reap the economic benefits that such valuable resources can offer the country and its inhabitants.

Unfortunately, some indigenous community in Namibia have already been the victims of biopiracy and this is due to the fact that the protection of TK in the country is still in its

---

[131] Frieda Shifotoka op cit note 99 at 156.

[132] International Work Group for Indigenous Affairs 'The Indigenous Peoples of Namibia' available at *https://www.iwgia.org/en/namibia.html#:~:text=Peoples%20of%20Namibia-,The%20Indigenous%20Peoples%20of%20Namibia%20include%20the%20San%2C%20the%20Ovatjimba,which%20was%202%2C630%2C073%20in%202020* accessed on 12 February 2022.

infant stage, with almost no infrastructure having been laid out to protect the indigenous communities.[133] Only recently have companies started approaching the communities in Namibia to enter into benefit sharing agreements to use this TK and this is not due to the national laws of the country, but rather the guidelines as set out in international instruments. Previously, the knowledge was simply shared on good faith and utilised by international corporations without any renumeration to the indigenous communities which was the case with a plant species known as Devil's Claw (*Harpagophytum Procumbens*). Indigenous communities, in Namibia have long made use of this plant species in traditional medicine practices. The knowledge of the plant and its medicinal uses were acquired and utilised without any renumeration for the community from where it originated.[134]

Similar to the provisions found in section 231 of the Constitution of the Republic of South Africa, 1996 (The Constitution), the Namibian government has made provisions in article 144 of the Constitution of the Republic of Namibia, 1990, which allow the legislature to bind themselves to any regulations that stem from public international law and international agreements so long as Namibia ratifies them. Namibia is currently party to the Berne Convention, CBD, the Nagoya Protocol, and the WTO agreements such as TRIPs, to name a few[135].

Although the Swakopmund Protocol came into existence in 2010, it has not yet been incorporated into existing legislation in Namibia. Instead, against the recommendations made by ARIPO of a *sui generis* approach to the protection of TK, the Namibian government has followed the path taken by many countries and has amended its national legislation, which it uses to recognise, protect, and promote, TK. Such protection can be found in the following pieces of legislation which are currently enacted in Namibia:

The Constitution of the Republic of Namibia Act 1 of 1990;

Copyright and Neighbouring Rights Protection Act 6 of 1994;

The Traditional Authorities Act 25 of 2000;

---

[133] Lucia Nandjembo The Effectiveness of the Swakopmund Protocol on the Protection of Traditional knowledge in Namibia (unpublished LLM thesis, University of the Western Cape,2017) 18.
[134] Ibid.
[135] Ibid at 38.

The Environmental Management Act 7 of 2007; and

The Industrial Property Act 1 of 2012.

The Namibian government has attempted to address the current issues which the owners of TK are facing. The creation and implementation of legislation and policies highlights the short comings of its current protection of TK. With a regional instrument such as the Swakopmund Protocol readily available, it is concerning that Namibia is yet to institute the recommendations made by ARIPO, which calls for the creation of a *sui generis* form of protection for TK. More damning to the protection of TK is that the existing legislation used for the protection of intellectual property, the Industrial Properties Act 1 of 2012, has to date not been amended to include TK.[136]

A quick overview of the existing intellectual property laws at a national level in Namibia shows that the current intellectual property laws are inadequate to protect TK. In terms of the Industrial Property Act[137] the patent system specifically mentions TK as being considered as prior art and therefore excludes TK from any patent applications and therefore protection under patent laws.[138]

Under the laws which recognise and protect trade marks, predominantly used to establish a product or goods and services in a particular class, TK is once again inadequately recognised. The objective behind indigenous communities protecting their marks in terms of trade mark laws is not to establish or promote a product, but rather these indigenous communities seek trade mark protection to prevent others from unauthorised use of their TK in trade mark applications.

Indigenous communities are able to register certain TK under certification marks or marks of origin under existing intellectual property laws which in essence is another tool at their disposal to protect and promote their cultural identity. This form of protection though is one which does not necessarily prevent misappropriation, but rather guarantees that the items bought are of a certain standard or that they originate from that indigenous community. While a certification mark or mark of origin may guarantee the authenticity of a product, again, it

[136] Frieda Shifotoka op cit note 99 at 158.
[137] Industrial Property Act 1 of 2012 (Hereinafter referred to as the Industrial Property Act).
[138] Lucia Nandjembo op cit note 133 at 33.

does not curb the misappropriation of TCEs and TK. These forms of intellectual property do provide a certain amount of protection for TK, but they are not protective in the sense that a person or organisation is not prevented from using a tribal design or clan name for example in their own trade mark.

The knowledge held by the indigenous communities whether it be in the form of TCEs or more practical uses of natural resources forms an integral part of the communities identity.[139] A concern for indigenous communities in the use of their TCEs without consent is generally premised on the fact that the knowledge may be used in an offensive way and severs the community from that knowledge or expression.[140] Cultural misappropriation is unfortunately not unique to the indigenous communities of Namibia, it is an occurrence which affects indigenous communities globally. When protecting TK, this form of misappropriation needs to be addressed. Under the existing trade mark laws, this is currently not achieved. Perhaps, a regulation similar to that contained in the CBD and Nagoya Protocol which enforces disclosure of any use of TK would be an effective tool in the trade mark registration process.

In terms of copyright laws, TK has always enjoyed more of an opportunity to be recognised and protected. For the most part, this can be attributed to the fact that there are very few nations who are not members of the Berne Convention.[141] Due to this membership, almost every nation has ratified and incorporated the principles under the Berne Convention into their national copyright laws. Under Namibian law, copyright is protected by the Copyright and Neighbouring Rights Protection Act.[142] This act does not contain any special or direct provisions which recognise or protect TK yet, unlike the provisions of the Industrial Properties Act and existing patent laws, it does not exclude TK.[143] There are certain categories of work which could be extended to include the works which are considered TK or TCEs.

A progressive step taken by the Namibian government is the creation of an amended copyright bill, the Namibian Copyright and Related Rights Protection Bill 2021, which has

---

[139] Susy Frankel 'Branding Indigenous Peoples Traditional Knowledge' (January 1, 2012) Cambridge University Press, 2012, Victoria University of Wellington Legal Research Paper No. 39/2012, Available at *https://ssrn.com/abstract=2142276* accessed on 15 February 2022.
[140] Ibid.
[141] The Berne Convention for the Protection of Literary and Artistic Works, World Intellectual Property Organization, 1982 (Hereinafter referred to as the Berne Convention).
[142] The Copyright and Neighbouring Rights Act 6 of 1994 (Hereinafter referred to as the Neighbouring Rights Act).
[143] Frieda Shifotoka op cit note 99 at 158.

taken proactive steps to protect TK by including works which are considered TK and widening the scope of existing intellectual property laws to actively include these works and therefore offer them protection.[144] While the Copyright and Related Rights Protection Bill does not expressly mention TK nor attempt to separate the concepts of TK and TCE, it does include the protection of 'Expressions of Folklore' and offers the following definition for the category of work:

> [M]eans any form, whether tangible or intangible, in which traditional culture and knowledge are expressed, appear, manifested, developed and preserved by the traditional communities of Namibia or by unidentified individuals of Namibia, and includes the following forms of expressions or combinations thereof: (a) verbal expressions, such as but not limited to stories, epics, legends, poetry, riddles and other narratives, words, signs, names, and symbols; (b) musical expressions, such as but not limited to songs and instrumental music; (c) expressions by movement, such as but not limited to dances, plays, rituals and other performances, whether or not reduced to a material or tangible form; (d) tangible expressions, such as productions of art, in particular, drawings, designs, paintings, including body-painting, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metal ware, jewellery, basketry, needlework, textiles, glassware, carpets, costumes and handicrafts; (e) traditional musical instruments; and (f) traditional architectural works.[145]

While it could be argued that this is a step in the right direction regarding the recognition and protection of TK, the formulation of the Bill goes against the very recommendations made by ARIPO which favours a *sui generis* approach for the protection of TK. In terms of the approach adopted by ARIPO, TK and TCE should be treated, firstly, as two separate categories and secondly which is more conflicting with the recommendations, it should be protected under a new regime of legislation as opposed to the generic incorporation into existing intellectual property laws.

Further to the abovementioned draft bills, the Namibian government has drafted various policy documents which it plans to enact such as the National Intellectual Property Policy 2019-2024. The policy aims to provide a workable definition of TK and to bring the existing intellectual property laws in line with the regional and international instruments currently in place. The policy takes further steps to provide the necessary protection needed for TK and TCEs.[146] The Namibian Arts, Cultural and Heritage Policy 2021/2022-2023/2026 is also an incredibly valuable tool in that it mandates the duty to recognise, protect and respect all TK and TCEs making mention that misappropriation and exploitation of these resources by parties

[144] Ibid.
[145] The Copyright and Related Rights Protection Bill 2021, s 1.
[146] Frieda Shifotoka op cit note 99 at 161.

who are not part of the indigenous community, will be prohibited. This is an active step by the Namibian government to protect its indigenous communities and, gives recognition to the importance and value of these resources.[147] However, these are currently just policies which are yet to come to life and interestingly, no obvious movements are being made by the Namibian government to incorporate the Swakopmund Protocol into its national legal system.

In 2017, the Namibian Government passed the Access to Genetic Resources and the Protection of Associated Traditional Knowledge Act.[148] This was implemented in order to bring the country's existing legislation in line with the guidelines agreed upon in the Nagoya Protocol.[149] The purpose of the Access to Genetic Resources Act is multifaceted and it seeks to: regulate access not only to biological and genetic resources but to the TK which is associated with such resources, aims to protect the rights of the communities from where the TK originates; to provide for fair and equitable benefit sharing between stakeholders and to assist in establishing the necessary structures required to enforce the protection offered.[150] It is interesting to note that more has been done to bring the Namibian laws in line with international instruments than the regional instrument provided by ARIPO.

Like most nations, the bare minimum is being done to adhere to the guidelines set at a regional level. States such as Namibia are waiting for the outcome of the IGC and possibly the introduction of an international instrument. On the one hand, this can be seen as a strategic move which allows such states to provide minimum protection and bypass the arduous task of drafting and implementing new legislation only to amend or repeal it at a later stage when uniformity is established in the form of an international instrument. Alternatively perhaps, the Namibian government is waiting on the recommendations of the African Continental Free Trade Area Agreement to be finalised. The African Continental Free Trade Area Agreement, which will be discussed further on in this chapter, has the potential to create at the very least, a regional instrument which will be applicable across the entire continent.

The issues and shortcomings of the Namibian legislative framework are not unique to Namibia. In fact, these are the same issues which many countries, not only African states, are

---

[147] Ibid.
[148] Access to Genetic Resources and the Protection of Associated Traditional Knowledge Act 2 of 2017 (Hereinafter referred to as the Access to Genetic Resources Act).
[149] John Hazam, Jessica Lavelle 'Implementing Namibia's Access to Biological and Genetic Resources and Associated Traditional Knowledge Act' available at *https://www.voices4biojustice.org/wp-content/uploads/2017/12/Namibia-Policy-Brief.pdf* accessed on 12 February 2022.
[150] Ibid.

grappling with when attempting to protect TK, which further illustrates the need for an international instrument which will offer a uniformed approach that may be adopted by willing nations. It is not just the remuneration of an indigenous community which needs to be addressed by TK protection, but also the right of these communities to not have their heritage and identity used by others in a way which may be seen as offensive or in a way which prevents that community and its members from making use of their TK later on.[151]

c. Organisation Africaine de la Propriété Intellectuelle – OAPI

The Organisation Africaine de la Propriété Intellectuelle (OAPI) was formed in 1977 in Bangui, Central African Republic, by the revision of the Libreville Accord and the introduction of the Agreement on Copyright and Cultural Heritage of the African Intellectual Property Organisation (the Bangui Agreement).[152] OAPI consists of seventeen African states which are predominantly French speaking nations.[153] While OAPI does not restrict its membership to only French speaking countries, it does require that all member states are a party to the Convention Establishing WIPO. Further, all member states must be a party to the Berne Convention.[154]

The organisation follows a vastly different approach to that of ARIPO when considering how intellectual property rights should be recognised and protected. Although the intention to create a uniformed approach for the protection of intellectual property rights in its member states is a shared goal by the organisations, OAPI created a unique intellectual property network by requiring member states to renounce their national sovereignty in respect of their intellectual property laws.[155] In terms of the guidelines prescribed by OAPI, all member states are bound by the organisation's regulations concerning patents and trade marks. Member states are however allowed to self-regulate the protection of copyright. The Bangui Agreement centres on regulating the following subject matter under one uniformed instrument: 'patents,

[151] Ibid.
[152] Bangui Agreement Relating to the Creation of an African Intellectual Property Organization Constituting a Revision of the Agreement Relating to the Creation of an African and Malagasy Office of Industrial Property, 1977 (Hereinafter referred to as the Bangui Agreement).
[153] Adams & Adams 'OAPI' available at (https://www.adams.africa/works/oapi/) accessed on (10 February 2022).
[154] Marumo Nkomo op cit note 87 at 321.
[155] The Bangui Agreement op cit note 152.

utility models, trade marks and service marks, industrial designs, trade names and protection against unfair competition, appellations of origin and copyright and cultural heritage'.[156]

In the initial Libreville Accord, which later transcended into the Bangui Agreement,[157] the organisation sought to achieve a unified approach to intellectual property and in turn this led to the creation of a singular piece of legislation and intellectual property system which would be governed by a common administrative procedure. This in turn creates one authority to oversee the national intellectual property rights offices in each member state and centralises the procedures that would be followed when seeking protection in each member state.[158]

The renouncement of national intellectual property laws by OAPI member states has not only created a unified approach and application of intellectual property laws, but it has allowed for cross-border protection with a singular application procedure.[159] Whilst the approach under ARIPO allows for cross-border registration in a sense, the member states are afforded a choice on whether or not to invalidate a patent or trade mark application should it not satisfy the requirements of their national laws.[160] There is no such choice given to member states of OAPI as all laws regulating intellectual property are those set by OAPI and no national laws are applicable in terms of the Bangui Agreement.

While the regulations formulated by OAPI are not unique to the world, the eradication of multiple applications for the protection of intellectual property rights is one which should be seen as innovative and progressive, especially in developing and least developed countries where more often than not, creators and owners of intellectual property do not apply for protection due to severely under developed intellectual property law systems, offices and administrative processes as well as the costs which an applicant needs to incur. OAPI binds all its member states to the various international treaties and conventions listed in the Bangui Agreement and thereby acknowledges such instruments in the creation of its own framework.[161] As previously mentioned, all member states of OAPI must be members of WIPO

[156] Marumo Nkomo op cit note 87 at 321.
[157] The Bangui Agreement op cit note 152.
[158] Ibid.
[159] Ibid.
[160] Marumo Nkomo op cit note 87 at 320.
[161] Ibid.

and the WTO and are bound by the Paris Convention, Lisbon Agreement, the Nairobi Treaty and TRIPs.

With regard to patent applications, OAPI member states adhere to the regulations created under the Paris Convention and the Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure (1977). In terms of the Bangui Agreement, allowance is made for a single patent application to be filed in a member state with cross-border protection in all other member states due to the renouncement of any national patent laws. Unlike a regional patent application, the protection if granted in one member state is automatic in all others.[162] This approach is not only time saving, but is far more financially viable for applicants, allowing for economically distressed inventors to truly benefit from the rights of a patent once granted without the barrier of multiple applications or the financial burden which comes with having to file applications in all states. By virtue of being a member of the Paris Convention, all OAPI member states benefit from the Patent Cooperation Treaty (PCT) and may still seek simultaneous protection by filing a PCT application when necessary.[163]

The framework created by OAPI with regard to trade marks aims to further the recognition of collective marks and geographical indications under the protection offered to trade marks.[164] In terms of the Bangui Agreement, trade or service marks may be registered with the organisation and the act of registering as opposed to the use of the mark will determine who the right holder of the mark is.[165] The application is filed with the central office and should it satisfy all requirements as set out in the Bangui Agreement, the mark will be protected in each member state. As all member states are party to the Berne Convention, the regulations under the Berne Convention will be applicable to all copyrightable works and registration is not required, the rights will automatically vest with the author.[166]

---

[162] The Bangui Agreement op cit note 152.
[163] Ibid.
[164] Ibid.
[165] Paul Kuruk 'Protecting Folklore Under Modern Intellectual Property Regimes: A Reappraisal of the Tensions Between Individual and Communal Rights in Africa and the United States.' *American University Law Review* (Volume 48, No. 4) (April 1999) available at *https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1331&context=aulr* accessed on 14 February 2022 at 769-843.
[166] Ibid.

i. The Bangui Agreement - Annex VII

The Bangui Agreement is an ever-evolving regulatory instrument. First drafted in 1977, the Bangui Agreement was amended in 1999, to include the protection of 'Expressions of Culture Heritage' (ECH) or 'Folklore' and then again in 2015 to further protect TK. The most recent recommendations are, however, yet to be enacted. The 2015 Agreement extends protection to TK and actively promotes this protection.[167]

TK is recognised by OAPI member states under a genre referred to as 'Folklore' or ECH. Unlike the approach followed by ARIPO, there is no distinction created between TK and TCEs, instead the term ECH is used under the umbrella of copyright law in the Bangui Agreement and can be found under Annex VII of the Agreement.[168] In terms of the regulations set out in Annex VII, protection of traditional cultural expressions and derivatives of the expressions has been created.[169] While the most recent revisions have not yet been enacted, OAPI's Director General has indicated the intention to develop a more extensive method of protection for ECH.[170]

Annex VII of the Bangui Agreement offers a broad protection of TK in terms of article 67 which classes TK as folklore and regulates it under the use of ECH. Folklore is defined as 'works that are created by the national ethnic communities in member states which are passed on from generation to generation.'[171] The Bangui Agreement recognises any work as an ECH if it is comprised of material or immaterial 'human productions that are characteristics of a nation over time and space'.[172] The aforementioned being a rather vague definition of what may or may not constitute an ECH. The regulations further go on to explain that the following will be recognised and protected under the Bangui Agreement: Productions which relate to folklore, sites, monuments, and ensembles.

In terms of the Bangui Agreement, ECHs and folklore are classified as forming part of the national heritage of each state which in turn means that any use or exploitation thereof must be allowed by the state from where it originates, effectively placing the state as the rights holder

[167] Ibid.
[168] Ibid.
[169] Ibid.
[170] Ibid.
[171] The Bangui Agreement, Annex VII, art. 68.
[172] The Bangui Agreement, Annex VII, art. 67(1).

of the knowledge.[173] While the Bangui Agreement does require that monies paid for the use of ECH's and folklore be used in a manner which will further aid social and cultural needs, it is not the indigenous community from where the knowledge originates, who benefits financially from the use of their TK.[174] What is even more concerning is that the indigenous communities do not have a say in how their traditions and knowledge are used and by who.

Under the description of folklore, a variety of TK is recognised and protected, and the list is extensive. Folklore is defined in the Bangui Agreement as being:

> [L]iterary works of all kinds, whether in oral or written form, stories, legends, proverbs, epics, chronicles, myths, riddles; artistic styles and productions: dances, musical productions of all kinds, dramatic, dramatico-musical, choreographic and pantomime productions, styles and productions of fine art and decorative art by any process, architectural styles; religious traditions and celebrations: rites and rituals, objects, vestments and places of worship, initiations; educational traditions: sports, games, codes of manners and social conventions; scientific knowledge and works: practices and products of medicine and of the pharmacopoeia, theoretical and practical attainments in the fields of natural science, physics, mathematics and astronomy; technical knowledge and productions: metallurgical and textile industries, agricultural techniques, hunting and fishing techniques.[175]

A careful reading of all material included under the umbrella of folklore clearly illustrates that all aspects of life which can be attributed to an indigenous community has been included. The items protected include: literary works whether written or in oral form; artistic expressions and religious, scientific, and technological advancements which is colloquially known as a community's 'know-how' and is widely recognised as TK. Further to the extensive list, practices which are created by a community and handed down from generation to generation will be covered under the wide regulations and while many would welcome such an exhaustive list, attention must be drawn to the fact that under the Bangui Agreement, all these resources belong to the state and not the indigenous community.

Similar to the requirements set out in the Swakopmund Protocol, member states must create databases of ECHs and are required to classify and record all possible forms of ECH. The administration of the documenting process falling on the state is one which removes the cumbersome administrative processes from the communities where these expressions are created and is progressive in the sense that it assists the poorer and more rural communities in safeguarding these valuable resources. What is concerning, however, is the enormous power

[173] The Bangui Agreement op cit note 152.
[174] Ibid.
[175] The Bangui Agreement, Annex VII, art. 67.

that the OAPI member states are given when administering these resources, as they hold all the power when it comes to the exportation, distribution, disposal and sale of any cultural property.

The approach taken by OAPI follows the more popular view that TK should be seen as its own category outside of the confines of intellectual property. The issue with the way in which this approach has been implemented, however, is that TK is locked up as a resource and falls under the control of the state. So, while the aspect of preservation of this resource is being met with the regulations on documentation, the overall socio-economic benefits which should be afforded to the indigenous people from where this knowledge arose are put into the hands of the state.

ii. Protection of Traditional Knowledge in Cameroon

Cameroon has an incredibly rich indigenous cultural background, with an estimated 250 ethnic groups.[176] These ethnic groups are comprised of a variety of indigenous communities with the predominant communities being the Pygmies, the Mbororo and the Kirdi. The Pygmies are further sub categorised into the Bagyeli/Bakola, Bakweri, Baka and the Bedzan and attribute to 0.4% of the Cameroonian population.[177] The Mbororo community, which is estimated at one million people, splintered into separate tribes which are known as the Woodabe, Jafun and the Galegi. These communities each have their own unique identity as hunter-gatherers, nomadic travellers and forest people who hold generations of TK that could be used, not only for the betterment of their communities, but for society as a whole. In additional to the various indigenous communities within the borders of Cameroon, the country is also the 'second largest biodiverse tropical area' in the world.[178]

Bio prospectors have long made use of ethically questionable methods in obtaining TK from indigenous communities in Cameroon and have financially benefited from this

---

[176] Forest Peoples Programme 'The Situation of Indigenous Forest Peoples in Cameroon' available at *https://www.forestpeoples.org/sites/default/files/documents/Cameroon%20Factsheet%20%28EN%29.pdf* accessed on 02 March 2022.

[177] International Work Group for Indigenous Affairs 'Indigenous peoples in Cameroon' available at *https://www.iwgia.org/en/cameroon/743-indigenous-peoplesincameroon#:~:text=Among%20Cameroon's%20more%20than%2020,and%20the%20Kirdi%20mountain%20communities.&text=Together%20the%20%22Pygmies%22%20represent%20around,the%20total%20population%20of%20Cameroon* accessed on 22 February 2022.

[178] Marcelin M Tonye '*Sui Generis* Systems for the Legal Protection of Traditional Knowledge and Biogenetic Resources in Cameroon and South Africa' (2013) (Vol. 6, No. 5) *The Journal of World Intellectual Property* 764.

knowledge with no benefit being derived by the indigenous communities.[179] In 1966, Dr Jacques Debat registered a patent for the use of *pygeum* bark extract to be used in the treatment of prostatic hyperplasia. The bark which originates from the tree species known as *Prunus Africana* has been used by indigenous communities in Cameroon for decades to treat a myriad of ailments which include 'old man's disease'.[180] Further to this patent application, the region has suffered a tremendous loss of its natural resources by the over-harvesting and unauthorised use of this particular plant species.[181]

Due to Cameroon being one of the seventeen member states of OAPI it has renounced all of its national laws which previously regulated the recognition and protection of patents and trade marks. In light of this, Cameroon does not have its own national legislative framework which governs intellectual property rights, but instead, and in accordance with OAPI, Cameroon applies the Bangui Agreement.[182] According to the regulations set out by OAPI in Article 3 of the Bangui Agreement, all member states retain their national laws which are applicable to copyright and as members of the Berne Convention, follow the regulations of that international instrument. If a member state has a national framework for the protection of copyright, then that legal instrument will be used as opposed to the regulations as set out in the Bangui Agreement.[183]

Cameroon has elected to continue its protection of copyright under its own national legislative framework of the Copyright and Neighbouring Rights Protection Law[184] (CNRPL). It has also included the protection of folklore under this piece of legislation.[185]In terms of this legislation, folklore is defined as:

---

[179] Dr Gerard Bodeker 'Traditional Medical Knowledge, Intellectual Property Rights & Benefit Sharing' (2003) (Vol. 11, No. 2) *Cardozo Journal of International and Comparative Law* 787.
[180] Charles Takoyoh Eyong 'Indigenous Knowledge and Sustainable Development in Africa: Case Study on Central Africa' available at *https://www.academia.edu/769691/Indigenous_knowledge_and_sustainable_development_in_Africa_case_study_on_Central_Africa* accessed on 10 January 2022.
[181] Dr Gerard Bodeker op cit note 179.
[182] Feh Henry Baaboh 'Intellectual Property Law in Cameroon' available at *https://www.hg.org/legal-articles/intellectualpropertylawincameroon7160#:~:text=The%20law%20regulating%20intellectual%20proper024%2F02%2F1999.&text=This%20simply%20means%20it%20is,other%20IP%20right)%20in%20question*. accessed on 10 February 2022.
[183] 'Copyright and Neighbouring Rights in Cameroon' available at *http://www.wipnetglobal.com/PDF%20files/Copyright.pdf* accessed on 02 March 2022.
[184] Law No. 2000/011 of December 19, 2000, on Copyright and Neighbouring Rights (Hereinafter referred to as the CNRPL).
[185] William Fisher 'The Puzzle of Traditional Knowledge' (2018) (Vol. 67, No. 7) *Duke Law Journal* 1537.

> [A]ll productions involving aspects characteristic of traditional cultural heritage, produced and perpetuated by a community or by individuals who clearly reflect the expectations of such community, comprising particularly folk tales, folk dances and shows, as well as artistic expressions, rituals and productions of popular art.[186]

Section 5 of the CNRPL regulates the protection of folklore and the distribution of any funds received for the use of folklore. Folklore is deemed to belong to the national cultural heritage and is administered by the governmental office responsible for the culture sector. All commercial uses of folklore must be approved by the government and are subject to a royalty fee which will be paid into a 'cultural support fund'.[187] The legislation does not elaborate on how the fund is administered and who the beneficiaries are in terms of the fund.

The objective of the Bangui Agreement in forming OAPI was to create one jurisdiction for the protection of intellectual property. The Bangui Agreement expressly states that all national laws concerning the regulation of patents and trade marks are no longer applicable, however, as previously stated, OAPI member states may retain and enforce national laws for the protection of copyrightable works.

While the Bangui Agreement provides guidelines on the protection of TK and ECH under the genre of folklore, member states are still free to incorporate TK into their own copyright laws which Cameroon has done.[188] The multi protection of TK in this manner, however, is problematic. In terms of the Bangui Agreement, folklore is owned by the state, but copyrightable works are owned by the rights holder. The national law regulating copyright in Cameroon considers certain aspects of TK as copyrightable and allows for the protection of TK in terms of their copyright legislation. This recognition allows for the ownership of the rights to vest with the author, as opposed to the state which is contradictory to the provisions of the Bangui Agreement.[189]

A concerted effort has been made by the Cameroonian government with regard to the protection of genetic resources by ratifying the CBD and acceding to the Nagoya Protocol.[190]

---

[186] The CNRPL, Part I (10).
[187] The CNRPL, s 5(1)-(4).
[188] Enyinna Sodienye Nwauche 'The *Sui Generis* and Intellectual Property Protection of Folklore in Africa' available at *http://repository.nwu.ac.za/bitstream/handle/10394/19787/Nwauche_ES_2016.pdf?sequence=1&isAllowed=y* accessed on 01 March 2022.
[189] Ibid.
[190] European Commission 'IP Fiche OAPI' available at *https://intellectual-property-helpdesk.ec.europa.eu/regional-helpdesks/africa-ip-sme-helpdesk/factsheets_en* accessed on 27 November 2022.

The ratification of this Agreement is aimed at offering protection to genetic resources and regulating benefit sharing agreements, it does however, offer an additional form of protection to TK outside of that offered by the Bangui Agreement. While Cameroon is obligated to follow the regulations set by OAPI, it has made significant steps to classify TK outside of the confines of intellectual property rights and by doing so it has been able to in some way give the resource back to the community members where it rightfully belongs.

In July of 2021, Cameroon introduce legislation to regulate the use of genetic resources and associated TK in line with the ratification of the CBD. In terms of this legislation, the Access to Genetic Resources, Their Derivatives, Associated Traditional Knowledge and the Fair and Equitable Sharing of Benefits Arising from their Utilization[191] (AGR), the objectives are to:

> (a) support the development of genetic resources and associated traditional knowledge to encourage their conservation and sustainable use;
> (b) regulate access to genetic resources, their derivatives and/or associated traditional knowledge;
> (c) ensure the involvement of indigenous peoples and local communities in the sharing of benefits arising from the use of genetic resources or associated traditional knowledge;
> (d) to promote and encourage the exploitation of research results, the documentation of genetic resources and associated traditional knowledge;
> (e) to contribute to the improvement of the living conditions of indigenous populations and local communities;
> (f) enhance the contribution of biodiversity to development and human wellbeing;
> (g) to discover and make available genetic information.[192]

This approach allows for indigenous communities to benefit from the use of their TK. However, unless the TK is used in relation to a genetic resource or protected under copyright, it will still belong to the state and any benefits derived from the use will be paid into a state administered fund as instructed by the Bangui Agreement.

While the approach to unifying intellectual property regimes in terms of OAPI has many benefits, its downfall is the failure to uphold the human rights of the indigenous communities in its member states. Any royalties and benefits which are derived from the use of TK should in all circumstances be to the benefit of the indigenous communities.

---

[191] Law No. 2021/014 of July 9, 2021, On Access to Genetic Resources, Their Derivatives, Associated Traditional Knowledge and the Fair and Equitable Sharing of Benefits Arising from their Utilization.
[192] Section 2 (a)-(g) supra note 191.

d. The African Continental Free Trade Area Agreement

In 1991, the Organisation of African Unity (OAU) introduced the 'Treaty Establishing the African Economic Community' (Abuja Treaty) in Abuja, Nigeria.[193] The Abuja treaty was viewed as a means to unite the African continent both politically and economically through the establishment of the African Economic Community (AEC) and free trade areas.[194] The Abuja Treaty entered into force in 1994 and was signed by South Africa in 1997.[195]

The objectives of the Abuja Treaty and the AEC to unify the African continent through trade has eventually been realised by the implementation of the African Continental Free Trade Area (AfCFTA) Agreement. The AfCFTA Agreement was signed in Rwanda on the 21st of March 2018 at the 10th Extraordinary Summit of the AU,[196] and entered into force for member states that had deposited their instruments of ratification.[197]

The AU felt it important to introduce a free trade area in order to assist, develop, and further grow the economic potential of all member states on the African continent.[198] While free trade areas are not a unique concept to African countries, the creation of the AfCFTA Agreement seeks to create a single market for goods and services across the African continent and by doing so create the world's largest free trade area.[199] The AfCFTA Agreement introduces a uniformed approach on the African continent to deal with the trade in goods and services, investments, intellectual property rights and competition in the market, with the overall aim of creating a network and guidelines which could bolster the economies of all nations on the continent.[200]

---

[193] Parliamentary Monitoring Group 'Abuja Treaty Establishing the African Economic Community: Ratification' available at *https://pmg.org.za/committee-meeting/67/#:~:text=The%20Treaty%20Establishing%20the%20African,treaty%20on%2010%20October%201997* accessed on 21 November 2022.
[194] Ricks, Tres 'From the Abuja Treaty to the Sustainable Development Goals: Realizing Economic Integration in Africa' (2016) (Vol. 42) *North Carolina Journal of International Law* at 250.
[195] Parliamentary Monitoring Group op cit note 193.
[196] Wend Wendland 'Multilateral Matters #7: The Draft Protocol on Intellectual Property Rights to The African Continental Free Trade Agreement (AfCFTA): Annotations on Genetic Resources, Traditional Knowledge, and Cultural Expressions' available at *https://infojustice.org/archives/42674* accessed on 10 February 2022.
[197] TRALAC 'The African Continental Free Trade Area, A TRALAC Guide' 5th edition, 2019 available at *https://www.tralac.org/images/E-books/booklet/AfCFTA-Booklet-5th-edition-June-2019.html#page=1* accessed on 10 February 2022.
[198] Ibid.
[199] Ala Peter-Daley 'AfCFTA: The Basics – What You Need to Know' available at *https://www.hoganlovells.com/en/blogs/the-a-perspective/afctfa-the-basics-what-you-need-to-know* accessed at 3 February 2022.
[200] TRALAC op cit note 197.

It has been estimated that the implementation of the free trade area could potentially up lift 30 million people from extreme poverty.[201] Ideally, the AfCFTA Agreement aims to create a 'single continental market' which will allow for goods and services as well as people to move within the trade area with fewer restrictions.[202] The idea is that by allowing such freedoms, innovation will increase and the removal of various barriers, tariff and non-tariff, will aid in uplifting even the poorest and most rural of states. It has been estimated that the successful implementation of the AfCFTA has the potential to increase trade across African countries by 52.3%.[203]

The AfCFTA Agreement was signed by 44 of its 55 member states in 2018. As of November 2022, there has been an increase in the number of signatory states, bringing the total number of signatory states to 54. Of the 54 states, 44 states have deposited their instruments for ratification.[204] The AfCFTA Agreement has been structured so that it will be implemented in phases with trading under Phase I having commenced on the 1st of January 2021. Phase I regulates the following: trading of goods, trading of services and the introduction and establishment of a 'dispute settlement mechanism'.[205] Phase II of the AfCFTA Agreement introduces protocols on the following; investments, intellectual property rights (including TK), competition policies, digital trade and women and youth in trade.[206] The initial timeline set for the completion of Phase II was January 2021, however, with the understandable delays caused by COVID-19, the protocol is yet to be finalised and implemented.[207]

The AfCFTA Agreement has several strategic objectives, all aimed at increasing and expanding the potential of all African countries and in order to achieve this, the AfCFTA Agreement has created a hierarchy of institutions which will spearhead the AfCFTA Agreement and oversee any disputes which may arise. The highest decision making body which will oversee and guide states is the Assembly of Heads of Government. Below the 'Assembly' is the Council of African Minister responsible for Trade, who will be authorised to

---

[201] The African Continental Free Trade Area Secretariat 'Creating One African Market' November 2022, available at *https://au-afcfta.org/about/* accessed on 23 November 2022.
[202] Emmanuel Dina 'AfCFTA's Protocol on Intellectual Property Rights And Its Potential Effects On Africa's Economic Growth' available at *https://centurionlg.com/2022/01/19/afcftas-protocol-on-intellectual-property-rights-and-its-potential-effects-on-africas-economic-growth/* accessed on 23 February 2022.
[203] Ala Peter-Daley op cit note 199.
[204] Ibid.
[205] Ibid.
[206] Ibid.
[207] Marumo Nkomo, Jabulani Mthombeni and Trod Lehong ' The African Continental Free Trade Area: A Significant Role for IP' available at *https://www.wipo.int/wipo_magazine/en/2020/04/article_0005.html* accessed on 10 February 2022.

make decisions on the AfCFTA Agreement and will guide other institutions under the Agreement and in the AU.[208]

Provisions have also been made for the formation of a Committee of Senior Trade Officials who will appointed by their member states to sit on the Committee and have the responsibility of the creating action plans for implementation and the development of programs which align with the AfCFTA Agreement. Finally, an administrative institution has also been created which will have the responsibility of coordinating and implementing the AfCFTA Agreement, the AfCFTA Secretariat.[209]

The creation of a continental customs union and the overall expansion of intra-African trade are at the forefront of the AfCFTA Agreement objectives which also aims to resolve any challenges which have arisen from previous free trade areas and any other overlapping memberships that states are bound to in the form of regional economic agreements.[210] Although trade and the expansion of African economies can be described as the overarching objective of the Agreement, it is important to note that considerable efforts and negotiations are taking place with regard to unifying intellectual property rights, thereby creating a regional intellectual property regime that can be applied across the continent.[211] A unified approach to the protection of intellectual property rights is an additional benefit which will draw in and attract more investors as they can guarantee that their products will be subject to the same intellectual property laws.[212]

While the aim of the AEC and AfCFTA Agreement is to unify African states and to alleviate poverty and stimulate economic growth by the creation of free trade areas, it is important to note that unification of intellectual property and TK have also been identified as objectives in the AfCFTA Agreement. The AfCFTA Agreement, by including intellectual property rights and TK in the protocols covered in Phase II seeks to assist in the development and economic growth of those areas of trade.[213] While international instruments authored by

---

[208] Enyinna Sodienye Nwauche op cit note 188.
[209] Ibid.
[210] Katrin Kuhlmann and Akinyi Lisa Agutu 'The African Continental Free Trade Area: Toward a New Legal Model for Trade and Development' *The Georgetown Journal of International Law*,(Vol. 15) 2020 available at *https://www.law.georgetown.edu/international-law-journal/wp-content/uploads/sites/21/2020/11/THE-AFRICAN-CONTINENTAL-FREE-TRADE-AREA.-TOWARD-A-NEW-LEGAL-MODEL-FOR-TRADE-AND-DEVELOPMENT.pdf* accessed on 22 March 2022 776.
[211] Ibid.
[212] Marumo Nkomo op cit note 87 at 323.
[213] Marumo Nkomo *et al* op cit note 207.

WIPO are widely implemented in African states, there is a disconnect in the implementation of certain instruments and therefore protection in some developing and least developed countries. Most developing and least developed countries in Africa do not have the economies, infrastructure and capabilities of fully incorporating intellectual property laws and systems into their national frameworks and therefore, have not reaped the benefits of these laws and the protection of intellectual property within their borders.[214] One of the aims of the AfCFTA Agreement is therefore to strengthen the intellectual property framework by standardising the approach followed in African countries.[215]

While the recognition and protection of TK has been acknowledged by WIPO with the formation of the IGC, the intellectual property rights protocol contained in the AfCFTA Agreement allows for the African continent to tailor an intellectual property rights framework which may be better suited across all states and one which seeks to standardise the protection offered to TK.[216]

The move by the AU to create a unified system for intellectual property rights and to recognise the need for protection of TK, is the opportunity which is needed to finally start bridging the gap of profitability of intellectual property in developed and developing countries and most importantly the least developed countries.[217] The move by the AU to include the protection of TK is also a progressive step which seeks to harmonise the legal principles and rules which will be applied in the protection of this resource. Although the negotiations for Phase II have not yet been concluded, there has been an undertaking to finalise the protocols under Phase II by the end of 2022.[218] If the deadline for Phase II is met, this will mean that the African continent will have a unified form of protection for TK before any other continent as

[214] Ibid.
[215] Ibid.
[216] Ibid.
[217] Vera Albino 'How The African Continental Free Trade Area Could Revolutionise IP in Africa' available at *https://www.ipstars.com/NewsAndAnalysis/How-the-African-Continental-Free-Trade-Area-could-revolutionise-IP-in-Africa/Index/8038* accessed on 23 February 2022.
[218] Baker McKenzie 'Africa: AfCFTA Update – The Streamlining of Intra-African Trade Gathers Momentum' February 2022 available at *https://insightplus.bakermckenzie.com/bm/international-commercial-trade/africa-afcfta-update-the-streamlining-of-intra-african-trade-gathers-momentum#:~:text=Phase%20two%20of%20AfCFTA%20negotiations,by%20the%20end%20of%202022* accessed on 21 November 2022.

the IGC is only set to meet in 2023. It is for this reason that the approach adopted by the AU in the AfCFTA Agreement is so important.[219]

i. A Unified Regional Intellectual Property Law Regime

The AU is yet to identify how it intends to unify intellectual property rights across Africa and as illustrated above, any approach which is adopted needs to be one which considers the vastly different intellectual property systems as well as the varying infrastructures which each state has. Although most states are members to the same international instruments and in most blocks, apply the same regional instruments, there are still inconsistences present in the intellectual property law systems. A distinction needs to be made between developing and least developed countries. While most states can be considered as developing countries, many are still least developed countries with under-utilised resources and barely established intellectual property law frameworks.[220] Any approach which is adopted needs to be one which takes into account the struggling economies and aims as its objective to bring all countries in line with one another so that adequate protection can be given to innovation and more importantly, TK.

An opinion expressed is that there are three possible routes which the AfCFTA Agreement could follow in the creation of an intellectual property regime.[221] The first being the creation of a 'General Regional Cooperation and Sharing of Experience of Intellectual Property Rights'[222], which would essentially look to create a non-binding instrument and would serve as a recommendation on how intellectual property rights should be protected. This approach is a familiar one as it is already followed in a few established memberships in Africa and is in line with Article 4 of the AfCFTA Agreement which states that all parties 'shall cooperate on investment, intellectual property rights and competition policy'.[223]

This approach also allows individual states to retain their already established intellectual property regimes and obligations in terms of international treaties. The issue with this approach, however, is perfectly illustrated by the Swakopmund Protocol and Namibia's failure to implement it. If the established protocols serve only as a guideline and its

[219] United Nations Conference on Trade and Development 'Implications of the African Continental Free Trade Area for Trade and Biodiversity: Policy and Regulatory Recommendations' UNCTAD/DITC/TED/INF/2021/3.
[220] Marumo Nkomo *et al* op cit note 207.
[221] Katrin Kuhlmann & Akinyi Lisa Agutu op cit note 210 at 777.
[222] Ibid.
[223] Ibid.

implementation is based solely on the cooperation of member states, then there is no guarantee that the protocols will be implemented. This in turn will not address nor solve the fragmented approach currently being applied across Africa and will not achieve the goal of a uniform intellectual property rights framework.

The second route which may be applied in the Phase II protocols is the creation of a 'Regional Filing System'.[224] Based loosely on the approach followed by ARIPO, the creation of a regional or central office will assist people wanting to file intellectual property rights applications. This approach allows states to retain their national legislative frameworks, but has the capability of centralising intellectual property rights and increasing the infrastructure of states which are incapable of managing their own offices.[225]

Finally, the third route is one which would mirror the approach adopted by OAPI where there is a 'Unification of Laws' for its member states.[226] Arguably the most controversial approach as it requires member states to renounce their own national laws regarding the protection of intellectual property. While this approach will be the most beneficial in the least developed countries who have barely established their intellectual property laws, in member states such as South Africa, the approach may not be welcomed.

Despite the various options available, it is of vital importance that whichever approach is adopted, it should be one which is going to successfully unify all of the member states. The overall aim is to implement protocols which will aid in bringing countries in line with one another and one which will to some extent be compulsory in its adoption, while still respecting the need for independence when legislating how intellectual property and TK is dealt with in each state.

ii. The Recognition and Proposed Protection of Traditional Knowledge Under the African Continental Free Trade Area (AfCFTA) Agreement

The protection of TK is not only fundamentally important for cultural and heritage reasons but taking into account that TK is such a valuable economic resource it makes sense for the AU to look to include it as part of the commodities and resources which are protected in terms of the

[224] Ibid.
[225] Ibid.
[226] Ibid.

AfCFTA Agreement.[227] If the objectives of the AfCFTA Agreement are to better the economic environment for all living on the African continent, especially those below the poverty line, then the recognition that TK has an economic value and the capability of uplifting millions of people is most certainly a welcomed one.

Who better to create the legislative framework and guidelines to be used to protect TK on the African continent than members of the various indigenous communities themselves? This approach is one which is in keeping with the rights of indigenous peoples to self-regulate on how their culture, heritage and knowledge is used and protected. As discussed in the previous chapter, the protection of TK is not as simple as creating a new *genus* of work in terms of existing intellectual property rights and the 'one size, fits all' approach which has been adopted by many states is clearly inadequate.[228]

While each indigenous community will have its own understanding of TK and their customs and traditions may differ, it is important that the regulatory body who is creating the guidelines and instruments used for the protection of TK has a similar understanding of the importance of this resource. Although a broad statement to make, a regulatory body from a first world country with limited knowledge of specific cultural aspects, traditions, and customs will not have this same first-hand experience as a regulatory body from the area where the TK stems from.[229] It is therefore fair to state that it may be a better approach to have frameworks created by people who understand the nature and importance of the resource that they are trying to protect. The AU has the responsibility of creating new regulations which will aid in increasing economic and social development while at the same time ensuring that they are balancing the rights and priorities of an incredibly diverse group of countries.[230]

Under the proposed regulations on intellectual property rights, the AfCFTA Agreement seeks to create a tailored approach to be used when addressing the current intellectual property rights issues which many African states experience. In doing so, the regulations will include the experience of African states which may be applied to already existing international rules.[231] The idea is that if the existing laws can be tailored to be African specific, the application of the

[227] UNCTAD op cit note 219 at 26.
[228] Marumo Nkomo *et al* op cit note 207.
[229] UNCTAD op cit note 219 at 30.
[230] TRALAC op cit note 197.
[231] Ibid.

laws will be more beneficial to the African economy thereby achieving the main objective of AfCFTA Agreement.

iii. The impact of the AfCFTA Agreement on the proposed legal framework for the protection of Traditional Knowledge in South Africa

It is evident from looking at the approaches adopted by ARIPO in the Swakopmund Protocol and by OAPI in the revisions made to the Bangui Agreement, that TK should be recognised and protected in a *sui generis* way as opposed to being incorporated into already difficult to administer intellectual property laws. The negotiations taking place in Phase II in terms of the AfCFTA Agreement have also clearly indicated that while intellectual property laws need to be further unified on the African continent, TK should remain separate from these laws and should be protected under its own legislative framework. Aside from the progressive steps taken by South Africa which will be discussed in the following chapter, most if not all states appear to be waiting for an international instrument or at the very least a unified regional instrument which may be implemented to protect TK. From the hesitation shown by Namibia in fully incorporating the Swakopmund Protocol into its national laws to the wide category of folklore created by the Bangui Accord, it is apparent that states are apprehensive about implementing a *sui generis* protection for TK until such protection is suggested by WIPO.

South Africa has made great developments in the protection of TK by incorporating the CBD And Nagoya protocol into its existing intellectual property laws. This has been achieved by the inclusion of specific definitions and terms such as genetic resource, indigenous biological resource, TK, traditional use, into the existing patents legislation. The South African Patents Act[232], which was amended in 2005 by the Patents Amendment Act[233], creates a compulsory duty on any patent applicant to disclose whether or not any form of TK has been used in the development of the patent article. In all patent applications, where there is any use of TK, evidence must be filed alongside the application that the indigenous community from where the TK originates is aware of the use and does not object to the use of that TK. Further to this, evidence must be provided that a mutual benefit sharing agreement has been entered into.[234] The current legislative tools in place further require any person who wants to make use

[232] The South African Patents Act 57 of 1978.
[233] The Patents Amendment Act 20 of 2005.
[234] UNCTAD op cit note 219 of 30.

of any TK to apply for a bioprospecting permit which is approved by the Department of Environmental Affairs.[235]

South Africa has adopted a two-pronged approach when it comes to the protection of TK. The first was to include TK as a *genus* of existing intellectual property laws by introducing the IPLAA while the second was to recognise TK as its own category and resource and to provide it with a unique and *sui generis* legislative framework by introducing the IKSA.

The approach adopted by South Africa for the recognition and protection of TK will be discussed in greater detail in the following chapter, but it is important to note that, unlike Namibia and Cameroon, South Africa has taken proactive steps towards protecting TK in terms of *sui generis* laws as well as under existing intellectual property laws. A benefit to this approach is that while the continent waits for the implementation of Phase II of the AfCFTA Agreement or an international instrument to be drafted by WIPO, the indigenous communities in South Africa have been afforded protection from the ever-growing threat of biopiracy and the misappropriation of their TK. The creation of two forms of protection in South Africa may be viewed as a pre-emptive measure, when the regional and international instruments are implemented, South Africa will already have established legislative frameworks which may be amended or repealed in order to satisfy any signatory obligations that arise at a regional or an international level.

e. Conclusion

Any protocols created for the protection of TK in terms of the AfCFTA Agreement needs to not only focus on the recognition of the indigenous communities and the economic development and upliftment of these communities, but the preservation of the knowledge and the cultural heritage. While the economic benefits are and will be extremely beneficial in the development of indigenous communities, the need to document and preserve these resources should be at the forefront of any suggested regulations.

A framework which encompasses the ideologies of upliftment, education, preservation, and economic development would be the best suited. A splintered approach, and a multitude

[235] The National Environmental Management Biodiversity Act 10 of 2004, s 30(3)(b).

of protocols and guidelines, do little to address the issues of protecting TK and the indigenous communities.

IV. THE SOUTH AFRICAN PROTECTION OF TRADITIONAL KNOWLEDGE

a. The South African Legal Framework for the Protection of Traditional Knowledge

This chapter will focus on the approach implemented by the South African government for the recognition and protection of TK. A brief history will be given with regard to the committees which were formed to draft the proposed pieces of legislation, the direction that each committee took and the end product of their endeavours. A discussion on each piece of legislation will then follow with the aim being to critically analyse the legislation and to discuss why it may or may not be an appropriate form of protection. The chapter will look at the various amendments which have been introduced into existing legislation and will discuss the impact that the amendments will have on the protection of TK and the intellectual property law system. The chapter will conclude with a comparison of the legislation.

i. An overview on the Indigenous Knowledge System Policy in South Africa

South Africa's move towards more adequate recognition and protection of TK was in large, prompted by the international and regional recognition of TK and those efforts to begin creating a framework in which TK could be developed and protected. In 2004, the Indigenous Knowledge Systems (IKS) Policy was adopted by government.[236] The IKS Policy was authored by the Department of Science and Technology after consultations with various stakeholders including the Department of Trade and Industry, The Department of Arts and Culture and the Department of Health.[237]

The overarching objective of the policy was to create recommendations on the recognition, understanding, integration and promotion of the wealth of TK which can be found in South Africa.[238] The IKS Policy sought to fine tune how TK was being managed and recognised and to investigate the extent of the benefits and downfalls of the commercialisation of this resource. The IKS Policy set out as its main objectives to affirm the cultural values of the indigenous communities and to ascertain what mechanisms would need to be implemented in order to assist the indigenous communities with the development and use of their TK. The

[236] Department of Science and Technology 'Indigenous Knowledge Systems' available at *https://www.dst.gov.za/images/pdfs/IKS_Policy%20PDF.pdf*, accessed on 21 May 2022.
[237] Dean & Dyer op cit note 5 at 347.
[238] Amos Saurombe 'The Protection of Indigenous Traditional Knowledge Through the Intellectual Property System and the 2008 South African Intellectual Property Law Amendment Bill' (2009) (Vol. 4 Issue 3) *Journal of International Commercial Law and Technology* 197.

Department of Science and Technology took into consideration when drafting the policy the roles played by traditional leaders, healers and community members.[239] The IKS Policy focused predominantly on traditional medicine and the benefits which could be derived from the commercialisation of this knowledge, but also considered TK forms which contained knowledge on agricultural methods, indigenous languages and TK in its general form.[240]

The purpose behind any effective protection of TK is to ensure that the communities who are holders of the knowledge are attributed as the 'creators' from where the knowledge originates and to ensure that where such knowledge is used, it is used in line with the communities cultural and traditional beliefs. The legal instrument should further aim to promote the use of this knowledge as it is undeniably beneficial to all and an incredibly valuable resource. The aim to protect TK is however not the only goal of the IKS Policy, any policies and legal reform which are implemented must also ensure that the indigenous communities who are entitled to benefit from the use of their knowledge do so and that they are provided the tools and resources to benefit from the use of their knowledge. [241] The general trend is that these benefits are secured in the form of a benefit sharing agreement.

From the inception of the IKS Policy, two vastly different paths were forged in the creation of a framework which could be implemented to protect TK adequately and appropriately. Both pieces of legislation will be discussed in detail below.

The Department of Trade and Industry followed the approach of amending existing intellectual property regimes to include TK as a form of intellectual property in order to achieve the objectives set out in the IKS Policy while the Department of Science and Technology adopted a very different approach. The Department of Science and Technology sought to satisfy the objectives of the IKS Policy by creating a *sui generis* form of protection for TK.[242]

ii. Regulation of Traditional Knowledge in South Africa

The decision and need to recognise and protect TK as a valuable resource extends far further than merely recognising the economic potential of TK and the economic contribution which it could make to struggling, rural communities. Although, undoubtedly, TK is an incredibly

[239] Dean & Dyer op cit note 5 at 347.
[240] Ibid.
[241] Amos Saurombe op cit note 238 at 197.
[242] Dean & Dyer op cit note 5 at 347.

beneficial resource for communities and has the potential to drive funds into indigenous communities, the value of recognising this resource also needs to extend to the principles of uplifting and preserving each communities right to cultural development and the understanding that the resource is inherently interwoven into the cultural identities of those communities.[243] Protecting TK will give the indigenous communities the rightful recognition as creators and owners of TK. It will further allow them to exercise control over how their resources are used and will ensure that the resources are used effectively and in keeping with the community's traditional and cultural beliefs.

The commercialisation of TK needs to be balanced with the cultural identity and values of each indigenous community.[244] There should be an overarching aim to blend the preservation and safeguarding of cultural heritage with the promotion of cultural diversity and a drive to allow access to TK in a manner which will be in line with sustainable economic development for the indigenous communities.[245] Without adequate protection for TK, indigenous communities and states are being economically disadvantaged.[246]

As discussed in chapter two, there is currently no international instrument which can be introduced into a state's domestic law to aid in the creation of a legislative tool for the protection for TK. Although there has been global recognition that this resource should and needs to be protected, each state seeking to protect TK has been tasked with the responsibility of creating their own framework which will adequately protect the resource.[247] The absence of an international agreement means that countries are free to tailor-make a framework which will better suit their economic needs and the needs of the communities involved.

While no international agreements are available yet, it must be noted that where a state, such as South Africa, chooses to extend and develop existing intellectual property laws, as a member to the TRIPs Agreement, that state must work within the already established

---

[243] Talkmore Chidede 'The Role of Intellectual Property Rights' Protection in Advancing Development in South Africa' *Law, Democracy & Development* (2022) (Vol 26) available at *https://law.uwc.ac.za/images/stories/ldd/2022chidede.pdf* accessed on 30 July 2022 at 179.
[244] Ibid at 183.
[245] Ibid at 179.
[246] Department of Trade and Industry (DTI) Policy Framework for The Protection of Indigenous Traditional Knowledge Through the Intellectual Property System and The Intellectual Property Laws Amendment Bill GN 552 *GG 31026* of 5 May 2008.
[247] Lee-Ann Tong 'Aligning the South African Intellectual Property System with Traditional Knowledge Protection' (2017) (Vol. 12, No. 3) *Journal of Intellectual Property Law & Practice* 179.

parameters of that agreement.[248] The TRIPs Agreement does not recognise nor exclude TK as a form of intellectual property, but does require that any amendments or additions made regarding intellectual property laws are made in line with its already established regulations.[249]

The basis for intellectual property rights protection is to allow individuals to trade and benefit financially from their knowledge. Whether that knowledge is in the form of an invention, artistic or literary creation, so long as it satisfies the requirements of the various forms of intellectual property it may be used as a commodity. This notion is founded on the principles of private property rights.[250] The purpose of private property rights is to identify a form of property which has a value and to attach ownership to that property. In almost all circumstances, ownership is granted to a singular legal person. In doing so, that person is then able to use that property in trade with others, which ultimately increases trade.[251] Trade is necessary in the develop of any economy and is widely recognised as being fundamental in the growth of an economy.

As stated by Elmien Du Plessis and Caroline Ncube in their collective work on 'Indigenous Knowledge and Intellectual Property'[252], it would appear as though there are not only two ways of approaching the protection and promotion of TK. Instead, it has been stated that there are four schools of thought regarding the approach which should be adopted when addressing the shortfall of protection for TK.[253]

The approaches are as follows: firstly, that TK should and can be protected under existing legislation; secondly that TK can be protected under existing legislation, but that it should be treated differently in terms of the existing framework; thirdly, that the only appropriate form of protection for TK would be a *sui generis* approach which would create new legislation using the model of ownership and private property and finally, the approach which advocates for a *sui generis* legislation which is not based on private property rights and

[248] Ibid.
[249] Ibid at 180.
[250] Elmien du Plessis & Caroline B Ncube 'Introduction: Indigenous Knowledge' in Elmien du Plessis & Caroline B Ncube *Indigenous Knowledge & Intellectual Property: Contemporary Legal and Applied Research Series* (2016).
[251] Elmien du Plessis & Caroline B Ncube *Indigenous Knowledge & Intellectual Property: Contemporary Legal and Applied Research Series* (2016).
[252] Ibid.
[253] Elmien du Plessis & Caroline B Ncube op cit note 250 at 4.

ownership.[254] Only two of these approaches were adopted in South Africa when the legislative frameworks for the protection of TK were drafted.

The use of existing intellectual property regimes to protect TK has been criticised by many. There are several shortfalls in using existing intellectual property law frameworks. While intellectual property laws are constructed to allow individuals to protect their inventions, creations and intellectual property rights, TK is a community-based creation and does not allow for individuality. Most areas of intellectual property law do not recognise the collective authorship or ownership as is the case with TK.[255] It must however be noted that where allowances for collective authorship or ownership have been made in terms of intellectual property rights, such as geographical indications and certification marks, this protection has fared exceedingly well in protecting TK.[256]

There is, however, a concern that where intellectual property rights could possibly protect works from a collective source, these avenues are not being utilised to their full extent.[257] Certain forms of intellectual property recognise joint or co-authorship with great success. This is, however, not the only incompatibility that is present when dealing with intellectual property rights and TK. In terms of most intellectual property laws, there must be an identified author, which is not the case when dealing with TK. A fundamental principle of TK is that it is a communal creation. In most instances, the forefathers who originally created the knowledge have passed on and as the knowledge is transferred from generation to generation it is adapted and developed. This form of authorship is not recognised under ordinary intellectual property rights as it is nearly impossible to identify the first 'creator'.[258]

Further to this, TK by its very nature does not meet the bare requirements for most intellectual property forms. If one considers patents, it is glaringly obvious that TK will never satisfy the requirements for novelty and in many cases will not contain an inventive step. When considering the requirements for copyright protection such as originality and being recorded in material form, again, TK will not cross this threshold.[259] As TK is based on the principle of

[254] Ibid.
[255] DTI op cit note 246.
[256] Ibid.
[257] Ibid.
[258]Caroline B Ncube '*Sui Generis* Legislation for the Protection of Traditional Knowledge in South Africa: An Opportunity Lost' in Elmien du Plessis & Caroline B Ncube (eds) *Indigenous Knowledge & Intellectual Property: Contemporary Legal and Applied Research Series* (2016) at 34.
[259] Ibid.

customs and tradition, it is a form of knowledge which has been reworked, expanded and development over centuries and although of vital importance, it is not novel, original and in most circumstances the knowledge is not recorded in a material form.[260] A very simplistic explanation of TK is that it follows the general nature of customary law which in its true form, is living law passed down verbally from generation to generation and developed depending on the needs of the community at the time.

Conventional intellectual property laws are founded on the western ideas of private property ownership which is in stark contrast to how indigenous communities practice their form of ownership. Indigenous communities are generally obligations and duty based. Property law in indigenous African communities has been said to be focused around a person's obligations to their community, nature and resources and does not necessarily find itself rooted in the idea of individual ownership.[261] The community's focus is placed on the relationship between the individuals who make up the community and the resources which are shared amongst them.[262] Many indigenous communities feel that the right to use and share in TK specific to that community stems from customary law responsibilities.

In additional to the use of communal resources, homage is often paid to the ancestors of the community members with the belief that only when this is done will the use of that specific resource have its full benefits. An example of the principle can be found in the community protocols of the Bushbuckridge indigenous community which regulates the use of specific TK and states the following:

> Our harvesting of medicinal plants is guided by our spiritual values and is regulated by our customary laws that promote the sustainability of our natural resources. For example, we ask our ancestors as we harvest to ensure that the medicines will have their full effect and believe that only harvested leaves or bark that are taken in ways that ensure the survival of the plant or tree will heal the patient….[263]

A further issue which has been raised regarding the use of the intellectual property law system is that it has allowed for the misappropriation of TK in certain circumstances. This has in turn caused speculation in the community that the very legal framework which is being

---

[260] Ibid.
[261] Elmien du Plessis 'Protection of Traditional Knowledge in South Africa: The Troubled Bill, the Inoperative Act, and the Commons Solution' in Elmien du Plessis & Caroline B Ncube (eds) *Indigenous Knowledge & Intellectual Property: Contemporary Legal and Applied Research Series* (2016) at 81.
[262] Ibid.
[263] Ibid.

suggested to protect their knowledge has in some way been responsible for the exploitation and misappropriation of that knowledge. In many cases, TK is being used and protected in terms of intellectual property rights where the owner of the rights is in fact not the creator or author of that work and has misappropriated the TK and claimed it for themselves or has claimed that the TK has fallen into the public domain. Examples of this notion have been illustrated in chapter three on the discussion of protection of TK in Namibia and Cameroon.

The use of existing intellectual property rights to protect TK may seem appealing due to the ease of fitting in a new category of 'work' into an existing and established framework and although on the face of it, there is merit in using the existing laws of trade marks, copyright and geographical indicators to protect TK, the issue that TK is by its nature not a form of work which will satisfy the requirements of patentability and other forms of intellectual property must not be overlooked.[264] TK simply does not and will not ever meet the basic requirements of novelty and originality in terms of the intellectual property laws.

Any attempt to stretch the existing intellectual property laws to adequately cover and protect TK could be seen as undermining the core principles of existing intellectual property laws. Another fundamental principle of intellectual property law which is threatened by the inclusion of TK as a category of intellectual property is the duration of protection. The duration sought for the protection of TK is perpetual protection.[265]

An important component and principle of intellectual property law is that the exclusive right is only ever granted for a limited amount of time. This is to ensure that innovation continues by allowing once protected works to eventually fall into the public domain.[266] An attempt to protect TK under existing intellectual property laws will only be successful if there is a substantial alteration of the existing core principles of intellectual property laws, this in itself should demonstrate that a specialised and unique form of protection is required for TK.[267] Intellectual property laws are capable of recognising several forms of property and it is not inconceivable that a new form of property could be introduced. The issue with recognising TK as a form of property in terms of intellectual property laws is that it is not seen as a new form

[264] Dr MM Kleyn 'Draft Protection, Promotion, Development and Management of Indigenous Knowledge Bill, 2014' available at *https://blogs.sun.ac.za/iplaw/files/2015/05/Written-comments-on-the-Indigenous-Knowledge-Systems-Bill-2014-Dr-MM-Kleyn-May-13-2015.pdf,* accessed on 20 July 2022.
[265] Ibid.
[266] Ibid.
[267] Ibid.

of property but instead it is being inserted into existing forms with requirements which are incompatible with the nature of TK.

That is not to say that TK should never be protected under intellectual property laws. Where TK satisfies the requirements of traditional intellectual property, it should be protected as a form of intellectual property but for the bulk of TK which does not meet the requirements of intellectual property, a *sui generis* approach which will achieve all of the objectives in protecting TK, should be the favoured approach.

iii. The implementation of the Convention on Biological Diversity – An overview of the introduction of the National Environmental Management: Biodiversity Act 10 of 2004.

It is widely recognised that the worlds collective biodiversity is a vital resource which is currently under threat.[268] It was on this premise that the CBD was introduced in 1992 and came into effect in 1993.[269] This international agreement sought to give recognition to the importance of resources which are derived and originate within indigenous communities, and to protect the world's biodiversity and natural resources.[270] The objectives of the CBD were to enact a framework for the conservation of biodiversity, regulate and promote the sustainable use of biodiversity and to create equitable relationships between parties seeking to make use of genetic resources.[271] In doing so, the CBD created international standards which must be adhered to in order to prevent the misappropriation and biopiracy of genetic resources.[272] South Africa signed the CBD in 1993 and gave effect to the agreement in 2005.[273]

The implementation of the CBD is twofold: the parties to the CBD must implement and adhered to the minimum standards which are introduced and the parties must ensure that the national laws of that particular state regarding the use of genetic resources are complied with.[274] As envisaged in Article 15 of the CBD, each member state must ensure through legislative

[268] Dean & Dyer op cit note 5 at 335.
[269] Ibid.
[270] Michael Heinrich *et al* op cit note 64.
[271] Dean & Dyer op cit note 5 at 335.
[272] Dr MM Kleyn op cit note 264.
[273] Dean & Dyer op cit note 5 at 335.
[274] Ibid.

steps that mechanisms and policies are created for the fair and equitable sharing of benefits where any indigenous biological resource is used for commercial purposes.[275]

In order to comply with the regulations of the CBD, the South African government introduced the National Environmental Management: Biodiversity Act 10 of 2004 (NEMBA), the aim of which is to give effect to the standards and requirements as set out in the CBD.[276] The patent laws of South Africa were also amended to bring them in line with the CBD and the objective of NEMBA, by introducing the Patents Amendment At 20 of 2005.[277]

The Nagoya Protocol, ratified by South Africa in 2013,[278] was the product of the World Summit on Sustainable Development and was drafted to act as a complimentary agreement to the CBD, further guiding member states on how to effectively implement legislation which would give effect to the objectives set out in the CBD.[279] The Nagoya Protocol sought to drive home the importance of regulating the use of genetic resources and ensuring that where genetic resources are used, fair and equitable benefit sharing agreements are entered into. The Nagoya Protocol has been instrumental in the establishment of National Focal Points and National Authorities to ensure compliance with the regulations which in turn ensures that indigenous communities are benefitting from the use of their resources.[280]

Under NEMBA, the objectives of the CBD are achieved by ensuring that the use of indigenous biological or genetic resources are disclosed. The objectives created in terms of NEMBA are to ensure that there is effective management and conservation of South Africa's biodiversity, that the use of indigenous biological resources is sustainable and that where utilised, fair and equitable benefit sharing agreements are in place.[281]

NEMBA ensures that any community who allows access to a genetic resource or indigenous biological resource which is then used in an invention or from where an invention is derived, is compensated for the use of their resource or TK.[282]

---

[275] Ibid.
[276] Ibid at 336.
[277] Ibid.
[278] Dean & Dyer op cit note 5 at 336.
[279] Dr MM Kleyn op cit note 264.
[280] Ibid.
[281] Ibid.
[282] Ibid.

Unfortunately, globally, there have been many instances where TK, indigenous biological and genetic resources have been misappropriated from the poorest communities around the world and South African communities in these instances have not been spared. Yet, there are examples of the effectiveness of the legislative safeguards which have been implemented. Such was the case of the misappropriation of the *Pelargonium sidoides* and *Pelargonium reniforme* from an indigenous community located in Alice in the Eastern Cape of South Africa. In 2010, the indigenous community with the assistance of the African Centre for Biosafety challenged a patent which had been granted to an international company, Schwabe Willmar GmbH & Co (Schwabe).[283]

Traditional healers from the indigenous community claimed that they had for years made use of the roots of a specific plant by steeping the roots and creating a tincture to treat respiratory infections.[284] Schwabe had obtained a patent over the extraction of two compounds from the plant used by the indigenous community, known as *Pelargonium sidoides* and *Pelargonium reniforme*.

The compounds were then developed into a cough syrup used in the treatment of respiratory infections.[285] The patent was challenged on the basis that Schwabe had failed to obtain prior informed consent from the indigenous community which was in contravention with the patent application process.[286]

A major concern regarding the granting of the patent was that if it remained in place, Schwabe would benefit from the IK of the community and hold a monopoly over the use of the indigenous biological resource for the duration of the patent.[287] The patent was challenged on the grounds that it lacked novelty and an inventive step as it was clearly evident that the indigenous community had made use of this compound and method for years to treat the same ailment.[288] Coupled with the fact that prior informed consent had never been obtained, the patent was subsequently revoked.[289]

---

[283] Ibid at 341.
[284] Ibid.
[285] Elmien du Plessis '*Protection of Traditional Knowledge in South Africa: The Troubled Bill, the Inoperative Act, and the Commons Solution'* op cit note 261 at 75.
[286] Ibid.
[287] Ibid.
[288] Dean & Dyer op cit note 5 at 341.
[289] Ibid.

iv. The Protection of Traditional Knowledge in Terms of the Patents Amendment Act 20 of 2005:

The objectives set out in NEMBA were given further effect in terms of the amendments made to patent law in South Africa. The Patents Act 57 of 1978 was amended by the Patents Amendment Act 20 of 2005 to bring the laws in line with NEMBA and in turn the CBD and the Nagoya Protocol.[290]

As of the 14th of December 2007, any patent application made in South Africa where indigenous biological or genetic resources are used, must indicate in the application that the patent is derived from such a resource. The application must include that there is prior informed consent from the indigenous community where the resource originates and that a benefit sharing agreement is in place.[291] The Patents Amendment Act does not only protect indigenous biological and genetic resources but also regulates the use of TK. Where an invention uses or is derived from TK or traditional use the applicant must disclose this use and comply with the requirements set out above.[292] A mechanism introduced into the Patents Amendment Act to ensure compliance with the above is the ability to revoke a patent where disclosure is not made or where a false statement in the application is made.[293]

Patents, which are a set of exclusive rights granted over an innovation for a fixed period of time have been recognised as an effective tool in protecting TK. A setback though to patent protection is the lifespan of the protection.[294] In terms of the South African law governing patents, the protection is only granted for fifteen to twenty years, which does not allow for the perpetual protection that most seek for TK.[295] Under the current patent system in South Africa and in line with the international CBD agreement, any patent application made in South Africa must disclose if TK has been appropriated or used. The applicant must disclose the origin of the indigenous resource and/or TK. Prior informed consent from the indigenous community must be obtained and this must accompany the application. There must be a benefit sharing agreement in place and where applicable, there may be co-ownership of the patent.[296]

---

[290] Ibid at 336.
[291] Ibid.
[292] Ibid at 338.
[293] Ibid at 339.
[294] DTI op cit note 246.
[295] Ibid.
[296] Ibid

b. Protection of Traditional Knowledge under existing Intellectual Property Laws

There are various sectors which would immediately benefit from the implementation of protection for TK under existing intellectual property rights. It has been argued that the insertion of TK into the existing IP framework will create protection and uplift the following sectors: culture, pharmaceuticals and chemical sectors, agriculture and the medical and health sector.[297]

In terms of the culture sector, the protection of TK under copyright, design and geographical indications would ensure that designs unique to the South African indigenous communities would be protected. Already achieved by the amendments to the Patents Act, the sector of pharmaceutical and chemicals, may now, after entering into a benefit sharing agreement, harness and use the TK of local communicates to further their studies and development in the sector. These sectors may now work closely with the indigenous communities to better understand and develop innovations in the areas of genetics, chemicals and biotechnologies.[298]

The agriculture sector depends heavily on biological diversity and the indigenous communities have a wealth of knowledge to assist in further developing patents and innovations in this field.[299] Traditional medicines have become increasingly popular in western civilisation and the use of knowledge from traditional healers will be incredibly beneficial to the sector of medical and health care.[300] TK in this regard may be protected under the laws for patents or trade secret systems.[301] Arguably, it is this 'quick' form of protection which makes the intellectual property law approach so attractive and convenient.

i. Amending existing Intellectual Property Laws – The IPLAA

The IPLAA was introduced in Parliament in 2008 by the Department of Trade and Industry. It was amended and reintroduced in 2010 where it was then published for public comment. In 2013, the IPLAA was assented to by the President, but is yet to be enacted.[302]

---

[297] Ibid.
[298] Ibid.
[299] Ibid.
[300] Ibid.
[301] Ibid.
[302] Dean & Dyer op cit note 5 at 347.

In terms of the IPLAA, the approach followed was one which has reconstructed existing intellectual property laws to include TK under the ambit of intellectual property. TK has been incorporated into the various forms of intellectual property such as trade marks, copyright, design and performers' rights.[303] The IPLAA proposes protection for TK under already existing databases, intellectual property systems and registers.[304] It is no surprise that the Department of Trade and Industry followed this approach after having had success in implementing the amendments to the Patents Act 1978, which introduced the Patents Amendment Act of 2005, ensuring that South Africa was compliant with the recommendations made under the CBD and NEMBA which has for the most part been incredibly successful.[305]

The objective of the IPLAA is to recognise and protect TK under the existing legislative framework which protects intellectual property rights.[306] While creating equal protection for TK across the already existing intellectual property categories, the IPLAA further seeks to protect TK at regional and international levels.[307] One of the many criticisms of the introduction of the IPLAA is that intellectual property law in its natural form does not offer protection to TK. Although amendments have been made to existing legislation, there are still categories of intellectual property which cannot accommodate the protection of TK such as patents.[308]

When considering the nature of intellectual property and the requirements in terms of intellectual property law protection, one cannot ignore the fact that TK in most instances cannot cross the requirements threshold. The requirements of originality for a copyright and novelty when dealing with designs and patents are requirements which TK cannot satisfy.[309] Intellectual property rights by their nature are limited in the protection that they may offer TK as TK does not 'fit' into the conventional intellectual property law system.[310]

Although the IPLAA extends across copyright, trade marks, designs, and performers' rights, the predominate power of the IPLAA lies in the definitions that it creates across the various pieces of legislation. Again, the IPLAA seeks to create a new category of intellectual

---

[303] Amos Saurombe op cit note 238 at 198.
[304] Ibid at 197.
[305] Ibid.
[306] Lee-Ann Tong 'South Africa Adopts *Sui Generis* Indigenous Knowledge Protection Legislation' (2019) (Vol. 14, No. 12) *Journal of Intellectual Property Law & Practice* 935.
[307] Amos Saurombe op cit note 238 at 197.
[308] Ibid.
[309] Dean & Dyer op cit note 5 at 345.
[310] Talkmore Chidede op cit note 243 at 180.

property and does so by inserting the amended definitions into the existing frameworks. The IPLAA has been criticised for being poorly drafted and repetitious in that the same or similar definitions and amendments are used throughout and then inserted into several pieces of legislation.[311] The majority of the amendments can be found in the Copyright Act 98 of 1978 (the Copyright Act).[312]

In terms of the IPLAA several new definitions have been incorporated in to existing legislative instruments to recognise TK. In terms of the IPLAA an indigenous community is defined as:

> [A]ny recognizable community of people orientated in or historically settled in a geographical area or areas located within the borders of the Republic, as such borders existed at the date of commencement of this Act, characterized by social, cultural, and economic conditions that distinguish them from other sections of the national community, and who identify themselves and are recognised by other groups as a distinct collective.[313]

Indigenous cultural expressions or knowledge are defined in the Copyright Act as:

> [A]ny 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, musical or sound expressions; expressions by actions tangible expressions.[314]

Also recognised and protected under the IPLAA are derivative indigenous works. They are defined as:

> [A]ny work forming the subject of this Act, applied to any form of indigenous work recognised by an indigenous community as having an indigenous or traditional origin, and a substantial part of which, was derived from indigenous cultural expressions or knowledge irrespective of whether such derivative indigenous work was derived before or after the date of commencement of this Act.[315]

In summary, the IPLAA protects TK as follows: under the amended definitions of 'works' to include protection of works under the Copyright Act, the IPLAA has introduced section 2A which recognises traditional works and indigenous cultural expressions of knowledge.[316] Traditional works and derivates created using TK are also protected. The

---

[311] Dean & Dyer op cit not 5 at 347.
[312] Ushenta Naidoo *A Comparative Assessment of South Africa's Proposed Legislation to Protect Traditional Knowledge* (unpublished LLM thesis, University of Pretoria, 2019) 11.
[313] The IPLAA, s 3(f).
[314] Ibid.
[315] The IPLAA, s 3(e).
[316] Dean & Dyer op cit note 5 at 354.

concept of traditional works further covers works with a traditional or indigenous origin and indigenous cultural expressions of knowledge. The indigenous cultural expressions of knowledge may be intangible or tangible but must embody TK and must be passed on from generation to generation and represent an element of creativity particular to that indigenous community. These expressions can be tangible material, actions expressions, phonetic or verbal and or musical and sound expressions.[317]

Under the IPLAA, the Trade Marks Act[318] has been amended to allow communities who own the original TK in a trade mark to license such trade marks. The ordinary requirements to be registered as a trade mark are applicable to 'traditional trade marks'. The communities have also been encouraged to form their own organisations to assist in the management of traditional trade marks.[319] TK will also be granted protection under the rules of geographical indicators. The aim of the amendments to the existing trade mark laws are to allow communities to not only obtain protection under domestic laws but to register their traditional trade marks internationally and thereby protect their knowledge across borders.[320]

The IPLAA makes no amendments to the intellectual property area of patents, however, it is important to note that TK was taken into account by the introduction the Patents Amendment Act 2005.

ii. The IPLAA and Copyright

The IPLAA has introduced TK as a new and distinct form of work which under the Copyright Act, as amended by the IPLAA, will be eligible for copyright protection like any other recognised work. In terms of section 28B of the Copyright Act, a traditional work will only be protected by copyright if it satisfies the requirements of an indigenous work as defined in the Copyright Act. It is important to note that although indigenous works created before the commencement of the IPLAA will be recognised and protected, any derivate indigenous work will only be protected under copyright if the work was created on or after the date of commencement of the IPLAA and only if the indigenous community from where the work was

[317] The IPLAA, s 3(f).
[318] The Trade Marks Act 194 of 1993 (hereinafter referred to as the Trade Marks Act).
[319] Amos Saurombe op cit note 238 at 198.
[320] Ibid.

derived is or was an indigenous community when the work was created.[321] This essentially means that any derivate indigenous works created before the commencement of the IPLAA which is yet to be enacted will not benefit from protection in terms of the legislation. [322]

The IPLAA relies heavily on the creation of community protocols which are defined in section 3(c) of the IPLAA as:

> [A] protocol developed by an indigenous community that describes the structure of the indigenous community and its claims to indigenous cultural expressions or knowledge and indigenous works and provides procedures for prospective users of such indigenous cultural expressions or knowledge or indigenous works, to seek the community's prior informed consent, negotiate mutually agreed terms and benefit sharing agreements.[323]

The inclusion of community protocols places a burden on the indigenous communities. They are required to establish and document a community protocol which is echoed in section 28C (8) of the Copyright Act where registration of TK in the National Database will only be successful if an indigenous community provides a community protocol alongside the registration application.[324]

The regulations inserted into the Copyright Act require the community protocol to include the details of the community member who has been appointed as the representative of that indigenous community. The appointed representative will be named as the right holder for that 'work'. The community protocol must also include the details of the 'work' which is being registered and the jurisdiction of the indigenous community claiming the rights in that 'work'. A written statement from the appointed representative, that they will hold the copyright on behalf of the indigenous community, must also be included.[325]

In terms of the amendments made to the Copyright Act by the IPLAA, section 28 (D)(2) regulates the ownership of TK when it is considered a work which falls under copyright protection. The section states that copyright in a traditional work will be owned by the author who is recognised to be the traditional community from where that work originates.[326] In terms

---

[321] Liani Taljaard ' South Africa: Copyright in Traditional Works' available at https://www.mondaq.com/southafrica/copyright/919736/copyright-in-traditional-works, accessed on 15 July 2022.
[322] Ibid.
[323] The IPLAA, s 3(c).
[324] Dean & Dyer op cit note 5 at 350.
[325] Ibid.
[326] Caroline B Ncube *'Sui Generis Legislation for the Protection of Traditional Knowledge in South Africa: An Opportunity Lost'* op cit note 258 at 43.

of the Copyright Act, such communities are deemed to be juristic persons and that the administration of copyrights must be in line with community protocols.[327]

This places the responsibility on the indigenous community to come up with and agree on the community protocols which will be followed. The community will have to appoint authorised representatives and the community protocols will be required when entering into licensing agreements.[328] The regulations limit the assignment of copyright in that the right may only be assigned to a collecting society or duly appointed representative who will not be entitled to be bequeath the copyright to any other person.[329]

The community protocols would therefore have to detail how the rights will be transmitted to subsequent representatives upon the death or liquidation of the duly authorised representative. The copyright duration is extended for traditional works to last for perpetuity or upon the death of the last living member of the indigenous community. Upon the death of the last living member, the copyright will revert to the National Trust.[330]

The responsibility of negotiating an appropriate royalty with regard to the use of the copyright protected traditional work will fall to the indigenous community, however, any licensing agreements will be overseen by the National Council for Indigenous Knowledge to ensure that the requirements in terms of the existing intellectual property laws and the community protocols have been adhered to.[331]

While the above may be seen as a lifeline to the indigenous communities, the negotiation of royalties places a burden on the community. It is possible that a power imbalance may exist between the negotiating parties which could lead to a royalty being agreed upon which is detrimental or unfair to that community. Although section 28(H)(3) provides guidelines to the community on how royalties should be negotiated it does not prevent the indigenous community from being in a position where they may be taken advantage of. Not all authorised representatives or collecting societies as appointed by the community protocols, will be capable of skilfully ascertaining what a fair royalty may be.[332] This process is open to abuse

[327] Ibid.
[328] Ibid.
[329] Ibid.
[330] Ibid.
[331] Ibid at 44.
[332] Ibid.

by negotiators who may be better educated than the community representative and does not create a fair and equal playing field for the community.

Section 28(H)(3) allows for the owner of the copyright to reach an agreement with the user of the traditional work or for the collecting society to reach such agreement. Where the parties are unable to reach an agreement on the royalties within a reasonable time, the matter may be referred to the dispute resolution process.[333] Should the dispute resolution process fail and the parties are unable to reach an agreement, they would then approach an accredited institution such as the Copyright Tribunal or commence arbitration proceedings to have a royalties amount determined on their behalf.[334]

A criticism of the amendments introduced into the Copyright Act by the IPLAA are the amendments or the lack thereof concerning the exceptions and limitation of the use of traditional works.[335] Where ordinarily, copyright will not be infringed where the work is used for criticism or review,[336] in terms of a traditional work, the criticism and or review must be professional, which may be viewed as an unnecessary limitation which restricts the access and use of traditional works. In terms of the general exceptions to protection of traditional works where prior consent will not be required by the user, the IPLAA has inserted the words 'educational' in section 28(G)(7)(d) and 'scientific' in paragraph (e) which has the effect of creating an incredibly broad and vague limitation which could be subject to misuse.[337]

While there are criticisms regarding the amendments mentioned above in that the provisions are seen to not adequately considered the indigenous communities which the IPLAA aims to protect, the drafters of the IPLAA should be commended on the insertion of section 28 K. Section 28 K introduces a dispute resolution process which takes into account the resources available to the indigenous community and the educational background of the members of that community.[338]

---

[333] Ibid.
[334] The Copyright Act, s 28(H)(3).
[335] C Ncube *'Sui Generis Legislation for the Protection of Traditional Knowledge in South Africa: An Opportunity Lost'* op cit note 258 at 45.
[336] The Copyright Act, s 16.
[337] C Ncube '*Sui Generis Legislation for the Protection of Traditional Knowledge in South Africa: An Opportunity Lost'* op cit note 258 at 45.
[338] Ibid at 46.

The dispute resolution process mirrors the procedure followed in labour law disputes. The parties involved in the dispute are not required to obtain legal representation in order to have a dispute heard. This process is one which alleviates the financial burden which parties often face when attempting to remedy a dispute in a legal forum. In terms of section 28 K, the process to be followed when a dispute arises must be overseen by an alternative dispute resolution forum which is accredited by the Companies and Intellectual Property Commission (CIPC).[339] Parties will only be permitted to rely on legal representation during the process if all parties concerned agree or if the adjudicator feels that such representation is appropriate. The forum must also take into account existing customary law dispute resolution principles. Any orders made by the forum will be granted the same authority as an order from the High Court.[340]

All disputes regarding copyrights vested in traditional works must first follow the dispute resolution process before litigation proceedings in any court are instituted and the decisions reached during the dispute resolution proceedings may be appealed in an appropriate court.[341] The incorporation of this tailored process is aimed at assisting indigenous communities and to prevent the feeling of alienation regarding their claims, which is often encountered in a litigious environment. It also further ensures that the communities will not be barred due to their financial shortfalls when attempting to settle a dispute.[342] An issue which has been raised regarding the proposed dispute resolution process is that adjudicators will not only have to be experienced in intellectual property law matters, but will also have to have an understanding of the customary dispute mechanisms which are applied in each indigenous community.[343]

In addition to the introduction of the IPLAA, the Department of Trade and Industry has also sought to rework the existing protection and legislative framework afforded to conventional copyright in South Africa.[344] The Copyright Amendment Bill[345] (CAB) is a legislative instrument which has been heavily criticised and reworked several times. The CAB

---

[339] Ibid.
[340] Ibid.
[341] Ibid.
[342] Ibid.
[343] Ibid.
[344] Owen Dean 'Reconstituting the Copyright Amendment Bill' 2021 available at *https://blogs.sun.ac.za/iplaw/2021/06/14/reconstituting-the-copyright-amendment-bill/* accessed on 07 November 2022.
[345] The Copyright Amendment Bill B13B-2017.

was passed by Parliament in 2019 and was submitted to the President of South Africa for signing which did not occur.[346] Despite being redrafted concerns still remained regarding the constitutional muster of the CAB. One of the many concerns, was that in its current state, the CAB did not comply with various constitutional provisions nor did it adhere to the regulations set out in the Berne Convention and the TRIPs Agreement, which South Africa is bound to comply with.[347]

While there have been various criticisms regarding the provisions in the CAB such as the introduction of illogical terms and defences such as fair use, for the purpose of this paper, the discussion will only focus on the proposed changes and impact that the CAB may have on TK if it is assented to and enacted.

In its current form, the CAB has been drafted so that it will operate in conjunction with the IPLAA. Although the IPLAA has been assented to by the President of South Africa, it is yet to commence. Should the IPLAA be repealed and replaced by the IKSA, the manner in which the CAB has been drafted to act alongside the IPLAA will be nonsensical. The CAB refers to structures and mechanisms specific to the IPLAA and ones which are currently not in place nor recognised in the realm of copyright law.[348]

The CAB has further been criticised for the way in which it has been numbered, referring to sections based on the implementation of the IPLAA and currently referring to sections which do not exist in law. These errors lead the CAB to be an instrument which is likely to create more confusion and uncertainty in our law than to deal with and address the pertinent issues of effective protection for TK.[349]

iii. The IPLAA and the Trade Marks Act

A trade mark is a mark, capable of being graphically represented, which distinguishes goods and services from one another. Under South Africa law, a trade mark will be afforded protection for a period of ten years, which again, may be detrimental to the protection of TK

[346] Owen Dean op cit note 344.
[347] Ibid.
[348] Ibid.
[349] Ibid.

as it is not for perpetuity.[350] Trade marks, certification marks and collective marks have the possibility of allowing TK in 'mark' form to be globally recognised and protected.

A registered trade mark which protects a cultural name or symbol is subject to an exception on the normal period of protection and is instead afforded protection for perpetuity in terms of the amendments introduced by the IPLAA. The same duration of protection is granted to any cultural name or symbol which satisfies the requirements for trade mark registration.[351] The protection offered to a certification mark in terms of conventional intellectual property law may be utilised by indigenous communities with very little adjustments to the current laws. Certification marks may be used to protect and recognise characteristics of products which are created by indigenous communities.[352] Due to collective marks allowing for the unconventional registration and protection of 'works' which are collectively owned, this form of IP remedies one of the issues of using the intellectual property system to protect TK. Through collective marks indigenous communities may register certain marks in order to protect their TK even without the IPLAA being enacted.[353]

Geographical indicators are another effective intellectual property tool which may be utilised to protect TK. A geographical indicator is 'a sign used on goods that have a specific geographical origin and possess qualities or reputations that are attributed to their place of origin.'[354] A benefit of using a geographical indicator as a form of protection for TK is the fact that declaring a name as a geographical indicator may be done unilaterally by a country without having to consult with other trading partners.[355]

Section 9 of the IPLAA inserts amendments into the Trade Marks Act by expanding on the existing laws which regulate certificate trade marks and collective trade marks to include traditional trade marks.[356] The amendments allow for the registration and protection of traditional terms and expressions as certificate trade marks or collective trade marks if the TK fulfils the requirements of being 'capable of distinguishing the goods or services of indigenous communities in respect of which they are registered or proposed to be registered from the goods

[350] DTI op cit note 246.
[351] Ibid.
[352] Ibid.
[353] Ibid.
[354] Ibid.
[355] Ibid.
[356] Dean & Dyer op cit note 5 at 353.

or services of another community or person.'[357] In terms of the amendments to the Trade Mark Act, an indigenous community may also register geographical indicators as collective or certificate trade marks.[358]

iv. Amendments to the Performers' Protection Act 11 of 1967

The Performers' Protection Act 11 of 1967 is amended by the IPLAA to include the performances of traditional works. These amendments are made by inserting section 8A-D into the existing legislation.[359] The amendments seek to ensure that where a work which contains TK is performed, the rights of the indigenous community are recognised and protected and where applicable, the necessary compensation is made. Arguably, the Performers' Protection Act has been the least effected by the amendments introduced by the IPLAA as the Performers' Protection Act's main objective has always been to protect any performer regardless of the nature of the work which is being performed.[360]

v. Criticism of the IPLAA

The IPLAA has been criticised for being too bulky and attempting to cover too many aspects governed by intellectual property law. Proposals were made for separate bills to be created for each area of intellectual property where protection for TK is sought.[361] Another criticism which was raised was the lack of understanding by the indigenous communities of the management of TK and the need for databases, the very nature of TK is that it remains unwritten and is passed on to members of the indigenous community verbally. The registration process is one which still operates as a 'first come, first serve' basis which is open to be abused by individuals who have the means or readily available access to the registration offices.[362]

The question of 'who is the author or creator' when considering TK has also been a point of contention regarding the protection of TK under existing intellectual property laws. In most cases, it is almost impossible to ascertain who the creator or author of an indigenous work is which is a requirement in terms of copyright protection. The very nature of TK means that it

[357] Dean & Dyer op cit note 5 at 354.
[358] Ibid.
[359] Ibid.
[360] Ibid.
[361] Amos Saurombe op cit note 238 at 199.
[362] Ibid at 200.

is a form of knowledge which has been passed down from generation to generation over centuries and in most cases, the creator is unknown by the community members.[363]

A further issue with the IPLAA is that the administration of the rights held in TK is effectively not managed by the indigenous communities themselves by rather with the National Trust Fund which is created in terms of the IPLAA.[364] The IPLAA has been criticised for not recognising TK in relation to traditional technical knowledge which includes traditional medicine and agricultural methods.[365] Both these sectors, not only in a South African sense, but globally, are expanding economic areas which have the capability of drawing in huge financial gains. While indigenous communities may benefit from the use of their cultural heritage and TK through the recognised forms of intellectual property under the IPLAA, these two sectors are by far the most important when looking at the economic benefits which may be derived from the use of TK.

Although TK in the form of traditional medicine and agricultural methods may be protected in terms of the Patents Amendment Act, this is yet again, another piece of legislation which the indigenous community must familiarise themselves with and is arguably the most complicated form of intellectual property law protection. The burden which the IPLAA places on the indigenous communities is immense. These communities which are often rural and impoverished communities who are now expected to familiarise themselves with the intricacies of intellectual property laws and various pieces of legislation should they wish to protect and benefit from their TK. This expectation has the potential to dissuade the indigenous communities from utilising the protection.

c. *A Sui Generis Approach to the Protection of Traditional Knowledge – The introduction of the IKSA*

The IKSA was passed in 2019 and follows the approach of creating a *sui generis* form of protection for TK. While an analysis will be provided regarding the IKSA further on in this chapter, it is important to note from the outset that the IKSA does not contain any mechanisms to repeal or displace the IPLAA. Currently, both pieces of legislation have been introduced to run alongside one another. While many have argued that the IKSA is a more suitable approach

[363] Dean & Dyer op cit note 5 at 345.
[364] Elmien (WJ) du Plessis *'Protection of Traditional Knowledge in South Africa: The Troubled Bill, the Inoperative Act, and the Commons Solution'* op cit note 261 at 77.
[365] Ibid.

for the protection of TK, the parallel implementation of the IPLAA and IKSA has the potential to cause confusion and complications in the protection of TK.[366]

Unlike the IPLAA, the IKSA introduces a *sui generis* form of protection for TK. In doing so, the IKSA has followed a different understanding of what TK is and has introduced its own set of definitions with regard to aspects of TK. The IKSA defines an indigenous community as:

> [A]ny recognizable community of people developing from, or historically settled in a geographical area or areas located within the borders of the Republic, characterized by social, cultural, and economic conditions, which distinguish them from other sections of the national community, and who identify themselves as a distinct collective.[367]

An indigenous cultural expression is defined in the IKSA as:

> [E]xpressions that have a cultural content that developed within indigenous communities and have assimilated into their culture and social identity. Including but not limited to phonetic or verbal expressions; musical or sound expressions; expressions by action; and action tangible expressions.[368]

The IKSA also seeks to define TK and does so as follows:

> [K]nowledge which has been developed within an indigenous community and has been assimilated into the cultural and social identity of that community, and include knowledge of functional nature, knowledge of natural resources, and indigenous cultural expressions.[369]

In terms of the IKSA, the concept of functional TK is also recognised, and the following definition is provided to explain what would constitute functional TK 'in relation to indigenous knowledge, means knowledge that is scientific and or technical in nature'.[370]

The framework created under the IKSA is less restive and broader in that it recognises and protects indigenous knowledge which comprises of scientific and technical knowledge, knowledge of natural resources which includes genetic, water, air and mineral knowledge and indigenous cultural expressions which are developed within an indigenous community and can

[366] Lee-Ann Tong op cit note 306 at 937.
[367] The IKSA, s 1.
[368] Ibid.
[369] Ibid.
[370] Ibid.

include phonetic or verbal, musical or sound, expressions by action and action tangible expressions.[371]

i. Implementation of the IKSA

What sets the IKSA apart from the IPLAA is the aim to protect all conceivable forms of TK.[372] The IKSA seeks to protect knowledge of a functional nature and goes beyond just simply defining TK as a form of IP. The IKSA is arguably more successful as a tool for the protection of TK in that unlike the existing intellectual property laws, the IKSA seeks to blend a *sui generis* approach for the protection of TK with the understanding of the importance of communal and cultural rights.[373]

The objectives of the IKSA are to protect TK from unauthorised use, misappropriation and misuse as well as the regulation of equitable distribution of benefits and the encouragement of the commercialisation of TK.[374]

In terms of the IKSA, the National Indigenous Knowledge Systems Office (NIKSO) is created and charged with the implementation of the protection of TK. The objectives of the IKSA are meant to be fulfilled by the implementation of a registration system which seeks to protect TK as a form of property recognised in terms of section 25 of the Constitution of the Republic of South Africa, 1996.[375] The property rights will vest with the indigenous community through a delegated trustee. An obligation is imposed on the trustee representing an indigenous community to register all TK. In terms of section 20(4) of the IKSA, protection in terms of this legislation will only be applied to registered TK.

In order for TK to be protected under the provisions set out in the IKSA, not only must the TK be registered, but it must satisfy the three criteria set out in section 11 of the IKSA, which are that: the TK has been passed on from generation to generation within an indigenous community as defined by the act; it has been developed within the indigenous community and that it is associated with the cultural and social identity of that indigenous community.[376]

---

[371] Ushenta Naidoo op cit note 312 at 57 -58.
[372] Lee-Ann Tong op cit note 306 at 936.
[373] Caroline B Ncube *'Sui Generis Legislation for the Protection of Traditional Knowledge in South Africa: An Opportunity Lost'* op cit note 258 at 47.
[374] Lee-Ann Tong op cit not 306 at 935.
[375] Ibid.
[376] Ibid.

The duration of protection granted in terms of the IKSA is set out in section 10 of the Act and will allow for the protection of traditional works for as long as they satisfy the three requirements listed above. Section 10 of the IKSA takes into account the importance of allowing certain works to become available in the public. Should TK no longer satisfy a requirement set out in section 11 of the IKSA, that traditional work will fall into the ambit of the public domain.[377]

NIKSO will be tasked with establishing the registration office and for the administration of the registration process. The IKSA does not make mention of any preregistration opposition processes, although it may be possible for an interested person to apply to amend the register. If such an application is made, the indigenous community must be given the opportunity to make representations regarding the proposed amendment.[378]

The indigenous community will be vested with the exclusive rights to any benefit which arises from the commercial use of their TK which has been duly registered. The community will also be entitled to be acknowledged as the origin of the TK and they will be entitled to limit the unauthorised use of their TK as regulated by section 13(1) of the IKSA.[379] In terms of section 13(2) of the IKSA, any person who is not a member of the indigenous community and who wishes to make use of any registered TK for commercial purposes, must enter into a license agreement with the trustee of the indigenous community. This provision is one which aims to illustrate the importance of the commercialisation of TK within certain parameters and achieves the objectives of the IKSA.[380]

The IKSA further enables NIKSO to oversee all commercial licenses to ensure that a fair agreement has been reached which ensures that the indigenous community has not been taken advantage of. All license agreements must be made through NIKSO. The application for the licence must indicate that prior informed consent has been obtained from the trustee of the indigenous community who owns the rights in the TK and all of the details pertaining to the benefit sharing agreement which has been entered into must be included. This process as set out in the IKSA is one which mirrors that contained in the Patents Amendment Act and the regulations contained in the CBD and Nagoya Protocol.

---

[377] Ibid.
[378] Ibid.
[379] Ibid.
[380] Ibid.

Unlike the duration of perpetuity created by the IPLAA for TK, the duration of protection for functional TK and indigenous cultural expressions under the IKSA, differs. The obligation to pay royalties for the use of the certain forms of TK under a license agreement will expire after 20 years for functional TK and 50 years for indigenous cultural expressions. These time periods run from the date that the agreement is entered into. It is important to note that their termination periods are only applicable to functional TK and indigenous cultural expressions.[381] All other forms of TK will be protected for as long as they satisfy the requirements of TK as set out in section 10 of the IKSA.

The IKSA creates two enforcement mechanisms. The first enforcement procedure is a dispute resolution committee that may be set up by the Minister of Science and Technology on an ad hoc basis to resolve any disputes. While there is no mention of an appeal procedure, the provisions in the act do allow for parties to take the matter on review to the appropriate High Court.[382] The dispute resolution committee is granted the authority to issue license holders with written warnings and notices which may prohibit them from using TK in an unauthorised manner. The committee may also make recommendations to NIKSO that a license holder's right be cancelled, suspended, or revoked in terms of section 27(4) of the IKSA. The second enforcement procedure is the criminalisation of misappropriation and unauthorised use.[383] Section 28 of the IKSA states the following:

> Any third party who knowingly makes commercial use of indigenous knowledge in a manner which is not in accordance with an agreement entered into with the indigenous community; and infringes the rights of that indigenous community, is guilty of an offence and on conviction liable to pay a fine as prescribed.[384]

The right to any benefits which arises from the commercial use of registered TK is regulated by the license agreement which is overseen and approved by NIKSO. The IKSA stipulates that this must occur whenever a non-member of the community wishes to make use of the TK from commercial purposes. The IKSA is silent on whether the community has the discretion to decide on the nature and terms of the agreement and whether or not the licenses are exclusive or non-exclusive.[385] The right to be acknowledged as the origin of the TK will most likely apply to commercial and non-commercial uses of the TK. Although only mentioned

---

[381] Ibid.
[382] Ibid at 935-936.
[383] Ibid at 936.
[384] The IKSA, s 28.
[385] Lee-Ann Tong op cit note 306 at 936.

in conjunction with a license holder, the IKSA is unclear on whether there are any other obligations on a user to mention the origin of the TK.[386]

Concern is raised when considering the right of the community to limit unauthorised use of the TK. The term 'use' is not defined in the IKSA. Commercial use is defined as 'the use of indigenous knowledge for financial gain', which does not assist in the interpretation of what is considered 'use' and therefore what 'authorised use' would be.[387] Reading section 26(4) broadly, it appears as though any use of registered TK would require prior informed consent from the indigenous community, regardless of whether the use is for non-commercial purposes.[388] The only exclusion of prior informed consent mentioned in the IKSA is if the use is for criticism or academic review, reporting news or current events, judicial proceedings and in certain circumstances if required in the time of a national emergency or natural disaster.

Although section 26(4), allows for prior informed consent to be disregarded in the circumstances listed above, the indigenous community would still be entitled to compensation for the use of their TK. When reading the above provisions, it can be assumed that all other uses of registered TK will require prior informed consent, regardless of the use being non-commercial.[389] This would then include instances where the knowledge is being used for educational purposes and research.

A criticism of this approach is that, if prior informed consent is required for all uses of TK, should the application procedure be inefficient or where applicants experience lengthy delays regarding the outcomes of the applications, these setbacks could lead to an increase in infringements or the avoidance of using TK altogether.[390] One of the objectives of the IKSA is to promote the use of TK and if the resource is not managed correctly, this objective will not be met.[391] It would be burdensome on any administrative system to have to approve each and every single use of TK and even more burdensome on any user to have to apply for approval in circumstances where the use is for non-commercial purposes.

[386] Ibid.
[387] Ibid.
[388] Ibid.
[389] Ibid.
[390] Ibid.
[391] Ibid.

The IKSA extends its protection of TK to regulate the use of the knowledge to any person within South Africa and ensures that creators and intellectual property rights owners are subjected to its provisions. The implications of the IKSA are that where a community has registered its TK, any person who is not a member of that community must obtain prior informed consent from the community to use the TK. The IKSA further ensures that where TK is used and a benefit is derived from the commercial use of the knowledge, the community who holds the exclusive rights over that knowledge will be entitled to benefit as well. All commercial use of TK will be subject to a benefit sharing agreement with the community who holds the rights of the TK.[392]

The IKSA also ensures that any person who has, before the commencement of the IKSA, benefited from the commercial exploitation of TK which is subsequently registered, will have to enter into a benefit sharing agreement with the rightful owners of that knowledge as per the requirements set out in the IKSA.[393] In terms of transitional arrangements, the continued use of registered TK will only be permitted if a license agreement application to NIKSO is successful. Parties using TK will then have 12 months from the date of commencement of the IKSA to complete the procedures set out for license agreements in order to ensure continued use of the resource as regulated by section 33(2) of the IKSA.[394] However, the IKSA does not guarantee that prior use of TK will entitle the user to a license once the IKSA has commenced and the TK is registered.[395]

One of the biggest concerns regarding the IKSA, however, is the relationship between the IKSA and the IPLAA. Section 32(1) of the IKSA specifically states that it does not 'alter or detract from any right in respect of any statue or common law' which means that it does not intend to repeal the current protection drafted in terms of the IPLAA. The issues raised on this point are that any innovation or creation which involves TK will be subjected to a plethora of regulations across multiple pieces of legislation which has the potential to cause uncertainty and undoubtedly, conflict between the various applicable laws.

It must be remembered that TK is intrinsically linked to cultural heritage and the cultural identities of indigenous communities. Any form of protection created for TK must

[392] Ibid.
[393] Ibid.
[394] Ibid.
[395] Ibid.

ensure that while the resource is being promoted and protected, it must allow for the economic development of that specific community. The protection must also ensure that the cultural identity of the indigenous community is respected and protected.[396]

The form of protection created by the IKSA must ensure that the mechanisms which are put into place do not lead to infighting amongst community members and that it does not cause the disintegration of communal values amongst the indigenous community.[397] It has been suggested that as part of the preamble of the IKSA, an effort should be made to elaborate on the intention of the legislation and to illustrate in detail how it will impact the communities who utilise the IKSA.

A few suggestions have been made regarding the current drafting of the IKSA. The first is that the IKSA considers introducing a form of classification of the various indigenous communities who will make use of the legislation.[398] The second is that it should incorporate into its framework, circumstances where TK may also qualify for protection in terms of conventional intellectual property law. Even if a *sui generis* approach such as the one created in terms of the IKSA is introduced as the primary form of protection for TK, there may still be circumstance where TK may meet the requirements of intellectual property law protection as well. Under these circumstances, TK could benefit from the dual protection.[399]

The registration process of TK has also come under scrutiny in terms of the drafting of the IKSA. It is unclear in terms of the IKSA what procedure would be followed when registering TK which is recognised and originates from more than one indigenous community.[400] Further to this, there is uncertainty on whether the registration process through NIKSO will replace the process that has been practiced in indigenous communities for centuries when managing, developing and using their own TK.[401]

While the IKSA has made an impressive attempt at creating a *sui generis* form of protection for TK, it falls short by allowing itself to be subservient to the IPLAA.[402]

---

[396] Dr MM Kleyn op cit note 264.
[397] Ibid.
[398] Ibid.
[399] Ibid.
[400] Ibid.
[401] Ibid.
[402]Caroline B Ncube '*Sui Generis Legislation for the Protection of Traditional Knowledge in South Africa: An Opportunity Lost'* op cit note 258 at 47.

d. A Comparative Analysis of the IPLAA and the IKSA

By introducing TK into the existing legislative framework of intellectual property law, as the IPLAA seeks to do, the indigenous communities who act as the owners of TK will need to familiarise themselves with intellectual property laws. The area of intellectual property law is a complex and intricate field of law which requires even in its simplest form, a high level of understanding.[403] By inserting TK into the existing legislation, the indigenous communities and representatives of those communities will be required to read several pieces of legislation to protect their TK. Further to this, while the legislation needs to be read and understood, most of the regulations and provisions will not be applicable to TK, only the amendments which have been introduced to recognise and regulate TK. It is a tedious and complex exercise which would need to be undertaken by the indigenous community members with very little assistance.[404]

By creating a separate piece of legislation which will be applicable to TK, one creates an avenue which is far more accessible to the indigenous community as well as those who seek to make use of TK.[405] It is obvious that an approach which seeks to make the regulations and guidelines as accessible and uncomplicated as the law will allow, will be more beneficial and appealing, not only to the indigenous communities, but for prospective licensees and users of TK.

Although both the IPLAA and the IKSA have been drafted and created to offer a legislative framework under which TK can be protected, there is a stark difference between how both pieces of legislation approach the protection of TK.[406] The IPLAA is aimed at following an intellectual property law-based approach to the protection of TK and seeks to create a new category of intellectual property rights as opposed to creating a new form of protection for TK.[407] The IKSA on the other hand, introduces a *sui generis* approach in creating a legislative framework under which TK can be protected, recognised and commercialised. It can be argued that the protection offered by the IKSA is broader and easier to apply than the

[403] Ibid at 39.
[404] Ibid at 40.
[405] Ibid.
[406] Ushenta Naidoo op cit note 312 at 59.
[407] Ibid at 60.

protection offered by the IPLAA, which follows a more restrictive approach when it comes to the protection of TK.[408]

Due to the different approaches followed in each piece of legislation, two different forms of protection are created and while it may seem beneficial to have an extensive set of tools to protect TK, the overlap and different approaches will lead to uncertainty in the law and may have a detrimental effect on the use and protection of TK. This in turn has the possibility of negating the purpose of protection for TK.

The IPLAA has been heavily criticised in that the approach to create a new category of intellectual property was done hastily and without the required backing of the international community. The IKSA is favoured in that it follows a more suitable approach of special protection for TK. Although, to date, there is still no international instrument to protect TK, most informed parties appear to favour the approach adopted by the IKSA.[409] The IKSA is favoured because it does not require extensive alterations to an already established legal field. As discussed previously, the very mechanisms created to protect intellectual property rights are not suitable to protect TK as TK does not in most cases confirm to the basic requirements under intellectual property laws.[410]

The criticism of using intellectual property laws as a vehicle for TK protection is not based on an opinion that intellectual property laws are incapable of growth and expansion. Intellectual property laws have shown exceptional development over the years, moving from the basic protection of copyright, trade marks and patents to including and effectively protecting concepts such as industrial designs, computer programs and various other concepts which did not exist in the early inception of intellectual property rights.[411]

The criticism of the use of intellectual property is instead founded on the argument that while various forms of TK are capable of meeting the requirements of intellectual property law protection, the protection of TK should not only be aimed at financial and economic gain for the state and the indigenous communities, but it should also be balanced with the underlying cultural and traditional practices of the indigenous communities as well. Any form of protection

---

[408] Ibid at 54.
[409] Ibid at 60.
[410] Ibid.
[411] Sue Farran *'Access to Knowledge and the Promotion of Innovation: Challenges for Pacific Island States'* op cit note 39 at 8.

created for the protection of TK should encompass the principles of preservation and promotion of the knowledge, as well as an objective of economic upliftment for the communities.

e. Conclusion

For effective protection of TK, the approach adopted should be one which can recognise and protect the very nature of TK. This form of protection inevitably needs to be one which is internationally favoured and in line with the majority opinion that for effective TK protection both domestically and internationally, a *sui generis* framework is best suited.

In its current form, intellectual property law mechanisms where appropriate may be used for the additional protection of TK without disturbing the very nature of intellectual property rights and a separate instrument for the recognition and protection of TK, such as the approached formulated in the Swakopmund Protocol and the IKSA, should be the method adopted for the protection of TK.

V. CONCLUSION

a. Summary of the Findings

The objective of this dissertation was to critically discuss the legislative instruments which have been created in South Africa for the recognition and protection of TK, those being the IPLAA and the IKSA and to offer an opinion on whether one or both pieces of legislation are capable of affording TK a form of protection which will not only be effective within our national borders, but which protection will align with the currently implemented and proposed regional and international instruments.

Throughout, it has been discussed how valuable this form of knowledge is. Not only for the indigenous communities from where it originates, but for a country's economy and for regional development. This resource is not only valuable in an economic sense but one which is interwoven into a community's identity and heritage and which has the ability to uplift and advance the international recognition of human rights of indigenous people.

The concept of TK is not only unique to South Africa, but endemic across the globe which is why the choice of protection for TK is so important. It would be a futile and expensive exercise to overhaul an existing legal framework which is by its nature incapable of protecting this form of knowledge when the current trend, regionally and in certain international jurisdictions, is to tailor-make a *sui generis* framework which not only recognises and protects TK, but is premised on the recognition of the human rights of indigenous people as required under the UNDRIP.[412]

i. International and Regional Protection

At the time of writing this dissertation, the IGC is yet to achieve its mandate by agreeing on and creating an international instrument for the recognition and protection of TK. It would appear, however, from the various meetings and committee sittings held by the IGC during the course of 2022, that the approach to protecting TK is moving towards a more human rights centric instrument as opposed to the initial point of departure of extending intellectual property rights to TK.[413]

---

[412] World Intellectual Property Organization op cit note 78.
[413] Ibid.

In terms of the protection offered at a regional level, considering the instruments drafted and implemented by ARIPO and OAPI, the African continent generally prefers a *sui generis* approach as the most effective form of protection for TK.

ii. Domestic Protection

South Africa, who has been unable to identify one particular form of protection, opted for the creation of two pieces of legislation which are glaringly different from one another. While the IPLAA seeks to follow a more conservative approach which favours the extension of existing intellectual property rights for the protection of TK, the IKSA has been drafted to follow an approach which aligns with that of OAPI and ARIPO.

Although each state is free to choose its own form and approach to the protection of TK, it would be sensible to align the domestic instrument with those favoured on the African continent, bearing in mind that the introduction of the AfCFTA aims to achieve free trade and alleviate poverty across the continent and includes TK as a tradeable resource.

b. Conclusion

The choice on which approach is the most appropriate for the protection of TK is one which is based on many factors and it is arguably dependent on how one views TK. If TK is seen only as a resource from which a state and right holder may benefit, then the approach of including it into existing intellectual property rights is one which is sensical as the framework is readily available, established, and intellectual property laws have been successfully used for centuries to protect right holders and stimulate economic growth. If, however, TK is viewed as a resource which is intrinsically linked to a community's identity and spirit, then treating it as a commodity to be traded is an approach which is wholly inappropriate.

Based on the analysis provided on the varying forms of protection which have been and could be implemented for the protection of TK, it is apparent that TK is not solely a commodity to be traded for economic benefit. Instead, it consists of the ideas, expressions, cultural practices and spirit of the indigenous communities. It is more than a work which can be used to aid innovation or creativity. It is tied to the survival of indigenous communities and their ancestors. While the knowledge that indigenous communities hold, can in the right circumstances, be traded and used in innovation and may well be an economic tool used for

the upliftment of indigenous communities and developing economies, the link between the knowledge and the community must be protected as well.

Considering this, the appropriate framework under which TK should be protected is a *sui generis* one such as the IKSA.

While the IPLAA and the IKSA have been implemented to run parallel to one another, this is an approach which seems counterintuitive. The IKSA has in essence been drafted in a manner which makes it subservient to the IPLAA and based on the movements internationally and at a regional level, the approach which would better suit TK protection in South Africa would be one which puts the IKSA at the forefront. Amendments to the IKSA will be needed to assert its authority as the instrument and regulatory framework under which TK should be recognised and protected.

There are still circumstances under which TK should be protected in terms of existing intellectual property laws. However, an overhaul of the existing intellectual property law system to extend its protection to, in many cases, a work which does not naturally fall within its ambit, seeks to undermine the integrity of intellectual property right protection. Where TK meets the requirements as a 'work' in terms of intellectual property law, protection should be granted.

Where a work which is inherently bound to an indigenous community's identity seeks protection, that protection should be offered in the form of a *sui generis* instrument. The IKSA appears to recognise and cater for the needs of the community it was created to benefit, whereas the IPLAA in it is current form creates a burdensome and complicated process which has the potential to dissuade users from implementing its protective mechanisms. This in turn would inevitably leave the resource unprotected and under developed.

The Constitution of the Republic of South Africa, 1996 sets out that the state has a duty to its citizens to respect, protect, promote and fulfil the rights contained in the Bill of Rights.[414] An aspect of the duty imposed on the state in fulfilling the rights contained in the Bill of Rights is that appropriate legislative measures must be created and implemented in order for the rights

[414] The Constitution, s 7(2).

to be realised.[415] Following the international recognition of the human rights of indigenous people, the indigenous communities in South Africa have the right to self-determination and self-regulation,[416] which affords them the right to choose how they disseminate and trade knowledge, which is inherently linked to the identity of their community. Any legislative tools which are implemented and tasked with the protection of TK should be created with this in mind.

On comparing the IPLAA and the IKSA, it is evident that the IKSA provides a better opportunity for the human rights of indigenous people and for their constitutional rights to be realised and exercised. The IKSA should not be implemented as a passive instrument but instead should be the governing regulatory framework used for the protection of TK.

[415] Pierre De Vos & Warren Freedman (eds) Zsa-Zsa Boggenpoel, Lisa Draga, Christopher Gevers, Karthy Govender, Patricia Lenaghan, Sindiso Mnisi Weeks, Catherin S Namakula, Nomthandazo Ntlama, Douglas Mailula, Khulekani Moyo, Sanele Sibanda, Lee Stone 'South African Constitutional Law in Context' 2021 at 796 -797.
[416] The Constitution, s 235.

Bibliography

National Laws

- Constitution of the Republic of South Africa, 1996
- Copyright Act 78 of 1978
- Copyright Amendment Bill 2020
- Designs Act 195 of 1993
- Intellectual Property Laws Amendment Act 28 of 2013
- National Environmental Management: Biodiversity Act 10 of 2004
- Patents Act 57 of 1978
- Patents Amendment Act 20 of 2005
- Performers' Protection Amendment Bill B24D - 2016
- Protection, Promotion, Development and Management of Indigenous Knowledge Systems Act 6 of 2019
- The Bioprospecting, Access, and Benefit Sharing (BABS) Regulations, 2008
- The Bioprospecting, Access, and Benefit Sharing (BABS) Regulations, 2015
- Trade Marks Act 194 of 1993

Government Policy Documents

- Parliamentary Monitoring Group 'Indigenous Knowledge Systems: Impact of policies of Department of Science & Technology' Nov 2019 available at *https://pmg.org.za/committee-meeting/12337/*
- Policy Framework for The Protection of Indigenous Traditional Knowledge Through the Intellectual Property System and The Intellectual Property Laws Amendment Bill GN 552 GG 31026 of 5 May 2008
- The Department of Forestry, Fisheries and the Environment ' The Access and Benefit-Sharing(BABS) Clearing House of the Republic of South Africa' available at *https://www.environment.gov.za/projectsprogrammes/bioprospectingaccess_benefitsharing_babs_clearinghouse*
- The Department of Science and Technology 'Indigenous Knowledge Systems' available at *https://www.dst.gov.za/images/pdfs/IKS_Policy%20PDF.pdf*

- The Department of Trade and Industry 'The Protection of Indigenous Knowledge through the Intellectual Property System: A policy framework' available at *http://www.rci.uct.ac.za/usr/rcips/resources/policy.pdf*

Books

- Elmien du Plessis & Caroline B Ncube (eds) 'Indigenous Knowledge & Intellectual Property: Contemporary Legal and Applied Research Series' (2016) Juta
- Owen Dean & Alison Dyer (eds) Tertia Beharie, Dina Biagio, Herman Blingnaut, Lodewyk Cilliers, David Cochrane, Mikhalien Du Bois, John Foster, Tyron Grant, Cobus Jooste, Sadulla Karjiker, Mohamed Khader, Megan Reimers, Tshepo Shabangu, Marco van der Merwe, Eben van Wyk 'Dean & Dyer Introduction to Intellectual Property Law' (2014) Oxford University Press
- Pierre De Vos & Warren Freedman (eds) Zsa-Zsa Boggenpoel, Lisa Draga, Christopher Gevers, Karthy Govender, Patricia Lenaghan, Sindiso Mnisi Weeks, Catherin S Namakula, Nomthandazo Ntlama, Douglas Mailula, Khulekani Moyo, Sanele Sibanda, Lee Stone 'South African Constitutional Law in Context' 2021 Second Edition, Oxford University Press

Journals, Articles and Online Sources

- 'Copyright and Neighbouring Rights in Cameroon' available at *http://www.wipnetglobal.com/PDF%20files/Copyright.pdf*
- Adams & Adams 'OAPI' available at *https://www.adams.africa/works/oapi/*
- African Regional Intellectual Property Organization 'Explanatory Guide to the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore' 2012 available at *https://www.aripo.org/wp-content/uploads/2020/04/Explanatory-Guide-to-the-Swakopmund-Protocol.pdf*
- Ala Peter-Daley 'AfCFTA: The Basics – What you need to know' available at *https://www.hoganlovells.com/en/blogs/the-a-perspective/afctfa-the-basics-what-you-need-to-know*
- Amnesty International 'Indigenous Peoples' available at *https://www.amnesty.org/en/what-we-do/indigenous-peoples/*

- Amos Saurombe 'The Protection of Indigenous Traditional Knowledge Through the Intellectual Property System and the 2008 South African Intellectual Property Law Amendment Bill' (2009) (Vol. 4 Issue 3) *Journal of International Commercial Law and Technology*
- Baker McKenzie 'Africa: AfCFTA Update – The Streamlining of Intra-African Trade Gathers Momentum' February 2022 available at *https://insightplus.bakermckenzie.com/bm/international-commercial-trade/africa-afcfta-update-the-streamlining-of-intra-african-trade-gathers-momentum#:~:text=Phase%20two%20of%20AfCFTA%20negotiations,by%20the%20end%20of%202022*
- Charles Takoyoh Eyong 'Indigenous Knowledge and Sustainable Development in Africa: Case Study on Central Africa' available at *https://www.academia.edu/769691/Indigenous_knowledge_and_sustainable_development_in_Africa_case_study_on_Central_Africa*
- Convention on Biological Diversity 'About the Nagoya Protocol' available at *https://www.cbd.int/abs/about/default.shtml/*
- Convention on Biological Diversity 'South Africa' available at *https://www.cbd.int/countries/profile/?country=za#:~:text=While%20it%20occupies%20only%202,up%20to%2070%25%20for%20invertebrates*
- Department of Science and Technology 'Indigenous Knowledge Systems' available at *https://www.dst.gov.za/images/pdfs/IKS_Policy%20PDF.pdf*
- Dr Gerard Bodeker 'Traditional Medical Knowledge, Intellectual Property Rights & Benefit Sharing' (2003) (Vol. 11, No. 2*) Cardozo Journal of International and Comparative Law* 787
- Dr Marisella Ouma 'Traditional knowledge: the challenges facing international lawmakers' available at *https://www.wipo.int/wipo_magazine/en/2017/01/article_0003.html*
- Dr Marisella Ouma 'Why and how to protect traditional knowledge at the international level – Keynote Address' available at *https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=359156*
- Dr MM Kleyn 'Draft Protection, Promotion, Development and Management of Indigenous Knowledge Bill, 2014' The Anton Mostert Chair of Intellectual Property

Law available at *http://blogs.sun.ac.za/iplaw/files/2015/05/Written-comments-on-the-Indigenous-Knowledge-Systems-Bill-2014-Dr-MM-Kleyn-May-13-2015.pdf*

- Dr Rob Davies 'Keynote Address: World Intellectual Property Organisation, International Conference on Intellectual Property and Development' (2016) available at *https://www.wipo.int/edocs/mdocs/mdocs/en/wipo_ipda_ge_16/wipo_ipda_ge_16_t3.pdf*
- Elmien (WJ) du Plessis 'Protection of Traditional Knowledge in South Africa: The Troubled Bill, the Inoperative Act, and the Commons Solution' available at *https://juta.co.za/pdf/24486*
- Emmanuel Dina 'AfCFTA's Protocol on Intellectual Property Rights and its potential effects on Africa's Economic Growth' available at *https://centurionlg.com/2022/01/19/afcftas-protocol-on-intellectual-property-rights-and-its-potential-effects-on-africas-economic-growth/*
- Enyinna Sodienye Nwauche 'The *sui generis* and intellectual property protection of folklore in Africa' available at *http://repository.nwu.ac.za/bitstream/handle/10394/19787/Nwauche_ES_2016.pdf?sequence=1&isAllowed=y*
- Feh Henry Baaboh 'Intellectual Property Law in Cameroon' available at *https://www.hg.org/legal-articles/intellectualpropertylawincameroon7160#:~:text=The%20law%20regulating%20intellectual%20proper024%2F02%2F1999.&text=This%20simply%20means%20it%20is,other%20IP%20right)%20in%20question*
- Forest Peoples Programme 'The situation of indigenous forest peoples in Cameroon' available at *https://www.forestpeoples.org/sites/default/files/documents/Cameroon%20Factsheet%20%28EN%29.pdf*
- Frieda Shifotoka 'An Analysis of the Applicable Laws on the Protection of Traditional Knowledge and Cultural Expressions in Namibia' *The Pretoria Student Law Review* Volume 15, 2021 151 available at *https://upjournals.up.ac.za/index.php/pslr/article/view/3680*

- Fulvio Mazzocchi 'Western Science and Traditional Knowledge – Despite their variations, different forms of knowledge can learn from each other' available at *https://www.embopress.org/doi/full/10.1038/sj.embor.7400693*
- IWGIA 'Indigenous peoples in Cameroon' available at *https://www.iwgia.org/en/cameroon/743-indigenous-peoplesincameroon#:~:text=Among%20Cameroon's%20more%20than%2020,and%20the%20Kirdi%20mountain%20communities.&text=Together%20the%20%22Pygmies%22%20represent%20around,the%20total%20population%20of%20Cameroon*
- John Hazam, Jessica Lavelle 'Implementing Namibia's Access to Biological and Genetic Resources and Associated Traditional Knowledge Act' available at *https://www.voices4biojustice.org/wp-content/uploads/2017/12/Namibia-Policy-Brief.pdf*
- John Mugabe 'Intellectual Property Protection and Traditional Knowledge: An Exploration in International Policy Disclosure' available at *https://www.wipo.int/edocs/mdocs/tk/en/wipo_unhchr_ip_pnl_98/wipo_unhchr_ip_pnl_98_4.pdf*
- Katrin Kuhlmann and Akinyi Lisa Agutu 'The African Continental Free Trade Area: Toward a New Legal Model for Trade and Development' *The Georgetown Journal of International Law*, 2020.
- Lee-Ann Tong 'Aligning the south African intellectual property system with traditional knowledge protection' (2017) (Vol. 12, No. 3) *Journal of Intellectual Property Law & Practice*
- Lee-Ann Tong 'South Africa Adopts *Sui Generis* Indigenous Knowledge Protection Legislation' (2019) (Vol. 14, No. 12) *Journal of Intellectual Property Law & Practice*
- Liani Taljaard 'South Africa: Copyright in Traditional Works' available at *https://www.mondaq.com/southafrica/copyright/919736/copyright-in-traditional-works*
- Loretta Feris 'Protecting traditional knowledge in Africa: Considering African approaches' African Human Rights Journal 4(2), 242-255 available at *https://scholar.google.co.za/citations?view_op=view_citation&hl=en&user=ufwS2I4AAAAJ&citation_for_view=ufwS2I4AAAAJ:ufrVoPGSRksC*
- M.W Maila and C.P Loubser ' Emancipatory Indigenous Knowledge Systems: Implications for environmental education in South Africa' *South African Journal of*

Education Vol 23(4)276-280 available at *https://www.ajol.info/index.php/saje/article/download/24946/20632/0*

- Marcelin M Tonye '*Sui Generis* Systems for the Legal Protection of Traditional Knowledge and Biogenetic Resources in Cameroon and South Africa' (2013) (Vol. 6, No. 5) *The Journal of World Intellectual Property* 764
- Marumo Nkomo 'Regional integration in the area of intellectual property: The case for Southern African Development Community involvement' *Law Democracy & Development* available at *https://law.uwc.ac.za/all-publications/ldd-items/regional-integration-in-the-area-of-intellectual-property-the-case-for-southern-african-development-community-involvement-pg-317*
- Marumo Nkomo, Jabulani Mthombeni and Trod Lehong 'The African Continental Free Trade Area: a significant role for IP' available at *https://www.wipo.int/wipo_magazine/en/2020/04/article_0005.html*
- Michael Heinrich, Francesca Scotti, Adolfo Andrade-Cetto, Monica Berger-Gonzalez, Javier Echeverría, Fabio Friso, Felipe Garcia-Cardona, Alan Hesketh, Martin Hitziger, Caroline Maake, Matteo Politi5, Carmenza Spadafora & Rita Spadafora 'Access and Benefit Sharing Under the Nagoya Protocol – Quo Vadis? Six Latin American Case Studies Assessing Opportunities and Risk' available at *https://www.frontiersin.org/articles/10.3389/fphar.2020.00765/full*
- Natural Justice: Lawyers for Community and Environment 'Rooibos Robbery: Nestle accused of bio-pirating South African genetic resources' 27 May 2010 available at *https://naturaljustice.org/rooibos-robbery-nestle-accused-of-biopirating-south-african-genetic-resources/*
- Natural Justice: Lawyers for Community and Environment 'The Rooibos Access and Benefit-sharing Agreement' available at *https://naturaljustice.org/the-rooibos-access-and-benefit-sharing-agreement/*
- Owen Dean 'Reconstituting the Copyright Amendment Bill' 2021 available at *https://blogs.sun.ac.za/iplaw/2021/06/14/reconstituting-the-copyright-amendment-bill/*
- Owen Dean 'The future of South African trade marks' available at *https://blogs.sun.ac.za/iplaw/files/2012/08/The-future-of-South-African-trade-marks.pdf*

- Pamela Andanda and Hojjat Khademi 'Protecting Traditional Medical Knowledge through the intellectual property regime based on the experiences of Iran and South Africa' in E du Plessis & C Ncube (eds) *Indigenous Knowledge & Intellectual Property* (2016)
- Parliamentary Monitoring Group 'Abuja Treaty Establishing the African Economic Community: Ratification' available at https://pmg.org.za/committee-meeting/67/#:~:text=The%20Treaty%20Establishing%20the%20African,treaty%20on%2010%20October%201997
- Patrick Ageh and Namrita Lall 'Biopiracy of Plant Resources and Sustainable Traditional Knowledge System in Africa' *Global Journal of Comparative Law* 8 (2019) 162 – 181 available at *https://repository.up.ac.za/handle/2263/72240*
- Paul Kuruk 'Protecting Folklore Under Modern Intellectual Property Regimes: A Reappraisal of the Tensions Between Individual and Communal Rights in Africa and the United States.' *American University Law Review* 48, no. 4 (April 1999): 769-843.
- Protection of Traditional Knowledge and Expressions of Folklore' available at *https://www.aripo.org/wp-content/uploads/2020/04/Explanatory-Guide-to-the-Swakopmund-Protocol.pdf*
- Rajesh B.L, Anagha S. Beedu, Varsha S. 'Geographical Indication as a tool for Protecting Traditional Knowledge' (2018) (Volume 3) ISSN 2581-5504 available at *http://www.penacclaims.com/wp-content/uploads/2018/09/Rajesh-BL-new.pdf*
- Ricks, Tres 'From the Abuja Treaty to the Sustainable Development Goals: Realizing Economic Integration in Africa' (2016) (Vol. 42) *North Carolina Journal of International Law*
- Sadulla Karjiker 'A better second attempt – Protection of indigenous Knowledge' The Anton Mostert Chair of Intellectual Property available at *https://blogs.sun.ac.za/iplaw/2015/04/08/a-better-second-attempt-protection-of-indigenous-knowledge/*
- Sadulla Karjiker 'Representations on the draft Protection, Promotion, Development and Management of Indigenous Knowledge Bill, 2014' available at *http://blogs.sun.ac.za/iplaw/files/2015/04/Commentary-Indigenous-Knowledge-Systems-Bill-2014.pdf*

- Sadulla Karjiker and Owen Dean ‘Written comments on the Copyright Amendment Bill 2017’ The Anton Mostert Chair of Intellectual Property Law available at *https://blogs.sun.ac.za/iplaw/2017/06/14/full-review-copyright-amendment-bill-2017/*
- Stephen Collins ‘Ghana’s copyright law for folklore hampers economic growth’ available at *https://theconversation.com/ghanas-copyright-law-for-folklore-hampers-cultural-growth-123550*
- Susy Frankel ‘Branding Indigenous Peoples 'Traditional Knowledge’ (January 1, 2012) Cambridge University Press, 2012, Victoria University of Wellington Legal Research Paper No. 39/2012, available at *https://ssrn.com/abstract=2142276*
- Talkmore Chidede ‘The Role of Intellectual Property Rights’ Protection in Advancing Development in South Africa’ Law, Democracy & Development (2022) (Vol 26) 179 available at *https://law.uwc.ac.za/images/stories/ldd/2022chidede.pdf*
- The Department of Trade and Industry ‘The Protection of Indigenous Knowledge through the Intellectual Property System: A policy framework’ available at *http://www.rci.uct.ac.za/usr/rcips/resources/policy.pdf*
- United Nations ‘State of the World’s Indigenous Peoples’ ST/ESA/375 available at *https://www.un.org/development/desa/indigenouspeoples/publications/state-of-the-worlds-indigenous-peoples.html*
- United Nations ‘State of the World’s Indigenous Peoples’ ST/ESA/371 available at *https://www.un.org/development/desa/indigenouspeoples/publications/state-of-the-worlds-indigenous-peoples.html*
- United Nations Conference of Trade and Development, 2021 ‘Implications of the African Continental Free Trade Area for Trade and Biodiversity: Policy and Regulatory Recommendations’ available at *https://unctad.org/system/files/official-document/ditctedinf2021d3_en.pdf*
- Vera Albino ‘How the African Continental Free Trade Area could revolutionise IP in Africa’ available at *https://www.ipstars.com/NewsAndAnalysis/How-the-African-Continental-Free-Trade-Area-could-revolutionise-IP-in-Africa/Index/8038*
- Wend Wendland ‘Multilateral Matters #7: The Draft Protocol on Intellectual Property Rights to The African Continental Free Trade Agreement (AfCFTA): Annotations on Genetic Resources, Traditional Knowledge, and Cultural Expressions’ 2020, available at *http://infojustice.org/archives/42674*

- Wend Wendland 'Protecting indigenous knowledge: a personal perspective on international negotiations at WIPO' available at *https://www.wipo.int/wipo_magazine/en/2019/06/article_0004.html*
- William Fisher 'The Puzzle of Traditional Knowledge' (2018) (Vol. 67, No. 7) *Duke Law Journal* 1537
- WIPO 'Geographical Indication' available at *https://www.wipo.int/geo_indications/en/#:~:text=What%20is%20a%20geographical%20indication,originating%20in%20a%20given%20place. Accessed on 04 November 2022.*
- 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*
- World Intellectual Property Organization 'Documentation of Traditional Knowledge' available at *www.wipo.int/tk/en/resources/tkdocumentation.html*
- World Intellectual Property Organization 'Traditional Knowledge and Intellectual Property – Background Brief' available at *https://www.wipo.int/pressroom/en/briefs/tk_ip.html*

International and Regional Instruments

- Access to Biological and Genetic Resources and Associated Traditional Knowledge Act of 2017
- African Continental Free Trade Area Agreement, 2018
- African Regional Intellectual Property Organization 'Swakopmund Protocol on The Protection of Traditional Knowledge and Expressions of Folklore', 2010
- Agreement on Trade-Related Aspects of Intellectual Property Rights, 1994
- Bangui Agreement of March 2, 1977, on the Creation of an African Intellectual Property Organization (of February 24, 1999)
- Bangui Agreement Relating to the Creation of an African Intellectual Property Organisation Constituting a Revision of the Agreement Relating to the Creation of an African and Malagasy Office of Industrial Property, 1977
- Berne Convention for the Protection of Literary and Artistic Works, 1886
- Berne Convention for the Protection of Literary and Artistic Works, World Intellectual Property Organisation, 1982

- Convention on Biological Diversity, 1992
- Convention on the Protection and Promotion of Diversity of Cultural Expressions, 2005
- Copyright and Neighbouring Rights Act 6 of 1994
- Industrial Property Act 1 of 2012
- International Covenant on Economic, Social and Cultural Rights, 1976
- Law No. 2000/011 of December 19, 2000, on Copyright and Neighbouring Rights
- Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and other forms of Prejudicial Action, 1982
- The Banjul Protocol on Marks, 1993
- The Constitution of the Republic of Namibia Act 1 of 1990
- The Copyright and Related Rights Protection Bill 2021
- The Harare Protocol on Patents and Industrial Designs within the Framework of the African Regional Industrial Property Organisation, 1982
- The Nagoya Protocol on Access to Genetic Resources and the Fair Trade and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, 2014
- The Swakopmund Protocol on the Protection of Traditional Knowledge, and Expressions of Folklore, 2010
- The Treaty Establishing the African Economic Community (Abuja Treaty), 1991
- WIPO, Copyright Treaty, 1996

Theses

- Lucia Nandjembo The Effectiveness of the Swakopmund Protocol on the Protection of Traditional knowledge in Namibia (unpublished LLM thesis, University of the Western Cape,2017)
- Ushenta Naidoo A Comparative Assessment of South Africa's Proposed Legislation to Protect Traditional Knowledge (unpublished LLM thesis, University of Pretoria, 2019)

Websites

- Convention on Biological Diversity 'South Africa' available at *https://www.cbd.int/countries/profile/?country=za#:~:text=While%20it%20occupies%20only%202,up%20to%2070%25%20for%20invertebrates*

- Natural Justice available at *www.naturaljustice.org*
- Stellenbosch University Faculty of Law 'The Anton Mostert Chair of Intellectual Property (CIP)' available at *http://sun.ac.za/iplaw*
- The African Continental Free Trade Area Secretariat 'Creating One African Market' November 2022, available at *https://au-afcfta.org/about/*
- TRALAC 'The African Continental Free Trade Area, A TRALAC Guide' available at *https://www.tralac.org/publications/article/13997-african-continental-free-trade-area-a-tralac-guide.html*