THE ROLE OF THE SWAKOPMUND PROTOCOL ON THE PROTECTION OF TRADITIONAL KNOWLEDGE AND EXPRESSIONS OF FOLKLORE IN ADDRESSING THE CONCERNS OF THE HOLDERS OF TRADITIONAL KNOWLEDGE

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Signature:  Date: 25 February 2022

DEDICATION

To Naomi my sunshine, Mutsa my angel and Hope my joy.

Ad maiorem Dei gloriam.

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I would like to express my gratitude to my Supervisor, Professor Sunelle Geyer, for her invaluable expertise, guidance and patience throughout this process.

Thank you to my husband, Tapuwa Pasirayi, who has always pushed me to do better. This dissertation would not be complete without his persistence and support.

SUMMARY

Due to the shortcomings in protecting traditional knowledge under the intellectual property system, it is considered that traditional knowledge should be protected through *sui generis* systems which are specifically adapted to its nature.

The Swakopmund Protocol is a *sui generis* system that offers protection for traditional knowledge and expressions of folklore.

This dissertation examines the effectiveness of the Protocol in protecting traditional knowledge through the identification of select needs of traditional knowledge holders, a review of how the Protocol addresses these concerns and provides recommendations on how the Protocol can more effectively address the issues of traditional knowledge rights holders.

Any improvements to the Protocol will be beneficial to the establishment of a continental framework for the protection of traditional knowledge under the Pan-African Intellectual Property Organisation and the African Continental Free Trade Area and may result in its use as a blueprint for international instruments for the protection of traditional knowledge.

KEY TERMS

Traditional knowledge; indigenous knowledge; expressions of folklore; Swakopmund Protocol; African Regional Intellectual Property Organisation (ARIPO); intellectual property system; *sui generis* system; indigenous communities; attribution; preservation; distortion; benefit sharing.

TABLE OF CONTENTS

ABBREVIATIONS

AfCFTA	African Continental Free Trade Area
ARIPO	African Regional Intellectual Property Organisation
AU	African Union
CBD	Convention on Biological Diversity
CSIR	Council for Scientific and Industrial Research (South Africa)
PAIPO	Pan African Intellectual Property Organisation
OAPI	African Intellectual Property Organisation
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
WIPO	World Intellectual Property Organisation
WIPO IGC	World Intellectual Property Organisation Intergovernmental Committee of the Protection of Traditional Knowledge and Expressions of Folklore

CHAPTER 1 INTRODUCTION

1.1 BACKGROUND

1.1.1 The importance of traditional knowledge and expressions of folklore

Traditional knowledge and expressions of folklore are an important part of the heritage of indigenous communities,[1] which play an important social, spiritual and cultural role and can be a source of creativity and innovation.[2] Apart from their importance to the heritage of indigenous communities, traditional knowledge and expressions of folklore also play a role in the economic development of indigenous communities. Exploitation by indigenous communities can result in the formation of creation of jobs, community initiatives, development of skills, tourism and foreign earnings from indigenous based creations.[3] Their exploitation by outsiders is therefore a matter of concern to indigenous communities.

Traditional knowledge holders need protection against the exploitation of traditional knowledge and expressions of folklore by outsiders. Reasons include the preservation of ecological functions such as sustaining human and plant life and maintaining a balanced ecosystem, cultural value, aesthetic value, and moral rights to claim authorship of the work and to object to any distortion, mutilation, modification, or other derogatory action in relation to the work.[4] However, the potential or actual value of traditional knowledge and expressions of folklore is mostly in its economic benefit. Traditional knowledge holders now want profit and development from their knowledge and creativity and thus seek to protect traditional knowledge against exploitation.[5]

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[1] Morolong S "Protecting Folklore Under Modern Intellectual Property Regimes: Limitations and Alternative Regimes for Protection" in Mazonde I *et al* (eds) *Indigenous Knowledge Systems and Intellectual Property in the Twenty-first Century: Perspectives from Southern Africa* (Council for the Development of Social Science Research In Africa 2007) 48.

[2] Article 8(j) Convention on Biological Diversity.

[3] WIPO Secretariat "WIPO Intellectual Property and Traditional Cultural Expressions / Folklore" (WIPO Publication No. 913) 6 https://www.wipo.int/edocs/pubdocs/en/tk/913/wipo_pub_913.pdf (Date of use: 6 July 2017).

[4] WIPO Secretariat *Intellectual Property Needs and Expectations of Traditional Knowledge Holders* (WIPO 2001) 34.

[5] Dutfield G "TRIPs-related aspects of traditional knowledge" 2001 *Case Western Reserve Journal of International Law* 2001 233

1.1.2 Justification for protection of traditional knowledge

In developed countries traditional knowledge is for the most part considered to belong to the public domain; their systems therefore exclude legal protection of community interests related to traditional knowledge.

Munzer and Raustiala argue that

> the importance of the public domain rests on innovation concerns, because most innovations derive from earlier innovations… Maintaining a vibrant public domain is therefore an important, if often underappreciated, goal of international IP law. [6]

It is for this reason that most forms of intellectual property rights, such as patents, designs and copyright, eventually fall into the public domain. Proponents of protection of traditional knowledge, on the other hand, would have the rights in respect of traditional knowledge continue in perpetuity which is untenable under the current system of intellectual property rights. Milius argues that the development of intellectual property legal tools in the area of traditional knowledge would provide incentives for incremental innovation of traditional knowledge while ensuring the preservation and protection of traditional knowledge systems.[7]

Traditional knowledge is also considered to be in the public domain because of a lack of identifiable owners. The main characteristic of the intellectual property rights system is individual private ownership. Roht-Arriaza highlights the fact that the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter referred to as TRIPS) only recognizes intellectual property rights as private rights to the exclusion of public rights.[8]

The problems encountered in identifying a creator or owner of traditional knowledge, the perpetuity of rights, lack of reduction to writing, lack of a tangible medium, among others, are differences between traditional knowledge and other

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[6] Munzer SR and Raustilia K "The Uneasy Case for Intellectual Property Rights in Traditional Knowledge" 2009 *Cardozo Arts and Entertainment [Vol. 27: 37 2009]* 53.

[7] Milius D "Justifying Intellectual Property in Traditional Knowledge" 2009 *IPQ* 187.

[8] Roht-Arriaza N "Of Seed and Shamans: The Appropriation of the Scientific and Technical Knowledge of Indigenous and Local Communities" 1996 *Michigan Journal of International Law* 936.

forms of intellectual property, which result in traditional knowledge being disregarded as a form of protectable intellectual property. Furthermore, where the justification for protection can be found for the protection of traditional knowledge, further justification is required as to why only the practices and expressions of indigenous peoples are to be protected and not those of other groups.[9]

1.1.3 Misappropriation and distortion

The need to protect traditional knowledge arises mainly from the protests by traditional knowledge holders against the misappropriation and unauthorised use of traditional knowledge, for example in the form of biopiracy.[10]

Protection of traditional knowledge from misappropriation can be in the form of defensive protection. Dutfield defines defensive protection as laws enacted to prevent the granting of intellectual property rights to unauthorized persons over traditional knowledge and expressions of folklore.[11] Proponents of protection of traditional knowledge advocate for further protection through positive protection. Positive protection is defined as the acquisition of intellectual property rights by traditional knowledge holders under the intellectual property regime or such other rights as provided by a *sui generis* system.[12] Morolong contends that the purpose of the intellectual property regime is to reward and protect creativity. Expressions of folklore are a form of intellectual creativity and their holders should be rewarded and afforded the same protection granted to other forms of intellectual creativity, such as for example copyright.[13]

1.1.4 Preservation

While misappropriation and inappropriate and exploitive use by others followed by commercial exploitation are the main driving forces behind the need for the

9 Munzer *Cardozo Arts and Entertainment* 2009 42.
10 Milius 2009 *IPQ* 187.
11 Dutfield G "Protecting Traditional Knowledge and Folklore: A Review of progress in Diplomacy and Policy Formulation" 2003 *ICTSD UNCTDAD* 27.
12 Dutfield, *Protecting Traditional Knowledge* 27.
13 Morolong *Protecting Folklore* 49.

protection of traditional knowledge there are other issues at stake. Dutfield identifies the disappearance of traditional knowledge and expressions of folklore as a major issue at stake with regards protection of traditional knowledge.[14] One of the aims of protecting traditional knowledge is therefore its preservation for future generations.

In more recent times, there is a tentative general consensus that traditional knowledge has value, and there is recognition of the rights of indigenous people to protect and exploit their traditional knowledge. However, the issue remains in what way traditional knowledge should be protected. In this regard, there are varying schools of thought.

1.1.5 How traditional knowledge should be protected

1.1.5.1 Intellectual property protection for traditional knowledge

There are those who are of the opinion that traditional knowledge can and should be protected under the current intellectual property system. It is argued that while the cornerstone of intellectual property rights is individual private ownership, and while determining ownership of expressions of folklore in an intellectual property sense is difficult, it is possible for the intellectual property rights system to protect traditional knowledge and there is therefore no need for a separate system for legal protection.

Copyright

Traditional knowledge in the form of literary and artistic folkloric creations can be protected under copyright law through the national copyright laws of individual countries, with some countries having specifically included the protection of folklore under their copyright legislation.[15] The Berne Convention for the Protection of Literary and Artistic Works (hereinafter referred to as the Berne Convention) also provides protection for folkloric creations which are eligible for protection as literary and artistic works at international level.[16] Further, the Berne Convention provides

[14] Dutfield *Protecting Traditional Knowledge* 25-26.
[15] Morolong *Protecting Folklore* 51.
[16] Articles 2 and 3 of Berne Convention for the Protection of Literary and Artistic Works.

protection for unpublished works of unknown authorship, such as expressions of folklore.[17] The Berne Convention provides for national treatment, that is the treatment of works of authors from other convention countries at least as well as those of their own nationals, automatic protection without the need for registration in the national offices of each of the members of the Berne Convention and independence of protection.

Designs

Traditional designs can be registered under the relevant design laws of individual countries, where the requirements for design protection can be satisfied.

Patents

Patents can be used to protect aspects of traditional knowledge which are scientific works. An example is the South African Patents Act which provides for granting of patents based on traditional knowledge subject to the filing of a statement acknowledging that the invention is derived from traditional knowledge[18] and permission from the knowledge holders to use the traditional knowledge.[19]

Trademarks

Some traditional marks can be protected as trademarks. There are communities that have registered certification marks to protect the originality and standard of their creations. An example is the certification mark registered by the National Indigenous Arts Advocacy Association in Australia for certifying the authenticity of aboriginal arts and products in the wake of the Australian case of *Milpurrurru v Indofurn* (1993) 130 ALR 659 (hereinafter referred to as the *Mipurrurru* case).[20]

Unlawful Competition

Traditional knowledge can be protected as trade secrets under unlawful competition laws that prohibit the misrepresentation of goods as traditional goods

[17] Article 15(4) of Berne Convention for the Protection of Literary and Artistic Works.
[18] Section 30(3A) South Africa Patents Acts 1978.
[19] Section 30(3B) South Africa Patents Acts 1978.
[20] Janke T *Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions* (WIPO 2003) 138-139.

and the disclosure of secret information.[21] For example, in the Australian case of *Milpurrurru* the court made a collective award of damages for copyright infringement of traditional artwork printed on carpets, which award was to be distributed among the community according to their practices; and, in the Australian case of *Foster v Mountford* (1976) 29 FLR the court determined that Mountford should not have published without authorization a book with details and pictures of secret ceremonies of the Aborigines which information had been divulged in confidence.[22]

On the other hand, there is the school of thought that the fundamentals of traditional knowledge and the current intellectual property system are so disparate that the system cannot protect traditional knowledge.

It is argued that while there are similarities between traditional knowledge and scientific knowledge,

> indigenous knowledge differs from scientific knowledge in being moral, ethically-based, spiritual, intuitive and holistic; it has a large social context. Social relations are not separated from relations between humans and non-human entities. The individual self-identity is not distinct from the surrounding world. There often is no separation of mind and matter. Traditional knowledge is an integrated system of knowledge and beliefs.[23]

Traditional knowledge systems do not view ownership of heritage as private but communal.[24] In this regard, the fact that traditional knowledge is not created or developed by one individual or privately owned but belongs to a community, and in some instances several different communities makes it difficult to protect under the intellectual property regime. Under copyright law, for instance, the identity of the author or creator is a requirement to determine the duration of copyright. This is not always possible in respect of traditional knowledge. Traditional scientific

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[21] Morolong *Protecting Folklore* 56.

[22] Antons C "Foster v Mountford: cultural confidentiality in a changing Australia" https://ro.uow.edu.au/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1188&context=lawpapers (Date of use: 6 December 2021).

[23] Berkes Traditional Ecological Knowledge, Biodiversity, Resilience and Sustainability" in Perrings CA, Maler KG, Folke C, Holling CS and Jansson BO (eds) *Biodiversity Conservation: Problems and Policies (*Kluwer Academic Publishers 1995) 271.

[24] Morolong *Protecting Folklore* 51.

knowledge cannot always satisfy the stringent requirements of patentability, being invention, novelty, inventive step and industrial applicability.

Traditional knowledge systems also view ownership of knowledge without limits as to time. Traditional knowledge is considered as belonging to the relevant community or communities in perpetuity. This stems from the inter-generational nature of traditional knowledge, which is ever evolving, with each generation building upon the knowledge and works of the last,[25] as well as the fact that traditional knowledge is intrinsically linked with the cultural identity of the knowledge holders.[26] There are no time limits placed on the monopoly rights in respect of traditional knowledge, as is the case under the intellectual property regime. In reality, the intellectual property rights system which is enshrined in the TRIPS Agreement[27] has dominance over the indigenous knowledge system, and as a result where there is no protection of traditional knowledge it is possible for non-indigenous people and unauthorised community members to obtain private rights to traditional knowledge.

1.1.5.2 *Sui Generis* system for protection of traditional knowledge

Due to the shortcomings in protecting traditional knowledge under the current intellectual property system, it is posited that traditional knowledge should be protected through *sui generis* systems which are specifically adapted to the nature of traditional knowledge. This school of thought is further divided among those who are of the opinion that the *sui generis* system should use elements of existing forms of intellectual property and others who are of the opinion that a distinct *sui generis* system separate from the current intellectual property system is required.

[25] Long DE "Traditional Knowledge and the Fight for the Public Domain" 2006 *J Marshall RIPL* 321; Nakashima D *Conceptualising Nature: The Culturing Context of Resource Management* (Nature Resources UNESCO 1998) 18.

[26] OseiTutu JJ "Traditional Knowledge: Is Perpetual Protection a Good Idea?" http://www.anuarioandino.com/Anuarios/Anuario07/art10/ANUARIO%20ANDINO%20ART10.pdf (Date of use: 6 December 2021)

[27] Visser CJ "Making Intellectual Property Laws Work for Traditional Knowledge" in Finger JM and Schuler P (eds) *Poor People's Knowledge: Promoting Intellectual Property in Developing Countries* (World Bank and Oxford University Press 2004) 209.

The former group bases its argument on the premise that application of an intellectual property system to the protection of traditional knowledge would provide clear rules of ownership of traditional knowledge and expressions of folklore by traditional communities and eliminate the uncertainty regarding their ownership, especially in the field of bioprospecting.[28] Further, there is no economic justification for the cost of developing and implementing a new legal regime to protect traditional knowledge.[29]

The latter group's argument is based mainly on the premise that traditional knowledge and the current intellectual property system are fundamentally different. Further, that protection for traditional knowledge through the current intellectual property system would "diminish the cultural and spiritual value of TK or, even worse, distort its essential nature and transform it into a tradable commodity,"[30] and that it generally fails to recognize existing indigenous customary laws of the different communities.[31] Customarily, traditional crafts have been protected through informal customary regimes that consist of rules, rights and obligations which for the most part are not written down but handed down from generation to generation, and which are binding on the communities by consensus.

Oguamanam therefore argues that a suitable *sui generis* system for protecting traditional knowledge must be based on the principles and ideologies of the

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[28] WIPO Secretariat "WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, – Elements of a *Sui Generis* System for the Protection of Traditional Knowledge Fourth Session Geneva" 8 https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_3/wipo_grtkf_ic_3_8.pdf (Date of use: 2 December 2017)

[29] WIPO Secretariat "WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, – Elements of a *Sui Generis* System for the Protection of Traditional Knowledge Fourth Session, Geneva" 8 https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_3/wipo_grtkf_ic_3_8.pdf (Date of use: 2 December 2017).

[30] WIPO Secretariat "WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, – Elements of a *Sui Generis* System for the Protection of Traditional Knowledge Fourth Session, Geneva" 6 https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_3/wipo_grtkf_ic_3_8.pdf (Date of use: 2 December 2017).

[31] Saez C "African Traditional Knowledge and Folklore Given IP Protection Despite Warning of TK Commodification'" http://www.ip-watch.org/2010/09/12/african-traditional-knowledge-and-folklore-given-ip-protection-despite-warning-of-tk-commodification/ (Date of use: 30 October 2017).

indigenous people. He further argues that the contradicting ideologies between Western and indigenous knowledge systems are the reason for the intellectual property rights system's failure to address indigenous peoples' need to protect and preserve their knowledge and its integrity.[32]

Similarly, the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (hereinafter referred to as WIPO IGC) concluded that a possible *sui generis* system for the protection of traditional knowledge must reflect its holistic nature, its spiritual and practical elements, which are intertwined and inseparable, taking into consideration the constant evolution of traditional knowledge and its informal nature.[33]

In response to the general consensus to protect traditional knowledge, the World Intellectual Property Organisation (hereinafter referred to as WIPO) conducted 9 fact finding missions in the South Pacific, East and Southern Africa, South Asia, North America, the Arab countries, Bolivia, Peru and the Caribbean region during the period 1998 to 1999 (hereinafter referred to as the WIPO Fact-finding Missions). The purpose of the WIPO Fact-finding Missions was to identify the needs and expectations of traditional knowledge holders in general, and more specifically, the intellectual property needs and expectations of traditional knowledge holders for the possibility of protecting their intellectual property rights.[34]

Subsequently during the Twenty-Sixth Session of the WIPO General Assembly held from 26 September 2000 to 3 October 2000, an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore was established. The themes which were identified as being the focus of the Committee are intellectual property issues that arise in relation to access to genetic resources and benefit -sharing, the protection of traditional knowledge and

[32] Oguamanam C "Localizing Intellectual Property in the Globalization Epoch: The Integration of Indigenous Knowledge" 2004 *Indiana Journal of Global Legal Studies* 137.

[33] WIPO Secretariat "WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore – Elements of a *Sui Generis* System for the Protection of Traditional Knowledge Fourth Session Geneva" 8 https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_3/wipo_grtkf_ic_3_8.pdf (Date of use: 2 December 2017).

[34] WIPO Secretariat *Needs and Expectations* 5.

the protection of expressions of folklore.[35] The objective of the Committee was to negotiate between the parties and reach an agreement on an international instrument for the protection of genetic resources, traditional knowledge and expressions of folklore. However, due to the numerous complex issues associated with protecting traditional knowledge, negotiations on a suitable instrument of protection are still ongoing over two decades later.[36]

1.2 Definitions

There is no standard definition for the term traditional knowledge, as such, there are numerous definitions.[37] This arises from the difficulty in defining traditional knowledge. There are those who are of the view that in light of the unique customary practices of each of the different cultures, it would not be proper for the diversity of their traditions and cultural heritage to be massed into one single definition.[38]

Further, concern is raised with regards westernisation of traditional knowledge by defining it, which has been aptly expressed as follows:

> Once you have done to indigenous and local knowledge whatever is necessary to make it fit into the IP mould, it would not be recognizable as indigenous and local knowledge anymore. It would lose its place within the inter-connected web of holistic indigenous and local cultures. Despite the best intentions of the people advocating its use, intellectual property ultimately 'colonizes' indigenous and local knowledge.[39]

However, in spite of the above apprehensions, in order to formulate a framework for the protection of traditional knowledge, it is submitted that it is necessary to

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[35] WIPO Secretariat "WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore - Matters Concerning Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore – An Overview First Session Geneva" https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_1/wipo_grtkf_ic_1_3.pdf (Date of use: 11 November 2017).

[36] WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (*IGC*) has been negotiating international legal instruments on TK since 2001.

[37] Hinz MO "The Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore" 2011 *Namibia Law Journal* 103.

[38] WIPO Secretariat "WIPO Intellectual Property and Traditional Knowledge" 4 https://www.wipo.int/edocs/pubdocs/en/tk/920/wipo_pub_920.pdf (Date of use: 10 July 2018).

[39] Crucible II Group *Seedling Solutions Volume 2: Options for national laws governing control over genetic resources and biological innovations* (IDRC/IPGRI/Dag Hammarskjold Foundation 2001) 94.

know what the term covers and what it does not cover, and a clear definition of the term of traditional knowledge is required in this regard. The need for definitions and clarity as to the subject matter for which protection is sought under the term traditional knowledge was identified as one of the main needs of traditional knowledge holders during the WIPO Fact-finding Missions.[40] The WIPO Secretariat observed that a lack of clarity with regard to the terminology in use would add to the confusion of an already intricate investigation.[41]

A major complicating and contributory factor to the difficulty in defining traditional knowledge is the fact that the term traditional knowledge is used in relation to wide ranging subject matter and has various meanings internationally, regionally and nationally.

Examples at national level include the South African Protection, Promotion, Development and Management of Indigenous Knowledge Act, 2019, which uses the term "indigenous knowledge", which is defined as follows:

> knowledge which has been developed within an indigenous community[42] and has been assimilated into the cultural and social identity of that community, and includes
>
> (a) knowledge of a functional nature;
> (b) knowledge of natural resources; and
> (c) indigenous cultural expressions.

In Ghana the term "folklore" is used and is defined as

> all literary, artistic and scientific work belonging to the cultural heritage of Ghana which were created, preserved and developed by ethnic communities of Ghana by unidentified Ghanaian authors, and any such works deigned under this Law to be works of Ghanaian folklore.[43]

[40] WIPO Secretariat *Needs and Expectations* 211.
[41] WIPO Secretariat *Needs and Expectations* 211.
[42] "Indigenous community" is defined as
any recognisable community of people
(a) developing from, or historically settled in a geographic area or areas located within the borders of the Republic;
(b) characterised by social, cultural and economic conditions, which distinguish them from other sections of the national community; and
(c) who identify themselves as distinct collective.
[43] Section 53 Ghana Copyright Law 1985.

Regional examples include the African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders and for the Regulation of Access to Biological Resources by the African Union which uses the terms "community knowledge" and "indigenous knowledge" alternately, and defines both terms as:

> the accumulated knowledge that is vital for the conservation and sustainable use of biological resources and/or which is of socio-economic value, and which has been developed over the years in indigenous/local communities.

The Statute of the Pan African Intellectual Property Organisation (hereinafter referred to as PAIPO) uses the terms "indigenous knowledge" and "traditional knowledge". No definition is provided, however these terms are grouped under the definition of "intellectual property" together with copyright, trademarks, patents and industrial designs.[44]

The African Regional Intellectual Property Organisation (hereinafter referred to as ARIPO) under the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore (hereinafter referred to as the Swakopmund Protocol) uses the term "traditional knowledge", which 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 from one generation to another. The term shall not be limited to a specific technical field, and may include agricultural, environmental or medical knowledge, and knowledge associated with genetic resources.[45]

However, there is a proviso under Section 1.2 which does not limit the concept of traditional knowledge to the definition provided. Section 1.2 provides as follows:

> This Protocol shall not be interpreted as limiting or tending to define the very diverse holistic conceptions of:
> (a) traditional knowledge; or
> (b) cultural and artistic expressions,
> in the traditional context."[46]

[44] Article 1 Statute of the Pan-African Intellectual Property Organisation.
[45] Section 2.1 Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore.
[46] Section 1.2 Swakopmund Protocol.

At international level, traditional knowledge is simply and broadly defined in the Convention on Biological Diversity (hereinafter referred to as CBD) as "knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles".[47]

The United Nations Declaration on the Rights of Indigenous Peoples uses the terms "indigenous knowledge", "traditional knowledge" and "traditional cultural expressions" in reference to the following subject matter:

> manifestations of their (indigenous people) 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.[48]

WIPO gives a more detailed definition of traditional knowledge as follows:

> tradition-based literary, artistic or scientific works; performances; inventions; scientific discoveries; designs; marks, names and symbols; undisclosed information; and all other tradition based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields.

"Tradition-based" is defined as referring to:

> knowledge systems, creations, innovations and cultural expressions which: have generally been transmitted from generation to generation; are generally regarded as pertaining to a particular people or its territory; and, are constantly evolving in response to a changing environment.[49]

Examples of categories of subject matter included under traditional knowledge under the WIPO definition include:

> agricultural knowledge; scientific knowledge; technical knowledge; ecological knowledge; medicinal knowledge, including related medicines and remedies; biodiversity-related knowledge; 'expressions of folklore' in the form of music, dance, song, handicrafts, designs, stories and artwork; elements of languages, such as names, geographical indications and symbols; and, movable cultural properties.[50]

[47] Article 8(j) Convention on Biological Diversity.
[48] Article 31 United Nations Declaration on the Rights of Indigenous Peoples.
[49] WIPO Secretariat *Needs and Expectations* 25.
[50] WIPO Secretariat *Needs and Expectations* 25.

From the above, it is to be noted that the subject matter under traditional knowledge is not exhaustive. However, there are certain characteristics that are common to the definitions and subject matter. Common characteristics are:

(i) Traditional knowledge is not limited to any specific scientific field or art form, it spans across industrial, scientific, medicinal, environmental, literary and artistic fields.[51]

(ii) Traditional knowledge is knowledge associated and identified with the tradition or culture of a traditional or indigenous community and forms a fundamental part of the history, culture and lives of the people. When distinguishing traditional knowledge from scientific knowledge it is described as being ethical, holistic and spiritual with a core focus on community.[52]

(iii) While traditional knowledge comprises the history and cultural traditions of the community, this does not make it ancient or static, it is constantly evolving.[53]

(iv) Traditional knowledge is created collectively through contributions of knowledge and experiences of various individuals within a community, or inter-generationally through cumulative contributions across generations. It can also be created individually in the traditional context.[54] Traditional knowledge is commonly owned collectively, ownership may be by the whole community or specific members of a community such as a clan, a sodality or a household in a fiduciary capacity on behalf of the community.[55]

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[51] WIPO Secretariat *Needs and Expectations* 25.

[52] Berkes *Traditional Ecological Knowledge* 271.

[53] Nakashima aptly puts it as follows:

"Traditional knowledge is not merely learned by rote and handed down from one generation to the next. Inherently dynamic, it is subject to a continuous process of verification, adaptation and creation, altering its form and content in response to changing environmental and social circumstances."

Nakashima D *Conceptualising Nature: The Culturing Context of Resource Management* (Nature Resources UNESCO 1998) 18; Varadarajan D "A Trade Secret Approach to Protecting Traditional Knowledge" 2011 *The Yale Journal of International Law* 377.

[54] WIPO Secretariat *Needs and Expectations* 219; Ni K "Traditional Knowledge and Global Lawmaking" 2011 *Northwestern Journal of International Human Rights* 85.

[55] Nwauche ES *The* sui generis *and intellectual property protection of expressions of folklore in Africa* (LLD Thesis North-West University 2016) 243; Le Gall SB "An Introduction to Core Concepts and Objectives: What are Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions and Why Should They Receive Legal Protection" (Paper Presented at the Regional

(v) Traditional knowledge relates to knowledge originating from intellectual activity.[56]

In keeping with the diversity of cultures under traditional knowledge, the WIPO Secretariat has noted that customary law definitions of traditional knowledge must also be taken into consideration.[57] This principle can be seen embodied in Section 2.2 of the Swakopmund Protocol which makes provision for the choice of terms defining the protectable subject matter under traditional knowledge and expressions of folklore to be determined at the national level. At the national level an example can be seen in the Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples which provides that indigenous people should define their intellectual and cultural property in the establishment of policies.[58]

It is to be noted from the numerous varying definitions and terms used in relation to traditional knowledge that the terms indigenous knowledge, folklore and expressions of folklore are used in relation to traditional knowledge, and sometimes interchangeably, rightly or wrongly, depending on the circumstances.

The fact that traditional knowledge is in some circumstances defined as "knowledge, innovations and practices of indigenous and local communities"[59] makes it difficult to differentiate between traditional knowledge and indigenous knowledge.

Seminar on Intellectual Property and Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions) 5 https://www.wipo.int/edocs/mdocs/tk/en/wipo_iptk_bkk_09/wipo_iptk_bkk_09_topic1_2.pdf (Date of use: 30 May 2017).

[56] WIPO Secretariat "WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore - Traditional Knowledge Operational Terms and Definitions" 14 https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_3/wipo_grtkf_ic_3_9.pdf (Date of use: 16 April 2017).

[57] WIPO Secretariat "WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore - Traditional Knowledge Operational Terms and Definitions" 13 https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_3/wipo_grtkf_ic_3_9.pdf (Date of use: 16 April 2017).

[58] Section 1.1. Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples.

[59] Article 8(j) Convention on Biological Diversity.

In order to differentiate between the two terms, it is necessary to look at the holder of the knowledge. While both relate to tradition based knowledge, the holder of the knowledge is not always indigenous people as knowledge can be and has also been passed down through generations by non-indigenous people. The latter is not indigenous knowledge. Indigenous peoples are defined by Mr J Martinez, the Special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, as

> those which, having a historical continuity with 'pre-invasion' and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those countries, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identities, as the basis of their continued existence as peoples, in accordance with their own cultural pattern, social institutions and legal systems.

Notable examples of indigenous people as per the definition include the various indigenous peoples of Africa, Aboriginal Australians and Native Americans. Examples of knowledge passed down through generations by non-indigenous people include ancient Chinese medicine, ancient Belgian weaving and lace-making techniques, ancient Swiss yodeling and Caribbean steel drum making and music.[60] Ancient Chinese medicine, Belgian weave making and Swiss yodeling are not considered indigenous knowledge as the knowledge holders do not fit the definition of indigenous people. These societies were not subject to colonialism and are the prevailing and dominant societies in their territories. Caribbean steel drum making and music are not considered indigenous knowledge as the knowledge holders have no historical link with the pre-colonial societies of their current territories as their roots are in Africa, South America and Asia.[61]

Tradition based knowledge passed down through generations by indigenous people is therefore termed indigenous knowledge; while any tradition based knowledge passed down through generations by both indigenous and non-

[60] Younging G "Traditional Knowledge Exists: Intellectual Property is Invented or Created" 2015 *University of Pennsylvania Journal of International Law* 1077.
[61] WIPO Secretariat *Needs and Expectations* 194.

indigenous people is termed traditional knowledge. Indigenous knowledge is consequently a category of traditional knowledge, and reference to traditional knowledge encompasses indigenous knowledge.[62]

Expressions of folklore are defined in the WIPO-UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and other Prejudicial Actions, 1982 (hereinafter referred to as WIPO-UNESCO Model Provisions) as follows:

> productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community of [a particular country] or by individuals reflecting the traditional artistic expectations of such a community.[63]

These are particularised as follows:

> verbal expressions, such as folk tales, folk poetry and riddles; musical expressions, such as folk songs and instrumental music; expressions by action, such as folk dances, plays artistic forms or rituals; whether or not reduced to a material form; and tangible expressions, such as musical instruments; architectural forms; and, productions of folk art, in particular drawings, paintings, carvings, sculptures, pottery; terracotta, mosaic, woodwork, metalware, jewellery, basket weaving, needlework, textiles carpets and costumes.[64]

Expressions of folklore and traditional knowledge are inter-related in that expressions of folklore are a category of traditional knowledge, and while the Swakopmund Protocol delineates between traditional knowledge and expressions of folklore, reference to traditional knowledge in this paper encompasses expressions of folklore unless specified.[65]

1.3 Research Problem

There are many complex issues associated with protecting traditional knowledge. The Swakopmund Protocol seeks to tackle these issues through a *sui generis* system. The problem which this dissertation wishes to address is whether the *sui*

[62] WIPO Secretariat *Needs and Expectations* 23.
[63] Section 2 WIPO-UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions.
[64] Section 2 WIPO-UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions.
[65] WIPO Secretariat *Needs and Expectations* 25.

generis system under the Protocol effectively deals with the concerns and issues faced by traditional knowledge rights holders. This problem is considered against the background of the issues associated with protecting traditional knowledge.

1.4 Aims of study

The aims of the dissertation are to:

(i) define the nature and extent of traditional knowledge;
(ii) identify key issues and challenges facing traditional knowledge rights holders with regards to the protection of traditional knowledge;
(iii) analyse the role of the Swakopmund Protocol in addressing the issues associated with protecting traditional knowledge and expressions of folklore;
(iv) offer recommendations for the improvement of the efficacy of Protocol;
(v) add to the literature on the Protocol which is currently scarce in light of the fact that it was signed in 2010 and only entered into force in 2015.

1.5 Point of departure

While there are opponents to the protection of traditional knowledge, it is relatively settled at this point in time that traditional knowledge must be protected. The Swakopmund Protocol is a *sui generis* system that offers protection for traditional knowledge and expressions of folklore. The Protocol, which came into effect in 2015, is a regional law for protection of traditional knowledge formulated by a group of developing nations, whose populations are comprised mainly of indigenous communities.

As there is currently no binding international legal framework for protecting traditional knowledge, an analysis of the Protocol in addressing the complex issues associated with protecting traditional knowledge may lead to an improvement in the efficacy of the Protocol. The Protocol's effectiveness in addressing the issues of traditional knowledge rights holders and the concerns of opponents of protection of traditional knowledge may result in its use as a blueprint for a global framework and international instrument for the protection of traditional knowledge.

At regional level, the Pan African Intellectual Property Organisation (PAIPO), an organisation under the African Union (hereinafter referred to as AU) is intended to merge ARIPO and the African Intellectual Property Organisation (hereinafter referred to as OAPI). OAPI currently has no legal framework for the protection of traditional knowledge,[66] as such it is submitted that the Swakopmund Protocol will layout the ground work for a harmonised[67] system of protection under PAIPO which system will potentially be applicable on the entire African continent.[68] Similarly, the Swakopmund Protocol will be able to provide a framework for protection of traditional knowledge under the African Continental Free Trade Agreement (hereinafter referred to as AfCFTA), whose IP Protocol is still under negotiation. Any improvements to the Swakopmund Protocol are therefore highly desirable and will be beneficial to the establishment of a continental framework for protection of traditional knowledge.

1.6 Introductory comments about the Swakopmund Protocol, the WIPO-UNESCO Model Provisions and national legislation and policies dealing with traditional knowledge within the contracting states to the Protocol

1.6.1 Current legal framework

It is considered that developing countries are pressured to grant intellectual property rights, such as patent, designs and trademark rights, which are important to developed countries, and that developed countries should in turn reciprocate and grant protection to rights that are important to developing countries, such as traditional knowledge and expressions of folklore.[69]

Traditional knowledge and expressions of folklore are protected within the communities through informal or customary law. However, these customary

[66] OAPI provides copyright protection for expressions of folklore under Articles 5 and 6 of Annex VII of the Agreement Revising the Bangui Agreement on the Creation of an African Intellectual Property Organization.

[67] Article 4(a)-(b) Statute of the Pan-African Intellectual Property Organisation

[68] Article 5 of the Statute of the Pan-African Intellectual Property Organisation provides that membership is open to all AU member states. AU membership comprises all 55 African states.

[69] Morolong *Protecting Folklore* 50.

practices have limitations in that in many instances they are only enforceable within the relevant communities, they are not recognized outside the communities and they do not extend to individuals beyond those communities.[70]

The WIPO-UNESCO Model Provisions came about in response to a call by developing nations that there should be an international instrument for the protection of folklore similar to those protecting other intellectual property rights. The WIPO-UNESCO Model Provisions were established on the basis that expressions of folklore are an important part of the heritage of nations and are a form of intellectual creativity deserving of the same protection provided for other intellectual creations, as well as protection from actions prejudicial to the culture of the rights holders.[71]

The WIPO-UNESCO Model Provisions are guidelines for national legislation and international measures for the protection of expressions of folklore. It is important to note that the WIPO-UNESCO Model Provisions are merely recommendations for laws and are not actual laws.

The Convention on Biological Diversity is a binding international treaty that came into force on 29 December 1993 and whose three main goals are the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of benefits arising from the utilisation of genetic resources.[72] The CBD currently has 168 signatories. The CBD also deals with the issues of access to traditional knowledge and benefit sharing arising from the utilisation and commercialisation of traditional knowledge under Article 8j. Article 8j provides that the contracting parties must preserve and respect the knowledge of local and indigenous communities and encourage its use beyond the traditional context with the consent of the knowledge holders and with benefit sharing.

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[70] WIPO Secretariat "Customary Law, Traditional Knowledge and Intellectual Property: An Outline of the Issues" 14 https://www.wipo.int/export/sites/www/tk/en/resources/pdf/overview_customary_law.pdf (Date of use: 16 June 2017).

[71] Introductory Observations WIPO-UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions.

[72] Article 1 Convention on Biological Diversity.

While the CBD is binding on all parties, it is apparent from the language of Article 8j that the mandatory implementation of the provisions of the Article is limited by the capacity of the implementing party and the appropriateness of such implementation which is subject to national legislation. In reality there are numerous reasons for lack of implementation of Article 8j which include lack of political will among a particular section of parties. Among those with the will to implement the provisions of the Article obstacles include e.g. poverty and lack of financial, human and technical resources, economic incentive measures, public education and awareness, capacities for local communities and appropriate policies and laws.[73]

Currently there is therefore no compulsory international framework for protection of traditional knowledge.

At regional level, with focus on the African continent, various entities provide or intend to provide a framework for protection of traditional knowledge. Currently the two regional organisations that provide centralised administration of intellectual property in the African region are ARIPO and OAPI. ARIPO, whose membership numbers 20[74] out of the 54 African states, provides for protection of traditional knowledge under the Swakopmund Protocol, which is the subject of this dissertation. OAPI, whose membership numbers 17[75] out of the 54 African states, does not as yet have an instrument for protection of traditional knowledge.

The Pan African Intellectual Property Organisation (PAIPO), an organisation under the AU, has the potential for universal membership of all African states. Although not yet in force, PAIPO is intended to merge ARIPO and OAPI and will provide for protection of traditional knowledge on a continental level. The organisation is

[73] Scott J "Protecting Traditional Knowledge and the Convention on Biological Diversity" 2006 *Indigenous Law Bulleting* 17.

[74] As at 24 November 2021 the following are ARIPO member states: Botswana, Eswatini, Gambia, Ghana, Kenya, Lesotho, Liberia, Malawi, Mauritius, Mozambique, Namibia, Rwanda, Sao Tome and Principe, Sierra Leone, Somalia, Sudan, Tanzania, Uganda, Zambia and Zimbabwe.

[75] As at 24 November 2021 the following are OAPI member states: Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Congo, Ivory Coast, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Mali, Mauritania, Niger, Senegal, Togo and Comoros

expected to set intellectual property standards and harmonisation of intellectual property laws on the continent.[76]

The African Continental Free Trade Agreement (AfCFTA) entered into force on 30 May 2019. Phase I under the AfCFTA, which covers trade, commenced on 1 January 2021. The aim of the AfCFTA is to create a strong common voice and policy in international trade, including the field of intellectual property.[77] To date 38[78] countries have deposited their instruments of accession.[79] Phase II includes the adoption and implementation of an IP Protocol. The IP Protocol, which will govern intellectual property under the AfCFTA, is still under negotiation. Once concluded, the AfCFTA IP Protocol is expected to harmonise intellectual property laws and principles on the continent and establish a uniform legal framework for protection of traditional knowledge.[80]

Traditional knowledge is generally protected by the national laws of each country, where available. Botswana, for example, makes provision for protection of traditional knowledge and expressions of folklore in the Botswana Industrial Property Act.[81] Zambia gives protection through The Protection of Traditional Knowledge, Genetic Resources and Expressions of Folklore Act 2016 and Kenya has the Protection of Traditional Knowledge and Cultural Expressions Act 2016. South Africa has chosen to protect traditional knowledge through existing intellectual property laws,[82] as well as *sui generis* legislation that is specifically directed at protecting indigenous knowledge.[83] This (South African) legislation is not yet in force.

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[76] Article 3 Statute of the Pan-African Intellectual Property Organisation

[77] https://afcfta.au.int/en/about (Date of use: 25 November 2021)

[78] https://www.tralac.org/resources/infographic/13795-status-of-afcfta-ratification.html (Date of use: 25 November 2021).

[79] Algeria, Angola, Burkina Faso, Burundi, Cameroon, Chad, Central African Republic, Côte d'Ivoire, Congo, Djibouti, Egypt, Equatorial Guinea, Eswatini, Ethiopia, Gabon, Gambia, Ghana, Guinea, Kenya, Lesotho, Malawi, Mali, Mauritania, Mauritius, Namibia, Niger, Nigeria, Rwanda, São Tomé & Príncipe, Sahrawi Arab Democratic Republic, Senegal, Sierra Leone, South Africa, Togo, Tunisia, Uganda, Zambia and Zimbabwe.

[80] Ncube CB *Science, Technology & Innovation and Intellectual Property Leveraging Openness for Sustainable Development in Africa* 1st ed (Juta 2021) 87-88.

[81] Part XII Botswana Industrial Property Act 2010.

[82] Intellectual Property Laws Amendment Act 28 of 2013.

[83] Protection, Promotion, Development and Management of Indigenous Systems Act 6 of 2019.

Apart from intellectual property systems and *sui generis* systems adapted from intellectual property traditional knowledge is also protected through non-intellectual property systems such as contract, unjust enrichment, trade secrets, cultural heritage preservation laws and customary laws.

The absence of a compulsory international framework for protection of traditional knowledge setting out at the very least minimum standards for protection of traditional knowledge is one of the main challenges faced by the rights holders of traditional knowledge. This is also contributed to by a lack of or unclear national laws and policies in some countries concerning use and protection of traditional knowledge.

Currently at international level protection for traditional knowledge is viewed from an intellectual property perspective. Whether the intellectual property system offers adequate protection is debatable.[84] One of the main issues faced by traditional knowledge rights holders with regards the intellectual property system is that it is this system which has allowed non-community members to acquire private ownership of intellectual property rights in community owned traditional knowledge,[85] which has in turn resulted in the commercial exploitation of the knowledge without equitable benefit sharing.

These issues are compounded by the traditional knowledge rights holders' lack of experience with the existing intellectual property system, their lack of economic resources to exploit traditional knowledge or to protect traditional knowledge within the framework of the existing intellectual property system, and the lack of unification between the various communities within the same borders. This results in the rights holders being at a great disadvantage with regards to the protection and exploitation of their knowledge.[86]

[84] Van der Merwe *et al Law of Intellectual Property in South Africa* (Lexis Nexis 2016) 548.
[85] Van der Merwe *et al Law of Intellectual Property* 549.
[86] WIPO Secretariat *Needs and Expectations* 215.

1.6.2 The Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore

At the WIPO IGC's Sixth Session in 2004 it was proposed by the African group that ARIPO should develop a regional legal mechanism to protect traditional knowledge, expressions of folklore and genetic resources.[87] It was proposed that this be a regional effort in light of the multi-cultural and trans-boundary nature of traditional knowledge and expressions of folklore. Recognizing the value of the knowledge, technologies, biological resources and cultural heritage of traditional and local communities and mindful of the need to protect these resources and the issues faced by the rights holders,[88] on 9 August 2010 the African Regional Intellectual Property Organization (ARIPO) adopted the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore. The Swakopmund Protocol entered into force on 11 May 2015. Of the 20 ARIPO member states,[89] which consist of developing countries and so called least developed countries,[90] 8 are signatories to the Protocol.[91] Any country that is a member of the African Union or the United Nations Economic Commission for Africa may also sign up to the Protocol.[92]

The Swakopmund Protocol is a *sui generis* regional law formulated by developing countries for the protection of traditional knowledge that offers both defensive protection, which aims to stop people outside the indigenous communities from acquiring intellectual property rights over traditional knowledge and positive protection, which grants rights that empower indigenous communities to promote

[87] ARIPO Secretariat *Explanatory Guide to the Swakopmund Protocol on Protection of Traditional Knowledge and Expressions of Folklore* (ARIPO 2012) 10.

[88] Preamble Swakopmund Protocol on Protection of Traditional Knowledge and Expressions of Folklore.

[89] The membership of ARIPO as at 24 November 2021 comprises Botswana, The Gambia, Ghana, Kenya, Lesotho, Liberia, Malawi, Mauritius, Mozambique, Namibia, Rwanda, Sao Tome & Principe, Sierra Leone, Somalia, Sudan, Swaziland, Uganda, United Republic of Tanzania, Zambia and Zimbabwe

[90] 13 members of ARIPO are currently classified by the United Nations as least developed countries. These are The Gambia, Lesotho, Liberia, Malawi, Mozambique, Rwanda, Sao Tome & Principe, Sierra Leone, Somalia, Sudan, Tanzania, Uganda and Zambia.

[91] Signatories to the Protocol are Botswana, The Gambia, Liberia, Malawi, Namibia, Rwanda, Zambia and Zimbabwe.

[92] Section 27.1. Swakopmund Protocol on Protection of Traditional Knowledge and Expressions of Folklore; Article IV Lusaka Agreement on the Creation of African Regional Intellectual Property Organisation.

their traditional knowledge, control its uses and benefit from its commercial exploitation.[93]

However, despite the apparent fundamental differences between traditional knowledge and the intellectual property system, the Swakopmund Protocol applies what are termed western legal and economic principles to traditional knowledge which is collectively owned knowledge in traditional communities. In this regard, the Protocol contains, among others, sections on assignment and licensing,[94] compulsory licences,[95] individual ownership[96] and limits on duration of ownership,[97] which are alien to traditional communities and incongruous with the spirit and soul of traditional knowledge.

It is also to be noted that half a decade after the Swakopmund Protocol came into effect it was reported during both the 8th and 9th Sessions of the Working Group on the Improvement of the ARIPO Protocols Relating to Industrial Property that there has been no meaningful uptake of the Swakopmund Protocol during the periods 2018-2019[98] and 2019-2020[99] and therefore no statistics to report. In general, there has been no meaningful uptake of the Swakopmund Protocol by rights holders since it came into operation. To date two applications have been filed under the Protocol and no data has been compiled in the ARIPO database.[100] I submit that this is to some extent due to a lack of awareness of the Protocol by traditional knowledge holders and a lack of trust by those who are aware of the Protocol and not to the Protocol itself. An examination of the Protocol will determine if this is indeed the case.

[93] WIPO Secretariat http://www.wipo.int/edocs/pubdocs/en/wipo_pub_tk_1.pdf (Date of use 14 August 2018).
[94] Section 8 Swakopmund Protocol.
[95] Section 12 Swakopmund Protocol.
[96] Section 13 Swakopmund Protocol.
[97] Section 13 Swakopmund Protocol.
[98] ARIPO Secretariat "document ARIPO/WG/VIII/2 paragraph 37 8th Session of the Working Group on the Improvement of the ARIPO Protocols Relating to Industrial Property".
[99] ARIPO Secretariat "document ARIPO/WG/IX/2 paragraph 28, 9th Session of the Working Group on the Improvement of the ARIPO Protocols Relating to Industrial Property".
[100] ARIPO Secretariat "The Future of the Swakopmund Protocol, 11th Session of the Technical Committee on Industrial Property".

It is against this background that this paper seeks to assess the extent to which the Swakopmund Protocol addresses the concerns of traditional knowledge rights holders in protecting traditional knowledge. This will be achieved through the identification of the needs of the rights holders, the exploration of the solutions offered by WIPO in their model legislation as well as recommendations made in response to the WIPO Fact-finding Missions and by the WIPO IGC, the examination of the text of the Swakopmund Protocol and the policies and legislation of individual countries as implementation of the Swakopmund Protocol is done at national level.

1.7 Outline of dissertation

Chapter 1 of the dissertation is an introduction which set out the following: the background of the dissertation including identifying some of the key issues faced by traditional knowledge holders in the protection of traditional knowledge, definitions of the term traditional knowledge and the various terms used synonymously, the research problem, the aims of the dissertation, a brief introduction on the legal framework currently in place for the protection of traditional knowledge, and an outline of the dissertation.

Chapters 2 to 7 focus on traditional knowledge holders' concerns: attribution and ownership, distortion and misuse, benefit sharing, preservation, access to resources and competing interests. An examination is made as to how the Swakopmund Protocol and the WIPO-UNESCO Model Provisions deal with these concerns, and observations are made regarding the advantages and shortcomings of each system and their overall efficacy in addressing the issues.

Chapter 8 concludes the dissertation with an examination of the overall efficacy of the Swakopmund Protocol in dealing with the key issues faced by traditional knowledge holders and provides recommendations for the improvement of the Swakopmund Protocol.

CHAPTER 2 ATTRIBUTION AND OWNERSHIP

2.1 Attribution and ownership as concerns for traditional knowledge holders

2.1.1 Introduction

This Section identifies attribution and recognition of ownership of traditional knowledge by indigenous people as a concern for traditional knowledge holders. The Section examines the misconception that traditional knowledge is in the public domain as one of the main reasons that there is a lack of attribution and recognition of ownership. It focuses on "biopiracy" as a major concern resulting therefrom and provides recommendations for addressing the issue. This Section sets the context for Section 2.2 which examines how the Swakopmund Protocol addresses the concerns of attribution and ownership.

2.1.2 Attribution and ownership as concerns for traditional knowledge holders

Securing acknowledgement of creatorship and ownership is identified as one of the main objectives of protecting traditional knowledge, and the foundation for addressing all other needs relating to traditional knowledge.[101] Essentially, as was aptly put by an indigenous informant during the WIPO-UNESCO Fact-finding Mission to Eastern and Southern Africa, "Local communities want acknowledgement that their knowledge is theirs".[102] The desire for recognition of origination and ownership of knowledge and works of their culture was a recurring theme amongst the traditional knowledge rights holders during the WIPO-UNESCO Fact Finding Missions.[103]

[101] WIPO Secretariat *Needs and Expectations* 213-214.
[102] WIPO Secretariat *Needs and Expectations* 87.
[103] WIPO Secretariat *Needs and Expectations* 135.

2.1.3 Traditional knowledge in the public domain

The notion that traditional knowledge is in the public domain has its origins in colonial history.[104] The colonisation of indigenous people was not limited to the misappropriation of land but also extended to cultural knowledge.[105] Similar to the indigenous peoples' land which was considered *terra nullius,* the knowledge of indigenous people was considered *scientia nullius* and as another object of colonial discovery, appropriation and exploitation.[106] This was in spite of the fact that traditional knowledge systems existed and flourished prior to contact of indigenous people with their colonisers.[107] The use, regulation, ownership and protection of traditional knowledge was, and in many instances continues to be regulated by customary regimes which consist of rules, rights and obligations which for the most part are not written down but passed down from one generation to the next. Through repeated use, these rules and practices became accepted by the community and enforced by elders and religious leaders within the community.[108] However, in many instances, there is no recognition of customary laws and informal regimes that govern and protect traditional knowledge beyond the relevant communities.[109]

The main characteristic of the intellectual property rights system is individual private ownership. Traditional knowledge on the other hand is communal and trans-generational,[110] concepts which are foreign to the intellectual property system. It is therefore difficult to identify a creator, owner or author of traditional knowledge.[111] This failure to fit into the mould of the intellectual property system

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[104] Oguamanam 2018 *SSRN* 3.
[105] DeGeer ME "Biopiracy: The Appropriation of Indigenous Peoples' Cultural Knowledge" 2002 *New England Journal of International and Comparative Law* 180; Smith LT *Decolonizing Methodologies: Research and Indigenous Peoples* (Zed Books Lt / University of Otago Press 1999) 58-59.
[106] Shiva V *Biopiracy: The Plunder of Nature and Knowledge* (North Atlantic Books 2016) vii; DeGeer 2002 *New England Journal of International and Comparative Law* 180.
[107] Younging 2015 *University of Pennsylvania Journal of International Law* 1077.
[108] Morolong *Protecting Folklore* 59.
[109] WIPO Secretariat "Customary Law, Traditional Knowledge and Intellectual Property: An Outline of the Issues" 14 https://www.wipo.int/export/sites/www/tk/en/resources/pdf/overview_customary_law.pdf (Date of use: 2 January 2021).
[110] WIPO Secretariat *Needs and Expectations* 217.
[111] Kariuki F "Notion of 'Ownership' in IP: Protection of Traditional Ecological Knowledge *vis-à-vis* Protection of TK and Cultural Expressions Act, 2016 of Kenya" 2019 *Journal of Intellectual Property Rights* 94.

is one of the reasons why traditional knowledge has been considered in the public domain.[112] Consequently vis-à-vis the intellectual property rights system, traditional knowledge was until recent years generally considered as being in the public domain and not protected by intellectual property rights.[113]

The result of the misconception that traditional knowledge is in the public domain is that traditional knowledge is often misattributed and consequently misappropriated by non-community members. The intellectual property system exacerbates the situation by making it possible for non-community members to obtain rights arising from origination and ownership of traditional knowledge, to the exclusion of the communities who originate and rightly own the knowledge.[114]

In some developed countries, traditional knowledge continues to be considered as belonging to the public domain, their intellectual property systems therefore exclude recognition and legal protection of community rights related to traditional knowledge. A major issue arising out of lack of attribution and recognition of ownership of traditional knowledge by indigenous communities can be seen in the global phenomenon commonly known as "biopiracy".[115] Biopiracy was also identified as a major concern for traditional knowledge holders during the WIPO-UNESCO Fact-finding Missions.[116]

2.1.4 Biopiracy

Biopiracy is defined as the appropriation of traditional knowledge belonging to indigenous communities without their permission, with no compensation and the grant of exclusive rights over the traditional knowledge through the intellectual

[112] Oguamanam C "Wandering Footloose: Traditional Knowledge and the 'Public Domain' Revisited" 2018 *SSRN* 3, 11; WIPO Secretariat *Needs and Expectations* 217.
[113] Long 2006 *J Marshall RIPL* 318.
[114] Oguamanam 2018 *SSRN* 11-12; Shah S "Plants, Patents and Biopiracy: The Globalization of Intellectual Property Rights and Traditional Medicine" 2014 *Global Health Governance* 58; https://theconversation.com/biopiracy-when-indigenous-knowledge-is-patented-for-profit-55589 (Date of use 1 January 2022).
[115] Shah 2014 *Global Health Governance* 58.
[116] WIPO Secretariat *Needs and Expectations* 100, 200, 217.

property system.[117] Biopiracy is considered a modern form of colonialism, as it perpetuates the historical non-recognition of origination and ownership of traditional knowledge by indigenous people and allows its misappropriation.[118]

Biopiracy is most common in the patent system, which grants rights to individuals in respect of inventions based on traditional knowledge.[119] Such granting of patent rights is contrary to the principle of novelty, which is one of the requirements for the patentability of an invention. Novelty means that the invention must not be known prior to the filing of the patent application. In order to establish an invention's novelty a search of the prior art on the relevant subject is made. Prior art is defined in the Patent Cooperation Treaty (hereinafter referred to as the PCT) as:

> everything made available to the public anywhere in the world by means of written disclosure (including drawings and other illustrations) shall be considered prior art provided that such making available occurred prior to the relevant date.[120]

The PCT makes provision for the consideration of non-written disclosures under Rule 64.2[121] and Rule 70.9[122] of the Regulations. Despite this provision, in certain countries like the United States of America no recognition is given to undocumented knowledge held in foreign countries.[123] As such, numerous patents based on traditional knowledge are granted by the United States Patent Office despite origination and ownership by indigenous people.

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[117] https://theconversation.com/biopiracy-when-indigenous-knowledge-is-patented-for-profit-55589 (Date of use: 1 December 2021);

[118] DeGeer 2002 *New England Journal of International and Comparative Law* 180.

[119] Shiva V *Biopiracy: The Plunder of Nature and Knowledge* (North Atlantic Books 2016) 1-3.

[120] Rule 64.1(a) Regulations Under the Patent Cooperation Treaty.

[121] "In cases where the making available to the public occurred by means of an oral disclosure, use, exhibition or other non-written means ("non-written disclosure") before the relevant date as defined in Rule 64.1(b) and the date of such non-written disclosure is indicated in a written disclosure which has been made available to the public on a date which is the same as, or later than, the relevant date, the non-written disclosure shall not be considered part of the prior art for the purposes of Article 33(2) and (3). Nevertheless, the international preliminary examination report shall call attention to such non-written disclosure in the manner provided for in Rule 70.9."

[122] "Any non-written disclosure referred to in the report by virtue of Rule 64.2 shall be mentioned by indicating its kind, the date on which the written disclosure referring to the non-written disclosure was made available to the public, and the date on which the non-written disclosure occurred in public."

[123] Dutfield *Protecting Traditional Knowledge* 31.

Examples of biopiracy include the following:

(a) The granting of a patent to South Africa's Council for Scientific and Industrial Research (hereinafter referred to as CSIR) in 1996 for the use of an extract of the hoodia plant as an appetite suppressant. This was despite the fact that the hoodia plant is indigenous to the Kalahari Desert and the Xhomani San people have for centuries known of the plant's qualities as an appetite suppressant and have historically eaten the plant to stave off hunger and thirst on their long journeys.[124] Documentation of the San people's use of the hoodia plant as an appetite suppressant is available dating back to the 1930s.[125]

There was a public outcry on the unfairness of CSIR's actions and with the assistance of various Non-Governmental Organisations the San people approached CSIR. The San people argued that first and foremost there was no attribution to them as the originators of the knowledge; CSIR did not seek the consent of the San people before applying for the patent; the patent granted to CSIR lacked novelty in light of the San's prior knowledge of the use of the plant as an appetite suppressant; the San had not been consulted or included with regards the commercialization of the product and in any of the agreements with international companies; and, they derived no benefit from the commercialization of their knowledge.[126]

Following negotiations, the CSIR acknowledged the San people's origination and prior knowledge of the use of the hoodia as an appetite suppressant and entered into a benefit sharing agreement with the San people in March 2003. This is an example of biopiracy where the traditional knowledge holders were able to fight for and acquire recognition as the source of knowledge and attain the resultant benefits.

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[124] Dutfield *Protecting Traditional Knowledge* 31.

[125] Tellez VM "Recognising the traditional knowledge of the San people: The Hoodia case of benefit-sharing" http://www.ipngos.org/NGO%20Briefings/Hoodia%20case%20of%20benefit%20sharing.pdf (Date of use: 15 August 2018)

[126] Tellez http://www.ipngos.org/NGO%20Briefings/Hoodia%20case%20of%20benefit%20sharing.pdf (Date of use: 2 August 2018).

(b) The granting of a patent to W.R. Grace in the US over the use of an extract from neem seeds as a fungicide. The neem tree is indigenous to India and its products have been used in numerous ways[127] by Indian farmers for more than 2000 years including as an agricultural fungicide. One of the major advantages of its use is that it has few negative side effects compared to traditional pesticides. The patents were challenged and the EPO patent was revoked on the basis that it lacked novelty as the use of the neem seeds as a pesticide was attributable to indigenous Indian farmers.[128]

(c) There are numerous other examples which include the patenting of medicinal uses for turmeric such as for wound healing, which have been known and used by the Indian Ayurdevic;[129] the granting of a plant patent for the variety of the ayahuasca plant which was already known to the Amazonian Indians and used for ritualistic purposes;[130] the granting of a patent for the sweetening proteins derived from katempfe and the serendipity berry which have been used by African tribes for their sweetening properties;[131] and, the granting of a patent for coloured cotton which has been cultivated by indigenous people in South America for centuries.[132]

Some of the patents based on traditional knowledge have been challenged successfully based on lack of novelty due to origination, use and therefore prior knowledge by indigenous and local communities.[133] However, such patents are not always challenged as challenging patents is expensive, especially as the patent holders are generally large affluent pharmaceutical, chemical or agribusiness companies, while the traditional knowledge holders are mostly communities from

[127] The products have been used in human and veterinary medicine, toiletries, cosmetics, insect repellents and agricultural fungicides; Schuler P "Biopiracy and Commercialization of Ethnobotanical Knowledge" in Finger JM and Schuler P *Poor People's Knowledge: Promoting Intellectual Property in Developing Countries* (World Bank and Oxford University Press 2004) 161.
[128] Schuler *Biopiracy and Commercialization* 162.
[129] Schuler *Biopiracy and Commercialization* 166.
[130] Varadarajan 2011 *The Yale Journal of International Law* 377.
[131] *Roht-Arriaza 1996 Michigan Journal of International Law* 923.
[132] *Roht-Arriaza 1996 Michigan Journal of International Law* 924.
[133] Schuler *Biopiracy and Commercialization* 161.

poor developing countries. As a result, the intellectual property system especially the patent system is often seen by traditional knowledge holders as "exploitative and predatory".[134]

2.1.5 Recommendations

In recent times there is general recognition of origination and ownership of traditional knowledge by indigenous communities.[135] However, as discussed above it is to be noted that not all international and national laws and policies align with this development, especially with regards to the patent system.

In the circumstances, it is recommended that there should be established an international legal instrument with provision for compulsory source disclosure of traditional knowledge and prior consent from traditional knowledge holders in patent applications to ensure true novelty and to take into account and properly acknowledge the source and ownership of written and non-written knowledge of indigenous communities in other countries.[136] Further that this provision is incorporated in the TRIPS Agreement, as currently source disclosure and prior consent are not mandatory under the TRIPS Agreement.

Some countries have already made provision for compulsory source disclosure and prior consent of knowledge holders in their national legislation. The South African Patents Amendment Act 2005 makes provision for compulsory source disclosure and submission of proof of authority to use traditional knowledge from the knowledge holders.[137] The sanctions for non-disclosure or lack of prior consent include revocation of the patent.[138]

At regional level, the AU Model Law enforces acknowledgement of source and ownership of traditional knowledge by making access to and use of traditional knowledge subject to prior informed consent from the knowledge holders, a written

[134] Dutfield *Protecting Traditional Knowledge* 33.
[135] See Article 31 United Nations Declaration on the Rights of Indigenous People.
[136] Dutfield *Protecting Traditional Knowledge* 34.
[137] Section 2 South African Patents Amendment Act 2005.
[138] Section 3 South African Patents Amendment Act 2005.

permit from the government and local community concerned,[139] among other things. Any access or use of traditional knowledge without the required consent and permits shall be invalid and subject to various sanctions. Further, in terms of the AU Model Law the granting of patents over traditional knowledge is prohibited and patents cannot be granted to anyone allowed access or use.[140]

2.2 How the Swakopmund Protocol deals with attribution and ownership

One of the objectives of the Swakopmund Protocol is to affirm the principle that local and traditional communities are the rightful holders and beneficiaries of their traditional knowledge and expressions of folklore.[141] The mere creation and existence of a Protocol that provides rules for securing attribution and recognition of ownership is a positive development in addressing these concerns. Two of the main tenets on which the Protocol is established are the recognition of the knowledge holders' creatorship and ownership rights and the need to respect traditional knowledge systems.[142]

Section 6 of the Protocol identifies the owners of traditional knowledge as the indigenous or local communities, and recognized individuals within such communities, who create, preserve and transmit knowledge in a traditional and intergenerational context.[143] Similarly, Section 18 of the Protocol identifies the owners of the rights in expressions of folklore as the indigenous and local communities entrusted with the custody and protection of the expressions of folklore in accordance with the customary laws and practices of those communities, and who maintain and use the expressions of folklore as a characteristic of their traditional cultural heritage.[144] The Protocol identifies the traditional knowledge holders as the creators and owners of traditional knowledge and expressions of

[139] Section 3 African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources.
[140] Section 9(2) African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources.
[141] Preamble Swakopmund Protocol.
[142] Preamble Swakopmund Protocol.
[143] Section 6 Swakopmund Protocol.
[144] Section 18 Swakopmund Protocol.

folklore. Defining and identifying the creators and owners of traditional knowledge and expressions of folklore addresses the fallacy often relied upon by those who misappropriate traditional knowledge that the knowledge holders or creators are unknown or long dead and therefore the knowledge is in the public domain and can be used without attribution or consent.

The Protocol confers the rights ensuing from creatorship and ownership on the traditional knowledge holders under Section 7.1. These rights include the exclusive right to authorize the exploitation of their knowledge. Whether the use of the word "confer" is appropriate is debatable. While the purpose of the Protocol is to provide legal certainty with regards to the knowledge holders' rights, I submit that their rights do not originate from the Protocol but existed prior to the Protocol and can exist outside the boundaries of the Protocol. Perhaps the appropriate word that should have been used is "recognizes", such that the Protocol shall recognize the owners' rights…to authorize the exploitation of their traditional knowledge or to simply state that the owners shall have the right to authorize the exploitation of their knowledge.

Section 10 of the Protocol makes source disclosure mandatory for use of traditional knowledge. Section 10 provides that any person using traditional knowledge must acknowledge its holders as the source and origin of the traditional knowledge when using it beyond its traditional context. Similarly, Section 19.2 makes source disclosure mandatory for use of expressions of folklore by non-community members.

The Protocol makes significant strides in addressing the knowledge holders' need for attribution and recognition of ownership. Rights cannot accrue without ownership and recognition thereof. The Protocol recognizes the knowledge holders' rights as creators and owners of traditional knowledge and expressions of folklore, and in turn empowers them by providing legal certainty in the management and exercise of their rights

2.3. How the WIPO-UNESCO Model Provisions deal with attribution and ownership

Unlike the Swakopmund Protocol, the WIPO-UNESCO Model Provisions do not provide for vesting or recognition of ownership of expressions of folklore. It is implied from the Model Provisions that ownership vests in the communities from the fact that authorisation for use of expressions of folklore must be obtained from the community concerned or the national competent authority in the country in which the community is located.[145] Further, it is the prerogative of the community or the national competent authority concerned to set a fee for use of expressions of folklore and collect such fee.[146] However, this implication is contradicted by Section 10(2) which provides that fees collected for utilisation must be used for the benefit of the nation as a whole. It is therefore unclear whether ownership vests in the community.

Section 2 identifies the communities and the individuals within the communities as the creators of the expressions of folklore. Section 5 makes source identification mandatory for use of expressions of folklore with some exceptions. Section 5 provides that for any identifiable expression of folklore in all printed publications and in connection with any communications to the public, its source shall be indicated appropriately by mentioning the community and or geographic place from where the expression of folklore is derived. The provisions of this Section do not apply to the exceptions provided under Section 4, paragraphs 1(iii) and 2. The stipulated exceptions in respect of which source identification is not necessary are borrowing expressions of folklore for creating an original work of an author and where such use is incidental. Incidental use is provided as including use that can be seen or heard in the course of reporting a current event using photography, broadcasting or sound or visual recording, provided that the extent of such utilisation is justified by the informatory purpose. Use of objects containing the expressions of folklore which are permanently located in a place where they can

[145] Section 3 WIPO-UNESCO Model Provisions.
[146] Section 10 WIPO-UNESCO Model Provisions.

be viewed by the public, if the use consists in including their image in a photograph, in a film or in a televisions broadcast is also considered as incidental use.[147]

There are some contentious aspects of Section 5 which reduce the effectiveness of the Model Provisions in addressing the issue of attribution. In the first place, the Model Provisions limit source acknowledgement to identifiable expressions of folklore. The text does not provide criteria for what constitutes "identifiable expressions of folklore". Further, there is no indication as to whether the test for identifiable folklore is subjective or objective. Ideally, the test should be objective. Although this gap is to some extent redeemed by Section 6(3) which provides for penalties where there is wilful deception as to the source of the expressions of folklore, it is not sufficient to cover situations where the user simply does not make enough effort to identify the source. The exception to source acknowledgement stipulated under Section 5(2) which allows borrowing expressions of folklore for the creation of an original work is also contentious. The text does not indicate what constitutes borrowing or limit the amount of work that can be borrowed without source attribution.

The Model Provisions provide under Section 6(1) for penalties for non-compliance with the provisions of Section 5 on acknowledgement of source as a deterrent to offenders. The penalties are largely open ended and allow for the national legislation to adopt provisions best suited to them.

The Model Provisions also provide for the seizure of objects used in violation of the provisions as well as civil remedies. Under Section 12 the Model Provisions provide that they do not limit the applicability of other laws such as copyright law or international treaties in protecting expressions of folklore.

The Model Provisions address the rights holders' concerns with regards attribution by identifying the communities as the creators of the expressions of folklore and making source acknowledgement and pre-authorisation by the creators of the

[147] Section 4(2) WIPO-UNESCO Model Provisions.

expressions of folklore compulsory for their use, subject to several penalties for failure to comply with the requirements. There are however some exceptions included in the text, discussed above, which seem to allow improperly regulated use of expressions of folklore without attribution. This creates inadequacies in the way in which the Model Provisions address the issue of attribution. The Model Provisions also do not adequately address the issue of ownership. It is unclear from the Model Provisions as to who owns the expressions of folklore.

2.4 Ad hoc observations

It is submitted that theoretically the Swakopmund Protocol effectively deals with the issues of attribution and ownership. The overarching concern of traditional knowledge holders was the need for acknowledgement that the knowledge is theirs. The Protocol's acknowledgement of the creatorship and ownership rights of the traditional communities is fundamental in addressing the knowledge holders' concerns as all other rights ensue therefrom. The Protocol identifies the knowledge holders as the owners and makes provision for mandatory source identification for use of traditional knowledge and expressions of folklore, which provides legal certainty with regards to the knowledge holders' rights.

Practically, the onus of ensuring that legal and practical measures are in place to ensure the enforcement of the principle of source identification lies with the parties to the Protocol and the relevant national competent authorities or appropriate authority which are supposed to be established to implement the provisions of the Protocol in the relevant states. In some instances, the Protocol has not been domesticated into national law and in others there are no such practical or legal measures in place.

It is also to be noted that while the Protocol confers rights of ownership of traditional knowledge to the indigenous and local communities, this is in some instances contradictory to the national laws of the signatories to the Protocol which vest ownership of traditional knowledge and or expressions of folklore in the state or vest ownership in the community but the ensuing rights of authorization of

exploitation vest in the state. In this regard, while the Protocol vests the rights holders with the exclusive right to authorize exploitation of their traditional knowledge and expressions of folklore, the national laws of The Gambia,[148] Liberia,[149] Malawi,[150] Namibia[151] and Zimbabwe[152] vest such rights with the State and not the local communities. To give effect to the provisions of the Protocol, it is necessary to harmonise the national laws with the Protocol. It will therefore be necessary to amend the national laws to vest ownership and the ensuing rights with the local communities who originated and created the traditional knowledge and expressions of folklore.

[148] Section 8(4) Copyright Act, 2004.
[149] Section 9.34(d) The Liberia Intellectual Property Act, 2016.
[150] Section 67(1) Copyright Act, 2016.
[151] Section 5 Access to Biological and Genetic Resources and Associated Traditional Knowledge Act, 2017.
[152] Section 81 Copyright and Neighbouring Rights Act {Chapter 26:05}.

CHAPTER 3 DISTORTION AND MISUSE

3.1 Distortion and misuse as a concern for traditional knowledge holders

3.1.1 Introduction

This Section identifies distortion and misuse of traditional knowledge as concerns for traditional knowledge holders which the Swakopmund Protocol needs to address. It examines what constitutes distortion and misuse and considers ways in which traditional knowledge is distorted and misused, as well as the effect of such distortion and misuse on traditional knowledge and the knowledge holders. The Section concludes with a study of the Carpets case[153] which is one example in which traditional artworks were able to be protected against distortion and misuse by existing intellectual property systems and laws. The Section sets the context for Section 3.2 which examines how the Protocol deals with the concern of distortion and misuse of traditional knowledge.

3.1.2 Distortion and misuse identified as a concern for traditional knowledge holders

An additional concern for traditional knowledge holders following on to that of attribution of creatorship and ownership is distortion and misuse. Traditional knowledge and expressions of folklore are an important part of the heritage, culture, social and spiritual identity of indigenous communities, and the rights holders want the right to be able to object to and prevent any distortion and misuse of their traditional knowledge and expressions of folklore.

Traditional knowledge and expressions of folklore are generally distorted and misused as a means of adapting them to westernization or commercialization. Distortion and misuse have been worsened by globalization and the development of new technology which has created newer and easier ways to access, recreate, copy and exchange knowledge and artistic creations. It is posited that commercialization and access to traditional knowledge and works should "be guided, as far as possible and appropriate, by respect for customary practices,

[153] *Milpurrurru v Indofurn* (1993) 130 ALR 659.

norms, laws and understanding of the holder of the knowledge, including the spiritual, sacred or ceremonial characteristics of the traditional origin of the knowledge".[154]

3.1.3 Examples of distortion and misuse of traditional knowledge

Distortion of traditional knowledge and expressions of folklore can be in many forms and is not limited to malformation or disfigurement of traditional knowledge or folkloric creations. According to the Commentary on the WIPO Model Provisions, the term distortion covers "any act of distortion or mutilation or other derogatory action".[155] Misuse by definition is the wrong and improper use of something.[156] Examples of distortion and misuse of traditional knowledge and expressions of folklore include the following:

- **Disclosure of secret knowledge.** Certain knowledge is secret and must be kept within the community. Any disclosure of the knowledge to outsiders and resultant use thereof amounts to its misuse and distortion. In the Australian case of *Foster v Mountford*[157] the court determined that certain important religious and cultural information which had been divulged in confidence should not have been used without authorization.

- **Knowledge or creation of folkloric creations by outsiders.** In some communities, certain knowledge is the preserve of particular persons such as the tribal leader or spiritually chosen people and must not be used or performed by anyone else within the community, least of all outsiders of the community. For example, in the Aboriginal *Rirratjingu* clan only certain persons are allowed to have "deep knowledge" of the land, there are also certain places that even the women of the clan are not allowed to see.[158]

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[154] Curci J *The Protection of Biodiversity and Traditional Knowledge in International Law of Intellectual Property* (Cambridge University Press 2010) 308.
[155] WIPO Secretariat *Commentary on Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions* (WIPO 1985) 22.
[156] https://www.lexico.com/definition/misuse (Date of use: 7 March 2021)
[157] *Foster v Mountford* (1976) 29 FLR.
[158] Janke *Minding Culture* 12.

- A further example is the Pueblo of Santo Domingo case where the Santa Fe New Mexican newspaper flew over the Pueblo of Santo Domingo and took photographs of a secret and sacred ceremonial dance and published the photographs. The Pueblo were offended by the publication of the dance for commercial entertainment and sued for among other things violation of tribal law preserving the secrecy of tribal rituals.[159] Unauthorised knowledge and dissemination of secret and sacred rituals by outsiders amount to misuse. As stated above, distortion is not limited to malformation or disfigurement and extends to derogatory actions. The actions of the Santa Fe New Mexican newspaper were perceived by the Pueblo of Santo Domingo as a derogatory act and therefore a form of distortion.

- **Adaptation of the original form of the work, which is usually done to enable commercialization or to suit a particular market.** Adaptation generally changes the original meaning of the work involved and in some cases can even be offensive and derogatory to the culture of the rights holders. For example, in the *Milpurrurru*[160] case the reproduction of particular artwork on carpet desecrated the culture of the *Rirratjingu* clan as in some instances the images of Djanda the sacred goanna originally depicted in the artwork had been replaced by a depiction of dragons to adapt the carpets to the Asian market.

Western knowledge systems are different from indigenous knowledge systems. Western ways of knowing are based on science and scientists have for many years been sceptical of indigenous ways of knowing. However, as can be seen from the phenomena of "biopiracy", scientists are using traditional knowledge to develop their knowledge in the form of patents. Where substances are known by indigenous communities to have certain qualities and uses, scientists now strive to be the first to describe the chemical formulation and obtain a patent over use of the

[159] Wuger D "Prevention of Misappropriation of Intangible Cultural Heritage Through Intellectual Property Laws" in Finger JM and Schuler P *Poor People's Knowledge: Promoting Intellectual Property in Developing Countries* (World Bank and Oxford University Press 2004) 186.

[160] *Milpurrurru v Indofurn* (1993) 130 ALR 659.

substance.[161] This is a form of distortion and misuse of traditional knowledge, which gives rise to the granting of patents over traditional knowledge to non-community members and in the process desecrates the integrity, purity and spirituality underlying traditional knowledge and practices.[162]

The effects of distortion and misuse of traditional knowledge and expressions of folklore include: [163]

- The dilution of traditional knowledge and cultural practices. The more the knowledge, practices and works are distorted or misused the further away they move from the original form and cultural intention.

- The ultimate disappearance of traditional knowledge, cultural practices and works through dilution and misuse by outside influences.

- The loss of value in the knowledge, cultural practices and works. For example, where certain knowledge or cultural practices equate to ranking within the community, use by outsiders would result in loss of value and ultimately interfere with the social structure of the community.

- There is a negative impact on the individuals and the communities, especially where distortion is offensive or amounts to desecration of their culture and heritage.

- The loss of income where the communities wished to commercialize their knowledge or works.

3.1.4 The Carpets Case

The case of *Milpurrurru v Indofurn* is an example of cultural distortion and misuse through knowledge and creation of folkloric creations by outsiders and adaptation of such knowledge with the effect of dilution, loss of value of the knowledge and a

[161] Dutfield *Protecting Traditional Knowledge* 33.
[162] WIPO Secretariat *Needs and Expectations* 102.
[163] WIPO Secretariat *Needs and Expectations* 137.

negative effect on the individuals and community involved. In 1993 carpets imported into Australia by a company named Indofurn (Pty) Ltd were found to reproduce and infringe the copyright of the artistic works of indigenous Aboriginal artists. It was established that 246 carpets were made and were sold for between A$500 and A$4 000 each.[164] Three of the artists, Banduk Marika, George M,[165] Gamarang[166] and the Public Trustee on behalf of the then deceased artists brought an infringement action against Indofurn.[167]

One of the artists, Banduk Marika's work which was reproduced by Indofurn on the carpets was entitled *Djanda and the Sacred Water Hole.* The method used to create the artwork by drawing the art directly onto plates for printing is believed to be the first time the technique was used by Aboriginal artists.[168]

The work *Djanda and the Sacred Water Hole* was created in 1986 and depicts events that took place at a site on *Rirratjingu* clan land called *Yalangbara* where their creational ancestors, the *Djangkawu*, visited. When the creational ancestors gave the land to the *Rirratjingu* it was on the condition that the *Rirratjingu* continue to perform the ceremonies, produce ceremonial paintings and objects commemorating the ancestors' journeys. The goanna depicted in the artwork, Djanda, is part of a larger story that cannot be disclosed.[169]

The artwork is an intrinsic part of the history and culture of the *Rirratjingu* clan and the knowledge and images belong to the clan. The *Rirratjingu* as the custodians of the knowledge and images have the right to authorize their reproduction or use through the senior representative of the clan who is responsible for and has "deep knowledge" of the land. Even though Banduk Marika is a member of the *Rirratjingu* clan she needed to obtain permission to reproduce the image in her artwork as the underlying knowledge and image is communally owned by the clan.[170]

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[164] Janke *Minding Culture* 18.
[165] Now deceased.
[166] Now deceased.
[167] Janke *Minding Culture* 10.
[168] Janke *Minding Culture* 11.
[169] Janke *Minding Culture* 10.
[170] Janke *Minding Culture* 11.

The commercialization of the images on the carpets had an effect both on a personal and a cultural level. On a personal level Banduk Marika was unhappy about the desecration of the story by its commercialization and was afraid of loss of reputation among her people due to being associated with the reproduced works. Per the indigenous law of the *Rirratjingu*, where permission is granted to an artist to create a picture based on cultural images the artist is held responsible for any inappropriate use of the resultant artwork by a third party even if the artist had no control over or knowledge of the misuse.[171] Banduk Marika was therefore responsible for the misuse of her artwork whether she consented to its reproduction or not. As a result, she would be liable to punishment and possibly be subject to restrictions on producing artwork based on clan images and participating in ceremonies, or be required to pay monetary remuneration to the clan and would generally become an outcast from the clan. The offence of use or misuse of cultural images is a serious offence, such that in the past it could be punishable by death.[172]

On a cultural level, as stated above, the images form an intrinsic part of the history and culture of the *Rirratjingu*, which only they have the authority to reproduce or authorize another party to reproduce. The custodians of the images generally consent to the use of the images in prestigious publications for purposes of education about their culture to non-indigenous people and not for commercial exploitation. The form in which the image was reproduced also desecrated the culture of the *Rirratjingu* in that it was reproduced on carpets where it would be stepped upon, which is opposed to the cultural use of the image.[173] Other reproductions were adapted for the market by a depiction of dragons instead of images of Djanda.[174]

In their infringement action, the artists relied on copyright law and the copyright owners' rights to reproduce the works, authorize others to reproduce or adapt the works and the moral rights to object to any derogation of their works. One of the

[171] Janke *Minding Culture* 15.
[172] Janke *Minding Culture* 15.
[173] Janke *Minding Culture* 12.
[174] Janke *Minding Culture* 19.

main issues raised by Indofurn with regards to whether copyright existed in the works was that the works were not original as they were based on traditional designs and images which had been there for centuries. The court determined that although the artworks were based on pre-existing themes they reflected great skill and originality and were therefore subject to copyright.

The court ruled in favour of the artists and ordered delivery up of the unsold carpets and damages in the sum of A$188 640. The damages awarded not only included damages relating to the number of carpets sold and flagrant conduct but also damages for culturally based harm resulting from the misuse of the artwork.[175]

In this case, the moral rights of traditional knowledge holders in their artworks were able to be protected by copyright law. However, not all artworks can comply with the requirements for copyright protection. In most cases, the artists of indigenous artworks are unknown or long deceased and the images passed from generation to generation and therefore do not fit within the parameters of copyright protection. As such international instruments for the protection of traditional knowledge and expressions of folklore that fall outside the parameters of existing intellectual property laws are necessary.

3.2 How the Swakopmund Protocol deals with distortion and misuse

Apart from attribution and recognition of ownership, the Swakopmund Protocol also seeks to address issues regarding the distortion and misuse of traditional knowledge and expressions of folklore.[176] The Protocol provides in the preamble as some of its objectives respect for dignity, cultural integrity and intellectual and spiritual values of local and traditional communities, the need to foster authentic use of traditional knowledge for the mutual benefit of society as a whole and concerns itself with the misuse, erosion and gradual disappearance of traditional knowledge.

[175] Janke *Minding Culture* 19.
[176] Preamble Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore.

The Protocol provides for the protection of traditional knowledge and expressions of folklore against misuse and distortion. Section 1.1 of the Protocol states one of the two purposes of the Protocol as the protection of "expressions of folklore against misappropriation, misuse and unlawful exploitation beyond their traditional context".[177] It is submitted that distortion encompasses unlawful exploitation beyond the traditional context of traditional knowledge and expressions of folklore. While the above provision specifically mentions the protection of expressions of folklore, it is submitted that it is not limited to expressions of folklore and extends to traditional knowledge, as Section 1.2 states that the Protocol "shall not be interpreted as limiting or tending to define the very diverse holistic conceptions of traditional knowledge and cultural artistic expressions, in the traditional context."

Section 7 empowers the traditional knowledge holders by granting them control over the use of their knowledge by outsiders. Section 7(1) confers upon the rights holders the right to prevent anyone from exploiting their traditional knowledge without prior informed consent. Under Section 7.3 "exploitation" is defined where traditional knowledge is a product as, among other things, "manufacturing, importing, exporting, offering for sale, selling or using beyond the traditional context" and "being in possession of the product for the purposes of … using it beyond the traditional context" and where traditional knowledge is a process "making use of the process beyond the traditional context". This seems to indicate that the traditional knowledge holders can consent to use beyond the traditional context. Section 7(4) of the Protocol grants the rights holders the right to institute legal action against anyone who exploits traditional knowledge without the prior informed consent of the rights holders. Rule 20 of the Protocol reinforces the knowledge holders' rights to prevent misuse and distortion by further granting them the right to withdraw consent where it becomes apparent that the activities consented to are likely to be detrimental to their socio-economic life or their natural and cultural heritage.

[177] Section 1.1(b) Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore.

Section 8 provides for the assignment and licensing of traditional knowledge. Section 8.1 grants owners of traditional knowledge the right to assign their knowledge, with the exception of traditional knowledge belonging to indigenous and local communities which is prohibited from assignment. Owners of traditional knowledge are defined as indigenous or local communities, and recognized individuals within the communities, for example healers.[178] The wording of Section 8.1 seems to suggest that the right of assignment is only granted to individual knowledge holders. However, I submit that while the Protocol recognises individual ownership of traditional knowledge, such ownership is in a fiduciary capacity within the context of the community and the traditional knowledge should therefore not be assignable.[179] This Section of the Swakopmund Protocol is therefore unclear as to what type of traditional knowledge can be assigned, if at all. This provision will need to be clarified.

Section 8.1 provides that traditional knowledge rights holders may conclude licence agreements. Rule 19 of the Protocol seems to reserve the rights of the traditional knowledge rights holders as it provides that rights holders can refuse to conclude a licence agreement where such authorisation is likely to be detrimental to their heritage. This is contradicted by Section 12 on compulsory licences which provides that where traditional knowledge is not being sufficiently exploited by rights holders or the rights holders refuse to grant licences subject to reasonable commercial conditions, the State may grant a compulsory licence if it is in the interests of public health and safety. This removes the authority and control of the rights holder to consent to exploitation of its traditional knowledge and confers it on the state. The state may not understand the traditional knowledge and its importance to the local communities, further, there is no consideration of issues like cultural and spiritual value and sacredness and the state may decide to use the traditional knowledge in a way that constitutes misuse and or distortion. However, as indicated above one of the objectives of the Protocol is to foster the use of traditional knowledge for the mutual benefit of society. I submit therefore that a balance must be struck between the rights of the knowledge holders and the

[178] Section 6 Swakopmund Protocol.
[179] Mutsiwa A. *Precedent, Policy and Possibility: A Victimological Orientation Towards the Protection of Traditional Knowledge in Africa* (PhD Thesis University of KwaZulu Natal 2015) 118.

exploitation of traditional knowledge for the benefit of society. Exploitation under compulsory licences must be conducted in a fair and equitable manner.

Section 19 of the Protocol provides for the protection of expressions of folklore against unlawful acts which include "any distortion, mutilation or other modification of, or other derogatory action, in relation to the expressions of folklore" including use "which disparages, offends or falsely suggests a connection with the community concerned, or brings the community into contempt or disrepute". The Contracting States are tasked with ensuring adequate, effective and practical legal measures are in place to ensure that the principle of prior informed consent is adhered to and any distortion, mutilation or other modification or other derogatory action in relation to expressions of folklore can be prevented and /or is subject to civil or criminal sanctions. Ideally, the threat of sanctions should act as a deterrent against distortion or any other derogatory action.

Under Section 19.4 the Contracting State is also tasked to put into place adequate and practical measures over expressions of folklore that are held secret to prevent unauthorised disclosure and misuse.

There are exceptions under Section 20 which allow fair use on the basis that there is acknowledgement of the community and the use is not offensive to the relevant community.

It is submitted that the Swakopmund Protocol is to some extent effective in addressing the concerns of traditional knowledge holders with regards to misuse and distortion of traditional knowledge and expressions of folklore. The Protocol empowers knowledge holders with the right to control the use of their traditional knowledge through the mandatory application of the principle of prior informed consent where the use of traditional knowledge and expressions of folklore is made by non-rights holders. Further, the Protocol provides the knowledge holders with the option to withdraw such consent at any time where use is likely to be detrimental to their heritage or socio-economic life.[180] The Protocol tasks the

[180] Rule 20 Swakopmund Protocol.

member states to make relevant provisions for enforcement of the principle of prior informed consent including the provision for civil and criminal sanctions for lack of compliance with the principle and misuse and distortion of traditional knowledge and expressions of folklore.

However, it is submitted that there are some provisions that detract from the efficacy of the Protocol in addressing the issues of misuse and distortion. These relate to assignments and licences, especially compulsory licences. It is submitted that these concepts are foreign to traditional knowledge, they are an affront to the spirit and ideals of traditional knowledge and their inclusion is tantamount to westernization and colonization of traditional knowledge.[181] Assignment and compulsory licencing of traditional knowledge removes control of the traditional knowledge from the hands of the knowledge holders and places it in the hands of non-community members who may not appreciate the values behind the knowledge and have no obligation to protect the knowledge against misuse and distortion. While it is appreciated that the assignment, licencing and issuing of compulsory licences in respect of traditional knowledge is in keeping with the Protocol's objective of use of traditional knowledge for the mutual benefit of society, it is yet to be seen how the Protocol strikes a balance between such benefit and the rights holders' need to maintain control and integrity of their knowledge.

3.3 How the WIPO-UNESCO Model Provisions deal with distortion and misuse

Another of the objectives of the establishment of the Model Provisions was the need to protect expressions of folklore from improper exploitation which often includes their misuse and distortion. One of the considerations stipulated in the Preamble as prompting the need for the Model Provisions is that any abuse of commercial or other nature or any distortion of expressions of folklore is prejudicial to the cultural and economic interests of the nation.[182]

[181] Mutsiwa *Precedent, Policy and Possibility* 124.
[182] Preamble Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions.

Section 1 of the Model Provisions provides for overarching protection against 'illicit exploitation' and 'prejudicial actions', which I submit includes misuse and distortion.

Section 3 provides for mandatory authorisation by the national competent authority or relevant community for use of expressions of folklore with gainful intent and outside the traditional or customary context in any form of communication to the public. What constitutes traditional or customary context is understood as use in its proper artistic framework and use in accordance with the practices of the community.[183] As it is possible to use expressions of folklore outside the traditional or customary context without gainful intent communities will not have complete control over the use of their folklore to prevent distortion and misuse.

Section 6 provides monetary and criminal penalties for failure to comply with the provisions of Section 3 and Section 4. Section 6(2) makes it an offence to wilfully or negligently use expressions of folklore with gainful intent without requisite authorisation. It is posited that Section 6(2) also makes it an offence to use expressions of folklore beyond the scope of the authorisation provided, which constitutes misuse. The section makes provision for a penalty in the form of a fine.

Section 6(4) makes wilful distortion of expressions of folklore in a way that is prejudicial to the cultural interests of the community concerned an offence subject to a penalty. The severity with which this offence is considered can be seen from the fact that the offence is subject to a criminal penalty.

3.4 Ad hoc observations

The Swakopmund Protocol aims to balance its objectives of maintaining the integrity of the rights holders' knowledge with the use of traditional knowledge for the mutual benefit of society. In this regard, the Protocol allows controlled use of traditional knowledge beyond the traditional context subject to prior informed consent. The Protocol also tasks contracting states to ensure adequate, effective

[183] WIPO Secretariat *Commentary on Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions* (WIPO 1985) 18.

and practical legal measures are in place to ensure that any distortion in relation to expressions of folklore can be prevented and /or is subject to civil or criminal sanctions.

The Protocol, however, goes so far as to allow assignment of traditional knowledge not belonging to the community. While it is unclear which traditional knowledge may then be assigned in the circumstances, it is submitted that this provision is contradictory to the objectives of the Protocol, in that while the Protocol seeks to protect traditional knowledge against misuse and foster its authentic use, it allows alienation of the knowledge to people who are not members of the community. It is submitted that the concept of assignment of traditional knowledge is not in keeping with the tenets of indigenous and local communities. Unlike western knowledge, traditional knowledge is an intrinsic part of the cultural heritage of indigenous and local communities and cannot be alienated completely from the rights holder. Where rights are assigned the assignor generally has no regulation or control over the assignee's use of the rights. It is further submitted that in some instances, the use of traditional knowledge by an outsider of the community either by consent or assignment in itself constitutes a violation of spiritual and traditional mores.

The concept of compulsory licences as provided for in the Protocol is alien to traditional and local communities. Compulsory licences remove the authority and control of the rights holders to consent to exploitation of their knowledge and confer it on to the state without consideration of issues like cultural and spiritual values. The inclusion of concepts such as compulsory licensing and resultant limitations further lends credence to the scepticism of opponents of intellectual property type of protection of traditional knowledge that view the Protocol as a proliferation of western ideologies and epistemologies which involuntarily make traditional knowledge holders the bearers of structures that they did not choose to create. [184] However, it is submitted that no rights are absolute and they will be subject to limitations and exceptions, such as compulsory licences in this instance. This is a reality which traditional knowledge holders must come to terms with as part of the

[184] Mutsiwa *Precedent, Policy and Possibility* 118.

need for legal certainty.[185] A balance must be therefore be struck between the knowledge holders' proprietary rights and global welfare considerations. It is submitted that compulsory licensing should be exercised without significantly disempowering the knowledge holders and should be exercised with the continuing involvement of the relevant communities as well as maintaining and focusing on the purpose for access.[186]

[185] Okediji RL "Traditional Knowledge and the Public Domain" https://www.cigionline.org/sites/default/files/documents/Paper%20no.176web.pdf (Date of use: 9 September 2021).

[186] Okediji https://www.cigionline.org/sites/default/files/documents/Paper%20no.176web.pdf (Date of use: 9 September 2021).

CHAPTER 4 BENEFIT SHARING

4.1 Benefit sharing as a concern for traditional knowledge holders

4.1.1 Introduction

This Section focuses on the sharing of benefits gained from the exploitation of traditional knowledge by outsiders as a concern for traditional knowledge holders. It reviews the commercial value of traditional knowledge through economic gains derived from commercialisation by non-rights holders. The Section considers how traditional knowledge rights holders can be assisted in benefiting from commercialisation of their knowledge through tools such as awareness raising of the economic value of traditional knowledge and legislation which promotes equitable benefit sharing. The Section concludes with a study of the benefit sharing aspect of the Hoodia case. This Section sets the context for Section 4.2 which examines whether the Protocol addresses the concern of benefit sharing.

4.1.2 Benefit sharing identified as a concern for traditional knowledge holders

Researchers and corporates in developed countries have for many years obtained patents on ethno-botanical knowledge that originated from indigenous communities without any or with very little benefit shared with the communities who were the originators of the knowledge and the genetic resources.[187] The Society for Research and Initiatives for Sustainable Technologies and Institutions has noted that 74 per cent of the plant derived human drugs are used for the same purpose for which the native people discovered their use.[188] The Rural Advancement Foundation International has also noted that at least 7,000 medical compounds used in Western medicine are derived from plants. The value of developing-country germplasm to the pharmaceutical industry in the early 1990s was estimated to be at least US$32,000 million per year, yet the communities were paid only a fraction of this amount for the raw materials and knowledge they

[187] Oguamanam 2018 *SSRN* 10.

[188] Schuler P "Biopiracy and Commercialization of Ethnobotanical Knowledge" in Finger JM and Schuler P *Poor People's Knowledge: Promoting Intellectual Property in Developing Countries* (World Bank and Oxford University Press 2004) 160.

contribute.[189] The multi-billion a year pharmaceutical industry is based on ethno-botanical knowledge.

Expressions of folklore are generally exploited by non-indigenous people, who not only seek to exploit folklore but to distort and obtain private ownership of folklore.[190] A survey by the National Sample Survey Organisation of India showed that the income generated from handicrafts in India during the period 2000-2001 was valued at US$3.3 billion. Hand woven Indian textiles and jewellery appear on the ramps in Paris and are sold in the best stores in New York, handmade Indian carpets cover some of the most elegant floors in the world; and yet thousands of the crafts persons who create them struggle financially and many starve to death.[191] This is but one example of the paradox arising out of the misappropriation of expressions of folklore.

The fact that patents are granted based on inventions derived from traditional knowledge, traditional crafts are sold the world over and traditional music and dance are sampled in western and other forms of music, shows that traditional knowledge and expressions of folklore have economic value and that there is a great capacity for the rights holders to earn from commercialization of their traditional knowledge.[192] In this era of globalization, culture has become a commodity.[193] However, the WIPO Fact-finding Missions on Intellectual Property and Traditional Knowledge conducted from 1998 to 1999 revealed that the traditional knowledge holders were not always aware of the commercial value of their traditional knowledge.[194] Some communities were not interested in the commercial value of their traditional knowledge and more concerned with its preservation. It was apparent that awareness raising of the value of traditional knowledge is therefore necessary. The traditional knowledge holders who were aware of the value of the commercialization of their knowledge wanted a "fair

189 Schuler *Biopiracy and Commercialization* 160.
190 Morolong *Protecting Folklore* 49.
191 Lieble M and Tirthankar R "Handmade in India: Traditional Craft Skills in a Changing World" in Finger JM and Schuler P *Poor People's Knowledge: Promoting Intellectual Property in Developing Countries* (World Bank and Oxford University Press 2004) 54-55.
192 Schuler *Biopiracy and Commercialization* 159; Ni 2011 *Northwestern Journal of International Human Rights* 85.
193 Wuger *Prevention of Misappropriation* 183.
194 WIPO Secretariat *Needs and Expectations* 230.

return" which was defined as including housing, services, money, transport, training, technology transfer and financial benefit from commercial exploitation[195]; tools for determining the economic value of traditional knowledge and its contribution to the development of commercial products[196]; and, solutions to the issues with regards to identifying the beneficiaries.

4.1.3 Awareness raising of the value of traditional knowledge

The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (hereinafter referred to as the Nagoya Protocol) is an international supplementary agreement to the Convention on Biological Diversity which entered into force on 12 October 2014. The aim of the Nagoya Protocol is the fair and equitable sharing of benefits arising from the utilization of genetic resources and the traditional knowledge associated with the genetic resources.[197] In order to address the issue of awareness raising Article 21[198] of the Nagoya Protocol is a mandatory provision that compels parties to the Nagoya Protocol to raise awareness of the importance of, among other things, traditional knowledge associated with genetic resources, and related access and benefit-sharing issues. The Nagoya Protocol recommends that such awareness raising can be in the form of organisation of meetings of indigenous and local communities, establishment and maintenance of a help desk for indigenous and local communities, information dissemination, promotion of codes of conduct, guidelines and best practices in consultation with indigenous and local communities, promotion of domestic, regional and international exchange of experience and education and training of traditional knowledge holders and users about their access and benefit sharing obligations.

[195] WIPO Secretariat *Needs and Expectations* 87.
[196] WIPO Secretariat *Needs and Expectations* 87.
[197] Article 1 Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity.
[198] Article 21 Nagoya Protocol provides that "Each Party shall take measures to raise awareness of the importance of genetic resources and traditional knowledge associated with genetic resources, and related access and benefit-sharing issues."

4.1.4 Fair return

While there are traditional knowledge holders who wish to keep their knowledge secret, there are those who are willing to share their knowledge and collaborate with scientists to share information and experiences. However, their fear is that their knowledge will be misappropriated without any attribution and economic benefit as has been the case in the past and continues to be the case in some instances.

In recent times there has been a shift in policy and ethical environment with equity in the form of prior informed consent, mutually agreed terms and benefit sharing being acknowledged as central to access to traditional knowledge.[199] The recognition of the rights of traditional knowledge holders and their rights to be involved in transactions involving their knowledge has been encompassed in international agreements, national laws and policies and commercial policies.

Examples of international agreements that address the issue of benefit sharing and are generally the blue print for any benefit sharing legislation include the following:

(i) The Convention on Biological Diversity is an agreement providing for state regulation of access to genetic resources and related traditional knowledge, subject to prior informed consent of the traditional knowledge holders, mutually agreed terms and equitable benefit sharing with the knowledge holders.[200] The main advantage of the CBD is that it has 196 parties and 168 signatories, as of June 2021, and therefore has near universal membership. Further, its provisions are legally binding on its signatories.

Problems with the CBD which potentially affect its effectiveness in addressing benefit sharing include the fact that despite near universal membership the United States of America, one of the great global powers, is not a party to the CBD and therefore not bound by its provisions. Further,

[199] Kate K and Laird S "Bioprospecting Agreements and Benefit Sharing with Local Communities" in Finger JM and Schuler P *Poor People's Knowledge: Promoting Intellectual Property in Developing Countries* (World Bank and Oxford University Press 2004) 133.

[200] Articles 8j, 15 and 16 Convention on Biological Diversity.

benefit sharing is generally a system governed by national laws through policies and legislation and there is a lack of such policies and legislation implementing the benefit sharing obligations, especially in the industrialized nations. Where there is legislation, there are no substantial provisions for measures practically addressing access and benefit sharing.[201] These issues ultimately resulted in the negotiation and adoption of the Nagoya Protocol to establish an international regime to promote and safeguard the fair and equitable sharing of benefits arising out of the utilization of genetic resources and associated traditional knowledge.

(ii) The Nagoya Protocol as stated above is a supplementary agreement to the Convention on Biological Diversity. Currently, as of June 2021, the Protocol has been ratified by 130 parties.

Article 7[202] of the Nagoya Protocol makes provision for access to traditional knowledge with the prior informed consent of the traditional knowledge holders and mutually agreed terms. Article 12 of the Protocol makes provision for the education of potential traditional knowledge users as to their obligations with regards access to the knowledge and fair and equitable sharing of benefits arising from use of the knowledge. The Protocol creates access obligations, benefit sharing obligations, compliance obligations and provisions on implementation. These provisions must be applied in accordance with the national laws. The system is governed by national laws through policies and legislation which must provide a means of ensuring that those seeking access to traditional knowledge have the prior informed consent of the relevant local community and that results and benefits arising from commercialisation and other utilisation are shared in a fair and equitable manner on mutually agreed terms. A number of the

[201] UNCTAD *The Convention On Biological Diversity and The Nagoya Protocol: Intellectual Property Implications* (United Nations 2014) 11.

[202] Article 7 of Nagoya Protocol: "In accordance with domestic law, each party shall take measures as appropriate, with the aim of ensuring that traditional knowledge associated with genetic resources that is held by indigenous and local communities is accessed with the prior and informed consent or approval and involvement of these indigenous and local communities, and that mutually agreed terms have been established."

provisions of the Nagoya Protocol are borrowed from the Bonn Guidelines on Access and Benefit-Sharing as Related to Genetic Resources, Monetary and Non-Monetary Benefits (hereinafter referred to as the Bonn Guidelines).

(iii) Bonn Guidelines on Access and Benefit-Sharing as Related to Genetic Resources, Monetary and Non-Monetary Benefits are voluntary guidelines for parties involved in access and benefit sharing such as governments, companies, communities and other stake holders. The Bonn Guidelines also provide examples of benefits that have been divided into monetary and non-monetary benefits. [203]

(iv) The United Nations Declaration on the Rights of Indigenous Peoples is not legally binding but places a moral obligation on countries to adhere to the provisions of the declaration. Article 8 of the Declaration provides for the right of indigenous people not to be subject to the destruction of their culture; the right of the indigenous peoples to their traditional medicines and health practices is entrenched under Article 24; and, Article 31 provides for the right of indigenous people to maintain, control and protect and develop their traditional knowledge, traditional cultural expressions as well as their

[203] According to the Guidelines monetary benefits include but are not limited to "access fees, up-front payments, milestone payments, payment of royalties, licence fees, special fees to be paid to trust funds supporting conservation and sustainable use of biodiversity, salaries and preferential terms where mutually agreed, research funding, joint ventures and joint ownership of relevant intellectual property rights. Non-monetary benefits include but are not limited to sharing of research and development results, collaboration, cooperation and contribution in scientific research and development programmes, particularly biotechnological research activities, participation in product development, collaboration, cooperation and contribution in education and training, admittance to ex situ facilities of genetic resources and to databases; transfer to the provider of the genetic resources of knowledge and technology under fair and most favourable terms, including on concessional and preferential terms where agreed, in particular, knowledge and technology that make use of genetic resources, including biotechnology, or that are relevant to the conservation and sustainable utilization of biological diversity, strengthening capacities for technology transfer, institutional capacity-building, human and material resources to strengthen the capacities for the administration and enforcement of access regulations, training related to genetic resources with the full participation of countries providing genetic resources, and where possible, in such countries, access to scientific information relevant to conservation and sustainable use of biological diversity, including biological inventories and taxonomic studies, contributions to the local economy, research directed towards priority needs, such as health and food security, taking into account domestic uses of genetic resources in the Party providing genetic resources, institutional and professional relationships that can arise from an access and benefit-sharing agreement and subsequent collaborative activities, food and livelihood security benefits social recognition, joint ownership of relevant intellectual property rights."

intellectual property over such traditional knowledge and traditional cultural expressions.

(v) The African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources makes provision for access to and use of traditional knowledge subject to prior informed consent, a written permit from the government and local community concerned[204] and a payment that constitutes a deposit on the benefits to be derived from the knowledge. Additional benefits will be collected when the knowledge generates a product used in a production process.[205]

It is to be noted that while the conclusion of the above protocols was ground breaking as regards the protection of traditional knowledge and genetic resources and the issue of benefit sharing, the protocols only set legal standards for countries to follow. Rights are granted and regulated under national laws, as such it is necessary to incorporate these legal standards in national laws. At national level over a hundred countries have introduced laws and policies relating to access and benefit sharing.[206] There are also documents developed by indigenous peoples, with clear demands in terms of recognition of ownership over knowledge, access requirements such as prior informed consent, right of veto over access, and benefit sharing, company policies and researcher codes and ethics guidelines which set out principles for research partnerships and obligations. [207]

4.1.5 Identifying beneficiaries

Once the question of benefit sharing is settled the complex issue of identifying the beneficiaries of the proceeds of utilisation of the traditional knowledge arises. Traditional knowledge has community based origins and can therefore not be

[204] Section 3 African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders and for the Regulation of Access to Biological Resources.
[205] Section 12 African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders and for the Regulation of Access to Biological Resources.
[206] Kate *Bioprospecting Agreements* 138.
[207] Kate *Bioprospecting Agreements* 141.

owned by any one individual and any benefits must therefore be awarded to the community. At the same time, traditional knowledge may originate from more than one community and in some instances, certain knowledge is not particular to indigenous communities in one country. For example, medicinal knowledge of the neem tree is known to indigenous communities in Uganda as well as Asia.[208] The issue of identifying the beneficiary is further complicated by the involvement of governments and other stakeholders who believe that they are also entitled to the benefits arising from the utilization of traditional knowledge. In some instances the state perceives itself as a beneficiary.[209]

The effect of the above complications is that it is not always easy to identify the correct beneficiary or beneficiaries as the case may be, and in some instances especially where there is government involvement the benefits do not always filter down to the traditional knowledge holders. It is recommended that there is a need for the establishment of organisations that can negotiate fair terms for the indigenous communities and ensure that the benefits reach the local communities. However, this is not always practical in light of the diversity of social, cultural and political systems and customs.[210] A most pertinent example is the fact that numerous contributors to the WIPO Fact-finding Mission to the Arab Countries believed that all traditional knowledge should vest in the state,[211] which while workable in one country might be heresy in another.

4.1.6 The Hoodia Case in relation to benefit sharing

The issues of attribution and ownership are intrinsically tied to benefit sharing, as the originator of traditional knowledge should rightly benefit from its exploitation. Attribution, as it relates to the hoodia case, was discussed under Section 2.1 above. However, as a result of the relationship between attribution and benefit sharing this case is also relevant to the current discussion on benefit sharing.

[208] WIPO Secretariat *Needs and Expectations* 88.
[209] Oguamanam *IDEA* 192.
[210] WIPO Secretariat *Needs and Expectations* 229.
[211] WIPO Secretariat *Needs and Expectations* 162.

In 1996 when CSIR was granted the patent for use of the hoodia plant as an appetite suppressant it intended to commercialise the product. In 1998 CSIR entered into an exclusive licence agreement with Phytopharm over the hoodia appetite suppressant, which company in turn granted licences to pharmaceutical giant Pfizer and the global consumer goods giant Unilever valued at US$32 million.[212] The San people were not mentioned as the originator of the knowledge nor was there a financial benefit or otherwise to be given to the San people for the use of their knowledge.

As a result of the public outcry which motivated the attribution of the San people as the originator of the knowledge, CSIR entered into a benefit sharing agreement with the San people in March 2003. In terms of the agreement, the San were to be given a 6% share of the royalties from the sale of the hoodia product and 8% of milestone payments received by CSIR.[213] Although not perfect, this was one of the first benefit sharing agreements that set a precedent for traditional knowledge holders of equitable benefit sharing that could be achieved from the commercialization of their knowledge.

The use of the hoodia plant as an appetite suppressant was also known to other indigenous communities. However, none were acknowledged as knowledge holders, nor did these communities claim traditional knowledge rights. The San were acknowledged as the primary knowledge holders and awarded the benefits arising from the patent. Pursuant to recognition of the rights of the Nama as knowledge holders in respect to the hoodia plant,[214] in 2010 the San and the Nama agreed to share the benefits arising from the exploitation of the hoodia plant.[215] This is further evidence of the complicated nature of benefit sharing as regards the identification of beneficiaries.

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[212] Tellez VM "Recognising the traditional knowledge of the San people: The Hoodia case of benefit-sharing" http://www.ipngos.org/NGO%20Briefings/Hoodia%20case%20of%20benefit%20sharing.pdf (Date of use: 2 August 2018).

[213] Tellez http://www.ipngos.org/NGO%20Briefings/Hoodia%20case%20of%20benefit%20sharing.pdf (Date of use: 2 August 2018).

[214] Kamau EC "Common Pools of Traditional Knowledge and Related Genetic Resources: a case study of San-Hoodia" in Kamau EC and Winter G *Common Pools of Genetic Resources: Equity and Innovation in International Biodiversity Law* (Routlidge 2013) 52.

[215] Chennells R "Traditional Knowledge and Benefit Sharing After the Nagoya Protocol – Three Cases from South Africa" 2013 *LEAD Journal* 169.

4.2 How the Swakopmund Protocol deals with benefit sharing

One of the objectives of the Swakopmund Protocol, as set out in the Preamble, is that traditional knowledge systems and expressions of folklore should benefit traditional and local communities and all humanity and an equitable balance should be struck between the rights holders and those using and benefiting from the knowledge.

The Swakopmund Protocol defines benefit sharing as "the sharing of whatever accrues from the utilization of traditional knowledge and expressions of folklore". Benefits include division of profits, payment of royalties and extend to technology access and transfer, training of human resources and other benefits which the parties agree upon.[216]

Section 9 of the Protocol provides for the protection of traditional knowledge which shall include fair and equitable sharing of benefits arising from the commercial or industrial use of knowledge Section 19.3 provides for fair and equitable sharing of benefits arising from the use or exploitation of expressions of folklore for gainful intent.

While it is now trite that there must be fair and equitable sharing of the benefits arising from the exploitation of traditional knowledge issues of lack of awareness about the value of traditional knowledge, what constitutes a fair return and the identification of beneficiaries arise and need to be addressed by the Swakopmund Protocol.

In keeping with Article 21 of the Nagoya Protocol which sets legal standards at international level on issues of benefit sharing, the Swakopmund Protocol provides for the awareness raising of the importance of traditional knowledge and related benefit sharing issues. Section 14 of the Swakopmund Protocol tasks the national competent authorities and ARIPO with awareness raising, education, guidance

[216] Rule 18 Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore.

and other activities related to the protection of traditional knowledge. Section 22 tasks the national competent authorities and ARIPO with similar activities in respect of expressions of folklore.

The Swakopmund Protocol prescribes fair and equitable sharing of benefits. What constitutes fair and equitable in respect of traditional knowledge is to be determined by mutual agreement between the parties, failing which the relevant national competent authority shall mediate between the parties. Equitable remuneration is not limited to money but extends to community development or whatever the needs of the community as agreed between the parties. With regards to expressions of folklore, the terms of the benefit sharing agreement are to be determined by the national competent authority in consultation with the relevant community. Section 22.3 provides that any benefits arising from the use of expressions of folklore monetary or otherwise must be transferred by the national competent authority to the relevant community or communities. The national competent authorities represent the interests of the communities concerned in as far as their rights arising out of their expressions of folklore are concerned. However, as previously discussed the communities may or may not benefit depending on the provisions of the national legislation and policies.

The most challenging aspect of fair and equitable benefit sharing seems to be the identification of the beneficiaries. The Protocol under Section 6 defines the beneficiaries of traditional knowledge as “the indigenous or local communities, and recognised individuals within such communities, who create, preserve and transmit knowledge in a traditional and intergenerational context”. Section 18 defines the beneficiaries of expressions of folklore as “the indigenous or local communities to whom the custody and protection of the expressions of folklore are entrusted in accordance with the customary laws and practices of those communities, and who maintain and use the expressions of folklore as a characteristic of their traditional cultural heritage”. In order for the benefit sharing provision to be effectively applied the beneficiaries must be accurately identified, however, the beneficiaries are not always evident and identifiable. Difficulties inherent to the identification of beneficiaries include the fact that different communities may have a claim to the same traditional knowledge, thus creating an issue of prior rights and conflicts as

to ownership. In this regard, different communities may have the same origins but have since split up, smaller communities may be part of larger communities to which the traditional knowledge belongs and some communities have no governance structures and it is difficult to ascertain the legitimacy of members claiming to represent communities.[217]

Unfortunately, not all difficulties can be addressed through the text of the Swakopmund Protocol. This issue will require that national policy considerations take into account the facts of each case and a number of relevant factors, as well as apply the principles of equity.[218] However, it is submitted that to the extent possible the Swakopmund Protocol is effective in addressing the issue of benefit sharing.

4.3 How the WIPO-UNESCO Model Provisions deal with benefit sharing

One of the issues raised in the Introductory Observations of the Model Provisions with regards the protection of expressions of folklore is the fact that expressions of folklore are being commercialised worldwide without regard to the economic interests of the communities where the expressions of folklore originate or sharing the economic benefits of such exploitation with the relevant communities.[219] One of the aims of the Model Provisions is therefore to ensure that the communities are properly recompensed for the commercialisation of their expressions of folklore through equitable benefit sharing.[220]

That said, the Model Provisions do not provide for mandatory sharing of monetary or non-monetary benefits arising from the utilisation of expressions of folklore outside the traditional and customary context. Section 10 which sets out the manner in which prior informed consent must be obtained, merely provides that the relevant community or national competent authority, as the case may be, may set

[217] Chennells 2013 *LEAD* 174-175.
[218] Chennells 2013 *LEAD* 184.
[219] Paragraph 2 Introductory Observations of the Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions.
[220] Paragraph 4 Introductory Observations of the Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions.

an amount of fees for utilisation of expressions of folklore and collect such fee approved by the "supervisory authority". The definition and constitution of the "supervisory authority", that is the body approving the fee for use of the expressions of folklore, is left up to the national legislators. Such fixing of a fee is not mandatory and it is assumed that the national competent authority or community may even grant authorisation for free if it sees fit. It is submitted that the discretion to grant authorisation for free should be limited to the relevant community only and not to the national competent authority. As the originator and the rights holder in respect of the folklore, it should be the sole prerogative of the community to authorise the use of their folklore without deriving any benefit. Where fees are collected the WIPO-UNESCO Model Provisions provide that the fees are to be utilised to promote and safeguard national folklore or culture. In terms of this provision, the communities whose folklore are utilised do not stand to benefit directly from the fees. It is submitted that it is therefore the responsibility of the national legislature to provide for the allocation of part of the fee to the relevant community, to ensure that the community derives some direct benefit from the utilisation of their folklore.

Section 10(3) provides for filing an appeal against decisions of the national competent authority. Appeals may be filed by the party seeking authorisation in respect of the national competent authority's decision not to grant authorisation to utilise the expressions of folklore. It is to be noted from the wording of Section 10(3) that an appeal can be filed against a decision of the national competent authority but not against a decision of the relevant community. A community's decision with regards to authorisation of use of its expressions of folklore is not appealable. Presumably non-formal negotiations with the community may be pursued in the circumstances.

In terms of Section 10(3) the community whose folklore is under consideration may also file an appeal against the granting of authorisation, and presumably against the national competent authority's decision not to fix a fee where such a decision is made. The communities therefore have recourse against a decision of the national competent authority to grant authorisation for free. Despite certain powers being exercised over the folklore by the national competent authorities, the WIPO-

UNESCO Model Provisions empower the communities with ultimate control over the granting of access to and utilisation of their folklore.

The WIPO-UNESCO Model Provisions whilst realising the importance of sharing the benefits of commercialisation of expressions of folklore do not make benefit sharing mandatory. The decision whether or not to impose any sort of fee for the benefit of using the expressions of folklore is left up to the national competent authority or community concerned. As submitted above such a decision should be the sole prerogative of the community concerned as the rights holders. Further, the Model Provisions make it mandatory that the fees collected are applied to the promotion and safeguarding or folklore and culture instead of being channelled to other uses. Whilst it is admirable that the WIPO-UNESCO Model Provisions ensure that the benefits are not channelled to other government expenditures unrelated to folklore and culture the community concerned does not benefit directly from the use of its folklore. This is an aspect that will need to be addressed at national level to ensure that the communities derive some direct benefit from the utilisation of their folklore.

4.4 Ad hoc observations

Intrinsically tied to the issue of attribution of the rights holders and ownership of traditional knowledge and expressions of folklore is the issue of benefit sharing and fair returns for exploitation of the rights holders' knowledge. The knowledge holders' right to benefit economically from the exploitation of their knowledge is recognised by both the WIPO-UNESCO Model Provisions as well as the Swakopmund Protocol and incorporated into their provisions.

While the WIPO-UNESCO Model Provisions do not make benefit sharing mandatory and leave the decision to make such demands to the discretion of the national competent authority and the community concerned, the Swakopmund Protocol makes equitable benefit sharing for the commercial or industrial use of traditional knowledge[221] and use of expressions of folklore for gainful intent[222]

[221] Section 9.1 Swakopmund Protocol.
[222] Section 19.3 Swakopmund Protocol.

mandatory. Further, the Swakopmund Protocol does not limit equitable remuneration to money, which some communities may not see the need for or its importance, but extends equitable remuneration to community development or whatever the needs of the community as agreed between the parties. The Swakopmund Protocol by providing the communities with the option of monetary and non-monetary benefits therefore ensures that the rights holders benefit from the exploitation of their knowledge and expression of folklore in one way or the other and most importantly in a manner most relevant to the needs of the communities.

Another issue that arises is which communities should benefit where more than one community is concerned and in some instances located in different countries. The Swakopmund Protocol makes provision for equal recognition of foreign holders of traditional knowledge and expressions of folklore[223] and for the resolution of trans-boundary disputes by ARIPO using customary laws and Protocols, alternative dispute resolution mechanisms and any other practical mechanisms necessary.[224] Other issues which arise is that the monetary benefits are not always allocated or applied to the communities concerned, as in some cases national legislation provides that any such monetary benefits accrue to the state and therefore end up being used for government expenditure which may or may not benefit the communities concerned. It is therefore recommended that ARIPO should lobby member states to amend their legislation and policies to allow for at least partial allocation of benefits to the relevant communities where such legislation and policies are not it place.

[223] Section 24 Swakopmund Protocol.
[224] Section 24 Swakopmund Protocol.

CHAPTER 5 PRESERVATION FOR FUTURE GENERATIONS

5.1 Preservation as a concern for traditional knowledge holders

5.1.1 Introduction

This Section identifies the preservation of traditional knowledge for future generations as a concern for traditional knowledge holders. It examines factors threatening the existence of traditional knowledge such as colonization, modernization, globalization and the lack of interest in and respect for traditional ways and how these factors threaten and erode the existence of traditional knowledge. It concludes with solutions to assist in the preservation of traditional knowledge through documentation, awareness raising, restriction of access to traditional knowledge by non-community members, the creation of cultural heritage and policy legislation to promote traditional knowledge and culture and the organisation of local communities and traditional knowledge rights holders for awareness raising and participation in the protection of their knowledge. The Section sets the context for Section 5.2 which examines whether the Protocol addresses preservation as a concern and how it does so.

5.1.2 Preservation identified as a concern for traditional knowledge holders

While lack of attribution, inappropriate and exploitive use by non-traditional rights holders are the main driving force behind the need for protection of traditional knowledge, some traditional knowledge holders see preservation of traditional knowledge and culture as of paramount importance. Dutfield identifies the disappearance of traditional knowledge and expressions of folklore as a major issue.[225] Dutfield states that traditional knowledge and expressions of folklore

> …are also threatened with actual disappearance. When peoples are forced to struggle for survival amidst intrusions on their traditional ways of life from outside, knowledge of and ability to perform them may no longer be major concerns of younger members exposed increasingly to outside cultural influence… In communities undergoing rapid social change, traditional knowledge may no longer be seen as valuable. As it dies out an important source of a peoples' cultural identity disappears with it.[226]

[225] Dutfield *Protecting Traditional Knowledge* 25-26.
[226] Dutfield *Protecting Traditional Knowledge* 25-26.

One of the aims of protecting traditional knowledge is therefore preservation of valuable knowledge for future generations and the cultural identity of indigenous people.

5.1.3 Factors threatening the existence of traditional knowledge

Numerous factors are threatening the existence of traditional knowledge and expressions of folklore. These include factors external to the local communities such as colonization, modernization and globalization which lead to the distortion, dilution and disappearance of traditional knowledge, as well as internal factors from within the local communities themselves, such as lack of respect for traditional ways and waning of oral tradition.[227]

Colonization is mainly perceived as the conquest of land and territories belonging to indigenous people,[228] however, it must be noted that it also extends to the subjugation of the language, laws, culture, knowledge systems and religion of the indigenous people.[229] Many traditional knowledge holders believe that their language is the cornerstone of their culture and its preservation is imperative for the survival of their culture.[230] As the Aborigines stated in their contribution to the WIPO Fact-finding Missions "Our biggest problem is our language: once we lose our language we lose our identity and knowledge".[231] Colonization began the erosion of indigenous culture through the forced attendance of colonial schools by indigenous children and the banning of their local languages in favour of the language of the colonizers, whether be it English, French, Portuguese or German.[232] Presently it can be noted that many former colonies have as their official language the language of their former colonizers.[233]

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[227] WIPO Secretariat *Needs and Expectations* 95.
[228] https://www.lexico.com/definition/colonization (Date of use: 24 December 2021).
[229] WIPO Secretariat *Needs and Expectations* 95; Smith LT *Decolonizing Methodologies: Research and Indigenous Peoples* (Zed Books Lt / University of Otago Press 1999) 64.
[230] WIPO Secretariat *Needs and Expectations* 128.
[231] WIPO Secretariat *Needs and Expectations* 128.
[232] WIPO Secretariat *Needs and Expectations* 128.
[233] Mufwene SS "Colonization, Globalization, and the Future of Languages in the Twenty-First Century" http://mufwene.uchicago.edu/mufw_colonization.html (Date of use: 27 December 2021); http://exploringafrica.matrix.msu.edu/3061-2/ (Date of use: 27 December 2021).

The subjugation of the indigenous language was only the beginning of the erosion of traditional knowledge and culture, colonial settlers also fostered upon the indigenous people their social, political and economic way of life.[234] The missions, mainly Christian, followed the colonial settlers into the conquered territories to promote their religions over the indigenous religions which were perceived as inferior and often savage,[235] especially as some involved human sacrifice.[236]

With regards to education, centuries old indigenous knowledge systems involving oral traditions of handing down knowledge from generation to generation, initiation processes for members of the community or chosen members of the community, spirituality and traditional skills were abandoned as primitive in favour of colonial knowledge systems, as indigenous children were forced to attend colonial schools and colonial knowledge systems fostered upon them.[237]

Indigenous legal systems existed prior to the introduction of colonial legal systems to indigenous and local communities. Indigenous laws mainly consist of unwritten practices, rules, rights and obligations which were passed down from generation to generation.[238] Conflict resolution processes were not as rigid and intimidating as colonial processes and emphasized the restoration of relationships and reconciliation.[239] These indigenous legal systems were replaced with colonial legal and justice systems.[240] To date, while some indigenous legal systems still exist in many territories they are superseded by the colonial legal system which is considered supreme.

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[234] Gann LH and Duignan P *Colonialism in Africa 1870-1960: Volume 5 A Bibliographical Guide to Colonialism in Sub-Saharan Africa* (Cambridge University Press 1973) 3.

[235] Oguamanam CO "Local Knowledge as Trapped Knowledge: Intellectual Property Culture, Power and Politics 2008 *The Journal of World Intellectual Property* 33; Tlou T and Campbell *History of Botswana* (MacMillan Botswana 1984) 187.

[236] Smith *Decolonizing Methodologies* 81.

[237] WIPO Secretariat *Needs and Expectations* 128; Smith *Decolonizing Methodologies* 64; Tlou and Campbell *History of Botswana* 107.

[238] Lajoie A "Introduction: Which Way Out of Colonialism" in The Law Commission of Canada (ed) *Indigenous Legal Traditions* (UBC Press 2007) 3.

[239] Choudree RBG "Traditions of Conflict Resolution in South Africa" 1999 *African Journal on Conflict Resolution* 10-11.

[240] Schmidhauser JR "Legal Imperialism: Its Enduring Impact on Colonial and Post Colonial Judicial Systems" 1992 *International Political Science Review* 331; Joireman S F "Inherited Legal Systems and Effective Rule of Law: Africa and the Colonial Legacy" 2001 *Journal of Modern African Studies* 576.

Ultimately colonization has resulted in dilution, distortion or complete loss of certain cultural aspects and knowledge of the indigenous people. This loss continues to be perpetuated in the modern era by globalization and modernization.[241]

Modernization, the transformation from traditional society to modern society, is often perceived as progress and is not only characterized by technological advancement but also social, intellectual, cultural, economic and political development.[242] Social modernization has most notably altered the traditional family unit and is characterized by nuclear family units and the decline of extended family units which are prevalent in indigenous societies.[243] This has further been fuelled by urbanization with the migration of people from rural areas in the countryside to towns and cities.[244] Intellectual modernization has seen the increase in literacy which is supposedly development but has perpetuated a movement from the traditional way of doing things as well as a lack of respect for traditional ways that focus on the western ways which emphasize science and rationale and less on spirituality and holism.[245]

Economic modernization is characterized by commercialization, industrialization and technological advancement and migration from subsistence economies with hunting, pastoralism and agriculture sufficient for their families and for bartering for other necessities.[246] While subsistence economies are considered primitive, they are sustainable, they do not promote waste, excess and over exploitation of natural resources unlike modernisation which has brought with it dire phenomena such as global warming and climate change.[247] Most notably political modernization has seen the delineation and demarcation of borders along colonial lines and the

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[241] WIPO Secretariat *Needs and Expectations* 95.
[242] Durston J "Indigenous Peoples and Modernity" 1993 *CEPAL Review* 93.
[243] Mayowa IO "Family Institution and Modernisation: A Sociological Perspective" https://www.researchgate.net/publication/343360977_FAMILY_INSTITUTION_AND_MODERNIZATION_A_SOCIOLOGICAL_PERSPECTIVE (Date of use: 27 December 2021).
[244] Mayowa https://www.researchgate.net/publication/343360977_FAMILY_INSTITUTION_AND_MODERNIZATION_A_SOCIOLOGICAL_PERSPECTIVE (Date of use: 27 December 2021).
[245] Dutfield *Protecting Traditional Knowledge* 25.
[246] https://www.yourarticlelibrary.com/articles/modernisation-introduction-meaning-concept-and-other-details/47757 (Date of use: 9 September 2020).
[247] https://www.worldatlas.com/articles/what-is-a-subsistence-economy.html (Date of use: 7 July 2020).

creation of states along these lines, which has had a negative and long lasting effect on local communities. The imposed arbitrary borders split ethnic groups across countries and it has been theorized that the splitting of ethnicities has fuelled civil conflict in countries with split ethnicities.[248] It is to be noted that in most civil wars the parties are delineated along ethnic lines.[249] For example, in Africa alone civil wars in Congo, Burundi, Sudan, Uganda, Rwanda and Nigeria have been fuelled by ethnic divisions.[250]

Globalization, that is the process of interaction and integration of people and cultures,[251] has intrinsically been accelerated by modernization and the resultant advances in communication technology and transportation. This has most notably resulted in transculturation, the blending of different cultures historically through phenomena such as migration, colonization, slavery[252] and still more recently through migration, genocide, unjust land policies, inappropriate conservation management[253] and exposure to other cultures. It is to be noted that transculturation ultimately leads to the dilution and distortion of traditional knowledge and culture at the very least and at worst its complete disappearance.

In response to the changes proliferated by colonialism, modernization and globalization traditional communities have to a large extent had to adapt their way of life in order to survive. This has in some instances led to the forsaking of indigenous people's traditional way of life. Other community members are forced to violate the sacredness and secrecy of their knowledge and rituals and exploit and commercialize the same in order to earn a livelihood and survive. In other instances, community members no longer have respect or interest in traditional culture and knowledge and are more interested in western knowledge and western culture to which they are now more easily exposed due to migration and development in technology and telecommunications.

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[248] Michalopoulos S and Papaioannou E "The long-run effects of the 'Scramble for Africa'" https://voxeu.org/article/long-run-effects-scramble-africa-0 (Date of use: 11 October 2020).
[249] Denny EK and Walter BF "Ethnicity and Civil War" 2014 *Journal of Peace Research* 199.
[250] Denny and Walter 2014 *Journal of Peace Research* 199.
[251] https://www.oxfordreference.com/view/10.1093/oi/authority.20110803095855259 (Date of use 27 December 2021)
[252] Ortiz F *Cuban Counterpoint: Tobacco and Sugar* (Duke University Press Durham and London 1995) 97.
[253] Dutfield *Protecting Traditional Knowledge* 25.

Unfortunately, many traditional practices are already lost forever. The loss of traditional knowledge is also a loss of culture, the environment suffers as well as the people who identified themselves by an ancient way of life.[254]

5.1.4 Ways of preserving traditional knowledge

Numerous solutions have been identified which can address the issue of preservation of traditional knowledge, many of which are beyond the scope of an intellectual property system, these include the following:

(i) Documentation and compilation of databases of information, that is maintaining a record of traditional knowledge, expressions of folklore, traditional artefacts, history and oral traditions, among others. Examples of such documentation processes include the Registry of Archaeological, Historical and Artistic Property in Guatemala which has been in operation since 1954 and National Cultural Property System (Sistema Nacionalde Bienes Culturales) in Panama. [255] I submit that such documentation could be incorporated into existing intellectual property procedures to avoid issues such as the patent controversy.

(ii) Awareness raising of the value of traditional knowledge and expressions of folklore within the local communities themselves including through the education system.[256] Knowledge must not die with one generation there must be a method of apprenticeship where practical knowledge is transmitted.

(iii) Restriction of access to traditional knowledge by non-members which limits its misappropriation and in turn distortion and will allow local communities to control the outflow of knowledge to their benefit.[257]

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[254] https://borgenproject.org/preserving-traditional-knowledge/?cv=1 (Date of use: 18 November 2018).
[255] WIPO Secretariat *Needs and Expectations* 138.
[256] WIPO Secretariat *Needs and Expectations* 78.
[257] WIPO Secretariat *Needs and Expectations* 79.

(iv) Cultural heritage and policy legislation that can be used to promote traditional knowledge and culture. For example, the National Cultural Commission of Papua New Guinea which promotes the cultures of Papua New Guinea and the Aboriginal and Torres Strait Islander Heritage Protection Act, 1984 in Australia which was suggested could be used to protect Aboriginal and Torres Strait Islander knowledge and culture.[258]

(v) Organization of local communities and rights holders to allow access to resources, legal protection, legal aid, awareness of means of exploitation and protection of their knowledge and their participation in international meetings concerning their rights.

Preservation of traditional knowledge and expressions of folklore extends beyond conservation of knowledge for future generations, it is also preservation and restoration of the dignity and integrity of local communities, their culture and heritage which has slowly been eroded over centuries, and which in some instances is sadly lost forever.

5.2 How the Swakopmund Protocol deals with preservation for future generations

One of the issues raised as a concern under the Preamble of the Swakopmund Protocol is the gradual disappearance and erosion of traditional knowledge and expressions of folklore, which iterates the need for preservation voiced by the traditional knowledge users during the WIPO Fact-finding Missions.

Section 5 of the Protocol provides for the maintenance of registers or other records of knowledge by national competent authorities and ARIPO. The purpose of the registers is not to confer rights of protection on traditional knowledge holders as these arise automatically, the purpose of the registers is evidentiary and for the preservation of traditional knowledge. In order to address the issue of secret

[258] WIPO Secretariat *Needs and Expectations* 78.

traditional knowledge, Section 5.3 of the Protocol provides that inclusion in the registers shall not compromise the status of any secret traditional knowledge. The Protocol does not indicate in what way the secret knowledge is to be kept confidential. It is therefore the responsibility of the national competent authorities and ARIPO to take special measures such as confidentiality agreements and protocols on access[259] to avoid unauthorised disclosure of secret knowledge.

Section 17 also provides for the notification of certain kinds of expressions of folklore to the national competent authority for evidentiary purposes. Such notification is merely for declaratory purposes and does not confer rights as these arise automatically. However, the Protocol does not define what constitutes "special cultural", "spiritual value", "sacred in character" or "significance" in respect of expressions of folklore or who determines whether the folklore falls within these specific categories.[260] As such a determination is subjective, it is recommended that the rights holders determine whether their expressions of folklore fall within the category.

Section 14.1 tasks the national competent authorities and ARIPO with awareness raising, education and other activities related to the protection of traditional knowledge. Section 22.1 tasks the national competent authorities and ARIPO with similar activities in respect of expressions of folklore. In terms of Sections 14.3 and 22.4 where two or more communities in different countries share the same traditional knowledge or expressions of folklore the tasks of awareness raising, education and other activities related to the protection of traditional knowledge and expressions of folklore shall be the responsibility of ARIPO.

The Protocol also aids in the preservation of traditional knowledge and expressions of folklore through the restriction of access to traditional knowledge and expressions of folklore by non-community members.[261] By restricting access the

[259] WIPO Secretariat "Documenting Traditional Knowledge – A Toolkit" https://www.wipo.int/edocs/pubdocs/en/wipo_pub_1049.pdf (Date of use: 10 October 2020).
[260] Nwauche *Sui Generis and IP Protection* 243.
[261] Sections 7.1, 7.2. 19.2 and 19.3 Swakopmund Protocol.

Protocol limits misappropriation and distortion and in turn preserves the dignity and integrity of traditional knowledge and expressions of folklore.

National cultural heritage and policy legislation which can be used to promote traditional knowledge is within the purview of the states which are party to the Protocol. Section 3 of the Protocol provides that the contracting states must establish national competent authorities whose task is to implement the provisions of the Protocol. Such implementation includes the maintenance of registers as stipulated under Sections 5 and 17, awareness raising, education, guidance, monitoring, registration, dispute resolution, enforcement and other activities related to the protection of traditional knowledge and expressions of folklore as stipulated under Sections 14 and 22 of the Protocol.

It is submitted that the Protocol effectively deals with the preservation of traditional knowledge to the extent possible within the confines of a legal system. Sociological and economic aspects of preservation are beyond the scope of the Protocol. However, it is submitted that in the implementation of the above provisions it is important that the Protocol takes into consideration customary laws and practices of the communities involved.

5.3 How the WIPO-UNESCO Model Provisions deal with preservation for future generations

In the Introductory Observations to the WIPO-UNESCO Model Provisions expressions of folklore are recognised as “living, functional tradition, rather than a mere souvenir of the past”. The WIPO-UNESCO Model Provisions do not specifically deal with the preservation of expressions of folklore as an issue separate from their protection. The principle of protection embodied in Section 1 can be seen as encompassing the preservation of expressions of folklore. Section 1 provides that expressions of folklore shall not only be protected against illicit exploitation but also against other prejudicial actions.

One of the main concerns of local communities is the disappearance of their culture and heritage. Section 3 of the WIPO-UNSECO Model Provisions, makes it

mandatory for any parties that wish to utilise expressions of folklore with gainful intent and outside their traditional or customary context to obtain authorisation from the competent authority or the community concerned. This ensures that the communities can prevent distortion and dilution of their culture, which are major threats to the preservation of the authenticity and integrity of their culture and heritage. The penalties provided for under Section 6 for failure to obtain authorisation for use of expressions of folklore, and wilful distortion also aid preservation as they act as a deterrent.

While the WIPO-UNESCO Model Provisions do not have specific provisions on preservation it is to be remembered that these are recommendations for laws and not actual laws. Protection of expressions of folklore is therefore not limited to the confines of the text of the WIPO-UNSECO Model Provisions. Section 12 provides that expressions of folklore may not only be protected under the WIPO-UNESCO Model Provisions but are also protected by any other national, regional or international laws under which they fall, which laws may include provisions on preservation.

5.4 Ad hoc observations

With the advent of modernisation and globalisation traditional knowledge and culture are fast being absorbed into a vast melting pot created by the global village leading to the fast disappearance of local culture and heritage.[262] Preservation of traditional knowledge and expressions of folklore is therefore now more important than ever.[263] Modern ways of preservation such as the compilation of databases of information have had to be effected in addition to the traditional ways of preserving knowledge through oral traditions, visual and performing arts and other customary practices.[264]

I submit that to a large extent the Swakopmund Protocol effectively makes provision for the preservation of traditional knowledge and expressions of folklore

[262] Dutfield *Protecting Traditional Knowledge* 25.
[263] WIPO Secretariat *Needs and Expectations* 320.
[264] WIPO Secretariat *Needs and Expectations* 95.

through the restriction of access by non-community members, awareness raising, education and other activities related to the protection of traditional knowledge and expressions of folklore as well as documentation of knowledge and folklore.

It is noted that with to regards documentation the Swakopmund Protocol makes no mention of the need for consent by the relevant communities. It is submitted that in keeping with the spirit of the Swakopmund Protocol documentation should take place with consent to access and collection by the traditional knowledge holders and rights holders of folklore with the knowledge of the potential benefits and disadvantages. Further, the documentation process must be conducted in a manner that is respectful of customary laws and practices.[265]

It is also noted that there have been some issues with regard the compilation of information and databases. While the Swakopmund Protocol makes provision for the compilation of an ARIPO database, in practice the ARIPO database and register on traditional knowledge and expressions of folklore have a paucity of information. To date, no data has been compiled in the ARIPO database.[266] It is submitted that awareness raising and education are the nexus between the Protocol and the potential users of the Protocol and must be pursued aggressively by ARIPO and its member states if the Protocol is to be saved from becoming a white elephant.

[265] WIPO Secretariat "Documenting Traditional Knowledge – A Toolkit" https://www.wipo.int/edocs/pubdocs/en/wipo_pub_1049.pdf (Date of use: 10 October 2020).
[266] As of 27 December 2021.

CHAPTER 6 ACCESS TO RESOURCES

6.1 Access to resources as a concern for traditional knowledge holders

6.1.1 Introduction

This Section recognizes lack of access to resources as a problem encountered by traditional knowledge holders in an effort to protect their knowledge. It identifies awareness raising and finances as the two main resources required by traditional knowledge holders. The Section concludes with a study of the Lion King case, an example of loss of rights due to lack of awareness of the value of one's knowledge and the intellectual property system. This Section sets the context for Section 6.2 which examines how the Swakopmund Protocol addresses the concern of access to resources.

6.1.2 Access to resources identified as a concern for traditional knowledge holders

Traditional knowledge holders are mostly poor communities or indigenous communities from poor developing countries. Despite their wealth of knowledge and potential to generate economic value therefrom, to a large extent traditional knowledge holders lack the expertise and financial resources to exploit their knowledge to the benefit of their communities.[267] Further traditional knowledge holders also lack the legal understanding and financial resources to protect their traditional knowledge from exploitation by third parties. The traditional knowledge holders are aware of shortcomings in this regard, and as a result, another of the issues raised by the informants during the WIPO Fact-finding Missions was the need for access to resources. The resources required by traditional knowledge holders will be categorised into two categories, that is awareness raising and financial resources.

[267] DeGeer 2002 *New England Journal of International and Comparative Law* 181; WIPO Secretariat *Needs and Expectations* 8.

6.1.3 Awareness Raising

As a starting point, traditional knowledge holders require awareness of the intellectual property system among indigenous and local communities for facilitating its use for protection of their traditional knowledge and enforcement of their rights.[268] They require knowledge as to what intellectual property is, the subject matter for protection under the intellectual property system, the nature and scope of intellectual property rights conferred by the system and in what way and to what extent the system can assist with protection of the rights of the traditional knowledge holders.[269]

During the WIPO Fact-finding Missions, it was revealed that many traditional knowledge holders are not aware of the potential economic value of their traditional knowledge.[270] Part of the awareness raising campaign with regards to the intellectual property system therefore needs to extend to awareness of the potential commercial value of traditional knowledge and the development of tools for the economic valuation of traditional knowledge. The issue of awareness raising of the economic value of traditional knowledge is one of the issues addressed in the Nagoya Protocol.[271] Examples of awareness raising of the value of traditional knowledge are discussed under Chapter 4.1.3 above.

Awareness raising of the ways in which local communities can regulate access and use of traditional knowledge by outsiders was also listed as a need.

Once equipped with the value of their knowledge and knowledge of the intellectual property system and how it operates, traditional knowledge holders require access to the system to enable them to protect their knowledge and exercise their rights under the system. In this regard, they require intellectual property advice and assistance in respect of legislation, regulations, guidelines, protocols, agreements,

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[268] WIPO Secretariat *Needs and Expectations* 70.

[269] Finger JM "Introduction and Overview" in Finger JM and Schuler P *Poor People's Knowledge: Promoting Intellectual Property in Developing Countries* (World Bank and Oxford University Press 2004) 12,19.

[270] WIPO Secretariat *Needs and Expectations* 240.

[271] Article 21 of the Nagoya Protocol compels parties to the Protocol to raise awareness of the importance of, among other things, traditional knowledge associated with genetic resources, and related access and benefit-sharing issues.

policies and processes on intellectual property.[272] Legal and technical training for traditional knowledge holders is also required in respect of the negotiation, drafting, implementation and enforcement of contracts such as licence agreements, access agreements, information transfer agreements and benefit sharing agreements, among others.[273]

Additional issues which run outside the scope of the intellectual property system which the traditional knowledge holders felt needed to be addressed include the organisation of indigenous communities to protect their rights.[274] Organisation of indigenous communities would enable the rights holders to effectively pursue the common goals of protecting their knowledge from outsiders as well as exploring and implementing ways of imparting and exploiting their knowledge. Organisation of communities would also result in participation, planning and organisation of national, regional and international meetings concerning the protection of traditional knowledge, as well as the development of *sui generis* forms of protection for traditional knowledge at national, regional and international level.[275] Such organisation is unfortunately impeded to some extent by a lack of resources,[276] which the knowledge holders acknowledged they required assistance. Other factors which impede the organisation of indigenous communities include internal and external politics.[277]

The informants also expressed the need for institutional arrangements for the protection and enforcement of the rights of the traditional knowledge holders, as well as collective management of rights similar to that of copyright.[278] This would require the documentation of traditional knowledge and expressions of folklore, which the informants also expressed the need for assistance with, not only for collective management but also for the purposes of identifying the traditional knowledge that needs protection, preservation of traditional knowledge for future

[272] Janke *Minding Culture* 147.
[273] Penna FJ, Thormann M and Finger JM "The Africa Music Project" in Finger JM and Schuler P *Poor People's Knowledge: Promoting Intellectual Property in Developing Countries* (World Bank and Oxford University Press 2004) 110.
[274] WIPO Secretariat *Needs and Expectations* 79.
[275] WIPO Secretariat *Needs and Expectations* 80.
[276] DeGeer 2002 *New England Journal of International and Comparative Law* 181.
[277] WIPO Secretariat *Needs and Expectations* 79.
[278] WIPO Secretariat *Needs and Expectations* 80.

generations, dissemination of traditional knowledge for research and educational purposes and prevention of registration of intellectual property rights over traditional knowledge.

6.1.4 Financial Resources

As previously stated traditional knowledge holders are mostly poor communities or indigenous communities who lack the financial capacity to protect or exploit their traditional knowledge. Even where traditional knowledge holders are aware of the value of their knowledge and how to utilise the intellectual property system lack of financial resources is a major hindrance to such access and utilisation. Traditional knowledge holders therefore expressed a need for finances to enable them to take advantage of the intellectual property system. In this regard, financial resources are required for traditional knowledge holders to register their intellectual property rights, where appropriate, through the existing intellectual property system and legal aid is required for enforcement of intellectual property rights, which can be a costly process. One of the complaints of the informants was the major cost involved in the registration of intellectual property rights, which they considered prohibitive for local and indigenous communities.[279] Their request was that these be made more affordable.

Financial resources are also required to allow the organisation of local and indigenous communities to enable them to effectively protect and exploit their knowledge, as well as participate in consultations concerning the protection of traditional knowledge. Further, financial resources are required to enable the setting up and maintenance of institutions for the protection, enforcement and management of the rights of the traditional knowledge holders.

6.1.5 Lion King Case[280]

The popular song The Lion Sleeps Tonight which was made even more popular by its incorporation in the Disney production of the Lion King is in fact derived from a

279 WIPO Secretariat *Needs and Expectations* 149; Janke *Minding Culture* 6.
280 Dean 2006 *De Rebus* 17-21.

song by Solomon Linda. Solomon Linda was an uneducated Zulu tribesman who composed numerous songs which included a song entitled “Mbube” meaning lion in Zulu. Without realising the value of his song and without knowledge or advice of how to protect and commercially exploit the same, Solomon Linda assigned the copyright in the Mbube song to Gallo Records, his employer, in 1952 for a consideration of 10 shillings. To date, the song in its various versions is said to have made millions of dollars over the years.

Solomon Linda died in 1962. His heirs realised the value of Solomon’s contribution to the songs and sought to formulate a claim for attribution of Solomon Linda as the author of the original version of the song and earnings made by the song and its various derivatives over the decades. In 2000 Owen Dean, a lawyer specialising in intellectual property law, was approached to assist Solomon Linda’s heirs. Ultimately the result of the litigation which was launched against big entertainment companies the likes of Disney and Nu Metro resulted in a settlement which included compensation to Solomon Linda’s estate for past uses of the song The Lion Sleeps Tonight, payment of royalties for future use of the song, attribution of Mbube as the origins of the song and attribution of Solomon Linda as co-author of the song The Lion Sleeps Tonight.

Although the Lion King case was not a traditional knowledge case, it is a prime example of how, without the expert legal services that were provided to Solomon Linda’s heirs, the copyright in the song would not have resulted in any income for his family. Formulation of the claim in this case and the subsequent litigation, like most litigation, was a costly process which in this case required funding at various stages. This particular case was driven by donor funding which is not always the case for many rights holders who wish to enforce their rights.[281] It is to be noted with concern that most rights holders do not enforce their rights due to financial constraints.

[281] Dean 2006 *De Rebus* 20.

6.2 How the Swakopmund Protocol deals with access to resources

One of the objectives of the Swakopmund Protocol as set out in the Preamble is the need to empower rights holders to exercise control over their traditional knowledge and expressions of folklore. As an initial step, the Protocol provides for the establishment or designation of national competent authorities in each of the contracting states whose task is the implementation of the provisions of the Protocol within the relevant state.[282] This provides institutional arrangements for the protection, enforcement and collective management of the rights of traditional knowledge holders.

The national competent authorities are also used as a vehicle for providing legal aid and intellectual property advice for traditional knowledge rights holders. Section 8.3 of the Protocol provides that all access, authorisations, licences and assignments granted in terms of Section 8.2 shall be approved by the national competent authority otherwise they shall be null and void.[283] This is to ensure that agreements entered into by rights holders are legally sound and equitable. Section 9 further makes it mandatory for the national competent authority to mediate between parties where they fail to mutually agree on an equitable benefit sharing arrangement. This provision aims to ensure that the Protocol's goal of promoting the utilisation of traditional knowledge for the mutual benefit of society is also realised.[284]

Section 14 provides for awareness raising, education, guidance, monitoring, registration, dispute resolution, enforcement and other activities related to the protection of traditional knowledge by the national competent authorities and ARIPO on behalf of the contracting states. Section 22 in turn provides for similar activities related to the protection of expressions of folklore by the national competent authorities and ARIPO on behalf of the contracting states.

[282] Section 3 Swakopmund Protocol.
[283] Section 8.2 Swakopmund Protocol.
[284] Preamble Swakopmund Protocol.

Section 14.2 provides for national competent authorities with the task of advising and assisting traditional knowledge rights holders in defending their rights and in civil and criminal proceedings where requested.

Section 23.1 further provides that contracting states must provide accessible and appropriate enforcement and dispute resolution mechanisms, sanctions and remedies where there are breaches relating to the protection of traditional knowledge and expressions of folklore.

Section 22.1 provides for authorisations to exploit expressions of folklore to be obtained from the national competent authority on behalf of the community concerned. The national competent authority acts on behalf of the interests of local communities with appropriate consultation, similar to collective management of rights in copyright.

Section 23.2 provides for the national competent authorities with the task of advising and assisting traditional knowledge holders and rights holders in respect of expressions of folklore in defending and enforcing their rights and instituting civil and criminal proceedings.

It is submitted that the Protocol to some extent addresses the issue of access to resources through provision for the educational, legal and institutional support required for the rights holders to access and utilise the Protocol. It is to be noted that the Protocol does not provide for the allocation of financial resources at regional or national level, which resources are identified as a major requirement for traditional knowledge holders.

6.3 How the WIPO-UNESCO Model Provisions deal with access to resources

Objectives driving the need for protection of expressions of folklore and an adequate system for such protection include the desire to foster expressions of

folklore as a source of creative expression, promotion of further development, maintenance and dissemination of expressions of folklore.[285]

The WIPO-UNESCO Model Provisions do not explicitly address the rights holders' need for access to resources. However, Section 9 of the WIPO-UNESCO Model Provisions provides for the establishment of competent authorities and supervisory authorities as per the needs and legislation of each state. Responsibilities within the purview of the competent authorities include authorisation of specific uses of expressions of folklore[286] and fixing and collecting fees for utilisation of expressions of folklore.[287] The supervisory authority is tasked with the establishment or approval of a tariff of fees to be levied for the utilisation of expressions of folklore.[288] The competent and supervisory authorities are used as the means for enacting and enforcing the provisions of the WIPO-UNESCO Model Provisions and collective management of the rights of the owners of the expressions of folklore.

It is submitted that while the WIPO-UNESCO Model Provisions have no provisions for the education of rights holders, legal aid and financial support it is the responsibility of each state to task the competent authorities with providing the necessary support.

6.4 Ad hoc observations

The Swakopmund Protocol effectively empowers rights holders by the creation of national competent authorities. The authorities raise awareness of the rights of the traditional knowledge holders and educates them on how to protect their rights. The authorities also participate in the negotiation and authorisation process in order to avoid the pitfalls of negotiations by individuals or individual communities without knowledge of the intellectual property system or legal advice. This is intended to prevent unfair outcomes such as that of Solomon Linda who lived and died in poverty despite his song and adaptations thereof having made millions of dollars. ARIPO as an organisation also takes it upon itself to raise awareness of

[285] Introductory Observations, WIPO Model Provisions.
[286] Section 3 UNESCO-WIPO Model Provisions; Section 10(1) UNESCO-WIPO Model Provisions.
[287] Section 10(2) UNESCO-WIPO Model Provisions.
[288] Section 10(2) UNESCO-WIPO Model Provisions.

rights to local communities and provide education on protection of such rights, thus complementing the efforts of the national competent authorities.

The WIPO-UNESCO Model Provisions also provide for the establishment of competent authorities whose task is to enforce the provisions of the Model Law. The Swakopmund Protocol is however more comprehensive than the WIPO-UNESCO Model Provisions in its establishment of resource points.

With regards to the issue of financial resources it is submitted that while the Protocol does not make provision for allocation of financial resources the Protocol provides for the national competent authorities and ARIPO to assist with legal aid, registration and enforcement of rights and thus reducing the financial burden on the knowledge holders. Notwithstanding these efforts stipulated in the Protocol, it is recommended that international organisations such as WIPO and UNESCO assist local communities financially for the purposes of registration and enforcement of rights. It is also recommended that governments allocate funds, especially those raised from exploitation of traditional knowledge and expressions of folklore, to support the registration and enforcement of such rights.

CHAPTER 7 COMPETING INTERESTS

7.1 Competing interests of traditional knowledge holders

7.1.1 Introduction

This Section acknowledges that some of the needs of traditional knowledge holders conflict. It identifies numerous conflicting and competing interests but only focuses on issues arising from cross border communities, community interests versus individual interests and community interests versus state interests. This Section sets the context for Section 7.2 which examines how the Swakopmund Protocol addresses the conflicting and competing interests of traditional knowledge holders.

7.1.2 Identifying competing interests of traditional knowledge holders

Some of the needs of traditional knowledge holders conflict and reflect competing interests. Such conflicting and competing interests include:

- whether the intellectual property system can or should be used to protect traditional knowledge and expressions of folklore,[289]
- who should benefit from the proceeds of exploitation of traditional knowledge especially where traditional knowledge is identified as originating from different communities and sometimes different countries,[290]
- whether individual communities owning the traditional knowledge or the governments where communities are located should benefit from the proceeds of exploitation,[291]
- whether traditional knowledge should be documented as documentation makes unauthorised exploitation easier,[292]
- whether traditional knowledge should be documented as it loses novelty through documentation and cannot be patented by a third party as well as

[289] Milius 2009 *IPQ* 203-204.
[290] Chennells 2013 *LEAD* 171.
[291] Kuruk P "The Role of Customary Law Under *Sui Generis* Frameworks of Intellectual Property Rights in Traditional and Indigenous Knowledge" 2007 *Indiana International & Comparative Law Review* 84.
[292] WIPO Secretariat "Documenting Traditional Knowledge – A Toolkit" https://www.wipo.int/edocs/pubdocs/en/wipo_pub_1049.pdf (Date of use: 12 December 2020); Varadarajan 2011 *The Yale Journal of International Law* 385.

the local community who stands to benefit from its exploitation and whether documentation freezes the knowledge in time and keeps it from developing further,[293]

- whether traditional knowledge should be used for the benefit of humanity or kept a secret for the sake of its protection and preservation.[294]

This chapter will limit its examination to the issues of traditional knowledge owned by cross border communities, community interests versus individual interests and community interests versus state interests.

7.2 Cross border communities

Most indigenous and local communities belong to countries that are former colonies. These former colonies had arbitrary borders imposed upon them, which borders split indigenous groups across different countries.[295] The effect of this is that in several cases the same traditional knowledge belongs to different communities in different countries. For example, the San are found in Botswana, Namibia and South Africa.[296] However, in some instances, the same traditional knowledge may originate from different communities in different countries having no historical relationship. For example, medicinal knowledge of the neem tree is known to indigenous communities in Uganda as well as Asia.[297]

The issue of traditional knowledge found across borders raises issues including identifying the knowledge holders and beneficiaries to proceeds derived from the exploitation of the traditional knowledge.[298]

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[293] WIPO Secretariat *Needs and Expectations* 89.
[294] WIPO Secretariat *Needs and Expectations* 140.
[295] Amadife EN and Wahorla JW "Africa's Political Boundaries: Colonial Cartography, the OAU and the Advisability of Ethno-National Adjustment" 1993 *International Journal of Politics, Culture and Society* 534.
[296] Bolaane M "San Cross-border cultural heritage and identity in Botswana, Namibia and South Africa" 2014 *African Study Monographs* 43.
[297] WIPO Secretariat *Needs and Expectations* 88.
[298] WIPO Secretariat "WIPO/GRTKF/IC/7/5" *https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwin5NHq0ZD1AhUqQkEAHYmEC6cQFnoECC4QAQ&url=https%3A%2F%2Fwww.wipo.int%2Fedocs%2Fmdocs%2Ftk%2Fen%2Fwipo_grtkf_ic_7%2Fwipo_grtkf_ic_7_5-annex2.doc&usg=AOvVaw3yA6INxZxt-yvFJAqtX0uD* 29-30 (Date of use: 2 December 2020).

This has exposed some of the limitations of national regimes for the protection of traditional knowledge and resulted in a call for regional and international regimes for management and protection of knowledge systems,[299] especially in cases where similar communities having similar cultural practices and knowledge are found across different bordering countries, such as the example of the San above. In this regard, most laws, whether intellectual property laws or otherwise, for the protection of traditional knowledge are territorial in nature.[300] This means that they do not protect the traditional knowledge in countries other than where it originates.[301] Regional regimes would allow for the same treatment of traditional knowledge originating in the region and international regimes would do so globally.[302]

7.3 Community interests versus individual interests

One of the main defining characteristics of indigenous knowledge systems is community ownership over individual private ownership. Traditional knowledge is created individually or collectively or inter-generationally but is generally owned collectively. It is generally not attributable to individual authors as it is passed on from generation to generation, community oriented, continually utilised and innovated by the communities.[303] The individual practising the traditional knowledge is seen as

> guarding and upholding the traditional principles of the art and at the same time making his individual imprint that announces his creations and solutions for problems he faces [in his own time].[304]

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[299] Arowolo A "A Continental Approach To Protecting Traditional Knowledge Systems and Related Resources in Africa" http://ssrn.com/abstract=1313582 (Date of use: 20 December 2020).

[300] Frankel S "The Challenge of Cross-Border Protection of Traditional Knowledge" in Robinson DF, Abdel-Latif A and Roffe P (ed) *Protecting traditional knowledge: the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore* (Routledge 2017) 325.

[301] Ouma M https://www.wipo.int/wipo_magazine/en/2017/01/article_0003.html (Date of use: 13 December 2020).

[302] Frankel *Cross-Border Protection of TK* 326.

[303] WIPO Secretariat *Needs and Expectations* 171; Muzah G "Legal Protection of Traditional Knowledge: Lessons From Southern Africa" https://www.wto.org/english/tratop_e/trips_e/colloquium_papers_e/2016/chapter_8_2016_e.pdf 68-69 (Date of use: 12 November 2020).

[304] WIPO Secretariat *Needs and Expectations* 161.

One of the issues raised by the informants during the WIPO Fact-finding Missions was a need for recognition of collective ownership of intellectual property alongside individual ownership of intellectual property.[305] This would put traditional knowledge and expressions of folklore at par with other forms of intellectual property.

Traditional knowledge and expressions of folklore are communally owned with differing levels of rights within the community.[306] An individual may create or originate something in which ownership belongs to the community and certain other rights belong to the family or specific members of the community. This brings about the different issues of ownership and custodianship. Certain traditional knowledge may be entrusted to certain families or members of the community, these individuals are custodians of the knowledge and ownership does not pass to them.[307] For example, certain medicinal practices may only be performed by members of certain families, knowledge and performance of certain songs or dance ceremonies may be secret and known to only certain members of a community. The custodians are not the originators of the traditional knowledge or expressions of folklore but they are authorised to manage and exercise rights over the traditional knowledge by the community on behalf of the community.[308] In some instances, the custodians may have the capacity to authorize the exploitation of the traditional knowledge on behalf of the community.[309] Any benefits arising from the exploitation of the traditional knowledge and expressions of folklore would be for the community and not the individuals or select groups who are the custodians of the traditional knowledge.

[305] WIPO Secretariat *Needs and Expectations* 171.
[306] WIPO Secretariat *Needs and Expectations* 148.
[307] Khumalo NB, Khumalo SV and Ndisane C "The Custody, Preservation and Dissemination of Traditional Knowledge within the Ndebele Community in Zimbabwe: A Case Study of Gonye Area in Tohwe, Nkayi District" 2018 *Oral History Journal of South Africa* 6-9.
[308] WIPO Secretariat *Needs and Expectations* 148; Khumalo Custody, *Preservation and Dissemination of TK* 4.
[309] Nwauche *Sui Generis and IP Protection* 298.

7.4 Communities versus the state

There are differing opinions as to where the state stands with regards to ownership and benefits derived from the exploitation of traditional knowledge. Some are of the opinion that intellectual property rights in traditional knowledge and expressions of folklore should vest in the relevant communities,[310] and there are those who believe that the rights should vest in the state, for example the Arab informants during the WIPO Fact-finding Missions.[311] However, the latter case would only be acceptable to some extent in respect of autonomous indigenous communities where the government comprises indigenous peoples, and would not be acceptable for indigenous communities which are governed by former colonial masters. Examples of communities in respect of which this would not be acceptable include the Maori of New Zealand who wish intellectual property rights in their traditional knowledge and expressions of folklore to vest in them and not the government of New Zealand which is still largely a representation of their former colonial masters.[312] Similarly, the Aborigines of Australia would not have their traditional knowledge vested in the government of Australia and are in fact moving to divest ownership from the government and bestowing it to the indigenous communities.[313]

Still, issues arise with regards to whether the rights in traditional knowledge and expressions of folklore should vest in the community or the state even where governments comprise members of indigenous peoples. In this regard, differing communities fall under the same government and it is difficult to reconcile the interests of the various communities.[314] Further, while traditional knowledge and

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[310] WIPO Secretariat "WIPO/GRTKF/IC/7/5" *https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwin5NHq0ZD1AhUqQkEAHYmEC6cQFnoECC4QAQ&url=https%3A%2F%2Fwww.wipo.int%2Fedocs%2Fmdocs%2Ftk%2Fen%2Fwipo_grtkf_ic_7%2Fwipo_grtkf_ic_7_5-annex2.doc&usg=AOvVaw3yA6INxZxt-yvFJAqtX0uD* 31 (Date of use: 2 December 2020).

[311] WIPO Secretariat *Needs and Expectations* 162.

[312] WIPO Secretariat *Needs and Expectations* 74.

[313] WIPO Secretariat *Needs and Expectations* 80.

[314] Alonso MF "Can We Protect Traditional Knowledges" in de Sousa Santos B (ed) *Another Knowledge is Possible: Beyond Northern Epistemologies* (Verso 2008) 249.

expressions of folklore are generally communally owned and the communities should therefore benefit from their exploitation, there is also the involvement of governments and other stakeholders who believe that they are also entitled to the benefits arising from the utilization of the traditional knowledge, sometimes to the exclusion of the rights holders.[315] As a result, where there is government involvement the benefits do not always filter down to the rights holders. Monetary benefits are not always allocated or applied to the relevant communities. Most national legislation dealing with traditional knowledge and expressions of folklore provides that any monetary benefits from the exploitation of traditional knowledge or expressions of folklore accrue to the state for the benefit of the nation as a whole[316] and therefore ends up being used for government expenditure which may or may not benefit the communities concerned.

7.5 How the Swakopmund Protocol deals with competing interests

7.5.1. Cross border communities

One of the aims of the Swakopmund Protocol as a regional law is to reconcile the interests of different communities and to harmonise laws pertaining to traditional knowledge and expression of folklore within the region.[317] This is especially important in respect of trans border traditional knowledge and expressions of folklore. The Protocol under Section 5.4 recognises that the same traditional knowledge may be owned by different communities which communities may sometimes be located in differing countries, and provides for registration of all qualified owners in the countries by the relevant national competent authority. Similarly, under Section 17.4 the Protocol recognises ownership of the same expressions of folklore by different communities and across borders and provides for registration of all the owners.

[315] Oguamanam C "Understanding African and Like Minded Countries' Positions at the WIPO-IGC" 2020 *IDEA* 191-193.

[316] Gorjestani N "Indigenous Knowledge for Development: Opportunities and Challenges" in Twarog S and Kapoor P (ed) *Protecting and Promoting Traditional Knowledge: Systems, National Experiences and International Dimensions* (UNCTAD 2004) 265.

[317] Preamble Swakopmund Protocol.

Under Section 24, the Protocol further provides for the same treatment of foreign traditional knowledge as local traditional knowledge subject to the customary laws and protocols of the countries concerned. This provision is in line with the principle of national treatment enshrined in Article 3 of the TRIPS Agreement. The provision provides minimum standards, harmonisation and non-discrimination in the treatment of national and foreign holders of traditional knowledge and expressions of folklore.[318]

Under Section 24.3 ARIPO as a regional body is tasked with settling disputes relating to claims from differing communities to the same traditional knowledge or expressions of folklore. The Protocol provides for issues arising out of trans border ownership of traditional knowledge and expressions of folklore to be dealt with at regional level and international level in keeping with recommendations made during discussions by the WIPO IGC.[319]

While the Protocol addresses the limitations of national regimes for the protection of traditional knowledge, the Protocol is limited in that it is only binding on its signatories. Numerous countries in the region are not a party to the Protocol and are therefore not bound by its provisions. The effectiveness of the Protocol in this regard is therefore limited by the low uptake of the Protocol by African states.

7.5.2 Community interests versus individual interests

The Swakopmund Protocol is mainly aimed at assisting traditional and indigenous communities in the recognition, protection and proper and beneficial exploitation of their traditional knowledge and expressions of folklore.[320] The Protocol recognises communal ownership and individual ownership in a custodial capacity under Section 6 and Section 17.5. I submit that while the Protocol creates a distinction

[318] Frankel *Cross-Border Protection of TK* 325-326.
[319] WIPO Secretariat "WIPO/GRTKF/IC/7/5" *https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwin5NHq0ZD1AhUqQkEAHYmEC6cQFnoECC4QAQ&url=https%3A%2F%2Fwww.wipo.int%2Fedocs%2Fmdocs%2Ftk%2Fen%2Fwipo_grtkf_ic_7%2Fwipo_grtkf_ic_7_5-annex2.doc&usg=AOvVaw3yA6INxZxt-yvFJAqtX0uD* 30 (Date of use: 7 December 2020).
[320] Preamble Swakopmund Protocol.

between communally owned traditional knowledge and traditional knowledge held by an individual in a custodial capacity, in essence both belong to the community.

The Protocol treats individually and communally owned traditional knowledge differently. In this regard, under Section 8.1 the Protocol provides for the assignment of individually owned traditional knowledge and specifically excludes community owned traditional knowledge from assignment. It is unclear why the Protocol allows for assignment of individually owned traditional knowledge, especially as such ownership is in the form of custodianship or guardianship. It is submitted that at the very least the Protocol should provide rules, checks and balances to ensure that custodially held traditional knowledge is not assigned. The Protocol does not provide for the assignment of expressions of folklore.

While there is generally no limitation as to the duration of traditional knowledge and expressions of folklore, the Protocol under Section 13 places such limitation on traditional knowledge which is exclusively individually owned. Protection for exclusively individually owned traditional knowledge is for 25 years from the date of exploitation beyond its traditional context by the individual. Such time limit seems to be regardless of whether the traditional knowledge qualifies as traditional knowledge and is associated with and forms an integral part of the identity of the community.[321] It is unclear as to what the Protocol refers to as traditional knowledge belonging "exclusively" to an individual, as individual ownership is within the context of the community in a custodial capacity.[322] There is no time limit for the protection of traditional knowledge and expressions of folklore. These are protected for as long as they qualify as traditional knowledge and expressions of folklore as defined in the Protocol.

7.5.3 Communities versus the state

Government interest in the protection of traditional knowledge and expressions of folklore is generally for the state and not the individual community originating the traditional knowledge or expressions of folklore. National policy objectives

[321] Section 4 Swakopmund Protocol.
[322] Section 6 Swakopmund Protocol.

generally promote the use of traditional knowledge for sustainable development and in the public interest.[323] As a result, there is invariably a conflict between state interests and community interests. The Protocol attempts to balance these interests in light of the fact that the indigenous communities must exist and exercise their rights within the parameters of the state.

First and foremost the Protocol recognises the rights holders and beneficiaries of traditional knowledge as the indigenous and local communities[324] generating the knowledge or whose cultural identity is seen as holding the knowledge.[325] The rights holders and beneficiaries of expressions of folklore are recognised as indigenous and local communities entrusted with their custody and protection and who maintain and use the expressions of folklore as a characteristic of their traditional cultural heritage.[326] In this regard, it is important to note that the Protocol does not recognise the state(s) in which the communities are located as having ownership of the traditional knowledge and expressions of folklore or as the beneficiaries. The Protocol however does provide for the establishment of national competent authorities whose tasks are to implement the provisions of the Protocol. The Protocol lists the rights accruing to rights holders as the right to allow access to third parties, authorisations to exploitation, assignments and licenses. However, these are subject to the authorisation of national competent authority failing which they are void.[327]

While the rights holders' rights must be exercised subject to the relevant authorisations by the national competent authority, the state through the authorities should not divest ownership from the rights holders. The national competent authorities are there to assist with numerous tasks such as registration of ownership, awareness raising and legal advice on exploitation, among others, and overall to ensure equitable benefit sharing as a result of any exploitation of any traditional knowledge and expressions of folklore.

[323] WIPO Secretariat "Protection of Traditional Knowledge: Summary of Draft Policy Objectives and Core Principles" https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_7/wipo_grtkf_ic_7_5-annex1.pdf 2 (Date of use: 27 December 2020).
[324] Section 6 Swakopmund Protocol.
[325] Section 1.1 Swakopmund Protocol.
[326] Section 18 Swakopmund Protocol.
[327] Section 8.2 Swakopmund Protocol.

It is submitted that in theory the Protocol effectively protects the community interests in their traditional knowledge against the state. However, as stated above the communities exist and exercise their rights within the state. In reality the national laws of most of the states provide that any benefits from the exploitation of traditional knowledge or expressions of folklore accrue to the state and these are ultimately used for the benefit of the state.[328] It is beyond the scope of the Protocol to redress this situation where it arises.

7.6 How the WIPO Model Provisions deal with competing interests

7.6.1 Cross border communities

The main aim of the WIPO-UNESCO Model Provisions is to provide a model law for the protection of expressions of folklore which can be used as a blueprint in countries where no such law exists. While the WIPO-UNESCO Model Provisions are provisions for a model law and not an actual law, adoption of the provisions by differing nations would result in some uniformity in the treatment of expressions of folklore at international level. This is especially important in respect of expressions of folklore belonging to different communities across borders. Section 14 of the WIPO-UNESCO Model Provisions is particularly important in this regard as it provides for reciprocal treatment of expressions of folklore originating from foreign countries. This deals with the territorial nature of national legislation and provides for the protection of expressions of folklore beyond the borders of the country from which they originate.

7.6.2 Community interests versus individual interests

The WIPO-UNESCO Model Provisions recognise that expressions of folklore may originate both from the community and from specific individuals whose work reflect the artistic expressions of a community.[329] The WIPO-UNESCO Model Provisions

[328] Nwauche *Sui Generis and IP Protection* 243.
[329] Section 2 WIPO Model Provisions.

treat individually and community created expressions of folklore in the same manner.

7.6.3 Communities versus the state

The WIPO-UNESCO Model Provisions recognise the rights holders of expressions of folklore as the local communities and individuals within the communities.[330] Under Section 9 the WIPO-UNESCO Model Provisions provide for establishment by the states of competent authorities. The role of the competent authorities is to implement the provisions of the law within the state as well as the administration and management of the rights of the communities relating to the expressions of folklore. In this regard, authorisation for utilisation of expressions of folklore may be obtained from the competent authorities or the community concerned depending on the laws of the state. The competent authorities are also tasked with setting and collecting a fee for the utilisation of expressions of folklore.[331] The WIPO-UNESCO Model Provisions provide that such fee shall be used to promote and safeguard national culture or folklore. In this regard, it is important to note that the WIPO-UNESCO Model Provisions do not name the originating communities as the beneficiaries but the nation's culture and folklore as a whole.

7.7 Ad hoc observations

The Swakopmund Protocol to a large extent reconciles the interests of different communities especially across borders through the establishment of a regional law that provides for the same treatment of local and foreign traditional knowledge and harmonisation of the laws pertaining to traditional knowledge and expression of folklore within the region. ARIPO is also tasked with settling disputes relating to claims from differing communities to the same traditional knowledge or expressions of folklore which allows for trans-border ownership issues to be dealt with at regional level. However, the low uptake of the Protocol by states impedes the Protocol effectively addressing the issues arising out of cross border traditional knowledge. It is noted that of the 20 ARIPO member states only 8 are party to the

[330] Section 2 WIPO Model Provisions.
[331] Section 10.2 WIPO Model Provisions.

Protocol. Potentially the Protocol may have more than 20 signatories as members of the African Union and the United Nations Economic Commission for Africa may also become party to the Protocol. It is submitted that universal adoption of the Protocol by all potential states would result in regional uniformity in the treatment of traditional knowledge and expressions of folklore.

The Protocol recognises that traditional knowledge rights are held collectively and in a custodial capacity by select individuals. However, there is some confusion created by reference to exclusive individual ownership of traditional knowledge and the differing treatment of community owned traditional knowledge and that held on behalf of the community by an individual. It would seem that the Protocol purports to grant individual rights in respect of traditional knowledge, intellectual property type protection whose principles are philosophically at odds with the nature of traditional knowledge.[332] I therefore submit that ARIPO should reconsider the inclusion of the provisions of this section in the Protocol.

The Protocol attempts to balance government interests in traditional knowledge and expressions of folklore against the interests of the individual communities in light of the fact that the indigenous communities must exist and exercise their rights within the parameters of the state.[333] The Protocol maintains that ownership and benefits arising from the use of the traditional knowledge and expressions of folklore vest in the communities originating the traditional knowledge and expressions of folklore. The WIPO-UNESCO Model Provisions on the other hand do not name the originating communities as the beneficiaries but the nation's culture and folklore as a whole. In practice, the national laws of most of the ARIPO member states seem to align with the WIPO-UNESCO Model Provisions as they provide that any benefits from the exploitation of traditional knowledge or expressions of folklore accrue to the state and therefore end up being used for the benefit of the nation as a whole and not the specific community concerned. This is seen as another form of unfair exploitation by the traditional knowledge

[332] Feris L "Protecting Traditional Knowledge in Africa: Considering African Approaches" 2004 *African Human Rights Law Journal* 248.
[333] Oguamanam *IDEA* 191-192.

holders,[334] and it is submitted that the national laws must be brought in alignment with the provisions of the Swakopmund Protocol.

[334] Oguamanam *IDEA* 193.

CHAPTER 8 CONCLUSION AND RECOMMENDATIONS

8.1 Introduction

The research question which this dissertation wishes to address is whether the *sui generis* system under the Swakopmund Protocol effectively deals with the concerns and issues faced by traditional knowledge rights holders in light of the issues associated with protecting traditional knowledge, especially through the intellectual property system.

I approached the question by setting out the background and identifying the main key issues faced by traditional knowledge holders in the protection of their traditional knowledge in Chapter 1. Also included in Chapter 1 are definitions of the term traditional knowledge and the various terms used synonymously, the research problem, the aims of the dissertation, a brief introduction on the current legal framework currently in place for the protection of traditional knowledge and an outline of the dissertation.

The ensuing chapters focused on each of the main key issues identified as being faced by traditional knowledge holders. Chapter 2 focused on attribution and ownership, which encompasses a need for recognition of creatorship and ownership of traditional knowledge and expressions of folklore, as a major concern for traditional knowledge holders. Chapter 3 focused on distortion and misuse of traditional knowledge and expressions of folklore, Chapter 4 on benefit sharing, Chapter 5 on the preservation of traditional knowledge and expressions of folklore for future generations, Chapter 6 on access to resources and Chapter 7 on competing interests related to the protection of traditional knowledge and expressions of folklore. Each chapter examines how the Swakopmund Protocol and the WIPO-UNESCO Model Provisions deal with the identified need, and observations are made as regards the extent to which the Swakopmund Protocol addresses the concerns of traditional knowledge holders.

Chapter 8 concludes the dissertation with an examination of the overall efficacy of the Swakopmund Protocol in dealing with the identified needs of the traditional knowledge rights holders and provides recommendations for the improvement of the Protocol.

8.2 General Findings

It is posited that due to the shortcomings in protecting traditional knowledge under the current intellectual property system, traditional knowledge should be protected through *sui generis* systems which are specifically adapted to the nature of traditional knowledge.[335] Some would have the *sui generis* system borrow elements of existing forms of intellectual property where possible and others would have a distinct *sui generis* system separate from the intellectual property system.[336] The WIPO-UNESCO Model Provisions are an early attempt to create a *sui generis* framework for the protection of expressions of folklore at international level. Despite the shortcomings of the Model Provisions, in that they are merely guidelines and non-binding and that they take no firm position on the issue of ownership of expressions of folklore, the Model Provisions set the minimum standards for *sui generis* systems for protection of expressions of folklore.[337] The Swakopmund Protocol is a *sui generis* system that offers protection for traditional knowledge and expressions of folklore and is binding on all signatories to the Protocol.[338]

A review of the select identified needs of the traditional knowledge holders, recommendations on how to address these needs and an analysis of how the Protocol addresses the issues reveals that the Protocol is to a large extent effective in dealing with the identified needs and expectations. The general findings are

[335] Ncube *Science, Technology & Innovation* 78-79.
[336] Oguamanam *IDEA* 160 174.
[337] AALCO Secretariat "Expressions of Folklore and its International Protection" https://www.aalco.int/FOLKLORE-BALI-2004.pdf (Date of use: 25 February 2022).
[338] Ncube *Science, Technology & Innovation* 81.

chapter specific and were discussed under the respective chapters. The following discussion will summarise the findings.

8.3 Attribution and Ownership

One of the major issues identified as a concern for traditional knowledge holders is the need for recognition of creatorship and ownership of traditional knowledge and expressions of folklore. An analysis of the Swakopmund Protocol shows that it effectively deals with the issues of attribution and ownership. In this regard, in order to address the fallacy that traditional knowledge is in the public domain, the Protocol clearly identifies the owners of traditional knowledge as the local and indigenous communities from which the knowledge originates. The Protocol also makes provision for the application of the principle of prior informed consent as a prerequisite for access and use of traditional knowledge and expressions of folklore, as well as source identification for any such use. The Protocol recognizes the knowledge holders' rights and empowers them by providing legal certainty.

While it is commendable that the Protocol recognizes the indigenous and local communities' ownership rights to their traditional knowledge and expressions of folklore, this is in some instances inconsistent with the national laws of the states which vest ownership of traditional knowledge in the state. Harmonisation in this regard is therefore necessary to ensure that ownership and ensuing rights vest in the relevant communities.

The practical effectiveness of the Protocol is dependent on the member states who have the duty to ensure that legal and practical measures are in place to implement the above principles. It is recommended that the member states are encouraged to put in place such measures and appropriate authorities for the implementation of the Protocol.

8.4 Distortion and Misuse

The second issue identified as a concern is that of distortion and misuse of traditional knowledge and expressions of folklore. Rights holders want the right to

be able to object to and prevent distortion and misuse of their traditional knowledge and expressions of folklore.

An analysis of the Swakopmund Protocol shows that it is to some extent effective in addressing the issue of distortion and misuse. The Protocol confers upon the rights holders the right to prevent anyone from exploiting their traditional knowledge without prior informed consent and the right to institute legal action against anyone who exploits traditional knowledge without the prior informed consent of the rights holders. Further, the Protocol provides for the protection of expressions of folklore against unlawful acts which include, among others distortion, mutilation or other modification of, or other derogatory action, in relation to the expressions of folklore.[339] Contracting states are tasked with ensuring adequate, effective and practical legal measures are in place to ensure that any distortion, mutilation or other modification or other derogatory action can be prevented and /or is subject to civil or criminal sanctions.

However, the Protocol then provides for assignment of what is supposedly individually owned traditional knowledge to non-community members and compulsory licensing which places limitations on the communities' control over the exploitation of their traditional knowledge. The concepts of assignment and compulsory licensing are contradictory to the spirit of traditional knowledge, foreign to indigenous communities and contribute to the communities' mistrust of western type systems of protection for traditional knowledge.

With regards to the provision on assignment, it is submitted that one of the main characteristics of traditional knowledge is that it is associated and identified with the tradition or culture of a traditional or indigenous community and forms an intrinsic part of the history, lives and culture of the people. The Protocol itself defines traditional knowledge as knowledge that is distinctively associated with a local or traditional community and is integral to the cultural identity of a local or traditional community.[340] It is therefore submitted that to allow the transfer of

[339] Section 19 Swakopmund Protocol.
[340] Section 4 Swakopmund Protocol.

ownership of traditional knowledge to an outsider of the community is inimical to the needs of the traditional knowledge holders and the objectives of the Protocol. It is therefore recommended that this provision is reconsidered in light of its contrary nature to the ethos of traditional knowledge.

With regards to compulsory licensing, it is submitted that in a bid for legal certainty traditional knowledge holders must become reconciled to the fact that no rights are absolute. Ultimately compulsory licensing should be exercised without significantly disempowering the knowledge holders and should be exercised with the continuing involvement of the relevant communities as well as maintaining and focusing on the purpose for access.[341]

8.5 Benefit Sharing

The third issue identified as a concern is that of equitable sharing of the benefits derived from the exploitation of the rights holders' traditional knowledge and expressions of folklore. It is submitted that the Protocol to a large extent effectively deals with the issue of benefit sharing. In this regard, the Protocol identifies the local and indigenous communities from which the knowledge originates as the beneficiaries of the exploits of traditional knowledge.[342] Further, the Protocol provides for fair and equitable sharing of benefits arising from the commercial or industrial use of knowledge which is to be determined by mutual agreement between the parties, failing which the national competent authority shall mediate between the parties. Benefits are not limited to money but include division of profits, payment of royalties and extend to technology access and transfer, training of human resources and other benefits which the parties agree upon.[343]

One of the challenges with regard benefit sharing is that monetary benefits are not always allocated or applied to the communities originating the traditional knowledge or expressions of folklore. In most cases, national legislation provides that any such monetary benefits accrue to the state, and therefore are used for

[341] Okediji https://www.cigionline.org/sites/default/files/documents/Paper%20no.176web.pdf (Date of use: 9 September 2021).
[342] Sections 6 and Section 18 Swakopmund Protocol.
[343] Rule 18 Swakopmund Protocol.

government expenditure that may or may not benefit the communities concerned.[344] It is recommended that national laws must be brought in alignment with the provisions of the Swakopmund Protocol in this regard or at the very least ARIPO should advocate for partial allocation of benefits to the relevant communities in such circumstances.

Another challenge is that while the Protocol clearly defines the beneficiaries of traditional knowledge and expressions of folklore, in reality, the beneficiaries are not always evident and identifiable. This is another challenge the solution for which is beyond the scope of the Protocol. It is however recommended that in identifying the beneficiaries the member states formulate policies and processes that take into account the facts of each case and apply the principles of equity and justice.[345]

8.6 Preservation for Future Generations

The fourth issue identified as a concern is the need for the preservation of traditional knowledge and expressions of folklore for future generations. Numerous factors threaten the existence of traditional knowledge and expressions of folklore, which include colonization, modernization and globalization which lead to the disappearance, distortion and dilution of traditional knowledge, as well as lack of respect for traditional ways by the indigenous people themselves and waning of oral tradition. Various solutions have been recommended to address the issue of preservation which include documentation of traditional knowledge, expressions of folklore, traditional artefacts, history and oral traditions;[346] awareness raising of the value of traditional knowledge and expressions of folklore within the local communities; [347] restriction of access to traditional knowledge by non-community members;[348] cultural heritage and policy legislation for the promotion of traditional knowledge and culture; and, organization of local communities and rights holders to allow access to resources, legal protection, legal aid, awareness of means of

[344] Oguamanam *IDEA* 192.
[345] Chennells 2013 *LEAD* 184.
[346] Poorna RL, Mymoon M and Hariharan A "Preservation and Protection of Traditional Knowledge – Diverse Documentation Initiatives Across the Globe" 2014 *Current Science* 1246.
[347] WIPO Secretariat *Needs and Expectations* 78.
[348] WIPO Secretariat *Needs and Expectations* 79.

exploitation and protection of their knowledge and their participation in international meetings concerning their rights.

An analysis of the Protocol reveals that it is theoretically effective in dealing with the issue of preservation. The Protocol provides for the maintenance of registers or other records of knowledge for evidentiary and preservation purposes by national competent authorities and ARIPO. The national competent authorities and ARIPO are tasked with awareness raising, education, guidance monitoring, registration, dispute resolution, enforcement and other activities related to the protection of traditional knowledge and expressions of folklore. The Protocol also aids in the preservation of traditional knowledge and expressions of folklore through the restriction of access by non-community members as it confers upon the traditional knowledge holders the exclusive right to authorize the exploitation of their knowledge and makes prior informed consent a pre-requisite for exploitation of the traditional knowledge.

However, the reality is that there has been an extremely low uptake of the Protocol by the potential users for reasons which include a lack of awareness and mistrust of the system. It is recommended that in order for the Protocol to be practically effective in addressing the issue of preservation an aggressive awareness raising campaign must be pursued by ARIPO and signatories to the Protocol. Further, it is recommended that in the implementation of certain provisions, the Protocol must take into consideration customary laws and practices of the communities involved.[349]

8.7 Access to Resources

The fifth issue identified as a concern is access to resources for traditional knowledge holders. Traditional knowledge holders are mostly poor communities or indigenous communities from poor developing countries. Despite their wealth of knowledge and potential to generate economic value therefrom, most traditional knowledge holders lack the know-how and financial resources to exploit their

[349] Kuruk 2007 *Indiana International & Comparative Law Review* 83.

knowledge to the benefit of their communities. They also lack the legal knowledge and financial resources to protect their traditional knowledge from exploitation by third parties. The resources required by traditional knowledge holders include awareness raising of the intellectual property system among indigenous and local communities, how to use the system for the protection of their traditional knowledge and enforcement of their rights, documentation of traditional knowledge and expressions of folklore, ways in which local communities can regulate access and use of traditional knowledge by outsiders, legal and technical training, organisation of indigenous communities to protect their rights, institutional arrangements for the protection and enforcement of the rights of the traditional knowledge holders and finances to enable them to take advantage of the intellectual property system and for the protection, enforcement and management of the rights.

It is submitted that the Protocol to some extent deals with the issue of access to resources. In this regard, the Protocol provides for the establishment of national competent authorities in each of the contracting states whose task is the implementation of the provisions of the Protocol within the relevant state.[350] This provides institutional arrangements for the protection, enforcement and collective management of the rights of traditional knowledge holders. The Protocol also provides for documentation of traditional knowledge, as it provides for the maintenance of registers or records of knowledge by national competent authorities. The national competent authorities are also used as a vehicle for providing legal aid and intellectual property advice for traditional knowledge rights holders, awareness raising, education, guidance, monitoring, registration, dispute resolution, enforcement and other activities related to the protection of traditional knowledge.

The Protocol does not address the crucial issue of financial resources. In this regard, it is noted that even where knowledge holders are aware of how to protect and exploit their knowledge and rights, a lack of finances acts as an impediment to doing so. It is recommended that ARIPO and organisations such as WIPO and UNESCO assist local communities financially for registration and enforcement of

[350] Section 3 Swakopmund Protocol.

rights. Governments must also be encouraged to allocate funds, especially those raised from exploitation of traditional knowledge and expressions of folklore, to financial aid for registration and enforcement of the rights of traditional knowledge holders.

8.8 Competing Interests

The needs of traditional knowledge holders to some extent reflect conflicting and competing interests. This dissertation deals with specific competing interests, being traditional knowledge owned by cross border communities, community interests versus individual interests and community interests versus state interests.

With regards to the competing interests of cross border communities, an analysis of the Protocol shows that it effectively addresses the competing interests of cross border communities. The Protocol provides a regional law that reconciles the interests of different communities and provides harmonised laws pertaining to traditional knowledge and expression of folklore within the region.[351] Further, the Protocol allows issues arising out of trans border ownership of traditional knowledge and expressions of folklore to be dealt with at regional level and international level and provides a forum for settling such disputes.

The most pertinent drawback is that the Protocol is binding only on its signatories, which are few. The effectiveness of the Protocol as a regional law is limited by the low membership. It is therefore recommended that all potential states be encouraged to accede to the Protocol. The low membership of the Protocol also makes a case for the operationalisation of PAIPO and the adoption and implementation of an AfCFTA IP Protocol. PAIPO proposes the merger of ARIPO and OAPI, which would increase membership and therefore cover the interests of communities across a wide area. However, it is as yet unclear how PAIPO would operate in the circumstances.[352] The AfCFTA IP Protocol will set a common position for intellectual property including traditional knowledge and expressions of folklore and to date has the widest membership of all continental intellectual

[351] Nwauche *Sui Generis and IP Protection* 250.
[352] Ncube *Science, Technology & Innovation* 141.

property institutions and therefore covers the interests of communities across the widest area. I submit that at the very least the Swakopmund Protocol should act as a basic framework for a harmonised regional system of protection of traditional knowledge and expressions of folklore under PAIPO and AfCFTA.

The concepts of traditional knowledge and individual ownership are largely considered dichotomous. However, the Protocol recognises community ownership, custodial ownership and exclusive individual ownership of traditional knowledge and expressions of folklore. Largely the Protocol treats individual and communal rights in the same manner with some exceptions. The Protocol provides for assignment of individually owned traditional knowledge and limits the duration of individual rights for 25 years. It is submitted that the concepts of assignment of traditional knowledge and limitation of duration of rights relating to traditional knowledge are equally as dichotomous as that of individual ownership of traditional knowledge. It is recommended that the inclusion in the Protocol of the provisions on exclusive individual ownership, assignment and limitation of rights are reconsidered.

The Protocol also attempts to balance the conflict between government interests and the interests of the local communities in light of the fact that the local communities must exist and exercise their rights within the parameters of the state.[353] Challenges in this regard arise out of the fact that while to a large extent the rights vest in the local communities, in practice the national laws provide that any benefits from the exploitation of traditional knowledge or expressions of folklore accrue to the state and therefore end up being used for the benefit of the nation and not the specific community concerned. It is submitted that in theory the Protocol effectively protects the community interests in their traditional knowledge against the state. In order to redress challenges as those indicated above where they arise, it is recommended that ARIPO facilitate an equitable agreement between the state and the communities as to the distribution of the benefits.

[353] Oguamanam *IDEA* 191-192.

8.9 Conclusion

Theoretically, the Swakopmund Protocol to a large extent effectively deals with the issues stipulated as concerns for traditional knowledge holders. Practically, whether the Protocol adequately addresses these issues remains to be seen as there has been a very slow uptake of the Protocol to date both by the rights holders and potential signatories. It is unclear why there has been a low uptake of the Swakopmund Protocol by the ARIPO member states and knowledge holders, although it is generally submitted that the low uptake by knowledge holders is due mainly to a lack of awareness and mistrust of the system. Ostensibly ARIPO needs to canvass for more ARIPO members to accede to the Protocol and ramp up their awareness raising campaigns among knowledge holders. Further, it is recommended that in the implementation of certain of the provisions under the Protocol, ARIPO must take into consideration customary laws and practices of the communities involved. Signatories to the Protocol need to put in place legal and practical measures for the enforcement of the Protocol, legal and technical training, institutional arrangements and finances for protection and enforcement and management of rights. The above is of primary importance and imperative for the practical effectiveness of the Protocol and must be pursued with vigour.

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