South Africa's proposed intellectual property law: the need for improved regional cooperation

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Abstract

The paper analyses the provisions of South Africa's Intellectual Property Laws Amendment Bill and the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore (2010) (the Swakopmund Protocol) of the African Regional Intellectual Property Organisation (ARIPO). The author's analysis focuses on the protection of regional or cross-border traditional cultural expressions from misappropriation, arguing that a more coordinated approach is required for a workable system to emerge.

INTRODUCTION

In October 2011, the South African parliament passed the Intellectual Property Laws Amendment Bill 8 of 2010 (IPLAB), which complements the Biodiversity Act 10 of 2004 (Biodiversity Act) and the Patents Amendment Act 20 of 2005 (Patents Amendment Act).[1]

Despite much criticism based on substantive deficiencies and poor stakeholder consultation throughout the legislative process, the IPLAB was passed by both houses of parliament.[2]

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1 The IBLAB deals with TCEs while the Biodiversity Act and Patent Amendment Act address the misapproropriation of traditional knowledge. The distinction between TCEs and traditonal knowledge will be dealt with extensively below.

2 Of the many indigenous communities and traditional leaders in South Africa, only the Traditional Leaders in Kwa Zulu Natal and North West Provinces were consulted. Failure to refer the Bill to the National House of Traditional Leaders was particularly problematic.

During its passage through the South African legislative process, the ARIPO[3] was concluding negotiations on the Swakopmund Protocol.[4] This Protocol is an instrument that adopts a regional approach to protecting traditional knowledge and traditional cultural expressions (TCEs).

A number of stakeholders in South Africa are of the view that a *sui generis* approach to the protection of traditional knowledge and the like, should have been pursued rather than the adoption of a solution within the architecture of intellectual property law.[5] This paper, however, raises the debate on the intellectual property versus *sui generis* approach only to the extent that it is relevant to another important issue; namely, the need to reconcile national and regional approaches adopted by the IPLAB and the Swakopmund Protocol respectively, in the context of regional TCEs. This is important in the African context where national boundaries are generally colonial constructs that did not consider where traditional groups were situated.[6] Often a single traditional group can be found in two or more countries.

One of the challenges that the IPLAB will face is ensuring that the national and regional instruments do not operate at cross purposes. While most of South Africa's neighbouring countries are members of ARIPO, South Africa is not. The IPLAB is nationalistic in focus, while many of the traditional groups that the law caters for are not only indigenous to South Africa, but can be found throughout the geographical area covered by ARIPO.[7]

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3 The ARIPO member states are as follows: Botswana, Gambia, Ghana, Kenya, Lesotho, Liberia, Malawi, Mozambique, Namibia, Rwanda, Sierra Leone, Somalia, Sudan, Swaziland, Tanzania, Uganda, Zambia, and Zimbabwe.

4 The Swakopmund Protocol is an annexure to the Lusaka Agreement on the Creation of the African Regional Intellectual Property Organization (1978).

5 At the IPLAB Portfolio Committee For Trade & Industry – Public Hearings 19 May 2010, a number of important domestic stakeholders expressed their preference for a *sui generis* system. These include: Publishers' Association of South Africa (PASA); The Southern African Music Rights Organisation (SAMRO); and The Dramatic, Artistic and Literary Organisation (DALRO) to name a few.

6 Austen 'Mapping Africa: problems of regional definition and colonial/national boundaries' (2001) available at: http://fathom.lib.uchicago.edu/1/777777122619/ (last accessed October 2012).

7 For example, the indigenous territory of the San spans as wide as South Africa, Zimbabwe, Lesotho, Mozambique, Swaziland, Botswana, Namibia, and Angola; while the Nama can be found in South Africa, Botswana and Namibia, see:

Consequently, certain provisions of the national and regional legal instruments may lead to conflicts. It is important that these inconsistencies be addressed to ensure that the respective legal instruments operate effectively and in the interests of the communities they are intended to benefit.

This paper starts with an overview of relevant conceptual issues and defines the scope of the discussion to follow. The divergent approaches to the protection of TCEs followed by ARIPO and South Africa respectively are described, and critiques offered of potential conflicts between the South African and regional approaches. Finally, conclusions are drawn and recommendations proposed for a way forward.

CONCEPTUAL OVERVIEW

In recent years, the value of traditional knowledge has been increasingly recognised.[8] This is most apparent in areas such as medicine and ecological management. Numerous examples have been documented. In the medical field, for example, the Hoodia plant is well known internationally for its efficacy as an appetite suppressant which has led to pharmaceutical products being developed from its active ingredient, P57.[9] With regard to water management, the *afalaj* irrigation system has been successfully employed in Oman and Yemen as a means of sustainable irrigation.[10] In an era when acute water scarcity is becoming a global concern, such techniques assume growing relevance.

Increased recognition that there is value in such knowledge, has led to the commercial application of indigenous knowledge systems (IKS) and their derivatives by 'outsiders' to the custodial communities. A large number of

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http://www.ipacc.org.za/eng/regional_southernafrica.asp (last accessed October 2012).

8 Taubman 'Saving the village: conserving jurisprudential diversity in the international protection of traditional knowledge' in Maskus & Reichman *International public goods and transfer of technology under a globalized intellectual property regime* (2005) 522.

9 Wynburg 'Rhetoric, realism and benefit-sharing use of traditional knowledge of Hoodia species in the development of an appetite suppressant' (2004) 7/6 *Journal of World Intellectual Property* 851–876.

10 'Intellectual property and genetic resources, traditional knowledge and traditional cultural expressions: an overview, available at: http://www.wipo.int/freepublications/en/tk/933/wipo_pub_933.pdf (last accessed November 2012).

developing countries are increasingly frustrated be the lack of benefits they have derived despite being rich in traditional knowledge – especially genetic resources and folklore. These countries have, therefore, called for the development of legal means by which to prevent what they perceive as misappropriation of their resources. [11]

In this context, the question arises whether the public good is served by rendering IKS the subject of exclusive rights.[12] Documenting and publicising traditional knowledge can serve the public good in making useful and culturally enriching information available in the public domain. For example, the dissemination and practice of yoga, which is a TCE, has yielded immense physical and spiritual benefits to its exponents throughout the globe. Would the public good have been served by restricting the dissemination of this art?

The argument for protecting IKS through legal means, be they in the form of intellectual property rights or other legal avenues, is based on the premise that absent such protection, it is impossible to prevent unauthorised use of such knowledge beyond the original community, which in turn results in erosion of the cultural framework that gave birth to such knowledge.[13]

A central problem in protecting traditional knowledge, however, is that while the information embodied therein can easily be transferred and disseminated; the underpinning norms, values, and social practices are innate to the original community and therefore cannot be as easily transmitted. These inherent qualities that distinguish traditional knowledge from other forms of knowledge then break down once the knowledge leaves the community.[14] Globalisation has the potential to act as a catalyst for the erosion of traditional knowledge in this way if the necessary protection is not adopted.

In response to these challenges, various intergovernmental organiations have

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11 Gervais 'The internationalization of intellectual property: new challenges from the very old and the very new (2012) 12/3 *Fordham Intellectual Property, Media and Entertainment Law Journal* 931–990.

12 Bizer & Gubaydullina 'Protection of cultural goods: economics of identity (2012) 19/1 *International Journal of Cultural Property* 97–118.

13 Taubman n 8 above at 523.

14 *Id* at 524.

been engaged in negotiations to formulate the best possible legal means of protecting traditional knowledge. Other than the Convention on Biological Diversity (CBD), the most significant consultations have taken place at the United Nations, Educational, Scientific and Cultural Organisation (UNESCO) and the World Intellectual Property Organisation (WIPO), which is the United Nations (UN) agency mandated to deal with intellectual property.

Within WIPO, a specialised body – the Intergovernmental Committee on Traditional Knowledge Genetic Resources and Traditional and Cultural Expressions (IGC) – was created to address, *inter alia,* the role that intellectual property principles and systems can play in protecting traditional knowledge and TCEs from misappropriation.[15] Currently, the IGC is conducting text-based negotiations in an attempt to establish an international treaty for the protection of traditional knowledge and TCEs. At the 22nd Session of the IGC in July 2012, specific discussions on an instrument dealing with TCEs were held.[16]

At this juncture, it is important to emphasise the distinction between traditional knowledge and TCEs. There is not, as yet, any generally accepted, formal definition of these terms. Instead, WIPO uses working descriptions as the basis for discussions in the IGC.[17] This is not to say that the two concepts are mutually exclusive; they are certainly not in their traditional context. It is necessary, however, to draw a distinction from a policy formulation perspective as different considerations arise in the context of propounding legal protection for the variety of subject matter concerned.

Traditional knowledge is a living body of knowledge that is developed, sustained, and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity. While it extends to a broad variety of themes, a large body of traditional knowledge is associated with genetic resources upon which patentable inventions have been based. Therefore, genetic resources have played a prominent role in the IGC discussions.[18]

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15 http://www.wipo.int/tk/en/ (last accessed November 2012).
16 The Protection of Traditional Cultural Expressions: Draft Articles (WIPO/GRTKF/IC/22/4).
17 The next IGC session dealing with these issues was scheduled for July 2013.
18 The Protection of Traditional Knowledge: Draft Articles (WIPO/GRTKF/IC/21).

TCEs are the forms in which traditional culture is expressed.[19] They can be, for example, dances, songs, handicraft, designs, ceremonies, tales, or many other artistic or cultural expressions.[20] TCEs are sometimes referred to as folklore, although this practice is in decline as certain indigenous communities regard the term to be derogatory.

This paper is limited to a discussion of TCEs, and more specifically, issues that arise in the context of the so-called 'regional TCEs'. This is the term commonly used to describe TCEs that are shared by traditional groupings across geographical borders.[21]

REGIONAL TCEs IN AFRICA: THE ARIPO APPROACH

As mentioned in the introduction, most geographical boundaries in Africa were developed during colonial times. Hence, they were decided based on the mercantile interests of colonial authorities with little, if any, regard for the realities of where indigenous communities were situated.[22] As a result, numerous traditional communities are indigenous to multiple countries. For example, in the Southern African Development Community (SADC) region, the Tsonga are native to Mozambique, South Africa, Swaziland, and Zimbabwe. Therefore, none of these countries can legitimately assert rights in the TCEs associated with the Tsonga, to the exclusion of any of the other states traditionally inhabited by the Southern African community.

In response to the challenges posed by the desire to devise legal avenues for the protection of TCEs, ARIPO has developed the Swakopmund Protocol. The Protocol aims to provide protection against misappropriation, misuse, and unlawful exploitation of TECs beyond their traditional context.[23]

Importantly, the Swakopmund Protocol recognises the regional nature of TCEs

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19 Article 1 of the Draft Articles on TCEs. Note that the definition provided in text is paraphrased. The full, as yet incomplete working definition can be found in the Draft Articles on TCEs.

20 *Ibid*.

21 The term 'regional folklore' is also used at times but use of the term 'folklore' is in decline as will be explained below.

22 Austin n 6 above.

23 Swakopmund Protocol s 1.1(b).

in Africa. The instrument specifically provides for regional protection in terms of which eligible foreign holders of TCEs shall enjoy benefits of protection to the same level as holders of TCEs who are nationals of the country of protection.[24] It goes further, by suggesting that national authorities and the ARIPO office should facilitate, as far as possible, the acquisition, management, and enforcement of protection for the benefit of the holders of TCEs from foreign countries.[25]

In many respects, the Protocol draws on the WIPO Draft Articles on TCEs incorporating facets of the approach taken by WIPO to the protection of traditional knowledge and TCEs. For one, the Swakopmund Protocol also distinguishes between the two concepts. The definition of TCEs found in the Protocol is based on the working definition in the WIPO Draft Articles on TCEs.[26] It is interesting to note, however, that the Swakopmund Protocol still refers to TCEs as folklore, despite the international trend away from this terminology.

The Swakopmund Protocol sets out two criteria to be met if TCEs are to enjoy protection. First, they should constitute the products of creative and cumulative intellectual activity – such as collective creativity or individual creativity where the identity of the individual is unknown;[27] and secondly, they must be characteristic of a community's cultural identity and traditional heritage and maintained, used, or developed by such a community in accordance with its customary laws and practices.[28]

These criteria are broad enough to include a wide range of subject matter and are based on the underlying principle that TCEs should have a connection to a community in the way they have been preserved and transmitted between generations.[29]

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24 *Id* at s 24.1.
25 *Ibid*.
26 *Id* at s 2.1.
27 *Id* at s 16 (a).
28 *Id* at s 16 (b).
29 This is the characteristic that renders knowledge tradition, see Taubman n 8 above at 524.

An important element of the Swakopmund Protocol is that it obliges member states to ensure that ownership of the TCEs vests in the traditional communities who are the custodians thereof in terms of customary laws and practices,[30] and who maintain and use the TCEs as a characteristic of their traditional cultural heritage.[31] The state, therefore, will not be the owner if the Protocol is to be observed.

This is a positive step. However, the Protocol does not define what is meant by a traditional community,[32] nor does it deal with how to identify the appropriate community representatives. Presumably, the Protocol is silent on this aspect to allow adequate flexibility for representatives to be determined through recourse to customary laws and practices. While this may be well intentioned, in reality customary law does not provide readymade answers to such questions. At least where South African customary law is concerned, the issue of TCEs is not dealt with. Moreover, the very application and jurisdiction of customary law is often difficult to establish. Jurisdictional issues are further complicated by the overarching constitutional right of the individual to participate in the cultural life of one's choice.[33]

It would have been helpful had the Protocol given further direction on how to implement its mandate that traditional communities be recognised as the owners of TCEs. Particularly when one takes into account that a number of ARIPO member states that are yet to implement the Swakopmund Protocol currently provide that ownership of folklore vests in the President or the state.[34]

THE IPLAB: ISSUES RELEVANT TO REGIONAL TCEs IN AFRICA

Issues around IKS came to prominence in South Africa during the furore surrounding the controversial Hoodia case. Misconceptions about the way in

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30 Swakopmund Protocol s 18.

31 *Ibid*.

32 The Protocol defines a community as follows: 'where the context so permits, includes a local or traditional community'. It does not go on to provide a definition of 'traditional community'.

33 Constitution of the Republic of South Africa 108 of 1996 s 30 . See also the Law of Evidence Amendment Act 45 s 1(3) 1988; and Bennett *Customary law in South Africa* (2004) 69, 86.

34 Ghana Act Copyright Act 2005 (Act 690) s 4.2 and the Sudan Copyright Law 54 of 1996 s 7.

which the appetite suppressant qualities of the plant were researched and applied in a commercial context were commonplace and became conventional wisdom.[35] In turn, a national sense of injustice emerged which has to a large extent since informed various positions in the debate around traditional knowledge and TCEs.

Bearing this in mind, it is helpful to highlight some of the key facts in the Hoodia case study before delving into South Africa's policy and legislative framework in the field of traditional knowledge, TCEs, and the like.

During the 1960s, the Council for Scientific and Industrial Research (CSIR) started conducting research on the Hoodia plant when it became aware of the plant's use by the San indigenous community as an appetite suppressant.[36] Between 1983 and1986, the relevant compound (P57) was identified and isolated. In 1995, patents based on P57 were applied for in SA and internationally. In 1998, patents were granted to the CSIR for various applications of P57 in Britain and Europe.[37]

In 1998, the CSIR concluded a licence agreement with Phytopharm, a UK based pharmaceutical company. During the same year, Phytopharm sub-licenced some of the commercial development work to the well known American pharmaceutical firm, Pfizer. In 2003, the CSIR and the San Hoodia Benefit Sharing Trust – a legal entity created to represent the interests of the San community – concluded a benefit sharing agreement.[38] This agreement has resulted in substantial financial benefit accruing to the San community.[39]

Here it is important to mention that the actions taken by the CSIR in relation to

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35 Numerous media reports containing vexatious characterisations of the *Hoodia* case can be found, the content in the following links are examples: 'Hoodiacactus: Western drug industry exploits developing countries' available at: http://www.sos-arsenic.net/english/homegarden/hoodia.html (last accessed August 2012) and 'Stealing South Africa's secrets' available at: http://www.planet-diversity.org/storiesandvideos/stealing-south-africas-secrets.html. (last accessed August 2012).

36 Wynburg n 9 above.

37 GB2338235 and W09846243, *Id* at 857.

38 *Ibid*.

39 *Ibid*.

the Hoodia plant were totally legitimate in terms of international law. Article 15 of the CBD provides that genetic resources are the sovereign property of the state. As a parastatal entity, the CSIR was authorised to assume proprietorship over the relevant material and seek intellectual property rights. Indeed the consultative process with the San community left much to be desired. However, the notion that western pharmaceutical companies came to South Africa and 'stole' the traditional knowledge of the San, is simply not true. It was in fact a South African government entity that asserted exclusive rights in relation to the appetite suppressant application of the plant and sought collaboration with international commercial entities. It is, therefore, ironic that a number of policy makers in the country feel aggrieved by the events surrounding the commercial application of Hoodia.

In 2004 cabinet, led by the Department of Science and Technology (DST), adopted the Indigenous Knowledge Systems Policy.[40] The policy was to serve as an enabling framework to stimulate and strengthen the contribution of indigenous knowledge to social and economic development in South Africa.[41] The policy mandates the creation of a recording system for indigenous knowledge and indigenous knowledge holders by which to proactively secure their legal rights, and legislation to protect intellectual property associated with indigenous knowledge, under the administration of the Department of Trade and Industry (DTI).[42]

The legislative response to this policy mandate began during the same year when parliament enacted the Biodiversity Act, and then the Patents Amendment Act in 2005. These two Acts seek, *inter alia,* to counter bio-piracy and to ensure that indigenous communities share equally and equitably in the benefits flowing from biological diversity and indigenous knowledge in South Africa. This is to be effected by incorporating the principles of disclosure, access, and benefit sharing (ABS) propounded in the CBD.[43]

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40 Department of Science of Technology: Indigenous Knowledge Systems Policy.

41 *Id* at 9.

42 *Ibid*.

43 The Regulations relating to Chapter 6 of the Biodiversity Act (Bioprospecting, Access and Benefit Sharing) and Chapter 7 (Permit System) came into force as from 1 April 2008. The Act was subsequently amended in May 2009 to deal with commercialisation aspects of bio-prospecting and export.

The IPLAB is the latest legislative response to cabinet's policy mandate. It amends a broad range of legislation, most notably, the Copyright Act 98 of 1978 (Copyright Act) and the Trademarks Act 194 of 1993 (Trademarks Act). The IPLAB seeks to recognise and protect indigenous knowledge as a form of intellectual property, and to enable and promote the commercial exploitation of indigenous knowledge for the benefit of the indigenous communities from which the indigenous knowledge originated.[44]

This objective is more ambitious than those articulated in the 2004 and 2005 Acts or the Swakopmund Protocol. Whereas, the earlier South African legislation and the ARIPO instrument focus on protection from misappropriation, as well as prior informed consent, access, and benefit sharing; the IPLAB expressly seeks to facilitate the commercialisation of indigenous knowledge systems.[45] This mandate stems from a DTI policy document.[46]

Another interesting aspect of the approach adopted by the IPLAB is that it favours the use of the conventional intellectual property system to achieve its aims. This approach was also mandated by the DTI policy document.[47] In fact, the DTI went so far as to expressly reject seeking a solution based on a sui generis system in a presentation made to the relevant parliamentary portfolio committee during the legislative process.[48] This departs from the approach being pursued at WIPO where discussions on the Draft Articles are proceeding on the basis of a sui generis system. In contrast to the IPLAB, the Swakopmund Protocol, concluded almost concomitantly with the South African instrument, mirrors the approach adopted in the WIPO Draft texts.

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44 Memorandum on the Objectives of the Intellectual Property Laws Amendment Bill 2011 s 1.3.

45 *Ibid*.

46 The document is entitled: 'Policy framework for the protection of indigenous traditional knowledge through the intellectual property system and the Intellectual Property Laws Amendment Bill, 2008' *Government Gazette* 31026 5 May 2008.

47 *Id* at 22.

48 Policy on Protection of Indigenous Knowledge using IP System, Presentation by Department of Trade and Industry to: Portfolio Committee on Trade and Industry And Select Committee on Trade and International Affairs, available at: http://www.thedti.gov.za/parliament/021710_dti_presentation_IP_Laws_A-Bill.pdf. (last accessed November 2012).

The definitions in the IPLAB also differ from what exists at IGC and ARIPO level. For one, the term 'indigenous knowledge' is an innovation of the Bill. It is not specifically defined in the legislative text, which is strange since it is the very content that the Bill seeks to protect.[49] Having said that, a reading of the Bill's Memorandum of Objectives which defines Indigenous Knowledge Systems,[50] together with the Indigenous Knowledge Systems Policy, and the DTI Policy document, suggests that the term 'indigenous knowledge' is a broad concept, wide enough to encompass both traditional knowledge and TCEs as they are known in the IGC discussions.[51] The substantive provisions of the IPLAB, however, relate specifically to subject matter covered in the working definition of TCEs in the Draft Articles; while traditional knowledge has been catered for in the 2004 and 2005 Acts.

'Indigenous community' is another important concept as the IPLAB seeks to recognise these communities as owners of indigenous knowledge and assist them to commercialise it.[52] Moreover, the concept is central to determining whether subject matter would qualify for protection under the IPLAB. For example, where amendments to the Trademarks Act are concerned, a 'traditional term and expression' is defined as

> a term or expression recognized by an indigenous community as having an indigenous origin and traditional character and that is used to designate, describe or refer to goods and services.

The IPLAB defines 'indigenous community' as 'any community of people

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49 Memorandum of Objectives n 44 above at s 1.3.

50 The Bill recognises indigenous knowledge as traditional intellectual property by defining indigenous knowledge systems components, in relation to the Copyright Act 1978, as 'traditional works'; Designs Act, 1993, as 'traditional designs'; Performers' Protection Act, 1967, as 'traditional performances'; and Trade Marks Act, 1993, as 'traditional terms and expressions'.

51 The Bill also defines indigenous cultural expressions almost identically to the WIPO Draft Articles on TCEs.

52 Having said this, there are concerns that the Bill places too much control over the royalties and financial benefits accruing from indigenous knowledge, which are to be deposited in National Trust Fund for Traditional Intellectual Property in the hands of the Registrar, without incorporating any obligation for the Registrar to apply the funds for the benefit of indigenous communities.

currently living within the borders of the Republic, or who historically lived in the geographic area currently located within the borders of the Republic'.
This definition has been heavily criticised for being too broad and imprecise. The reference to communities which historically lived within the Republic is commendable as it seeks to recognise emigrant communities. However, there are no discernible limitations on groups qualifying as indigenous communities. As one expert remarked, 'any community of people in South Africa, including the residents of a golf estate, the members of a church, a rugby union, to give but a few examples, can subjectively decide that a particular work of their choice has an indigenous origin and a traditional character'.[53]

This raises practical concerns because the competent authorities have no extra-territorial jurisdiction to deal with emigrant 'indigenous communities' now domiciled in neighbouring countries. The challenges that arise in this context will be analysed in the following section.

While the criticisms have merit, one interesting aspect of the IPLAB is that it initiates the concept of a community protocol. In terms of the IPLAB, a 'community protocol' means:

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

It is not a pre-requisite for protection that an indigenous community establish a community protocol. If a community applies for its TCEs to be entered into the database of traditional intellectual property,[54] the application must be accompanied by the protocol.[55] Where a community protocol does exist, any

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53 Dean 'Submissions in respect of the Intellectual Property Laws Amendment Bill' (2010).

54 Entry into the database is not a perquisite for protection under the Bill.

55 There are problems around South Africa's approach of creating a pre-emptive database of traditional intellectual property while purporting to grant exclusive rights for the same content as 'traditional works' under the Copyright Act. This highlights a lack of appreciation of the

attempt to seek the community's prior informed consent, or negotiate mutually agreed terms and benefit-sharing agreements, must be conducted pursuant to the protocol.[56] Community protocols are of limited application in the IPLAB's most recent form. This concept could be expanded to make identification and beneficiation of indigenous communities more workable.

POTENTIAL CONFLICTS BETWEEN THE ARIPO AND SOUTH AFRICAN APPROACHES

South Africa is not a member of ARIPO, and not a signatory to the Swakopmund Protocol. However, the country shares several traditional groupings and a plethora of TCEs with neighbouring ARIPO states. In the context of regional TCEs, South Africa's non membership of ARIPO raises enough challenges, but the country's insistence on using the conventional intellectual property system for the protection of TCEs complicates matters further. This section will identify and critique some of these challenges.

The Swakopmund Protocol leaves the management of rights in TCEs to competent national authorities.[57] A party wishing to make use of TCEs would require the acquiescence of the relevant competent authority. However, the question arises: where the party wishes to utilise a certain expression of folklore being part of the national heritage of several countries, to the competent authority of which country would a user have to turn? The Protocol does not specify this, although it does provide that where a dispute arises, ARIPO will mediate.

This may provide an adequate solution where the countries sharing the regional TCEs are all signatories of the Protocol. What would the situation be, however, where one of the countries is not? This is a very likely scenario given that South Africa is not a member of ARIPO while it shares several traditional communities with neighbouring countries. In addition, South Africa's status of economic hegemony in Southern Africa means that users are more likely to seek the use of regional TCEs in South Africa than in neighbouring countries that share

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public domain, a fundamental concept in intellectual property law.

56 IPLAB s 5.

57 Swakopmund Protocol ss 3 and 22.

regional TCEs with South Africa.

By way of illustration, South Africa shares regional TCEs with Zimbabwe, which is a signatory to the Swakopmund Protocol, in the form of Ndebele artefacts. Factors such as per capita income and demand may influence the decision of an international firm to market their products in South Africa, using Ndebele TCEs in the advertising campaign. Such a firm would be likely to seek permission from the national competent authority in South Africa.[58] The IPLAB makes no provision for transnational distribution of benefits,[59] and therefore, in such a scenario, the Zimbabwean Ndebele community would apparently have no recourse.

The IPLAB appears to make an attempt to cater for this dilemma by providing vague provisions on a procedure whereby the minister may confer the status of indigenous community under the IPLAB to groups from other countries. This is subject to the group in question being recognised as an indigenous community in its home country.[60]

The problem with this approach is that it is at odds with the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). South Africa's insistence on using the conventional intellectual property system to protect TCEs, means that the Bill must be TRIPS compliant. The most fundamental principle in the multilateral trading system, and indeed in TRIPS, is arguably the most favoured nation (MFN) doctrine. The MFN principal requires that, with regard to intellectual property, any advantage, favour, privilege, or immunity granted by South Africa to any other country must immediately and unconditionally be accorded to the nationals of all members of the World Trade

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58 The requisite national competent authority that the IPLAB proposes creating is the National Council for Traditional Intellectual Property. The council will consist of twelve members who may serve for a period of three years, renewable.

59 The Bill proposes the creation of a National Trust fund for Traditional Intellectual Property to function as a fund for dealing with income related to traditional terms and expressions. It would receive and administer all monies payable in respect of the use of traditional terms and expressions. No provision is made for extra-territorial distribution.

60 This procedure is described in ss 28N, 43 K and 53K of the IPLAB. The relevant provisions are entitled 'Compliance with international arrangements'. This heading is ironic given that the said provisions most likely fall short of complying with the TRIPS Agreement as will be explained below.

Organisation (WTO).[61]

Therefore, if indigenous community status were given to the Zimbabwean Ndebele community, for example, failure to immediately and unconditionally confer the same status to the citizens of all WTO members would result in a breach of the MFN principle. Since the granting of indigenous community status is in any event subject to conditions and ministerial discretion, it is doubtful whether this aspect of the IPLAB would satisfy TRIPS. Had South Africa opted to follow a *sui generis* approach to the protection of TCEs instead of attempting to force it within the framework of the intellectual property statutes, it would have been unnecessary to consider TRIPS compliance.

CONCLUSION

The protection of TCs gives rise to many challenges, particularly in the context of regional TCEs. The Swakopmund Protocol attempts to address some of these but as with all international instruments, implementation at national level is key. Although South Africa is not a member of ARIPO or signatory to the Protocol, the country shares common indigenous communities with various ARIPO member states.

The President's decision to refer the IPLAB back to parliament provides an opportunity to reconsider and address numerous issues. With specific regard to regional TCEs, some recommendations are proposed below.

South Africa should consider becoming a signatory to the Swakopmund Protocol or concluding a mutual recognition agreement with ARIPO in the field of TCEs. The IKS policy indicates an awareness of regional TCE issues on the part of cabinet. The policy provides that trans-boundary issues can be regulated by means of bilateral and multilateral treaties.[62]

Even if South Africa were to sign an international instrument with ARIPO to cater for regional TCEs, TRIPS compliance would remain an issue. As explained above, this is due to South Africa's intellectual property-based approach. The

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61 TRIPS Agreement art 4.

62 Indigenous Knowledge Systems Policy n 40 above at 28.

country should consider substituting this with a *sui generis* system.

Greater clarity in the identification of community representatives is needed at both national and ARIPO levels. South Africa's community protocols could serve as a starting point. The use of community protocols could be useful in addressing the ambiguity in the Swakopmund Protocol around how to identify communities and their representatives for the purposes of beneficiation.

In this regard, South African policymakers should engage in wider consultations and awareness-raising activities with indigenous communities. During this process, traditional groupings should be encouraged to submit detailed community protocols that expressly cater for regional TCEs. The submission of these documents should be a prerequisite for protection under the Bill.

Reforms are required at national and regional level if indigenous communities are to benefit from efforts to safeguard regional TCEs from misappropriation. The ideas advanced in this paper are a starting point.