



# AEIP – Activity 2 Technology exchange – learning activity

Traditional knowledge protection  
Case study



# **AEIP – Activity 2 Technology exchange – learning activity**

## Report

Case study on Traditional Knowledge Protection – Activity 2 AEIP

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# 1 Introduction

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During their first meeting, the AEIP's Community of Practice of Technology Transfer Organisations, defined a roadmap for the duration of the AEIP pilot. The CoP during the Marseille event in 2019, stressed upon the many barriers and limits to technology exchange between Africa and Europe in the strategy note starting with the price of technologies, the legal framework, absorption capabilities etc. The AEIP team has pre-identified a list of seven topics that could be studied with the CoP to be able to increase collective knowledge and explore the ways to facilitate technology exchange between innovation actors in Africa and Europe. This final case study explores the concept of Traditional Knowledge protection, which, according to the International Labour Organisation (ILO) "is yet to be adequately understood, with many research gaps confronting policy-makers".<sup>1</sup>

The AEIP team has defined a number of research questions that we aim to answer in this study:

- What is the definition of the concept of Traditional Knowledge?
- What are different approaches to protecting Traditional Knowledge?
- What types of mechanisms have been developed or implemented that offer Traditional Knowledge protection on global, regional, and national level?
- How effective are these mechanisms in offering protection to local communities and indigenous peoples?
- What are the challenges encountered in the implementation of Traditional Knowledge protection mechanisms?
- What are the main recommendations to policymakers to further Traditional Knowledge protection?

In terms of research methods, the AEIP team has conducted a desk study into the body of literature around Traditional Knowledge (TK) and TK protection, which has steadily increased over the past two decades, as well as policy documentation of (inter)governmental organisations implementing or developing TK protection mechanisms.

Following initial desk study and the development of a concise overview of national, regional, and national protection mechanisms, a selection has been made of two TK protection mechanisms already under implementation on the African continent. This serves to identify specific challenges in the field of TK protection, and formulate lessons learned and recommendations.

The case study is divided into the following sections. Chapter 1.1 presents an introduction into the background of Traditional Knowledge protection. Chapter 1.2 provides insights into the definitions of the most important concepts. In the following Chapter, 1.3, the approaches to TK protection are summarized and an overview is provided of some of the main global, regional and national TK protection mechanisms. Of this list of mechanisms, we have selected a regional instrument, the Swakopmund Protocol, and a national instrument, the Zambian Act, for deep dives. These deep

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<sup>1</sup> Eds. Ariell Ahearn, Martin Oelz and Rishabh Kumar Dhir (2019), Indigenous peoples and climate change: Emerging Research on Traditional Knowledge and Livelihoods, ILO PRODOC, available at: [https://www.ilo.org/global/topics/indigenous-tribal/publications/WCMS\\_686780/lang--en/index.htm](https://www.ilo.org/global/topics/indigenous-tribal/publications/WCMS_686780/lang--en/index.htm)



dives are presented in Chapter 1.4. Conclusions and recommendations based on this case study is presented in Chapter 1.5.

## 1.1 Background of Traditional Knowledge Protection

In 2019, the United Nations Permanent Forum on Indigenous Issues underlined the relevance of traditional knowledge for indigenous peoples and local communities:

*“There is a growing appreciation of the value traditional knowledge. Traditional knowledge is valuable not only to those who depend on it in their daily lives, but to modern industry and agriculture. Traditional knowledge about land and species conservation and management and revitalization of biological resources conservation is grounded in the daily lives and practices of indigenous peoples and their close understanding of their environments cultivated over thousands of years.”<sup>2</sup>*

Local and indigenous communities have used traditional knowledge for centuries, applied to a wide variety of sectors. Its use was for a long time regulated through the communities that applied the knowledge, but globalisation and commercialisation of resources meant, according to one IP Consultant, that TK has become *“increasingly vulnerable to misappropriation and misuse by third parties [which is] why holders of traditional knowledge and many international policymakers are calling for new policies and laws in this area”*.<sup>3</sup>

One of the first cases of measurements for the protection of traditional knowledge was the Convention on Biological Diversity (CBD), signed in 1992/1993. Amongst others, it set out rules around the fair and equitable sharing of benefits from genetic resources, including for local communities that provided traditional knowledge or biodiversity resources.<sup>4</sup> Since the CBD, other mechanisms have been put in place to protect traditional knowledge and the debate around the benefits of traditional knowledge and the necessary protection has become more prominent. It has been widely recognized in academic literature and by stakeholders, including by the World Intellectual Property Organization (WIPO), that the criteria for inventions under the classical mechanisms for IP protection is inadequate for the protection of Traditional Knowledge.

Another prominent debate in the field of TK protection has been that surrounding protection of Indian medicinal formulations. Around the year 2001, it was estimated that “2,000 patents relating to Indian medicinal systems were being erroneously granted by patent offices around the world”.<sup>5</sup> The response has been a Traditional Knowledge Digital Library (TKDL), which contains 34 million pages of formatted information on some 2,260,000 medicinal formulations in multiple languages,

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<sup>2</sup> The United Nations Permanent Forum on Indigenous Issues (2019), Backgrounder – Traditional Knowledge, available at: <https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2019/04/Traditional-Knowledge-backgrounder-FINAL.pdf>

<sup>3</sup> Dr Marisella Ouma (2017), Traditional Knowledge: the challenges facing international lawmakers, WIPO Magazine, available at: [https://www.wipo.int/wipo\\_magazine/en/2017/01/article\\_0003.html](https://www.wipo.int/wipo_magazine/en/2017/01/article_0003.html)

<sup>4</sup>Convention on Biological Diversity, What the Convention says about Traditional Knowledge, Innovations and Practices, available at: <https://www.cbd.int/traditional/what.shtml#:~:text=%2F%2F%207.6.2010-.What%20the%20Convention%20says%20about%20Traditional%20Knowledge%2C%20Innovations%20and%20Practices,sustainable%20use%20of%20biological%20diversity%22>

<sup>5</sup> Unknown author (2011), Protecting India’s Traditional Knowledge, WIPO Magazine, available at: [https://www.wipo.int/wipo\\_magazine/en/2011/03/article\\_0002.html](https://www.wipo.int/wipo_magazine/en/2011/03/article_0002.html)



and which has led to the withdrawal of numerous granted patents in Europe.<sup>6</sup> While the issue of TK protection has been taken up in global agreements such as the Agreement on Trade-related Aspect of Intellectual Property Rights (TRIPS, developed in the framework of the WTO) an overarching global protection mechanisms is still lacking.<sup>7</sup>

## 1.2 Definitions of Traditional Knowledge protection

One of the most often used and cited definition of traditional knowledge is provided by the World Intellectual Property Organisation (WIPO):

Traditional knowledge (TK) is knowledge, know-how, skills and practices that are developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity.<sup>8</sup>

Traditional knowledge (TK) as a broad concept includes “cultural heritage, practices and knowledge systems of indigenous peoples and local communities”. The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), elaborates that TK as “broad subject matter” refers to both the contents of knowledge itself held by indigenous peoples and local communities as well as “traditional cultural expressions”. The term traditional cultural expressions (or expressions of folklore, EoF) indicates “tangible and intangible forms in which TK and cultures are expressed, communicated or manifested”.<sup>9</sup> The WIPO and the IGC have become increasingly concerned that TK is not being protected properly and that this form of knowledge is being used and patented by third party organisations without prior permission from traditional and indigenous communities which hold the TK in question. This means that benefits gained from using the TK are not shared with the communities in which the TK originated and is used.

Protecting TK can involve various approaches and mechanisms, though much discussion exists on the effectiveness of those approaches (as can be seen in the following sections in this case). WIPO and the IGC recognize two types of traditional knowledge protection: **defensive protection** and **positive protection** of traditional knowledge. The definitions used are provided in the boxes below and approaches to implementing TK protection frameworks are described in the next section.

**Defensive protection** aims to stop people outside the community from acquiring intellectual property rights over traditional knowledge. India, for example, has compiled a searchable database of traditional medicine that can be used as evidence of prior art by patent examiners when assessing patent applications. This followed a well-known case in which the US Patent and Trademark Office granted a patent (later revoked) for the use of turmeric to treat wounds, a property well known to traditional communities in India and documented in ancient Sanskrit

<sup>6</sup> Unknown author (2011), Protecting India’s Traditional Knowledge, WIPO Magazine, available at: [https://www.wipo.int/wipo\\_magazine/en/2011/03/article\\_0002.html](https://www.wipo.int/wipo_magazine/en/2011/03/article_0002.html)

<sup>7</sup> WIPO (2008), TRIPS Background and the current situation, available: [https://www.wto.org/english/tratop\\_e/trips\\_e/art27\\_3b\\_background\\_e.htm](https://www.wto.org/english/tratop_e/trips_e/art27_3b_background_e.htm)

<sup>8</sup> WIPO, Traditional Knowledge, available at: <https://www.wipo.int/tk/en/tk/>

<sup>9</sup> WIPO (2013), Intellectual Property, Traditional Knowledge and Traditional Cultural Expressions/Folklore: A Guide for Countries in Transition, available at: [https://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_transition\\_9.pdf](https://www.wipo.int/edocs/pubdocs/en/wipo_pub_transition_9.pdf)



texts. Defensive strategies might also be used to protect sacred cultural manifestations, such as sacred symbols or words from being registered as trademarks.<sup>10</sup>

**Positive protection** is the granting of rights that empower communities to promote their traditional knowledge, control its uses and benefit from its commercial exploitation. Some uses of traditional knowledge can be protected through the existing intellectual property system, and a number of countries have also developed specific legislation. However, any specific protection afforded under national law may not hold for other countries, one reason why many indigenous and local communities as well as governments are pressing for an international legal instrument.<sup>11</sup>

### 1.3 Mechanisms and approaches to implementing TK

The following section describes the main regulatory and legal approaches used to protect traditional knowledge. Some of the key points from academic and expert debates surrounding common approaches are summarised here, followed by an examination of global, regional, and national mechanisms in place to protect TK. Due to the scope of the case study, this list is non exhaustive.

#### 1.3.1 Approaches to implementing TK

In terms of mechanisms for implementing defensive and positive protection, literature points to various possible approaches within existing international and national regulatory and legal frameworks. In one article on traditional knowledge protection in Africa, the author, points to three **types of defensive TK protection**: the use of databases to identify prior art, secrecy, and the imposition of a disclosure requirement as a condition for acquiring IP rights.<sup>12</sup> The author goes on to describe weaknesses surrounding these approaches.

- For instance, using databases to identify prior art forms can allow a form of TK to be stored in a database but does not protect it from being used by commercial actors or patenting. This assumes that TK can be registered in a database, in current regulatory frameworks tends to require a copy or proof of the existence of that piece of TK. In the case of intangible heritage or spoken or sung TK this is a challenge in protecting the use of that piece of TK. Registering a form of TK in a database is also a first step in IP protection, it does not necessarily mean there will be any “return for the holders of TK”. Finally, if the database in which a form of TK is stored is in the public domain, the holders of TK can not apply for intellectual property protection.

<sup>10</sup> WIPO, Traditional Knowledge and Intellectual Property – Background Brief, available at: [https://www.wipo.int/pressroom/en/briefs/tk\\_ip.html](https://www.wipo.int/pressroom/en/briefs/tk_ip.html)

<sup>11</sup> WIPO, Traditional Knowledge and Intellectual Property – Background Brief, available at: [https://www.wipo.int/pressroom/en/briefs/tk\\_ip.html](https://www.wipo.int/pressroom/en/briefs/tk_ip.html)

<sup>12</sup> Ferris, L, (2004), Protecting Traditional Knowledge in Africa: Considering African approaches, AFRICAN HUMAN RIGHTS LAW JOURNAL, available at: <https://www.corteidh.or.cr/tablas/R21556.pdf> .



- Secrecy in turn is difficult to maintain when it concerns TK which comes from a culture or community; how does one keep such TK a secret when by definition, it is passed down by and to multiple individuals?<sup>13, 14</sup>
- At the time of writing (2004), the author indicates that consent to use materials or source disclosure provisions are not mandated by the World Trade Organisation Trade-Related Intellectual Property Rights (TRIPS) Agreement.

For **positive TK protection**, different types of intellectual property rights-based approaches are discussed, including trade secret protection, geographical indication (and registration) of forms of TK, and the application of patent law. Ferris also indicates that countries and regions started to turn to the use of contract law to arrange the protection (defensive and positive) of TK.

The main forms of positive and defensive TK protection and the main discussions associated with them are treated briefly in turn below.

Concerning **IP protection and Intellectual Property Rights (IPR)**, Ferris indicates that IP rights are usually designed to protect a person's creative or intellectual output. This conception of IP rights conflicts with the often collectively held nature of TK. Beyond that the widespread, ubiquitous nature of TK in cultures makes it difficult to register and apply IP rights to. Furthermore, the novelty criteria that is central in many IP protection mechanisms is essentially in conflict with Traditional Knowledge.<sup>15</sup> Other authors point to this conflict in how traditional knowledge works and the individual orientated, evidence-based approach of IPR protection systems<sup>16, 17</sup>.

**Trade secret protection** could be applied to certain forms of TK, such as those that are not registered in the public domain, for which there is written/explicit evidence, and which are held by a particular (more closed) community or group. Making use of knowledge under trade secret protection in principle offers royalties when the "secret" in question is used. This implies the knowledge must have commercial value, must not be in the public domain, and subject to "reasonable efforts to maintain secrecy"<sup>18</sup>. In practice, maintaining such secrecy is difficult when looking at TK as it tends to be shared in a community and passed down through generations.

**Geographical indications and registrations** of products or pieces of knowledge can be applied to various products. (For instance, Gouda cheese may only come from Gouda in the Netherlands.) This mechanism is often used to protect goods from a given area. However, in the context of TK, affiliated knowledge with a given geographical area is often challenging (consider here again non-

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<sup>13</sup> Ferris, L, (2004), Protecting Traditional Knowledge in Africa: Considering African approaches, AFRICAN HUMAN RIGHTS LAW JOURNAL, available at: <https://www.corteidh.or.cr/tablas/R21556.pdf> .

<sup>14</sup> Kurnilasari, D. T., Yahanan, A., and Rahim, R.A., (2017), Indonesia's Traditional Knowledge Documentation in Intellectual Property Rights' Perspective, Sriwijaya Law Review, Vol2. Iss1.114.pp110-130.

<sup>15</sup> WIPO (2013), Intellectual Property, Traditional Knowledge and Traditional Cultural Expressions/Folklore: A Guide for Countries in Transition, available at: [https://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_transition\\_9.pdf](https://www.wipo.int/edocs/pubdocs/en/wipo_pub_transition_9.pdf)

<sup>16</sup> Kurnilasari et. Al;

<sup>17</sup> Antons, C., (2010), Sui Generis Protection for Plant Varieties and Traditional Knowledge in Biodiversity and Agriculture: The International Framework and National Approaches in the Philippines and India, The Indian Journal of Law and Technology, (89), 2010.

<sup>18</sup> Otswang'o, F., (2011), Protecting Traditional Knowledge and Associated Genetic Resources in Kenya: What A Community Needs To Know, Institute of Economic Affairs, available at: <https://www.ieakenya.or.ke/downloads.php?page=ISSUE-31-2011.pdf> .





explicit forms of TK). TK also includes genetic and plant materials and while these could call under geographical indication rules, forms of TK which have become more generic or commonly used are difficult to register and protect in this way.

**Patent laws** require that the object/item being patented adhere to three criteria: novelty, non-obviousness, and usefulness. Ferris indicates that requirements concerning utility are usually easy to satisfy as applications of TK can usually be demonstrated. However, novelty and non-obviousness are more difficult explains the author, because forms of TK are often not new (having been passed down for generations) and may have passed into common usage and thereby are no longer “non-obvious”.

Ferris describes **contract law** as a more practical way to positively protect TK. These state the duties and responsibilities for all parties involved. Contractual cooperation agreements have been made between research organizations and indigenous people or traditional communities in the past, where organisations make use of a given substance or piece of knowledge and share returns with the local community. A challenge here however is ensuring enforcement of agreements made and the difference in actual bargaining power between signatory parties.<sup>19</sup>

Other authors such as Otswang'o (2011) and Swederiska (2006) cite approaches such as “**customary law**” to protect TK. Otswang'o indicates that “customary laws and practices cut across every aspect of social life including transaction and management of property, crimes, marriages and divorce, sanctioning and enforcement in the community”. The WIPO indicates is difficult to define but often comes down to: “First, the idea of “customary law” that is under consideration concerns the laws, practices and customs of indigenous peoples and local communities. It is not, for instance, the same idea as “customary law” in the international context. “Customary international law” has a more precise and technical meaning in the realm of rules governing relations between distinct States, referring to those aspects of international law that are based on custom or practice between States (...). Customary law is, by definition, intrinsic to the life and custom of indigenous peoples and local communities.”<sup>20</sup> Swiderska indicates that some indigenous communities (from Peru, Panama, India, Kenya and China), feel legislation should go further and be based on customary law<sup>21</sup>, indigenous values and ancestral cultural habits such as collective knowledge sharing and often in intangible forms. This clashes with the principles on which western legislation on knowledge protection is founded, where the individual and evidence of the knowledge are key elements. Furthermore, while WIPO acknowledges the concept of customary law, it is a work in progress to define in accepted, legal terms. However, customary law is often not recognised by national legislation<sup>22</sup>, a further challenge for more indigenously focused traditional knowledge protection approaches.

**“Sui generis” models** of TK protection have often been mentioned in discussions on how best to regulate and legislate this form of knowledge. Experts and policy makers suggest that “sui generis” or law “of its own kind” is required to regulate and protect TK. They argue that tailor made IPR

<sup>19</sup> Ferris, L, (2004), Protecting Traditional Knowledge in Africa: Considering African approaches, AFRICAN HUMAN RIGHTS LAW JOURNAL, available at: <https://www.corteidh.or.cr/tablas/R21556.pdf> .

<sup>20</sup> WIPO,(2013),CUSTOMARY LAW, TRADITIONAL KNOWLEDGE AND INTELLECTUAL PROPERTY: AN OUTLINE OF THE ISSUES, (p2), [https://www.wipo.int/export/sites/www/tk/en/resources/pdf/overview\\_customary\\_law.pdf](https://www.wipo.int/export/sites/www/tk/en/resources/pdf/overview_customary_law.pdf).

<sup>21</sup> Swiderska, K., (2006), Protecting Traditional Knowledge: A framework based on Customary Laws and Bio-Cultural Heritage, Paper for the International Conference on Endogenous Development and BioCultural Diversity, 3–5 October 2006, Geneva.

<sup>22</sup> (Idem.)



legislation which acknowledges the different forms of TK with the aim of also allowing indigenous cultures to benefit from commercialised use of that knowledge could be a way forward. Indeed, Kenya designed a draft sui generis framework for genetic resource protection<sup>23</sup>. The aim of this framework was to protect and preserve TK related to genetic resources and to share the access and benefits of this TK being used by other parties<sup>24</sup>.

While the discussion above draws on academic and theoretical discussions and debates on approaches to TK protection (though with some practical examples woven in), the following sections provide examples of actual legislative mechanisms in place at global, regional, and national levels.

### 1.3.2 Global mechanisms

While the right of indigenous peoples to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions as well as the intellectual property over such knowledge and expressions is increasingly recognized, there are as of yet limited overarching global mechanisms for their protection.<sup>25</sup>

As mentioned in the introduction, some agreements, such as the **Convention on Biological Diversity** (CBD), have taken into account protection of TK on various aspects. A major development, in 2000, was when the World Intellectual Property Organisation established the **Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore** (IGC). In 2009 it agreed to develop international legal instruments to provide effective protection in these areas. The IGC “undertakes text-based negotiations to finalize an agreement on an international level instrument(s) for the protection of traditional knowledge (TK), traditional cultural expressions (TCEs) and genetic resources (GRs).<sup>26</sup> As of the work plan for 2020–2021, the 40<sup>th</sup> meeting of the IGC recommended to the 2019 WIPO General Assembly that it continues to work with the objective of finalizing an agreement on international legal instruments ensuring to balanced and effective protection of genetic resources (GRs), TK and traditional cultural expressions.<sup>27</sup> In the field of trade, the 2001 Doha Declaration, has mandated the **Trade Related Aspects of Intellectual Property Rights** (TRIPS) Council to “work on the issue of the relationship between the TRIPS Agreement and the UN Convention on Biological Diversity, and at the protection of traditional knowledge and folklore.” This raised questions about TRIPS conflicting with the CBD, however the Council found non-conflicting objectives and purposes in

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<sup>23</sup> Swiderska, K., (2006), Protecting Traditional Knowledge: A framework based on Customary Laws and Bio-Cultural Heritage, Paper for the International Conference on Endogenous Development and BioCultural Diversity, 3–5 October 2006, Geneva.

<sup>24</sup> Otswang'o, F., (2011), Protecting Traditional Knowledge and Associated Genetic Resources in Kenya: What A Community Needs To Know, Institute of Economic Affairs, available at: <https://www.ieakenya.or.ke/downloads.php?page=ISSUE-31-2011.pdf> .

<sup>25</sup> UN Department of Economic and Social Affairs Indigenous Peoples (2007), UN Declaration on the Rights of Indigenous Peoples (<https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>)

<sup>26</sup> Assemblies of the Member States of WIPO (2019), Report on the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), available at: [https://www.wipo.int/export/sites/www/tk/en/igc/pdf/igc\\_mandate\\_2020-2021.pdf](https://www.wipo.int/export/sites/www/tk/en/igc/pdf/igc_mandate_2020-2021.pdf)

<sup>27</sup> WIPO (2019), Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore: Fortieth Session, available at: [https://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_40/wipo\\_grtkf\\_ic\\_40\\_decisions.pdf](https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_40/wipo_grtkf_ic_40_decisions.pdf)



terms of dealing with biological diversity in relation to the CBD.<sup>28</sup> Furthermore, in 2009 144 countries signed the **United Nations Declaration on the Rights of Indigenous Peoples**, which states that “Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions [...] [and] have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.” A number of countries with large numbers of indigenous peoples (Australia, New Zealand, the United States) that voted against this Declaration have since come out to support the Declaration.

### 1.3.3 Regional mechanisms

While a debate is ongoing at the international level about appropriate instruments and standards for the protection of traditional knowledge, regional and national processes have been proceeding in parallel in the African continent.<sup>29</sup>

One major initiative is undertaken by the **African Regional Intellectual Property Organization (ARIPO)**, a regional organization that facilitates cooperation among its Member States on intellectual property matters. ARIPO consists of 20, mostly English speaking, Member States. ARIPO has made significant progress regarding intellectual property. **The Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore** within the Framework of the ARIPO was adopted by the Diplomatic Conference of ARIPO at Swakopmund (Namibia) on August 9, 2010 and amended on December 6, 2016. At this point, the Protocol counts the following adherent states: Botswana, Gambia, Liberia, Malawi, Namibia, Rwanda, Zambia and Zimbabwe. Within the preamble of the Swakopmund Protocol, [ARIPO](#) addresses the particular importance of Traditional Knowledge as it recognizes “*the intrinsic value of traditional knowledge, traditional cultures and folklore, including their social, cultural, spiritual, economic, intellectual, scientific, ecological, agricultural, medical, technological, commercial and educational value*” and that “*traditional knowledge systems, traditional cultures and folklore are diverse frameworks of ongoing innovation, creativity and distinctive intellectual and creative life that benefit local and traditional communities and all humanity*”.<sup>30</sup>

Some literature however points at shortcomings of the Swakopmund Protocol, arguing that while it “*recognizes ownership of communities of their expressions of folklore, the control of third party use of expressions of folklore is still endowed on ARIPO States and their national competent authorities*.”<sup>31</sup> A similar initiative has been implemented by the **Organisation Africaine de la Propriété Intellectuelle (OAPI)**, which has 17 Member States, mostly French-speaking countries. However, desk study into available documentation about this initiative has yielded fewer insights.

<sup>28</sup> WTO (2006), The Relationship between the TRIPS Agreement and the Convention on Biological Diversity: Summary of Issues Raised and Points Made, available at:

[https://www.wto.org/english/tratop\\_e/trips\\_e/ta\\_docs\\_e/4\\_ipcw368rev1\\_e.pdf](https://www.wto.org/english/tratop_e/trips_e/ta_docs_e/4_ipcw368rev1_e.pdf)

<sup>29</sup> Unknown author (2010), A new dawn for custodians of TK in Africa, WIPO Magazine, available at:

[https://www.wipo.int/wipo\\_magazine/en/2010/06/article\\_0008.html](https://www.wipo.int/wipo_magazine/en/2010/06/article_0008.html)

<sup>30</sup> Inês Monteiro Alves (2019), The Protection of Traditional Knowledge In Africa, Inventa International (<https://inventa.com/en/news/article/430/the-protection-of-traditional-knowledge-in-africa>)

<sup>31</sup> Enyinna S. Nwauche (2014), The Swakopmund Protocol and the Communal Ownership and Control of Expressions of Folklore in Africa, The Journal of World Intellectual Property (<https://www.kiip.re.kr/webzine/1501/library/pdf/4.pdf>)



#### 1.3.4 National mechanisms

A number of approaches have been taken in African countries to legally protection traditional knowledge. Some examples of national mechanisms include the following.

In South Africa different steps have been taken during the last decades to protect TK and indigenous communities. For example, **a co-operation agreement was established between the Khomani San people of Southern Africa and South Africa's Council for Scientific and Industrial Research (CSIR)**. In 2002, the CSIR and the San Council (representing the San people), reached a memorandum of understanding which formally acknowledged the right of the San people as 'custodians of the ancient body of traditional knowledge' and the role of the CSIR as an organisation which uses an indigenous plant from which to extract anti-obesity properties. This particular plan is important to the San people to sustain them when they have limited access to food and water.<sup>32</sup> Furthermore, in 2013, South Africa amended its Intellectual Property Law to include the recognition and protection specific traditional and indigenous expressions<sup>33</sup>.

In Botswana, the Industrial Property Act of 2010 includes the definition and protection of traditional knowledge. Traditional knowledge is defined as "an idea, knowledge, practice, use or invention, written or unwritten which, may be associated with biological diversity, cultural, traditional, or spiritual belief or value of a group of people"<sup>34</sup>. This act, (coming into force in 2012), aims to protect TK from use by unauthorised third parties and allows leaders or representatives of indigenous communities to register their TK with the Office of the Registrar of Companies and Intellectual Property. The owner of the TK must clarify the nature and scope of the TK so that permits can be assigned to third party users. However, literature indicate that this system does not consider the nature of TK and indigenous communities sufficiently<sup>35</sup>.

In 2016, both Kenya and Zambia introduced national acts on the protection of TK. The Zambian Act is explained in further detail through an in-depth case study later in this report. The **Kenyan act, is the Protection of Traditional Knowledge and Cultural Expressions Act, No.33 of 2016**. This act established a sui generis system for protection traditional knowledge and traditional cultural expressions. The act aims to protect and promote traditional knowledge and forms of expression and does so by granting traditional communities more control over the use of their cultural expressions and knowledge, particularly if the knowledge in question has economic value or is especially culturally significant. The Act in essence sets up a new form of IPR, where permits must be received by organizations wanting to make use of TK.<sup>36</sup> The Kenyan Act indicates that a digital database will be established to register traditional forms of Kenyan knowledge. Some individuals indicate that while this Act forms a good first step, its effectivity will rely on the robustness and

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<sup>32</sup> Ferris, L, (2004), Protecting Traditional Knowledge in Africa: Considering African approaches, AFRICAN HUMAN RIGHTS LAW JOURNAL, available at: <https://www.corteidh.or.cr/tablas/R21556.pdf> .

<sup>33</sup> Inês Monteiro Alves (2019), The Protection of Traditional Knowledge In Africa, Inventa International, available at: <https://inventa.com/en/news/article/430/the-protection-of-traditional-knowledge-in-africa>

<sup>34</sup> WIPO, Traditional Knowledge Laws: Botswana, available at: [https://www.wipo.int/tk/en/databases/tklaws/articles/article\\_0001.html](https://www.wipo.int/tk/en/databases/tklaws/articles/article_0001.html)

<sup>35</sup> Muzah, G., (2016), Legal Protection of Traditional Knowledge (chapter 8), WTO, available at: [https://www.wto.org/english/tratop\\_e/trips\\_e/colloquium\\_papers\\_e/2016/chapter\\_8\\_2016\\_e.pdf](https://www.wto.org/english/tratop_e/trips_e/colloquium_papers_e/2016/chapter_8_2016_e.pdf) .

<sup>36</sup> Naidoo, U., (2019), A Comparative Assessment of South Africa's Proposed Legislation to Protect Traditional Knowledge (Thesis), Faculty of Law, University of Pretoria, (supervisor: Honorary Professor C.K Job).



commitment of institutions to implement and enforce the legal provisions. Furthermore, the issue of cross-border TK remains a challenge which one single legal framework cannot remedy.<sup>37</sup>

## 1.4 Examples of implementation of the concept

This section provides a few deeper looks into approaches to implementing TK protection mechanisms. Where the preceding section described types of mechanisms in place, this section delves more deeply into the mechanisms, experiences, strengths and weaknesses across a series of protection mechanisms. Through 2 case studies, this section describes:

1. A regional level mechanism in practice, “The **Swakopmund Protocol** on the Protection of Traditional Knowledge and Expressions of Folklore” signed by a number of African countries,
2. A national level mechanism: the case of **Zambia** (as a signatory to the protocol we will investigate how the regional level rules are implemented nationally).

### 1.4.1 Regional mechanism example: The Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore within the Framework

#### *Background of the Swakopmund Protocol*

The Swakopmund Protocol is a regional sui generis instrument (see 1.3.1) developed by the African Regional Intellectual Property Organization (ARIPO) for the protection of Traditional Knowledge and Expressions of Folklore (EoF). The Swakopmund Protocol was signed in 2010 by 9 member states of ARIPO and entered into force in 2015. ARIPO was founded in 1976 and initially focused on patents and industrial designs, complemented later by trademarks and service marks. TK and EoF were not covered initially, however their increasing misappropriation prompted this initiative. According to the ARIPO Office, knowledge from communities can have a lot of potential benefits of TK protection not addressed by the traditional patent system. For example, the situation was that a foreign company could come in and patent traditional medicine, while under the current system they would require prior informed consent from that community.

Following a number of fact-finding missions organised by the WIPO regarding the needs and expectations of local communities and indigenous peoples, ARIPO’s Council of Ministers mandated the ARIPO office to take initiative for the protection of TK, in coordination with the WIPO. At the Sixth Session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), established under the auspices of the WIPO, the ARIPO countries argued for a regional protection mechanisms, since much of the TK in Africa is trans-boundary. The development process of the Swakopmund Protocol included national and regional consultations, expert reviews and technical assistance of the WIPO for the preparation of

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<sup>37</sup> Katiba Institute.org, (2016), Traditional Knowledge and Culture Expressions Act 2016, available at: <http://katibainstitute.org/traditional-knowledge-and-culture-expressions-act-2016/>



a concept paper on legal and policy options. The development by experts took six years, and was done in coordination with OAPI, which developed a similar instrument for the protection of TK.<sup>38</sup>

### *Description of the Protocol*

ARIPO recognizes that a “growing interest in TK, GRs and EoF has led to cases of misuse, misappropriation and unauthorized exploitation” in Africa. While local communities and indigenous peoples have generated and maintained this knowledge over many generations, they have received little benefits from its commercialisation by third parties, for instance in the field of medicine. The traditional IP system, as also mentioned in the previous section of this study, has not been well suited to protect this knowledge due to amongst others originality and novelty requirements nor do they recognize collective ownership of communities. This made the IP system inadequate for the protection of Traditional Knowledge of local communities. The Swakopmund Protocol seeks to offer this protection, as is listed in the objectives set out in ARIPO’s explanatory guide on the Protocol:

- “It affirms the principle that local and traditional communities are the beneficiaries and rightful holders of their TK and EoF
- It provides legal protection against the unlawful exploitation, misappropriation and infringement of knowledge beyond its traditional context
- It empowers the holders with legal certainty to exercise and manage their inalienable rights
- It facilitates for the holders the utilization of their knowledge for socio-economic development and wealth creation
- It prevents bioprospecting without prior informed consent and mutually agreed terms and facilitates fair and equitable benefit-sharing mechanisms
- It preserves cultural heritage and diversity and enables ARIPO to register knowledge that is trans-boundary and multicultural in nature.”<sup>39</sup>

The Protocol affirms the principle that local communities are the rightful holders of their own TK and may exercise their rights over their knowledge, both through positive and defensive protection (see 1.3 for the explanation of positive and defensive protection) for their TK and EoF. The Protocol is subdivided in the following four parts: (I) on preliminary provisions, which includes the purpose of the protocol and definitions, (II) on the protection of TK and (III) on the protection of Expressions of Folklore (EoF), and finally on (IV) Part IV general provisions.<sup>40</sup> TK and EoF are separated here because according to ARIPO they raise different legal and policy issues, are exploiting in different ways and require different forms of protection.

Part I (Preliminary Provisions) of the Protocol amongst other lays out the purpose of the Protocol, the definitions of TK and EoF and the necessity of the establishment of a national competent

<sup>38</sup> WIPO (2010), WIPO Director General Welcomes Moves to Enhance Protection of Traditional Knowledge & Folklore in Africa, available at: [https://www.wipo.int/pressroom/ja/articles/2010/article\\_0028.html](https://www.wipo.int/pressroom/ja/articles/2010/article_0028.html)

<sup>39</sup> ARIPO Secretariat (2012), Explanatory Guide to the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore, available at: <https://docplayer.net/200020132-Explanatory-guide-to-the-swakopmund-protocol-on-the-protection-of-traditional-knowledge-and-expressions-of-folklore.html>

<sup>40</sup> ARIPO (2010), Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore, available at: <https://www.ceja.ch/images/CEJA/DOCS/Bibliotheque/Legislation/Africaine/Textes%20Communautaires/BC/BC6.pdf>





authority to implement the provision of the Protocol. Part II (Protection of Traditional Knowledge) indicates in which situation TK protection can be extended. The TK must be generated, preserved and transmitted in a traditional and intergenerational context, be distinctively associated with a local or traditional community and be integral to the cultural identity of local or traditional communities. Part I also states that protection of TK and EoF is automatic and not subject to formalities. Part III (Protection of Expressions of Folklore) defines EoF as the products of creative and cumulative intellectual activity and as a characteristic of a community's cultural identity and traditional heritage and maintained by that community according to customary laws and practices. Similarly, protection of EoF are not subject to formalities. Part III also lists against what type of use EoF is protected, amongst others against use and adaptation without knowledge of the community. Part IV (General Provisions) amongst others sets out the ambition of the protocol in terms of sanctions, remedies and enforcement; the contracting states are to ensure accessible and appropriate enforcement and dispute settlement mechanisms. It also designates national competent authorities as the actors tasked with advising and assisting holders of TK.

Following the ratification of the Protocol, as is mentioned under Part IV, it comes into force after three months. However, as is indicated by the interview conducted with the ARIPO Office and other sources, ratification does not yet equal effective protection. The Protocol itself makes this sufficiently clear, by setting out the way to organise protection. For instance, to ensure that TK and EoF are well protected, registration of TK and EoF is important; registration should occur by national competent authorities and the ARIPO Office.<sup>41</sup> The signatory parties are responsible for designating these national competent authorities which then may “maintain registers or other records of the knowledge, where appropriate and subject to relevant policies, laws and procedures, and the needs and aspirations of the traditional knowledge holders concerned.” While the databases can offer extra protection, TK and EoF not included do not lose their rights for protection, according to the Protocol.

The scope of protection, according to the explanatory guide, extends to economic and moral rights. For TK this means a right, through prior informed consent, to allow exploitation, which could be through manufacturing, importing, exporting or selling products related to TK. For EoF the protection this is somewhat different, relating to the nature of the knowledge, and it is protected against misappropriation, misuse and unlawful exploitation. To ensure effective protection however, the interviewee from ARIPO emphasized the proactive role that is expected of national competent authorities in advising communities, advocating for the importance of TK protection and explaining the mechanism and potential benefit. The national competent authorities would also have to take a role in collecting the TK and gathering this in a database so that it can be protected and potentially commercialised. To organise a fair system, the national competent authorities will need to identify which communities are eligible for this type of protection and understand through which channels to gain potential prior and informed consent from communities.

### *Outcomes of the Protocol*

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<sup>41</sup>ARIPO Secretariat (2012), Explanatory Guide to the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore, available at: <https://docplayer.net/200020132-Explanatory-guide-to-the-swakopmund-protocol-on-the-protection-of-traditional-knowledge-and-expressions-of-folklore.html>



The Protocol has entered into force in 2015. As of 2019, the Protocol has eight contracting states: Botswana, The Gambia, Liberia, Malawi, Namibia, Rwanda, Zambia and Zimbabwe. The Protocol offers essential protection for TK and guidance for signatory countries to implement effective protection. The sources indicate however that reaching this level of protection demands further efforts on the part of the ARIPO Office, National governments and the national competent authorities.

The interviewee indicated that a number of countries are still to implement *sui generis* national laws or policies implementing the TK and EoF protection set out in the Swakopmund Protocol. Reasons for this, according include slow bureaucratic processes and a lacking sense of importance of TK protection.

Furthermore, not yet in each case countries have designated national competent authorities been established. The role of the national competent authority is quite essential, as described above. They are responsible for identifying TK and EoF and the processes of gathering prior informed consent from communities or sub-communities of TK holders. Possible institutions to take up this role are IP offices or through cultural institutions. Important also for effective implementation of the Protocol is awareness of the communities on the TK protection mechanism and potential benefits for them. This requires an active role of the national competent authorities to raise awareness and facilitate the use of TK protection.

Similarly, a database for TK and EoF from the side of the ARIPO Office is still under development. Once established, this should provide transparency and create the evidence to protect TK and EoF, but also facilitates translating TK in a way that it could be use by third parties which would have to share benefits with the communities.

### ***Conclusions and reflections***

The Swakopmund Protocol represents one of the most focused protection mechanisms for the protection of TK and EoF. According to the WIPO “The Swakopmund Protocol is an important input into efforts to identify an effective international framework for the protection of TK and folklore”. Established in close consultation with the WIPO and the IGC, the Protocol can support the parallel development of a global protection mechanisms.

While challenges in terms of implementation of the protection measures remain, both on the level of ARIPO and the individual member states, the Protocol offers an important framework and guidance towards effective protection of TK and EoF. National policies or laws are yet to be developed in various cases and national competent authorities designated. Without institutions that can enforce the protection and control misuse or misappropriation of TK and EoF as well as advice and support communities eligible for protection, protection is not effective. The ARIPO Office could fulfil the role of advocating for its member states to sign up and to create further awareness on the protection of traditional knowledge.

Brought up in the interview with the ARIPO office is the importance of more countries joining the Swakopmund Protocol since much of the TK and EoF in the region is transboundary, held by communities that exist in different countries. Protection would not be complete if some of these countries are not signatory to the Protocol and have instigated their own legislation of policy for protection.





Enforcement of the national laws and policies is another essential factor that will determine the success of TK protection. Without the threat that sanctions will be placed on organisations or individuals misappropriating TK, communities will continue to lose out on their rightful benefits.

For the Swakopmund Protocol to be most effective, it must be embedded in a global protection mechanism, currently under development by WIPO but not near its completion. Similarly, other regions must acknowledge the importance of TK protection and offer protections; for instance, as mentioned in the interview with the ARIPO Office, the European patent office could demand disclosure of origins of traditional knowledge.

#### 1.4.2 National mechanism example: The Zambian Act on Protection of Traditional Knowledge, Genetic Resources and Expressions of Folklore, 2016.

##### *Background of the Act*

In 2016, the Zambian Parliamentary Assembly approved the Protection of Traditional Knowledge, Genetic Resources and Expressions of Folklore Act, thereby establishing a framework for traditional knowledge protection for traditional communities.

The WIPO categorises this act as a “sui generis” piece of legislation, that is to say, legislation tailored to a specific topic and context. The act covers traditional knowledge, traditional cultural expressions, and genetic resources, with specific provisions for each of these three areas laid out in different chapters. The act focuses on the issue of regulating and providing benefits for rightsholders (traditional communities), the scope of protection of traditional knowledge forms, and a series of exceptions and limitations for adhering to the other legal provisions.

The rationale behind this legal step is a culmination of factors and reasons. One of the main goals the act aims to achieve is to protect and preserve traditional knowledge as well as to economically empower traditional Zambian communities. The act also sought to implement other relevant regional and international legislation on traditional knowledge protection, including the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore from 2010 and the WTO’s Organisation Trade-Related Intellectual Property Rights Agreement (TRIPS) from 1994. It should be noted as well that in Zambia the political and policy attention for topics such as intellectual property rights is generally high and that, together with other national signatories of the Swakopmund protocol, the political support for IPR rules in Zambia is comparatively higher than in other African countries.

Development of the act appears to have started over 10 years prior. As Talent Ng’andwe explained in a 2005 article, traditional healers and lawyers came together with policy makers to draft a new and better framework for protecting indigenous knowledge and genetic resources. Due in part to the complexity of the Zambian patent system and the nature of traditional knowledge and indigenous communities, the National Institute for Scientific and Industrial Research conducted a situation analysis in nine Zambian provinces to understand how familiar indigenous and traditional



communities were with IPR and property rights.<sup>42</sup> Combined with the establishment of the Swakopmund protocol, and the overall importance attached to IPR in Zambia, this eventually led to the development and implementation of the *Zambian Act on Protection of Traditional Knowledge, Genetic Resources and Expressions of Folklore* in 2016.

### *Description of the 2016 Act*

The Act defines a series of important concepts to traditional knowledge protection, including “folklore” and lists the variety of forms this can take, “traditional context”, and “traditional process of method”. These are included alongside more typical concepts such as traditional knowledge, genetic resources, etc. In this way the act expands but also concretises which practices and knowledge forms are covered by the act.

The Act works using, amongst others, a permit system for traditional knowledge to be used outside of a given traditional community. Article 67(a) indicates that a traditional community has the right to prevent any one form outside the community, using its traditional knowledge outside of the traditional context. The traditional community provide an access agreement and in the event this has been given, a permit may be granted by the *Zambian Patents and Companies Registration Agency (PACRA)*, which is responsible for the enforcement of a series of registration and patent related laws. Conversely, the act also indicates that traditional communities may not allow the use of a traditional knowledge form outside of their community without a valid permit either.

Concerning the registration of traditional knowledge forms, the *Zambian Act* has been tailored to the realities of traditional knowledge. There is no formal requirement to register a piece of traditional knowledge; the law acknowledges that traditional knowledge is protected from the moment of its creation<sup>43</sup>. In the act, registration in the registry is voluntary as a result. In the event that a form of traditional knowledge is registered, the Registrar publishes this piece of knowledge in an *Intellectual Property Journal* for TK protection along with the records of licenses, access agreements and other contracts related to TK protection.

An important feature of this Act is that it also includes enforcement provisions. Any disputes regarding the use of protect TK is heard by PACRA and decisions can be appealed in the High Court. Sanctions for violating the provisions of the Act include going to prison for up to 4 years or a fine of up to 400,000 penalty units (where one penalty unit is equal to approximately 180 kwacha<sup>44</sup>).

### *Outcomes and first reactions*

The law has not been in place for very long and at the time of writing (June 2021), sources indicate that the Registry is not yet publicly available. However, looking in broader terms at the first

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<sup>42</sup> Talent Ng’andwe, (2005), *Zambia moves to protect traditional knowledge*, SciDevNet, available at: <https://www.scidev.net/global/news/zambia-moves-to-protect-traditional-knowledge/>

<sup>43</sup> Article 15(1), *Protection of Traditional Knowledge, Genetic Resources and Expressions of Folklore Act 2016*, Zambia, available at: <https://ictpolicyafrica.org/en/document/rjvxmpeuppq?page=15>

<sup>44</sup> <https://zambialii.org/node/7824#:~:text=6.-.In%20any%20written%20law%2C%20unless%20the%20context%20otherwise%20requires%2C%20%22,one%20hundred%20and%20eighty%20kwacha.>



reactions and outcomes of this act, legal and regulatory analysts indicate that the act has been well-received<sup>45, 46</sup>. The fact that the act provides for automatic protection of TK and establishes a framework for economic benefit has been lauded as a means of preserving TK and cultural heritage and in providing more economic stability for traditional communities. The fact that enforcement measures are mentioned in the act is said to provide comfort to members of indigenous communities and is deemed an important element of this act. For example, an article by the African Innovation Research organisation on Tonga baskets, a form of traditional cultural expression in Zambia, the researcher explains how the Zambian Act is a first step towards protecting forms of traditional cultural expression and traditional knowledge. These baskets are made using traditional weaving techniques and patterns, mainly by women through communal craft clubs. Making these baskets is a collective activity the women in a community (for mothers, grandmothers, nieces, sisters, friends etc., as well as a source of self-employment for these women. The author notes that these women and the Tonga baskets are at risk of misappropriation and that legal protection would be a first important step against this.<sup>47</sup>

### *Conclusions and reflections on the Zambian Act*

An interesting feature of the Act is that much of the text consists of legal definitions. Given the variety of forms which TK can take, the communities and contexts in which TK develops and evolves, defining the environments in which TK can be situated are all important elements for establishing the scope of what is protecting. A further strength of the law is that it follows a bottom-up approach to regulating and protecting TK which is considered a strength when legally protecting TK<sup>48</sup>. The realities of indigenous and traditional communities, the forms which TK can take and how it is transferred are all considered in the design of the law. Notably the fact that TK does not need to be formally registered to be protected reflects a more tailored approach.

That being said, this broad definition of TK and the inclusive approach to protecting TK may mean that some forms of TK which enter into more everyday use amongst Zambians would in principle also fall under the law and could put individual Zambians at risk of violating the Act<sup>49</sup>.

Furthermore, the Act indicates that organisations or people wanting to use a form of TK must request a permit from the PACRA. The PACRA must then get an agreement from the traditional communities to be able to grant the permit. However, if the PACRA register does not require TK to be formally registered to be protected, understanding which forms of TK require a permit and

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<sup>45</sup> Naidoo, U., (2019), A Comparative Assessment of South Africa's Proposed Legislation to Protect Traditional Knowledge (Thesis), Faculty of Law, University of Pretoria, (supervisor: Honorary Professor C.K Job).

<sup>46</sup> Makoko, M. and Oliver, D., (2017), Traditional knowledge as a trade secret, Lexology, available at: <https://www.lexology.com/library/detail.aspx?g=66ba6f29-1333-4474-a487-5aeb58b4fcfb>

<sup>47</sup> African Innovation Research, (2021), Traditional cultural expressions preservation and innovation: The Tonga Baskets of Zambia, available at: <https://openair.africa/traditional-cultural-expressions-preservation-and-innovation-the-tonga-baskets-of-zambia/> .

<sup>48</sup> Lawal-Arowolo, A. (2011), A Continental Approach to Protecting Traditional Knowledge Systems and Related Resources in Africa, Babcock University – School of Law and Security Studies, available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1313582](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1313582) .

<sup>49</sup> Na'ombe, (2016), ZAMBIA'S NEW TRADITIONAL KNOWLEDGE, GENETIC RESOURCES AND EXPRESSIONS OF FOLKLORE ACT, available at: <http://afro-ip.blogspot.com/2016/09/zambias-new-traditional-knowleg.html> .



require permission from a traditional community to begin may be challenging. It is difficult to understand what requires a permit if a database for TK is not complete.

Beyond this, as indicated when discussing the Swakopmund Protocol, the strengths of acts protection TK are also reliant on neighboring countries to have legal protection frameworks in place. Tribes, knowledge, genetic resources can all move and be found across national borders. If an organization or individual wishes to make use of a specific form of TK and a country such as Zambia regulates the protection thereof, that organisations or individual can go to another country where that TK is less protected and make use of it from there. For this reason, ARIPO continues to try to create awareness for the need for national policies and laws. This issue of cross-border movement and the need for more national approaches which can then be harmonized as well has been cited by many analysts of the Act and TK protection in general<sup>50, 51</sup>.

## 1.5 Conclusion and recommendations

### 1.5.1 Conclusions on strengths and weaknesses

Based on the information collected, the main overarching conclusions and reflections regarding TK protection in African countries include the following:

A key challenge in IPR protection laws and TK is the fact that the fundamental principles of this legal framework are at odds with the principles associated with TK by traditional and indigenous communities. The former is individualistically orientated, requires evidence, and introduces a type of monopoly on knowledge in order to yield economic gain. Traditional knowledge on the other hand is collective, usually not tied to concrete evidence, records, or evidence of its conception, and is shared and passed down through generations for the sake of the community in most cases. The differences in the basic values of laws on the one hand and this form of knowledge in the other do not appear compatible. Criteria for application to IPR at patent offices, such as the novelty criteria, are not applicable to TK. It is worth recalling that laws are a reflection of a society or community's social and cultural values in a given historical and geographical point. In this sense trying to force western laws on traditional community values and practices does not seem a practical or effective approach when the aim is to offer protection to local communities and indigenous peoples.

For this reason, authors indicate that a more tailored approach is needed to legal protection of TK. Specifically looking at the nature and customs of traditional communities and looking at the nature of TK and using this as a point of departure is viewed as a more pragmatic and effective approach to protecting TK. Authors mention "sui generis" and "customary laws" as suitable approaches and countries such as Zambia and Kenya have implemented such approaches. The acknowledgement of the realities of traditional knowledge forms and the practices of traditional communities (and the fact that they are not all equally informed about patent laws and other forms of IPR) appear to be effective principles to work from. The Zambia Act does not require formal

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<sup>50</sup> Lawal-Arowolo, A. (2011), A Continental Approach to Protecting Traditional Knowledge Systems and Related Resources in Africa, Babcock University – School of Law and Security Studies, available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1313582](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1313582) .

<sup>51</sup> Marumo L Nkomo, (2013), South Africa's proposed intellectual property law: the need for improved regional cooperation, The Comparative and International Law Journal of Southern Africa, Vol. 46, No. 2 (JULY 2013), pp. 257–272 (16 pages), available at: [https://www.jstor.org/stable/23644673?seq=2#metadata\\_info\\_tab\\_contents](https://www.jstor.org/stable/23644673?seq=2#metadata_info_tab_contents) .



registration, which is often one of the main challenges related to protecting traditional knowledge. The fact that TK is rooted within a “traditional context” in Zambian legislation and requires formal permission from the traditional community in question represents a more inclusive, pragmatic approach to protecting and providing economic benefits for TK.

A challenge with such approaches are monitoring and enforcing breaches in use of TK. Also, some indigenous and traditional communities may be far removed from a country’s main, more modern society and not be aware that they can choose to withhold access agreements to TK; they would have to be aware of this system to use it. For defensive protection to happen effectively, a protection against misuse or misappropriation by third parties of traditional knowledge that is held by local communities, the third party must be aware that these rights are actually held solely by the communities. Furthermore, protection must be enforced by the authorities when a third party unjustly uses the traditional knowledge for their own gains. As of yet this scenario appears far removed from the reality on the ground in many regions. The traditional and indigenous cultures may still see genetic resources and other forms of TK used without their permission, let alone being accompanied by any benefits being offered by the user. But this is probably a weakness for most traditional knowledge legislation: how does one reach and protect traditional communities and their knowledge forms? Positive protection seems even more complicated. This would entail for a system that allows local communities and indigenous peoples benefiting from the exploitation or commercialisation of their Traditional Knowledge. Organising a well functioning, fair system that facilitates this brings with it a number of serious challenges. As the cases have indicated, registration of TK is a particular challenge. Finding and identifying communities whose TK is eligible for protection and raising awareness on the value and benefits of the legal framework is a resource-intensive process for national authorities. Furthermore, setting up and maintaining registration databases are time consuming and require particular expertise. Some authors mention the possibility of using museums more in the identification, classification and registration of TK to ease this challenge somewhat. Identifying the processes of decision-making within communities needed for gaining prior informed consent in the case that a third parties wants to use the traditional knowledge appears to bring with it another set of challenges. For instance, how to identify this decision-making process? What if this decision-making process is challenged within the community itself? And what if the same TK is held by various communities with their own decision-making processes that do not agree on their exploitation. An additional challenge would be if the TK in these communities is trans-boundary and different levels of protection are offered in the different territories.

Setting up national legal frameworks and databases for registering TK remains a challenge, amongst others due to the issues outlined above, and one which organizations such as ARIPO, OAPI and WIPO work to address. Through awareness raising and knowledge support to individual countries, these organisations try to further TK protection through legal frameworks. The Swakopmund Protocol (ARIPO) is an important contribution that offers a definition of TK and sets out a clear path towards the protection in practice, offering possibilities for defensive and positive protection. This is key because the effectivity of legal TK protection frameworks are tied to a large degree with other countries having comparable laws in place.



### 1.5.2 Recommendation for the EC

Based on the information collected in this case study, some recommendations came forward from the literature examined and a discussion with an IP expert from ARIPO. These first recommendations have been provided below as a starting point for discussion by TTO stakeholders and policymakers. Main recommendations include:

- The need for more awareness amongst African countries on the value and benefit of TK protection, and the consequent need for national laws is an important recommendation for TK protection in Africa.
- More support for regional organisations such as ARIPO and OAPI for setting up regional database registers is also needed. In this area organisations such as WIPO and the EU could continue and deepen the support they provide. Technical capacity building, knowledge exchanges and such initiatives could be useful future avenues to achieve this.
- Furthermore, beyond more national legal frameworks for TK in African countries, harmonizing existing and future frameworks across borders is a key element when protecting TK specifically. This relates to the nature of traditional and indigenous communities and the way in which they and their TK move and evolve. The EU, with policy making experience for legal and regulatory frameworks to be implemented across its own Member States may be able to offer support in these endeavors.
- Finally, the EU can contribute to protecting TK in Africa by including provisions in its own legal instruments and frameworks regarding the origin or source of TK used by its enterprises. For instance, if an EU enterprise uses some form of TK in a product or project, the EU patent office could include legal requirements that the origin or source of knowledge should be indicated. Based on such a declaration of the origin of TK, organisations such as ARIPO can then establish whether informed consent or a permit is required. By setting up agreements and cooperation arrangements between bodies such as the EU and the African Union, the EU can contribute to a fairer sharing of profits and benefits from African TK.



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