UNIVERSITY OF THE WESTERN CAPE

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THE RELEVANCE FOR SUSTAINABLE DEVELOPMENT OF THE PROTECTION OF INTELLECTUAL PROPERTY RIGHTS IN TRADITIONAL CULTURAL EXPRESSIONS

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LIST OF ABBREVIATIONS

ACCRALAW	Angara Abello Concepcion Regala & Cruz Law Offices
ACTS	African Centre for Technology Studies
ALR	Australian Law Reports
CBD	Convention on Biodiversity
DIGERPI	General Office for the Registration of Industrial Property of the Ministry of Commerce and Industry of Panama
EIPR	European Intellectual Property Reports
GATT	General Agreement on Tariffs and Trade, 1994
GI	Geographical Indications
IKS	Indigenous Knowledge Systems Policy of South Africa
INDECOPI	National Institute for the Defence of Competition and the Protection of Intellectual Property of Peru
IP	Intellectual Property
IPR	Intellectual Property Rights
LTD	Limited
MTS	Multilateral Trading System
NIAAA	National Indigenous Arts Advocacy Association of Australia
OAPI	African Organization of Intellectual Property
PTY	Property
QUNO	Quaker United Nations Office
TCE	Traditional Cultural Expression
TK	Traditional Knowledge
TKIP	Traditional Knowledge Intellectual Property
TRIPS	Agreement on the Trade Related Aspects of Intellectual Property, 1994

UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
US	United States of America
WIPO	World Intellectual Property Organization
WPPT	WIPO Performers and Phonograms Treaty, 1996
WTO	World Trade Organization

DECLARATION

I, Olajumoke Ibironke Esan, declare that this thesis is my own work except where acknowledged in the text.

Signed ……..…

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(Student)

Dated on this ..... day of May, 2009

CERTIFICATION

I certify that I have read, and hereby recommend for acceptance by the University of the Western Cape, the thesis entitled "**The relevance for sustainable development of the protection of intellectual property rights in traditional cultural expressions**", submitted in partial fulfilment of the requirements of an LL.M. Degree in International Trade and Investment Law in Africa of the University of the Western Cape.

Signed .....

Professor Tobias Van Reenen

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Dated on this ..... day of May, 2009

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KEYWORDS

Intellectual Property

Traditional Knowledge

Traditional Cultural Expressions

Development

Folklore

Public Domain

World Intellectual Property Organization

Copyright

Performer's Rights

TRIPS Agreement

Indigenous Art and Culture

DEDICATION

To the One who has given me a brilliant hope and brought me into this glorious future.

To my father, Chief Rapheal Makanjuola Esan, SAN and my mother, Chief (Mrs.) Florence Bayode Esan JP, without whom none of all these would have been possible.

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CHAPTER ONE

1.0 INTRODUCTION

1.1 INTRODUCTION AND BACKGROUND TO THE RESEARCH

Intellectual property rights (IPRs) have been protected over the years as private rights belonging to legal personae, giving them authority and control over the use of their ideas and their expression, to the exclusion of all others.[1] This is believed to stimulate greater innovation and creativity, as these individuals have direct control over the commercial exploitation of these ideas and their expression.[2] Initially, Intellectual property (IP) was divided into three, namely: patents, trademarks and copyrights and the scope of rights arising from each were completely distinct and separate from one another.[3] The protection afforded by one could not be used interchangeably to cover items or works that exclusively pertained to the others.[4]

IPRs are often regarded as monopolistic tools[5] because of the way in which they are being used by individuals and corporate entities holding them to control the market by restricting others from selling their products and services.[6] Irrespective of this, the scope of the subject matter of IP continues to expand.[7]

IP laws vary from country to country both in nature and in scope. There are differences in coverage of subject matter, level of disclosure required in applying for protection, duration of protection and institutional arrangements

[1] Bradford S., '*Intellectual property and traditional knowledge: A psychological approach to conflicting claims of creativity in International Law*', (2005) 20 *Berkeley Technology Law Journal*, 1613 at page 1623.
[2] Ibid.
[3] Lee R., '*The scope and interplay of IP rights*', (2004). Online article for Angara Abello Concepcion Regala & Cruz Law Offices (ACCRALAW) website. Available online at http://www.accralaw.com/sub.php?p=news&s=article&id=12. Last accessed on the 2nd of February, 2009.
[4] Ibid.
[5] Drahos P., *The universality of intellectual property rights: Origins and development*, a WIPO panel discussion paper. A copy of the paper is available online at www.wipo.int/tk/en/hr/paneldiscussion/papers/word/drahos.doc. Last accessed on the 3rd of March, 2009. Also, in published in *Intellectual property and human rights,* (1999) Geneva: World Intellectual Property Organization.
[6] Field T., '*Intellectual Property: The practical and legal fundamentals*', (1994) 35 *Idea* 79 - 133. Available online at http://www.piercelaw.edu/tfield/plfip.htm. Last accessed on the 2nd of February, 2009.
[7] Drahos P., see n5 above.

for ensuring compliance worldwide. Aside from this, in international relations between countries, IPRs are also not always reciprocally recognized, if ever.[8] IP is better protected in developed countries than in developing countries.[9] In developing countries the protection of IP has been perceived to be detrimental to economic growth and development, especially in the area of health, on account of the protection of patents granted on life-saving drugs, which restrict access to them at affordable prices.[10] Thus, developing countries have a perceptible anathema for the protection and enforcement of IPRs.[11]

There is, however, a negative side to the general lack of enthusiasm for protection of IP in developing countries. Over the past few years there has been an international move for the protection of indigenous property, practices, culture, and their expression, otherwise known as Traditional Knowledge[12] (TK).[13] Consequent to the deliberations leading to, and the signing of the United Nations Convention on Biological Diversity (CBD) at the United Nations Summit in Rio de Janeiro in 1992, bio-prospecting and TK have received a lot of global attention.[14] The World Intellectual Property

[8] Mugabe J., *Intellectual property protection and traditional knowledge: An exploration in international policy discourse*, (1999) Nairobi: ACTS Press, (African Centre for Technology Studies), at pages 8 – 9.

[9] Ibid.

[10] Bluemel E., '*Substance without process: Analyzing TRIPS participatory guarantees in light of protected indigenous rights*', (2004) 86 *Journal of the Patent and Trademark Office Society*, 671, at page 685.

[11] It is believed that IPRs serve the interests of industrialized countries. A number of authors advocate that the current IP system as applied internationally should be amended and broadened to enable rural populations gear their lives to the world of modern technology as providers of commercially valuable information. See Cottier T. and Panizzon M., *Legal perspectives on traditional knowledge: The case for intellectual property protection*, International public goods and transfer of technology under a globalized intellectual property regime, Maskus and Reichman (eds.) (2005) Cambridge: Cambridge University Press.

[12] In the main, the term traditional knowledge is used to describe (inclusively but not exhaustively) traditional practices, culture, knowledge of plants and animals and knowledge of their methods of propagation and it includes expressions of cultural values, beliefs, rituals and community laws and it includes knowledge regarding land and ecosystem management, which is often unwritten, orally transmitted and sometimes sacred. See United Nations, 'Report on Indigenous Traditional Knowledge', (2007) Economic and Social Council document E/C.19/2007/10, being the report submitted to the permanent forum on indigenous issues at its 6th Session held in new York between the 14th and the 25th of May, 2007.

[13] Taubman A., '*Nobility of interpretation: Equity, retrospectivity and collectivity in implementing new norms for performers' rights*', (2005) *12 Journal of Intellectual Property Law*, 351 at page 369.

[14] Mugabe J., n8 above, at page 7. It should be noted that the bulk of global attention being received by traditional knowledge is focused on the medicinal and agricultural aspects of traditional knowledge as opposed to traditional cultural expressions aka folklore. As was stated by Rosemary J. Coombe, "*Nonetheless, the cultural dimensions of traditional knowledge are often avoided in legal and economic considerations of the issue, and the importance of cultural issues in emerging struggles for social justice is even more rarely appreciated*". See Coombe R., *Protecting cultural industries to promote cultural diversity: Dilemmas for*

Organization (WIPO) and the United Nations (UN) have pushed for global recognition of indigenous intellectual property so that indigenous people would have special rights to claim over their own knowledge, thus ensuring that it is better protected and valued against probable and ongoing misappropriation and abuse.[15]

The TK of indigenous people sought to be thus protected, lies more in developing countries than in developed countries. Indigenous peoples have never been accorded similar rights to the protection of their cultural knowledge as is accorded to the protection of valuable knowledge under IP regimes in the western world.[16] They have no say in its appropriation; neither do they share in the proceeds of its commercialization.[17] This leaves the developing country in a quandary as to whether to actually enact IP laws to protect TK and put in place effective modes of the enforcement of those laws.

It appears worthy of mentioning that protection was afforded to culture, an aspect of TK, as a basic human right in the Universal Declaration of Human Rights,[18] Universal Declaration of the Rights of Peoples[19], the International Covenant on Civil and Political Rights[20] and the International Covenant for Economic, Social and Cultural Rights.[21] The protection afforded however, is for all human persons and is not peculiar to indigenous people, who have more to lose culturally; nor does it create any private intellectual property rights.

Developing countries have so much to protect in terms of their culture and its expression, for example, cultural performances, sculptures, chants, folktales,

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international policymaking posed by the recognition of traditional knowledge, International public goods and transfer of technology under a globalized intellectual property regime, Maskus and Reichman (eds.) (2005) Cambridge: Cambridge University Press.

[15] This move culminated in the adoption of the United Nations Declaration on the rights of indigenous peoples on 29th June, 2006 at the inaugural session of the Human Rights Council of the United Nations and adopted by the United Nations General Assembly at its 61st session on the 13th of September, 2007. See further http://www.un.org/esa/socdev/unpfii/en/declaration.html. Last visited 2nd February, 2009.

[16] Mugabe J., see n8 above, at page 1.

[17] Ibid.

[18] Article 27, Universal Declaration of Human Rights (1948).

[19] Articles 1, 5, 14 and 15, Universal Declaration of the Rights of Peoples (2001).

[20] Article 27, International Covenant on Civil and Political Rights (1976).

[21] Articles 1 and 15, International Covenant on Economic, Social and Cultural Rights (1976).

songs, etc. These are now being commercially exploited by individuals and identified as isolated pieces of literature and isolated creations, even though they were collectively developed by a whole community over time.[22] This form of commercial exploitation moves such cultural expressions out of the reach of their origin, and affords the individual who expresses them a sole right to use them to the exclusion of their origin; and also deprives the community and country of origin of any benefit arising from its commercialisation including mere acknowledgement.[23]

The significance of the need for the protection of TK is apparent. With the snowballing growth in urbanisation and the rate of development of technology, soon all TK would be lost, be it cultural practices or folklore. Following globalisation trends, indigenous knowledge is being lost as the world is becoming a global village, and people are losing their roots and the access to knowledge inherent therein.[24] Furthermore, a significant part of the global economy is based on the appropriation and the use of TK.[25] Unfortunately, the generality of modern IP laws at best ignore the existence of TK and at worst contribute to destroying it.[26]

In light of the economic importance of TK and its gradual loss mentioned above, there have been a lot of unresolved policy issues being generated, especially those involved with IP protection for it.[27] IP protection being afforded to TK would invariably lead to nationwide participation in the IP Regime in countries where such protection is afforded. This would in turn lend publicity to culture, and foster the exposure of the marginalised minority who are the custodians of such culture by giving them a market reputation,

[22] Taubman A., see n13 above, at page 368.
[23] Ibid.
[24] Warren M., *Indigenous knowledge, biodiversity conservation and development,* (1992) being the keynote address at International Conference on Conservation of Biodiversity in Africa: Local Initiatives and Institutional Roles, August 30-September 3, 1992.
[25] Mugabe J., see n8 above, at page 7.
[26] Ibid.
[27] Mugabe J., n8 above, at page 8. See further Posey D., *Intellectual property rights for native peoples: Challenges to science, business and international Law*, (1991) being a paper presented at the international symposium on property rights, biotechnology and genetic resources, held in Nairobi, Kenya.

generating income for them, and thus leading to development.[28] Carefully designed IPRs in TK would help these developing countries become full players in the global market while equitably rewarding indigenous people for their contributions to international well-being.[29] It is thus necessary that protection be afforded to culture and its commercial exploitation to create wealth and engender development.

1.2 PROBLEM STATEMENT

This research work addresses the problem being faced by developing countries in the commercial exploitation of their traditional cultural expressions (TCEs) by third parties without giving due attribution to nor sharing benefits with the communities from which these TCEs originate. This problem stems from the inability of customary law systems which regulates life in such communities to adequately cater for the protection of these TCEs. The legal systems of the developing countries have also proven to be ineffective in the protection of TCEs from such misappropriation and unauthorized commercial exploitation.

This mini-thesis examines how TCEs have been protected domestically through national legislation and internationally through treaties and proposes means by which they can be protected in a manner that would preserve them, while promoting the dissemination of those which can be shared without destroying their inherent nature. This mini-thesis thus explores avenues through which the protection of TCEs would contribute to economic and human development in developing countries.

1.3 RATIONALE FOR THE RESEARCH

The ambivalent position on the protection of IP in developing countries is of great importance as the TK of their indigenous people is being consistently

[28] Long D., '*Traditional knowledge and the fight for the public domain*', (2006) *5 John Marshall Review of Intellectual Property Law*, 317 at page 322.
[29] Cottier T. and Panizzon M., *Legal perspectives on traditional knowledge: The case for intellectual property protection*, International public goods and transfer of technology under a globalized intellectual property regime, Maskus and Reichman (eds.) (2005) Cambridge: Cambridge University Press, at page 567.

and continually fixated and commercialised by third parties.[30] The benefits therefrom do not profit the developing countries from which the TCEs originate, but are diverted to the developed countries which have the advantage of technology, thereby widening the divide between the countries and making the rich richer and the poor poorer.[31]

This mini-thesis seeks to identify the means through which protection can be effectively afforded to TCEs both nationally and internationally. It also seeks to identify how this would be done without undermining the position of the developing countries in requesting greater flexibilities in their protection and enforcement of other IP Laws. This has to be such that they can derive maximum benefits from both IP regimes, getting the best of both worlds.

Another objective of this mini-thesis is to examine the legislation in countries which have enacted laws that offer protection to TK, and identify means by which the protection thus offered can be adapted to the African scene, and made use of by developing and least developed countries in Africa.

There is protection offered in the World Trade Organization multilateral system of regulation of trade. It is enshrined in the provisions of Article XX (f) of the General Agreement on Tariffs and Trade (GATT) and the Agreement on Trade Related Aspects of Intellectual Property (TRIPS). This mini-thesis would also look into the extent of protection afforded TCEs by these provisions.

An examination of the proposed South African Intellectual Property Bill and the level to which it has adapted the protection of TCEs to the African context would also be conducted.

1.4 THEORETICAL ASSUMPTIONS

This research work is based on assumptions regarding the fundamental and expanded roles of the government in the control and regulation of basic security, law and order of the governed. It assumes that every government

[30] Taubman A., see n13 above, at page 361.
[31] Bradford S., see n1 above, at page 1616.

has the responsibility of maintaining economic security, social security, environmental security and the general welfare of its citizens.

Stemming from this is the assumption that states, in fulfilling their roles and servicing their responsibilities, would legislate to protect the interests of their citizens and would make available satisfactory forms of enforcement of the laws thus made. That way, the laws would have force and be adhered to by the citizens.

A further assumption made in this research work is that of the role of the sovereign state in the international community while acting in the interest of its citizens. In fulfilling this role, states are obliged to enter into international agreements and this is turn places a responsibility on the state to enforce the international agreements locally and refrain from enacting domestic legislation in violation of its international obligations. It is therefore assumed that the interest of its citizens is the most paramount consideration in the formulation of laws and negotiation of treaties for sovereign states.

IP laws are usually formulated and enacted by sovereign states for the protection of the creations of their citizens and, in light of the recognition of IPRs as economic rights, IP legislation also performs the function of fulfilling the state's role in the provision of economic security for its citizens. In the light of the above, it is assumed that states, in fulfilling their abovementioned roles, would also enact IP laws for the protection of their citizens.

1.5 RESEARCH METHODS

In view of the assumed roles and duties of a state, this research was conducted by examining international debates regulating the conduct of states in relation to one another and other intergovernmental initiatives on the protection of TCEs globally. The forums in which debates on the international protection of TCEs were undertaken have been examined i.e. the African Study Meeting on Copyright held in 1963, Stockholm Conference on the Revision of the Berne Convention held in 1967, the United Nations Educational Scientific and Cultural Organization, the WIPO – UNESCO World

Forum on the Protection of Folklore held in 1997, and the activities of the World Intellectual Property Organization. These helped to identify the nature of the rights and the level of protection that had been given is available to TCEs internationally.

Aside from this, the treaties with provisions in relation to international IPR regulations were analyzed i.e. TRIPS, GATT and the WIPO Performers and Phonograms Treaty. An analysis of selected domestic regulations and policies in some countries where such were effectively employed in the protection of TCEs was carried out, i.e. Australia, New Zealand, Panama and Peru.

In addition to this, a thorough study of existing literature in the subject of IPRs as they relate to the use of TK in general and TCEs in particular was done.

1.6 HYPOTHESES

If developing countries can protect TCEs with the use of IP laws and harness such IP protection, it would grant them more control over the normative process of such protection and ensure that ensure that their TCEs contribute to their economic and human development.

1.7 SIGNIFICANCE OF THE RESEARCH

Knowledge and creativity is pervasive in all human communities, be it acquired by association, innovation or devolution. IP evolved to protect and reward knowledge and creativity. However, IP is not widely used in the protection of the various types of knowledge that exist and is also used to varying degrees in different communities, irrespective of the fact that knowledge and creativity abound in its various types in the various communities even if in an uneven distribution.

The significance of this mini-thesis lies in the urgent need to address the dastardly effects of on-going misappropriation of TK/TCEs and the need to conserve the way of life of indigenous communities before all knowledge is lost and originating communities and countries become merely consumers of their own products at a great price.

This research seeks to address the imbalance of protection and benefits accruing from the enforcement of IP laws in developing countries.

1.8 CHAPTER STRUCTURE

Chapter One introduces the subject area and speaks about the way in which the research was conducted.

Chapter Two deals with the basic characteristics of IPRs and those of TCEs and seeks to identify similarities and disparities between the two. It seeks to see if the conflicts between the two types of properties are reconcilable and how.

Chapter Three examines the current position of rights in respect of TCEs, when they are protected by IPRs and when such protection is under other systems internationally, regionally and nationally. It also goes further to examine the reasons why TCEs should be protected and the manner in which they should be classified for ease of protection.

Chapter Four analyzes existing forms of effective protection of TCEs and examines their adequacy to protect the extant types of TCEs. This protection is analyzed with reference to the protection offered in the multilateral trading system and domestic legislation. It also analyzes proffered protection in an African country (i.e. South Africa) and its envisaged effectiveness.

Chapter Five is a cost-benefit analysis of the protection of TCEs vide IP. It examines the economic effects of strengthening IP laws in a bid to protect TCEs and also its developmental effects.

Chapter Six contains the conclusions and recommendations of the author.

CHAPTER TWO

2.0 BASIC INTELLECTUAL PROPERTY RIGHTS AND TRADITIONAL CULTURAL EXPRESSIONS

2.1 BASIC INTELLECTUAL PROPERTY RIGHTS

IP is usually defined as a list of statutory rights.[32] Different statutes are passed to protect IP in its various forms. Thus, it requires a combination of laws to define IPRs. In the light of the foregoing, attempting to define IP would be a futile exercise as the various forms of IPRs call for varying definitions. As a generic term, IP refers to copyright and related rights, industrial property covering patents, trademarks, designs, protection against unfair competition and geographical indications.[33] These form the traditional core of IP. It should be noted that the subject matter of these rights is disparate.[34] Individual IP statutes usually provide definitions of the subject matter of their application.[35]

IPRs are created on the premise that innovation is the product of the creative and intellectual concepts and ideas of individuals. IP laws establish private property rights in these creations and innovations in order to grant control over their exploitation.[36] Thus, sovereign states grant specific rights to creative individuals to own, use and dispose of their creations and innovations as a reward for sharing their contributions with the world at large and to stimulate further innovative activity in that area of endeavour.[37]

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[32] In some cases, there is additional protection under contract or tort law. See Gervais D., '*Traditional knowledge and intellectual property: A TRIPS compatible approach*', (2005) *Michigan State Law Review* 137, at page 142.

[33] Kallinikou D., *Protection of traditional cultural expressions or expressions of folklore*, (2005) being a paper presented for the conference "Can Oral History Make Objects Speak?", held in Nafplion, Greece between the 18th and the 21st of October, 2005.

[34] Drahos P., see n5 above, at page 1.

[35] *Ibid*.

[36] Kallinikou D., see n33 above, at page 5.

[37] Janke T., *Report on Australian indigenous cultural and intellectual property*, (1998) Michael Frankel and Company, being a report prepared for the Australian Institute of Aboriginal and Torres Strait Islander Studies and the Aboriginal and Torres Strait Islander Commission, at page 1.

IPRs, in another context, have also been viewed as rights of exploitation of information.[38] Information is a prime resource in modern economic life. On account of this, its exploitation by exercising IPRs affects the interests of other persons. Property rights, by their nature, allow the right holder to exclude others from the use of this resource.[39]

2.1.1 CHARACTERISTICS OF INTELLECTUAL PROPERTY RIGHTS

An IPR, which is specific in application, usually involves a rights holder (an identifiable person(s)), an object (an invention or work) and a specified term of protection.[40] IPRs can be bought and sold like any other form of property. The owner of such property has the exclusive right to do, or authorize anyone else to do, certain things with the whole or any substantial part of the property.[41]

The concept of ownership is pervasive in IP and is based on assumptions of individualism which conceives an individual as the proprietor of his capacities, and this is one of the major influences on the related ideas of originality and creativity, which are the fulcrum upon which the ideology of private property in the form of IPRs rest.[42]

2.2 CHARACTERISTICS OF TRADITIONAL CULTURAL EXPRESSIONS

Until recently, IPRs were not considered as suitable for the protection of TK/TCEs given their special features. However, their value to modern society as commercial property has increased steadily over the years. Thus, indigenous people worldwide are seeking to protect their interests and much of this is being sought to be done under the auspices of IP.[43] However, TCEs differ from all other objects of IP as a result of these special features, which are:

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[38] Drahos P., see n5 above, at page 2.
[39] *Ibid*.
[40] Gervais D., '*Traditional knowledge and intellectual property: A TRIPS compatible approach*', (2005) *Michigan State Law Review* 137, at pages 142 – 143.
[41] McCann A., *Traditional music and copyright – The issues*, being a paper presented at "Crossing Boundaries", the seventh annual conference of the International Association for the Study of Common Property, held in Vancouver, British Columbia, Canada between the 10th and the 14th of June, 1998, at page 1.
[42] *Ibid.*, at page 3.
[43] Janke T., see n37 above, at page 1.

(a) they are collectively held by a community and handed down in the community from generation to generation, either by verbal transmission or by imitation;

(b) they are in continuous use, circulation, evolution and development in the community and as such they are always being created and re-created; and

(c) the persons responsible for their creation are largely unknown, and where they are known, they are usually individuals vested with the authority to administer these TCEs within their communities.[44]

These features of TCEs have very much influenced the effectiveness of legal IP mechanisms in protecting them.

However, there is something to be said for extending IP protection to folklore. It would translate to the enforcement of the rights to TCEs being made in a national legal system as opposed to the customary way in which these TCEs are protected within the local community, the latter being limited in jurisdiction. The national court system would strengthen prohibitions and conventions regarding the use of folklore as they exist within communities. The benefits of this would be discussed in greater detail in the next chapter.

2.3 CONFLICTS BETWEEN INTELLECTUAL PROPERTY RIGHTS AND TRADITIONAL CULTURAL EXPRESSIONS

The basic concepts of IP relate to ownership, originality, duration, fixation, inventiveness and uniqueness.[45] TCEs conflict with these basic concept of IP in the following ways:

(a) **Ownership/Authorship**[46] - TCEs are by nature created by a community with common practices. These communities develop a process for their

[44] For a detailed enumeration of distinctive features of TCEs, see Ying K., "Protection of expressions of folklore/traditional cultural expressions: To what extent is copyright law the solution?" (2005) *Journal of Malaysian and Comparative Law* 2.

[45] Kuruk P., '*Protecting folklore under modern intellectual property regimes: A reappraisal of the tensions between individual and communal rights in Africa and the United States*', (1999) 48 *American University Law Review*, 769, at page 794.

creation and variation over time. TCEs are developed by individual contributions of creative members of the community to the corpus of the existing traditional practices and these evolve into the TK/TCEs that are practiced.[47] In traditional communities, inventions and knowledge are passed on and improved from one generation to the next.[48]

Within indigenous communities, TK, even in the form of folklore/TCEs belongs to the group, as a whole. There is no individual author. The community functions as the author and owns the right to control such works.[49]

Most copyright legislation only recognise the rights of individual authors or, in the case of works for hire, their employers. Indigenous communities on the other hand, do not conceive of TCEs as being capable of individual ownership. Rather, they view them as inalienable elements of collective identity belonging to the tribe as a whole.[50]

IPRs, in general, are based on the identification of an author/creator of a work, but in contrast, the distinguishing mark of folklore is the anonymity of its creator and its collective ownership by the community.[51] IPRs confer the exclusive right of exploitation on the person who creates the work. This is difficult to reconcile with the collective ownership of folklore within a community.[52] In the case of contemporary traditional-based cultural expressions, this requirement of known authorship is easier to meet as authors/joint authors are identifiable. However, for pre-existing cultural

[46] See Bellagio Declaration, 1993. Principal drafters: James Boyle, Peter Jaszi, and Martha Woodmansee. Available online at http://www.cwru.edu/affil/sce/Bellagio.html. Last visited 2nd February, 2009.
[47] McCann A., see n41 above, at page 2.
[48] Gervais D., see n40 above, at page 141.
[49] Long D., see n28 above, at page 324.
[50] Sturrock M., '*U.S. Copyright Law and Traditional Cultural Expressions*', *University of Maine Centre for Law and Information Journal*, 1 at page7. Available online at http://tlc.usm.maine.edu/documents/Sturrock.pdf. Last visited 3rd March, 2009.
[51] Ying K., '*Protection of expressions of folklore/traditional cultural expressions: To what extent is copyright law the solution?*' (2005) *Journal of Malaysian and Comparative Law*, 2. Available online at http://www.commonlii.org/my/journals/JMCL/2005/2.html. Last accessed on the 2nd of February, 2009.
[52] Kallinikou D., see n33 above, at page 2.

expressions which have been communally developed for a long time, it is much more difficult, if not impossible, to trace and identify the authors.[53]

In some cases, where TCEs are actually created by a specific group of persons,[54] such works might qualify as joint works under a copyright legislation. Unfortunately, because courts require that an individual's contribution to a joint work be independently copyrightable in order for the person to be deemed a joint author, key participants in the process, such as members of the community who share the ideas for the work, would be excluded from obtaining copyright in the work.[55]

In the instances referred to above, where TCEs are jointly created by specific individuals or even individually created, it would have been used by the whole community and would have lost its individualistic traits.[56] For example, a TCE that is originally the product of an individual would be taken by the people and put through a process of re-creation, which through constant variations and repetition become a group product. Hence, it might be impossible to identify the first creator of such work. Even if an author could be located for its variant, it may still be difficult to establish the person's "independent effort", sufficient to justify copyright protection as the work would be substantially similar to already existing TCEs.[57]

[53] Ying K., see n51 above.
[54] For example art work.
[55] Sturrock M., see n50 above, at page 7. It is common knowledge that copyright usually protects the expression of an idea and never the idea itself. Thus, only those responsible for the manner in which the communities' ideas were expressed would be granted rights to the work in question. For example, in the Australian Case of *Milpurrurru and Others vs. Indofurn Pty Ltd and Others* ((1995) 30 IPR 209.), the Federal Court of Australia awarded damages for breach of copyright to Aboriginal artists whose artistic works were wrongfully reproduced on carpets. However, the claim of the representatives of the Aboriginal group for compensation in respect of the communal harm failed. It was pointed out that the available statutory remedies do not recognise the infringement of ownership rights in traditional owners of the dreaming stories and the imagery used in the artworks of the artists. Even if the Court had found that there had been infringement of copyright, damages could only have been awarded to the copyright owner and not to compensate the community whose images were used.
[56] See for example the "Ere Ibeji" among the Yorubas in Nigeria. It is a sculpture made by families with twins but which different members of the family dress and adorn with jewellery over the years thus altering its nature and appearance over time. For a full description of this, see Bradford S., n1 above, at page 1646.
[57] Kuruk P., see n45 above, at page 97.

While these feature makes TK/TCE an unlikely object of IP protection,[58] some authors argue that the disparity is not necessarily irreconcilable.[59] It is believed that group authorship is not untenable in the current IP regime as the concept of collective authorship already exists. In the words of Doris Estelle Long:

> "*Copyright law is already used to the idea that there does not have to be an individual author for protection to exist. Thus, there already are potential flexibilities on which one can rely as certain aspects of traditional knowledge are incorporated into an intellectual property style regime"*.[60]

Nevertheless, the idea that rights are collectively owned in traditional communities conflicts with the objective of modern IP laws, which encourage private initiative and provide rewards for individual rights. Consequently, modern IP provisions would be difficult to apply generally in the case of communal ownership of legal rights, which so far appear to have received scant attention in the property rules enunciated under common and civil law.[61]

(b) **Dissemination** - The system of dissemination of TCEs is one of reciprocal exchange. Consequently, TCEs are generally not treated as private property but as communal property, owned and managed by a group of persons. This stems directly from the traditional concept of ownership. As such, TK/TCEs are not ordinarily commoditised.[62] In this regard, it is quite different from other objects of IP as it does not serve the purpose of economic gain for its owners traditionally but serves as a means of maintaining the public good in the community to which it belongs.

In addition to this, disseminating works protected by IPRs, either by commoditisation or by making it available to the public after the expiration of its term of protection, is said to provide the public with the necessary fodder

[58] *Ibid*., at page 96.
[59] One of such authors is Doris Estelle Long. See Long D., n28 above, at page 318.
[60] Long D., see n28 above, at page 324.
[61] Kuruk P., see n45 above, at page 96.
[62] Sturrock M., see n50 above, at page 7.

for innovation.[63] However, disseminating spiritual TCEs with a level of religious significance violates the religious precepts of some traditional communities. Thus, the dissemination of works protected by IP conflicts with traditional conceptions of TCEs which are perceived as sacrosanct and which ought to remain sacred indefinitely.[64]

Consequently, the concept of commoditisation for economic gain and dissemination of protected works in general goes against the grain of traditional perceptions of rights vested in TCEs.

(c) **The Work** – Originality. An original work must not be copied from another work and it should originate from the author.[65] IPRs are usually given in respect of autonomous works. Where such autonomy is stretched, it would only cover copies of the original autonomous work. The inherent nature of TCEs is that they are dynamic, ever changing by progressive contributions from individuals within the community and thus each creation is an imitation of an earlier work which makes even the copies of the original form of the work subject to subsequent changes and amendments, which do not fundamentally alter the work in itself but is a form of consecutive imitation.[66] Consequently, traditional works eligible for IP protection would be excluded since their originality would be difficult to establish.[67]

TCEs, most times, are ancient and draw largely upon pre-existing tradition, custom and belief which have evolved over time. Sacred TCEs, with spiritual and religious significance, must even be reproduced faithfully and as such, innovation in that regard is strictly limited as the reproduction has to be done according to law and custom.[68]

The negative side to the exclusion of TCEs from IP protection for its lack of originality is its commercial exploitation. If an author outside the originating

[63] Chander A. and Sunder M., '*The romance of the public domain*', (2004) 92 *California Law Review*, 1331, at page 1338.
[64] Kuruk P., see n45 above, at page 799.
[65] Ying K., see n51 above.
[66] Sturrock M., see n50 above, at page 6.
[67] Kuruk P., see n45 above, at page 97.
[68] Ying K., see n51 above.

community creates a derivative work based on the work with enough derivative originality to benefit from copyright protection, he would be granted IP protection. This situation is one of double jeopardy for the community. On the one hand, they do not benefit financially from the work's commercial exploitation, and on the other hand, rights to the derivative work having been granted to another, they are prevented from using their own material commercially if it evolves and resembles the protected derivative work.[69]

With this feature of TCEs as well, while it excludes TCEs from IP protection, there is still some solace to be had in that protection can be afforded to contemporary derivative works.[70] Thus, they would be protected as copyright works if some new elements or expression are added, even if the original materials are already in the public domain.[71] Unfortunately, only the derivative work can be protected and not the underlying pre-existing work. The same applies to TCEs which are inspired by or based on pre-existing designs if it can be proven that sufficient skill, effort and judgment have gone into recreating them.[72]

Fixation of the work. In addition to the requirement of originality, for IPRs to be attributed to a work, there is a usual prerequisite that the work be fixated. This is particularly so with copyright. Consequently, the work must be in writing, recorded or reduced to material form with some degree of permanence.[73] Since TCEs are the copyright aspects of TK, the requirement of fixation is one which applies to it directly. This requirement stresses individual creativity and ownership.[74] However, many TCEs lack fixation in a tangible medium of expression.[75] Thus, rights in TCEs such as songs and dance are unlikely to

[69] Gervais D., see n40 above, at page 157.
[70] Ying K., see n51 above.
[71] Discussions on mechanism of the public domain follow hereafter in this chapter.
[72] Ying K., see n51 above.
[73] *Ibid*.
[74] McCann A., see n41 above, at page 5.
[75] Sturrock M., see n50 above, at page 6. Examples of these are folk tales, indigenous poetry, folk songs and dance which are usually passed down through generations by memorisation and imitation.

satisfy this fixation requirement inasmuch as they are largely verbal and have not been written down or recorded.[76]

However, IPRs in a TCE would vest in the person who is responsible for the first fixated version of the work.[77] Unfortunately, such a person might not be a member of the originating community and thus, the cycle of cultural appropriation is initiated once again.[78]

Idea/Expression. In general IPRs, and in particular copyright, protects the expression but not the underlying idea or original thought of the author. Consequently, use of the idea underlying a work is permitted as long as the mode of expression of the idea is not copied. This IP principle seems to work to the benefit of the appropriation of TCEs in that it allows cultural objects and practices to be copied without necessary recourse to the originating community and guarantees that those appropriating it would receive legal protection for the legal, even though unconscionable, activities.

(d) **Mode of protection** – Current IP norms force creators and inventors to select one or more rights packages in existence since IPRs are defined by a limited spectra of statutes. These packages may or may not fit the needs of the owners/authors.[79] Generally, TCEs are diverse in nature and disparate in their forms and the expectation of the communities seeking to protect them is wider than the ambit of the various modes of protection considered individually.[80]

Even though some traditional practices are capable of meeting statutory criteria for the grant of IPRs, they would most likely be excluded from

[76] Kuruk P., see n45 above, at page 797.
[77] Examples of these are folk songs noted by a musician and later sequenced and reproduced, photos of traditional performers taken and reproduced on postcards, legends and folk tales written down and later reproduced as movies etc which give rights over these works to the musician, photographer and film maker.
[78] Coombe R., *Cultural and intellectual properties: Occupying the colonial imagination*, (1999) The international library of essays in law and legal theory, Drahos P. (ed.), (2nd Edition), Aldershot: Dartmouth Publishing Company Limited, at page 13.
[79] Gervais D., see n40 above, at page 155.
[80] Torsen M., '*"Anonymous, untitled, mixed media": Mixing intellectual property law with other legal philosophies to protect traditional cultural expressions*', (2006) *American Journal of Comparative Law*, 173, at pages 177 – 178.

protection on the grounds that they are already available to the public and do not constitute anything new as they have been passed down through generations. As TCEs are never created, but simply evolve, it may be excluded from IP protection.[81]

(e) **Limitation of time**[82] - IP protection, in all its forms, is limited to a fixed duration subsequent to which the protected work falls into the public domain and is thereafter open for all to draw upon.[83] The duration of protection depends on the type protection.[84] Thus, it is problematic when the object of protection is a TCE, as some originated centuries ago and the term of protection for them would have long expired.[85] As a direct consequence of this, the fixed duration of IPRs would not meet the need of the traditional communities, as what they desire, or require as the case may be, is perpetual protection for their TCEs.[86] Thus, after a few years, TCEs would fall into the public domain and be open to inappropriate use by outsiders who are not from within the community.[87] This is because the limited duration of copyrights is incompatible with the religious and representative functions of TCEs.[88]

TCEs generally exist for centuries and thus, it would be impossible to limit its protection to the finite regimes of IP. Regardless of its characteristic longevity, on account of the special features of TCEs, it would be difficult to determine which period of protection would be appropriate for them on account of their slow evolution (as opposed to creation). Furthermore, in light of the discourse

[81] Kuruk P., see n45 above, at page 798
[82] Kallinikou D., see n33 above, at page 2.
[83] Ying K., see n51 above.
[84] Generally, patents are protected for 20years, the term of protection for trademarks vary from country to country and region to region but is most times renewable, industrial designs are protected for 5years, copyrights are protected for 50years after the author's death or 50years after the performance. For example, in Nigeria patents are generally granted for twenty years, in Ghana copyrights last for the life of an author plus fifty years, and in most African countries trademarks are recognized for various renewable terms. See Kuruk P., see n45 above, at page 799.
[85] Ying K., see n51 above.
[86] *Ibid*.
[87] An example of such use is the commercial exploitation of sacred material which ought to be protected by some form of prohibition but which protection it would be unable to receive as its term of protection would have lapsed. See Gervais D., n40 above, at pages 155 – 156.
[88] Kuruk P., see n45, at page 799.

on ownership, the lack of an author/owner upon whose life span the term of protection can be premised creates additional difficulty.[89]

2.4 INDIVIDUAL RIGHTS VS GROUP RIGHTS

Individual rights are rights held by individuals within a group while group rights are rights held by a group jointly rather than by its members severally.[90] At times, the term group rights also connotes peoples' rights, a legal concept in the context of indigenous rights as established in the United Nations' Declaration on the Rights of Indigenous Peoples.[91] Group rights are not human rights because they are group-differentiated rather than universal to all people just by virtue of being human. Group rights have historically been used both to infringe upon and to facilitate individual rights, and the concept remains controversial.[92]

It should however be noted that group rights exist more within the human rights discourse as opposed to under IPRs. This is because under western IP regimes, rights to IP protection are not given to a group but rather to individuals. IPRs are vested in the owner and they are regarded as a private property or proprietary interests that can be transferred and not communal right.[93] Thus, though IPRs are universally recognized, it does not follow from their recognition that they are universal norms i.e. human rights.[94] This is because while the IPR protection focuses on private property rights, the Human Rights paradigm focuses on group rights.[95] Consequently, the rights of a group to determine their cultural heritage and participate in the evolution

[89] Kuruk P., see n45, at page 799
[90] Wikipedia, the free online encyclopaedia. Available online at http://en.wikipedia.org/wiki/Group_rights. Last visited 3rd March, 2009.
[91] United Nations Declaration on the rights of indigenous peoples, adopted by the United Nations General Assembly at its 61st session on the 13th of September, 2007.
[92] Wikipedia, see n90 above.
[93] Ying K., see n51 above.
[94] For a more thorough discussion of the distinction between IPRs as universally recognised rights as opposed to universal human rights, see Drahos P., n5 above.
[95] Long D., see n28 above, at page 324.

of their culture would not be enshrined and protected for the group as a whole but rather on an individual basis being human rights and not IPRs.[96]

It is necessary to protect intellectual creativity in the realm of TCEs as this would ensure the maintenance and development of cultural diversity, which would in turn result in the ultimate good of participants in the cultural community and the society at large.[97] A case is therefore made for the importance of creating, maintaining and protecting communal rights to TCEs.[98]

The current IP regime only allows individuals to protect their creations/works using IPRs, but does not give room for communities acting collectively to protect their knowledge in all areas.[99] Accordingly, TK/TCEs are not protected using the IP system.[100]

2.5 THE PUBLIC DOMAIN DEBATE.[101]

The application of the concept of the public domain makes it the cornerstone of copyright law and indeed of IP doctrine generally. The public domain is not a set of specific rights, but rather the space and possibility of access, which is left over after all other IPRs have been defined and distributed.[102] Public domain in IP law generally includes any information not subject to IPRs or for

[96] These rights are protected by 1 and 15, International Covenant on Economic, Social and Cultural Rights (1976).

[97] McCann A., see n41 above, page 2.

[98] Kuruk P., see n45 above, at page 778. Legal definitions support the recognition of communal rights. For example, Ghanaian legislation defines folklore as "*all literary, artistic and scientific work belonging to the cultural heritage of Ghana which were created, preserved and developed by ethnic communities of Ghana or by unidentified Ghanaian authors, and any such works designated under this Law to be works of Ghanaian folklore*." See Section 53 of the Ghanaian Copyright Law (March 21, 1985), reprinted in (1985) 21 *Copyright Monthly Review of the World Intellectual Property Organization*, 423 at page 435. Nigerian law also similarly defines folklore as *"a group-oriented and tradition-based creation of groups or individuals reflecting the expectation of the community as an adequate expression of its cultural and social identity, its standards and values as transmitted orally, by imitation or by other means"*. See the Section 28(5) of the Nigerian Copyright Decree (December 19, 1988), reprinted in (1988) 25 *Copyright Monthly Review of the World Intellectual Property Organization* 1, at page 8.

[99] South African Department of Trade and Industry, *The Protection of Indigenous Knowledge through the Intellectual Property System: A Policy Framework*, (2004), at page 6. Available online at www.thedti.gov.za/ccrd/ip/policy.pdf. Last visited 3rd March, 2009.

[100] It is however pertinent to note that IP system of protection of geographical indications has however been used to protect TK successfully, for example, in the area of beverages, wines and spirits.

[101] McCann A., see n41 above, at pages 10 – 11.

[102] Frow J., Time and Commodity Culture. (1997) Oxford: Clarendon Press, at pg 209.

which IPRs have expired.[103] Pivotal to the notion of the public domain is the fact that resources therein are available broadly for access and use. Therefore, as IP is a varying bundle of rights revolving around a central right to exclude the public from ownership and use of private property, the public domain consists in a differing bundle of rights revolving around the right of the public to freely access and use private property.[104]

Anupam Chander and Madhavi Sunder have defined the public domain as resources for which legal rights to access and free use (or for nominal sums) are held broadly.[105] There is a cyclical relationship between IP and the public domain.[106] IP views the public domain as the basic fodder on which innovation is based, as the presence of a robust public domain ensures continued innovation with rich materials from which the public can borrow in its acts of innovation. The public domain on the other hand, is a creation of IP and grows over time out of IP and lapse of periods of IP protection.[107]

In spite the growing recognition of TK as a valuable source of knowledge, it is still regarded under Western IP conceptualization as information which is in the public domain, and is freely available for use by anybody.[108] This is so because TK/TCEs usually date much earlier in time than the term of legal protection granted IP statutes.[109] In addition to this, those TK/TCEs that do not date that far back often adhere to prior TCEs, which may themselves have originated thousands of years ago,[110] thus placing them in the public domain as well.[111] Thus, to the extent that TK is not covered under any of the IPRs, it

[103] Correa C., *Traditional knowledge and Intellectual property*, (2001) a Quaker United Nations Office (QUNO) discussion paper, at page 3. Available online at http://www.quno.org. Last visited 3rd March, 2009.
[104] Chander A. and Sunder M., see n63 above, at page 1338.
[105] *Ibid*.
[106] *Ibid*., at page 1343.
[107] Kallinikou D., see n33 above, at page 6.
[108] Correa C., see n103 above, at page 3. There are groups of individuals who believe that TK falls outside the scope of legal protection and should be strictly within the public domain. These people also believe that even if any rights exist at all in TK, the right should be given up for the benefit of the global society at large. They affirm that it resides firmly in the public domain. Long D., see n28 above, at page 318. See also Sturrock M., see n50 above, at page 6.
[109] Kallinikou D., see n33 above, at page 2.
[110] Blakeney M., '*Protecting expressions of Australian aboriginal folklore under copyright law*', (1995) 17 *European Intellectual Property Review*, 442, at page 445.
[111] Sturrock M., see n50 above, at page 6.

would belong to the public domain and may be freely exploited.[112] It would then appear that the public domain is essential to the private property system because it offers a sphere of free works upon which others can draw without either seeking consent or drawing liability.[113] This appears to be the rationale behind keeping TK in the public domain.

The term "public domain", as it applies to TK/TCEs, also connotes anonymous or unknown authorship/ownership. While most TK/TCEs are not of unknown but rather collective authorship, its nature is merely alien to the basic IP conceptions of individual ownership of works as described above. Usually, with respect to TK, authorship/ownership is not a central concern. Under traditional dispensations, the idea of a "public domain", in a sense, would imply unlimited access to TK to all who wish to participate in the community and as such, the dissemination of it is premised on community participation, not with a view to expropriation or commercial exploitation. Traditional communities share their knowledge and allow it to be subsumed into the traditional participatory processes in return for the very participation that begot their efforts in the first place.

There is a group of people who see potential benefits in TK/TCEs being in the public domain. This is because there are restrictions to the use of such works. They may only be used as a basis for derivative works and as such, restrictions, like moral rights could be used to prohibit the distortion of TK/TCEs.[114] It is doubtful if this manner of restrictions would however be applicable to TK/TCEs in light of the fact that eligibility for such restriction is centred on the basic concepts of IP, which were shown above to differ largely from the special features of TK/TCEs.

If the concept of the public domain, as it continues to be applied to TK globally, remains unchecked, it would complicate the already confusing labyrinth of issues involved in the protection of TK. This is because TK would be accessed without recourse to its owners, expropriated, and commercially

[112] Correa C., see n103 above, at page 3.
[113] Chander A. And Sunder M., see n63 above, at page 1343.
[114] Kuruk P., see n45 above, at pages 831 – 832.

exploited, as it is regarded as free knowledge without the benefit of recognised ownership in general legal terms.

TK consistently focuses on innovation, culture, and works that have been passed through generations. Such knowledge, from the Western copyright point of view, is in the public domain. Yet, there is value in that generational passage and in the knowledge that has been perfected by such controlled transmission.[115] Western IP notions do not identify that TK changes in response to culture, environment, and the passage of time. It then appears that the restriction of TK to the public domain is a consequence of the fact that it is a living active concept which is not locked up in time. The placement of TK/TCEs in the public domain therefore not only runs contrary to its representative functions but also, threatens the future existence of traditional cultures.[116]

Undoubtedly, if and when TK/TCEs are protected, there would be a most definite recalibration of the public domain, and things already belonging in the public domain would receive protection and be removed therefrom. Access to some traditional works would be restricted or even outrightly forbidden.[117]

It has been proposed that in response to the exploitation of the public domain to the detriment of TK holders, TK/TCEs should be declared to be the property of defined communities. This approach would limit access to it and restrict its exploitation, while making it available for free to those within the traditional communities.[118]

2.6 CONCLUSION

IP laws could play an important role in providing legal protection for TK/TCEs which would vest traditional communities and their members with the right of

[115] Long D., see n28 above, at page 321.
[116] Sturrock M., see n50 above, at page 7.
[117] Long D, see n28 above, at page 321.
[118] Chander A. And Sunder M., see n63 above, at page 1363.

self determination, thus enabling them to commercialize their traditional practices, if they so wish, or exclude outsiders from free exploitation.[119]

It however seems that conventional or basic IPRs as they currently exist may not be the right means for protecting TK/TCEs.[120] This is consequent to the fact, as shown above, that TK/TCEs are often not eligible for protection under existing IP laws.[121] The forms of protection necessary for TCEs exceed the scope of protection afforded by copyright law.[122] The TK/TCEs of a community often do not fit into the perceived notions of objects of patents, industrial designs and copyright.[123] While laws of copyright, designs, trade mark and geographical indications may be used to protect indigenous culture, the specific context in which they would be used has to be taken into special consideration.

However, the conventional IP system is currently being used by individuals to poach and misappropriate indigenous or TK.[124] These individuals use the IP system to register ownership of an idea without appreciating or benefiting the holders of the TK/TCE. Attributing rights in TK/TCEs to an individual would amount to possessive individualism in practice.[125] The degree of control of an individual over a work, if applied to TK/TCEs, bestows rights on that individual which they would not previously have had within the traditional practice of knowledge dissemination/transmission, and which would in fact run contrary to the welfare of the community and its transmission process.[126] Such

[119] Kallinikou D., see n33 above, at page 2.
[120] Indonesian Media Law and Policy Centre, *The Impact of Intellectual Property Laws on Indonesian Traditional Arts*, (2005) being text of the summary of conclusions from the seminar held at Hotel Atlet Century in Jakarta, Indonesia on 29th July, 2005 by the Indonesian Media Law and Policy Centre in cooperation with the Social Science Research Council and the Ford Foundation, at page 1. Available online at http://programs.ssrc.org/ccit/ip/indonesian-arts/. Last visited 3rd March, 2009.
[121] Torsen M., see n80 above, at page 173.
[122] Torsen M., see n80 above, at page 174.
[123] WIPO, '*Introductory Seminar on Copyright and Neighbouring Rights: The Protection of Folklore*'. (1997) WIPO: Geneva.
[124] South African Department of Trade and Industry, see n99 above, at page 6.
[125] The consequence of possessive individualism resulting from the concept of authorship was exhaustively enunciated by Jaszi P. See Jaszi P., '*Towards a theory of copyright: The metamorphoses of "Authorship"*', (1991) *Duke Law Journal*, 455, at pages 485 – 491.
[126] See Blaukopf K., '*Legal Policies for the Safeguarding of Traditional Music: Are They Utopian?*' (1990) *The World of Music XXXIII* (1). See further Mills S., *Indigenous Music and the Law: An Analysis of National and*

possessive individualism may in fact be tantamount to theft as would cause an individual to claim ownership of a common cultural heritage, which in all probability is not even his own to start with.[127] It presents as the property of one, that which is taken from the lives of many.[128]

The application of principles of IP as it presently stands within communities could carry with it the threat of breakdown of such communities since relationships are expressed through and maintained by creative expression and traditional resources.[129] If the advancing commoditisation of TCEs is allowed to go unhindered, without adequate and sympathetic official protection for the originating non-market community system, then the transmission process itself, as a vital scene of community cohesion and humanising personal development, will itself be placed under a threat.[130]

Thus far IP has not been used to protect traditional knowledge but has in fact been used to usurp traditional knowledge, since it falls within the public domain, without any benefit to the knowledge holders.[131]

In conclusion, the basic concepts of IP are inherently incompatible with the fundamental principles guiding the evolution of TCEs. Thus, the types of acts that traditional communities want to prevent outsiders from doing are not necessarily those that private property laws provide.

International Legislation, Yearbook for traditional music, (1996) Canberra: International Council for Traditional Music.

[127] McGraith D., *Anti-Copyright and Cassette Culture,* Sound by Artists, Lander and Lexier (eds.) (1990) Toronto: Art Metropole and Walter Phillips Gallery.

[128] Ibid.

[129] McCann A., see n41 above, at page 11.

[130] McCann A., see n41 above, at page 3.

[131] South African Department of Trade and Industry, see n99 above, at page 8.

CHAPTER THREE

3.0 IP RIGHTS IN RESPECT OF TCES: THE CURRENT POSITION

The use and exploitation of TK/TCEs has been a moot point at many forums at the international, regional and national levels. Developed and developing countries alike have engaged in debates and concluded general agreements for the protection of TK/TCEs. A number of intergovernmental organisations[132] have also been engaged in such debates relating to the use of IP systems for the protection of TCEs.[133]

3.1 THE INTERNATIONAL DIMENSION

3.1.1 AFRICAN STUDY MEETING ON COPYRIGHT, 1963

On the international scene, one of the earliest occasions on which the protection of TCEs was discussed was at an African Study Meeting on Copyright which was held in Brazzaville 1963.[134] At that meeting, the countries proposed that copyright concessions be granted for developing countries, and these included reductions in the duration of protection and the protection of folklore in general.

3.1.2 STOCKHOLM CONFERENCE FOR THE REVISION OF THE BERNE CONVENTION, 1967.

Another international convention at which the issue of the protection of TCEs came up was the Stockholm Conference for the Revision of the Berne Convention in 1967.[135] At the conference, developing countries were concerned inter alia about establishing a regime for the protection of TCEs. Their concerns culminated in the adoption of a protocol embodying solutions thereto, the protocol did not come into force as it failed to secure the requisite

[132] For example, the United Nations Educational, Scientific and Cultural Organization (UNESCO), the World Intellectual Property Organization (WIPO), the World Trade Organization (WTO), UNEP and UNCTAD.
[133] South African Department of Trade and Industry, "The Protection of Indigenous Knowledge through the Intellectual Property System: A Policy Framework", (2004), at page 4. Available online at www.thedti.gov.za/ccrd/ip/policy.pdf. Last visited 3rd March, 2009.
[134] Blakeney M., see n110 above, at page 442.
[135] Ibid.

number of ratifications. This Protocol became an Appendix to the Paris Act, which was adopted by the Paris Revision Conference of 1971.[136]

3.1.3 UNITED NATIONS EDUCATIONAL SCIENTIFIC AND CULTURAL ORGANIZATION

The seeming impossibility of securing some form of protection for TCEs in these forums led to initiatives being taken up in other forums for its protection. In 1975, the United Nations Educational, Scientific and Cultural Organization (UNESCO) Secretariat prepared a study on the protection of TCEs internationally.[137] In 1977, it convened a Committee of Experts on the Legal Protection of Folklore because of the broad scope of the analysis contained in the study.[138] Pursuant to a resolution adopted by its general conference in 1980, and a decision taken by the Governing Bodies of the WIPO in 1981, a Committee of Governmental Experts on the Intellectual Property Aspects of the Protection of Expressions of Folklore was convened. After a series of meetings the Committee formulated the Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions (hereinafter referred to as the "Model Provisions") and released its final text in 1982.[139] The Model Provisions were adopted by both organizations in 1985.[140]

The Model Provisions extended protection to TCEs irrespective of their modes of expression[141] and vested the rights thereto in a "competent authority".[142]

[136] Ibid. It seems worthy of mention that the protocol became significant with the entry into force of the TRIPS Agreement of the WTO in 1994 as Article 9 of the TRIPS Agreement obliges member states of the WTO to comply with Articles 1 to 21 of the Berne Convention (1971) and the appendix thereto. Unfortunately, the protocol as adopted addressed all other concerns of the developing countries aside for the protection of TCEs.
[137] The commissioning of this study was prompted by a memorandum sent by the Government of Bolivia to the Director General of UNESCO requesting that the organization examine the feasibility of there being an international instrument for the protection of TCEs to be attached to the Universal Copyright Convention, which is administered by UNESCO. See ibid. See also, International dimension, at page 2.
[138] Blakeney M., see n110 above. The committee in its report concluded that more work was required to be done on the subject matter of the protection within the framework of an overall and integrated approach.
[139] Kuruk P., see n45 above, at page 814.
[140] Ibid.
[141] Be it verbal, musical, a performance or in tangible form. The Model Provisions do not require material fixation or identifiable authors. It grants perpetual protection and does not impose binding international obligations.
[142] Kuruk P., see n45 above, at page 814.

This authority was responsible for granting approval for the use of TCEs outside its community of origin and the disbursement of fees levied and collected for such use to either promote or safeguard existing TCEs.[143] It prescribed criminal penalties for not obtaining prior written consent for the use of the protected TCEs, not acknowledging their source, misrepresenting their origin and distorting them in a disparaging manner contrary to the interests of the originating community. In addition to all these, the Model Provisions provided for the seizure of objects made in violation of its provisions and the profits derived therefrom. It however provided for an exception to such protection when TCEs are used for educational purposes.[144]

Unfortunately, these provisions have not been adopted by any country till date and are thus of little legal consequence.[145]

3.1.4 WIPO – UNESCO WORLD FORUM ON THE PROTECTION OF FOLKLORE, 1997

In 1997, a joint WIPO-UNESCO World Forum on the Protection of Folklore was held in Thailand. Issues relating to IP and its protection of TCEs were discussed. The forum culminated in the adoption of a plan of action expressing concerns about the adequacy of copyright law in the protection of TCEs and the need for an international agreement on a *sui generis* protection of TCEs. Regional Consultations were subsequently organized thereon in 1999 and they all adopted recommendations and proposals relating to IP and TCEs.[146]

3.1.5 WORLD INTELLECTUAL PROPERTY ORGANIZATION

In the year 2000, the WIPO General Assembly established an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (hereinafter referred to as "the committee") as a forum for the discussion of IP issues in relation to

[143] Ibid.
[144] Ibid.
[145] Kuruk P., see n45 above, at page 816.
[146] Ying K., see n51 above.

access to genetic resources, benefit sharing and the protection of traditional knowledge and expressions of folklore.[147] Thus WIPO has played a leading role in the push for the recognition and protection of indigenous traditional knowledge from misuse and misappropriation[148] and as such, the debate has been within the confines of IP.[149]

The committee has made considerable progress in examining the viability of a regime for the protection of TK/TCEs internationally.[150] It has successfully produced, among other things, a toolkit for the management of IP in the context of documenting TK and genetic resources and a practical guide for the protection of TCEs.[151] Consequent to a suggestion by the African Group at its fifth session[152] in 2005, the committee developed an overview of policy objectives and core principles[153] for the protection of TCEs. [154] This was left open for comments and suggestions. Subsequently, it drafted the Revised Provisions for the Protection of Traditional Cultural Expressions/Expressions of Folklore and the Revised Provisions for the Protection of Traditional Knowledge in further attempts to address the issue.[155] These documents set

[147] Drahos P., "Towards an international framework for the protection of traditional group knowledge and practice", (2004) being a paper presented at the UNCTAD-Commonwealth secretariat workshop on elements of national *sui generis* systems for the preservation, protection and promotion of traditional knowledge, innovations and practices and Options for an International Framework, held at Geneva between the 4th and 6th of February, 2004 at page 10.
[148] South African Department of Trade and Industry, see n99 above.
[149] Dodson M., "Report on indigenous traditional knowledge", (2007) being a report prepared for the sixth session of the Permanent Forum on Indigenous Issues of the United Nations Economic and Social Council, United Nations document E/C.19/2007/10, at page 12.
[150] Ibid.
[151] For a full summary of the successes of the IG, see WIPO, 'Overview of Activities and Outcomes of the Intergovernmental Committee', WIPO document (WIPO/GRTKF/IC/5/12), of 3rd April, 2003.
[152] See Chair's Conclusions: Fifth Session of the Intergovernmental Committee.
[153] These principles include the fact that the beneficiaries of the protection should be the indigenous peoples, there should be equitable remuneration rights for misappropriation, it should confer rights on the indigenous communities or their agents, there should be limited exceptions e.g. use of TCEs for educational purposes, there should be a procedure for the registration of TCEs and the provision of civil and criminal remedies for breach. For further analysis of the details of the contents of the draft, see Kallinikou D., see n33 above, at page 5.
[154] Drahos P., see n147 above, at pages 10 – 11.
[155] Loew L., **'***Creative industries in developing countries and intellectual property protection*', (2006) 9 *Vanderbilt Journal of Entertainment and Technology*, 171 at page 184.

out a potential system of protection which takes care of the practical issues that arise in the implementation of a *sui generis* system of protection.[156]

In 2000, the Economic and Social Council of the United Nations also adopted a resolution establishing the Permanent Forum on Indigenous Issues.[157] Its mandate covers the discussion of indigenous issues relating to economic and social development, culture etc in general and to promote the integration and coordination of activities relating to indigenous issues within the United Nations system in particular.[158] The Permanent Forum has not been in operation for long.[159]

Although the provisions of these treaties are under discussion, many developed nations are opposed to formulation of such treaties and negotiations are on the verge of collapse.[160] Consequently, and rather unfortunately, no international instrument embodying these provisions has entered into force or has even been signed yet.

The TRIPS Council of the WTO has also had occasion to review this issue.[161] Unfortunately, negotiations at the WTO about amendments to the TRIPS Agreement as it pertains to TK/TCEs have collapsed.[162]

3.2 THE REGIONAL DIMENSION: THE AFRICAN INTELLECTUAL PROPERTY ORGANIZATION

Regional organisations[163] have also been engaged in debates and deliberations with respect to the development of regional treaties and conventions regarding the protection of TK/TCEs. They have been considerably more successful on this front than the intergovernmental organizations. Consequent to this, member states of these regional

[156] Dodson M., see n149 above, at page 12.
[157] Drahos P., see n147 above, at page 15.
[158] See further United Nations, Economic and Social Council document, (E/RES/2000/22).
[159] Drahos P., see n147 above, at page 15.
[160] South African Department of Trade and Industry, see n2 above
[161] Kallinikou D., see n33 above, at page 5.
[162] South African Department of Trade and Industry, see n99 above, at page 4.
[163] For example, the Asia Pacific and the African Union.

organizations, being seised of the existence of these treaties and conventions, are legislating accordingly.[164]

An example of a regional organization involved in IP matters and which has a legislative structure dealing with the protection of TCEs is the group of French-speaking African countries known as the African Intellectual Property Organization ("OAPI").[165] In the OAPI Agreement, there are special provisions relating to the protection of TCEs.[166] Like in the Model Provisions jointly adopted by WIPO and UNESCO, the provisions of the OAPI Agreement vest authority for the administration of TCEs (which it considers as part of the national heritage) in an appropriate state agency. It also has provisions for obtaining prior authorization from the agency for its appropriation, and gives the agency the responsibility of the disbursement of fees collected for such exploitation for "social and cultural purposes".

Each member state of the OAPI is required to submit a list of its national heritage property which is to be subject to such protection to the regional body for effective administration of these provisions.[167] However, no member state has submitted any such list to the OAPI, and thus, its fate has become similar to that of the Model Provisions, giving it little or no legal significance.

3.3 THE NATIONAL DIMENSION

In the light of the above, in spite of the agitation for international and regional regimes for the protection of TCEs, there is none and thus, the setting of standards for the protection of TCEs is done by positive laws enacted by sovereign states in their individual capacities.[168] Regrettably, there is no clear legislative pattern in the promulgation of these laws.[169]

There have been efforts geared at creating guidelines for states in the promulgation of these laws to enhance the predictability of legislation between

[164] South African Department of Trade and Industry, see n99 above, at page 5.
[165] Kuruk P., see n45 above, at page 806.
[166] Kuruk P., see n45 above, at page 811.
[167] Ibid.
[168] Drahos P., see n147 above, at pages 4 and 18.
[169] Correa C., see n103 above, at page 4.

states by intergovernmental organizations. An example of such is the Recommendation on the Safeguarding of Traditional Cultures and Folklore, adopted by the General Conference of the UNESCO in 1989**,** which proposed measures to be taken at the national level for the identification, preservation and dissemination of TCEs.[170]

Another development in this regard was the creation of the Tunis Model Law in 1976[171], which was designed to be used as a guideline in drafting national copyright legislation to extend copyright protection to TCEs and its derivative works for an indefinite period irrespective of its mode of expression.[172] Like all other provisions already examined, it vested rights to this protection in a competent authority to be established by the state. The authority also had the responsibility of disbursement of fees collected for the use of folklore for the benefit of authors and performers and to protect and disseminate national folklore. It is worthy of note that the Tunis Model Law appears to have influenced the copyright laws of a number of developing countries[173].

3.3.1 CAMEROON

Cameroonian copyright law[174] protects TCEs and requires that prior authorization be obtained from the National Copyright Corporation before it can be commercially exploited. The National Copyright Corporation vested with the responsibility of representing the interests of authors and regulating the use of folklore in Cameroon. It is authorized to commence infringement actions against unlawful users of protected works.[175]

[170] Blakeney M., see n110 above, at pages 442 – 443.
[171] A joint effort of WIPO and UNESCO led to the development of the Tunis Model Law on Copyright for Developing Countries of 1976.
[172] Kuruk P., see n45 above, at page 813.
[173] Ibid. Countries like Burundi, Cameroon, Congo, Ghana, Guinea, Cote d'Ivoire and Mali. It appears that the Tunis Model Law drew inspiration from other developing countries as provisions similar to it had been adopted by Algeria. Kenya, Senegal and Tunisia, prior to its preparation.
[174] Cameroonian Law No. 82-18 to Regulate Copyright of 1982, reprinted in (1983)19 *Copyright Monthly Review of WIPO*, 360, at 360-61.
[175] Kuruk P., see n45 above, at page 802.

3.3.2 CONGO

Congolese copyright law[176] protects TCEs without a time limitation. Authority for the protection of TCEs however vests in the "Body of Authors". It is responsible for the collection of fees and overseeing the use of TCEs both in Congo and abroad. It is therefore charged with the issuance of authorization for its use.[177] This fee is used to support cultural and social objectives that benefit Congolese authors. Breach of the provisions of the law attracts penalties.[178] The body is also authorized to take legal action in prevention of and against improper exploitation of Congolese TCEs.[179]

3.3.3 GHANA

Ghanaian copyright law,[180] for example, vests right copyright in TCEs in the government. As a result, Ghanaian TCEs can only be used after obtaining due authorization from the state and paying a fee. Criminal penalties attach to use without this authorization. The state is also authorized to designate particular known practices as Ghanaian TCEs.[181]

3.3.4 MALI

In Mali[182], the authority for the protection of TCEs vests in the Minister of Arts and Culture. Here as well, public agencies are exempted from obtaining prior authorization for the use of TCEs. It is however worthy of note that this law, unlike the others, places TCEs with unknown authors[183] in the public domain but charges a user fee for it.[184]

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[176] See Congolese Copyright Law, reprinted in (1989) 25 *Copyright Monthly Review of WIPO*, 374

[177] Public agencies are not obliged to obtain prior authorization to use TCEs for non-profit activities. They are however required to notify the body before such use.

[178] For example, fines may be imposed for the unlawful exportation, importation or reproduction in Congo of TCEs in Congo or abroad.

[179] Kuruk P., see n45 above, at page 800 – 801.

[180] See Ghanaian Copyright Law, reprinted in (1985) 21 *Copyright Monthly Review of WIPO*, 423 at 435.

[181] Kuruk P., see n45 above, at page 799.

[182] See the Mali Ordinance Concerning Literary and Artistic Property of 1977, reprinted in (1980) 16 *Copyright Monthly Review of WIPO*, 125.

[183] These works include songs, legends, dances, and other manifestations of the common cultural heritage, which is a definition that encompasses all TCEs.

[184] Kuruk P., see n45 above, at page 801.

3.3.5 SENEGAL

Finally, Senegalese copyright law[185] also requires that prior authorization be obtained from the Copyright Office to use TCEs, and it charges users a fee. Criminal penalties also attach to the importation of works into Senegal that violate its copyright law. Consequently, since TCEs are protected under the copyright, the provision that criminalizes the import of all works that violate the copyright law should be helpful in its protection.[186]

Having seen the trend of national law making for the protection of TCEs a few considerations come to the fore. Generally, public agencies are the ones exempted from the necessity of obtaining prior authorized consent for the use of TCEs. It is worrisome as the implication of this is that there is a tendency that members of the ethnic community from which the TCE originates might be charged a fee for the use of their own folklore as rights thereto do not vest in the originating community but rather in the government or one of its agencies.[187]

The fact that users from within the originating community are required to obtain prior authorized consent to use TCEs commercially also presupposes that the rights of these communities to commercialize their TCEs, which existed under customary law to a limited degree, has been usurped by the national legislation.[188] These statutes generally exclude indigenous communities from participating in deciding the future of their TCEs and deprives them of any share of the revenues derived from either their use or from the damages received in infringement actions.[189] Moreover, these laws

[185] See Senegalese Law on the Protection of Copyright of 1973, reprinted in (1974*)* 10 *Copyright Monthly Review of WIPO* 211 at 212.
[186] Kuruk P., see n45 above, at pages 802 – 803.
[187] Kuruk P., see n45 above, at page 805.
[188] Ibid.
[189] Ibid. From the above examples, most national legislations provide for the disbursement of the revenue towards support cultural and social objectives that benefit authors, towards the general protection of national heritage or merely leave it in the discretion of the body vested with authority over it for disbursement.

do not provide any guidance on how TCEs are to be valued and how this would affect the fees charged for their use.[190]

Whatever the case may be, there hasn't been any noticeable number of foreign requests for permission to use TCEs in these countries. Meanwhile, TCEs continue to be expropriated and commercially exploited there. As such, it is doubtful if these laws, even though they are in force in these countries, do protect TCEs effectively or even raise any form of revenue. [191] Thus, the situation remains mostly the same, even with such legislation, to the detriment of indigenous communities.

In the final analysis, though international, regional and national arrangements provide some protection for TCEs, they, however, do not adequately address the needs and concerns of indigenous peoples. All the highlighted efforts to prevent misappropriation and misuse of TCEs are disparate and evidently insufficient.[192] The question of how TCEs can be properly protected therefore still remains unanswered in these forums.[193]

3.4 THE PERVASIVE RATIONALE FOR THE PROTECTION OF TCES

It is imperative to examine the justification for the proper protection of TCEs. This is because an examination of the appropriate mode of protection of it would be an exercise in futility if there are no real or strong reasons for such a protection. As highlighted above, in some countries, especially in the western world, the dire need for protection of TCEs is not identified with even though it is a subject of debate in many international and intergovernmental circles. The pervasive rationales for the protection of TCEs are as follows:

(a) <u>The conservation of indigenous communities</u>[194]: Expropriation and illegal exploitation of TCEs harm indigenous communities. This is because by

[190] Ibid.
[191] Kuruk P., see n45 above, at page 806.
[192] Dodson M., see n149 above, at pages 13 – 14.
[193] Ibid.
[194] Correa M., see n103 above, at page 6.

expropriating these items,[195] it would lead to the permanent loss of irreplaceable property which ought to be in museums and art houses of the originating community and state.[196] In addition to these items being lost, there is also a danger of losing documentary and photographic records of traditional societies, records which ought to be preserved for posterity and which would enable the generations to come feel a sense of belonging to their roots and traditions. [197] On the other hand, where traditional practices are copied and attributed to other communities, they would be eroded and they are generally in danger of disappearing. Thus, there is a case for the protection of TCEs to conserve these traditional practices.[198] The protection of TCEs would provide a framework which would ultimately encourage the maintenance of practices and knowledge embodying traditional life styles and assist the members of the indigenous communities take pride in them.[199] This would in turn stimulate and promote innovation and creativity in indigenous communities. [200] It has been noted[201] that world cultures are going extinct and even more face extinction in the next few years.[202]

(b) <u>The prevention of unauthorized exploitation</u>[203]: TCEs are under economic, psychological and cultural threats from alien sources.[204] The identities of groups are being threatened by the exposure and revelation of their sacred knowledge, knowledge peculiar to the group, outside of their communities. Members of indigenous communities have their sense of identity and self-respect inextricably intertwined with their group culture.[205] As a result of this,

[195] This would apply where the TCEs in question are tangible.
[196] Kuruk P., see n45 above, at page 772.
[197] Blakeney M., see n110 above, at page 449.
[198] Blakeney M., *Protecting Traditional Cultural Expressions: The international dimension*, (2005) being a paper presented at the Birbeck University of London Arts and Humanities Research Council Workshop on the Protection of Traditional Knowledge and Culture, held on the 28th of February, 2005 at the Queen Mary Intellectual Property Research Institute, University of London, at page 8.
[199] Correa M., see n103 above, at pages 6 – 7.
[200] Blakeney M., see n198 above, at page 8.
[201] Ibid.
[202] According to Correa M., around 90% of the 6000+ currently spoken languages (and the cultures expressed by them) may have become extinct or face extinction in the next 100 years. See n103 above, at page 7.
[203] Blakeney M., see n198 above, at page 8.
[204] Blakeney M., see n110 above, at page 449.
[205] Ying K., see n51 above. In identifying with the fact that maintaining cultural integrity is a basis for legal protection of TCEs, the Philippines Indigenous Peoples Rights Act of 1997 recognises, protects and promotes

they consider the right to control their TCEs an integral part of maintaining their cultural integrity, particularly when the TCEs in question are secret in nature. Unauthorized exploitation leads to ancient territorial practices being perceived as belonging to a wider group than its original owners.[206] Consequent to this, there would be competing claims of ownership of traditional practices and knowledge by indigenous peoples and outsiders alike. Derivative works would gain more attention than the original. Traditional performances would be recorded and used commercially without authorization. TCEs would be imitated and commercialized without due attribution or worse, false attribution to other groups or communities. Outsiders would commercialize TCEs for their own selfish benefit without recourse to the owners and custodians thereof. [207]

(c) The protection from distortion and other prejudicial actions[208]: Proper protection would give indigenous communities ownership and control of their TCEs. This would enable them protect the sacred aspects from distortion, misappropriation and ridicule.[209] Indigenous communities are invariably harmed when their sacred TCEs subjected to use outside of that for which they were created, sold as mere decorative art, or commercial copies are made of them misrepresenting the values of the community and generally disparaging them.[210] Thus, adequate protection would not only preserve the dignity of the community, but also the sanctity and deference due to their religious practices and the creators of these works.[211] Therefore, the protection of TCEs is essential to cultural health.[212] It is a source of concern as indigenous communities may be short-changed or even harmed in the process of misappropriation of their TCEs.[213]

rights of indigenous cultural communities' to cultural integrity. See Section 32, Chapter IV, Indigenous Peoples Rights Act, 1997.

[206] Indonesian Media Law and Policy Centre, see n120 above, at page 1.

[207] Ibid.

[208] Blakeney M., see n198 above, at page 8.

[209] Dodson M., see n149 above, at page 18.

[210] Kuruk P., see n45 above, at page 772.

[211] Blakeney M., see n198 above, at page 8.

[212] Blakeney M., see n110 above, at page 449.

[213] Kuruk P., see n45 above, at page 772.

(d) Adequate compensation for appropriation[214]: Ideas and knowledge are an increasingly important aspect of trade.[215] Consequently, the misappropriation of TCEs, either as a form of knowledge or practice continues to generate income for some people. It has been argued that the fact that TK/TCEs have been continuously misappropriated is indicative of the fact that they are commercially viable.[216] Most times when TK/TCEs are exploited, the originating communities derive no economic benefits or benefits which pale in comparison to the huge profits made by the exploiters.[217] In the light of the foregoing, vesting rights of ownership and control of TCEs in indigenous communities would undoubtedly give the members of these communities an opportunity to engage in trade and economically utilize them. It is trite that indigenous peoples constitute some of the poorest people in the world and live in situations of abject poverty.[218] Thus, the commercial exploitation of their TCEs would serve as an important source of income for them.[219] Without due protection and granting of rights of control and ownership of their TCEs to indigenous communities, there is a threat of competition in the global market place by non-indigenous people who would imitate these TCEs and uninhibitedly exploit them commercially.[220] It would result in economic harm to the indigenous communities.[221] On a larger scale, benefit to indigenous communities from the exploitation of their TCEs would invariably translate to benefits to the national economy.[222] In South Africa, the Department of Trade and Industry reported that traditional products such as handcrafts, medicine, agricultural products and non-wood forest products are traded both locally and internationally and provide substantial benefits for the exporting country.[223]

[214] Blakeney M., see n110 above, at page 449.
[215] WTO. Available online at http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm. Last visited 3rd March, 2009.
[216] See Dodson M., see n149 above, at page 18.
[217] Kuruk P., see n45 above, at page 772.
[218] Ibid.
[219] South African Department of Trade and Industry, see n99 above, at page 9.
[220] Ying K., see n 51 above.
[221] Ibid.
[222] South African Department of Trade and Industry, see n99 above, at page 9.
[223] Ibid. It is reported that the international trade in non-wood forest products alone generate about 11 Billion US Dollars per year.

(e) Global equality[224]: This rationale for the protection of TCEs, though seemingly small, has been a great force in the push for global recognition of the rights of indigenous peoples. The underlying motivation for many proposals for the protection of TK/TCEs is considerations of equity. In the global trading system, western notions of IP are in place and these naturally have a lilt towards protecting more of the industrial property of the developed countries than those of the developing countries. Thus, access to the knowledge of industrialized countries comes to developing countries at a high cost. On the other hand, TK/TCEs generate value but due to the western notions of IP, they are not subject to adequate protection and its use is not sufficiently compensated.[225] As a result of this, it appears that an internationally recognized regime of protection for TK/TCEs would be necessary to bring equity into patently unjust and unequal relations within the global community.[226]

3.5 CLASSIFICATION OF TCES WITH A VIEW TO PROTECTION

As discussed in Chapter One, TK encompasses very different types of knowledge. These different types of knowledge may be distinguished from one another by the elements involved, the manner in which the knowledge or practice is applied, the level of its fixation, the form of possession exercised over it, be it individual[227] or collective, and its legal status.[228] TCEs are also diverse. Examples are poetry, riddles, songs, instrumental music, dances, plays, productions of art in the form of drawings, paintings, carvings, sculptures, pottery, jewellery, handicrafts, costumes, and indigenous textiles.[229] The peculiar nature of the various types of TCEs necessitate that the protection to be afforded to them be varied as well.[230]

[224] Correa M., see n103 above, at page 5.
[225] Ibid.
[226] Ibid.
[227] Individual possession is usually exercised in respect of tangible art works like sculptures and handcrafts.
[228] Correa M., see n103 above, at page 4.
[229] Kuruk P., see n45 above, at page 779.
[230] Long D., see n28 above, at page 322.

However, the on-going debates in the different forums have not shed much light on how to classify TCEs, neither are there indications related to how widespread a cultural practice must be to qualify as recognisable TCEs under a legal regime of protection.[231]

Generally, classifying by form of expression, TCEs can be divided into four groups.[232] These are:

a) Verbal expressions, examples of which are poetry and riddles;
b) Musical expressions, examples of which are songs and instrumental music;
c) Expressions by action, examples of which are dances and plays; and
d) Tangible expressions, examples of which are drawings, paintings, carvings, sculptures, pottery, jewellery, handicrafts, costumes and indigenous textiles.[233]

Based on the differences in form of these TCEs, the standard of protection required in each of these forms would be significantly different. An example of this is that while current modern IP regimes may find it easy to protect tangible expressions under designs, being attributable to an individual and fixated, verbal and non-fixated musical expressions would not be so protected. They would require a different mode of protection, given that they possess peculiar traits that oust them from the protection of IP laws as discussed earlier in Chapter Two.

Aside from this, there are some types of traditional practices where sharing and commercialization is not acceptable to the originating community. This is mostly true of sacred TK/TCEs. Typically, indigenous communities do not want to reveal their sacred practices, neither do they want them used by others not initiated into their religious systems, not to talk of it being publicly shared or marketed.[234] This form of TCEs would most assuredly require a

[231] Kuruk P., see n45 above, at page 803.
[232] Kallinikou D., see n33 above, referring to WIPO, "Intellectual property: Needs and expectations of traditional knowledge holders", (2001) at page 22.
[233] Ibid.
[234] Long D., see n28 above, at page 322.

different form of protection that would prohibit appropriation as opposed to merely requiring a fee for use or demanding attribution or benefit sharing. Thus, individual communities should be given the liberty of identifying which of their knowledge or practices should be protected, as such identification is critical to the well being of each community. [235]

3.6 ASCERTAINING OWNERSHIP OF PROTECTABLE TCES

Another peculiar problem associated to the protection of TCEs is that of ascertaining ownership thereof.

Essential to the adequate protection of TCEs is the identification and possibly, the registration thereof.[236] This would be done by the creation of registers and databases for such knowledge. However, registration of TCEs after their identification would necessarily require its disclosure, [237] at least to the officers of the registering authority. The documentation and inventory of TK/TCEs have always been viewed with a measure of scepticism by indigenous communities. This is because it is perceived as increasing the risk of unauthorized appropriation of the knowledge, since it implies access thereto.[238] Failure to properly protect the information in registers and databases poses a great threat to the owners of the TCEs. There are known examples of countries where such registers and databases were created but which ended up resulting in unintended consequences.[239] The communities who were supposed to benefit are not benefiting at all.[240] In any event, a registration system to be adopted for TCEs should be adequately funded and supported so as to avoid undue burdens on indigenous groups. This would help begin the critical identification process.[241] However, there is a form of legal protection for registers and databases internationally. Article 5 of the

[235] Long D., see n28 above, at page 327.
[236] Indonesian Media Law and Policy Centre, see n120 above.
[237] South African Department of Trade and Industry, see n99 above, at page 18.
[238] Gervais D., see n40 above, at page 164.
[239] Examples are India and Venezuela cited in South African Department of Trade and Industry, see n99 above, at page 18.
[240] South African Department of Trade and Industry, see n99 above, at page 18.
[241] Long D., see n28 above, at page 327.

WIPO Copyright Treaty covers compilations of data and therefore registers and inventories of TCEs can therefore be protected under it.[242]

Identification is essential because it would be difficult to enforce a right in respect of a practice or knowledge that has not been identified prior to appropriation.[243] Granting rights with respect to TCEs that have not been clearly identified and the ownership thereof ascertained would at best lead to a situation of legal uncertainty, which would render the thus protection afforded void, if ever contested in court.[244]

Another fact that militates against ascertainment of ownership is that indigenous communities are not always located within national borders and interactions between indigenous communities often occur across national borders.[245] Thus, it is foreseeable that various communities may claim rights in the same knowledge or practice.[246] Notions of nationality and territoriality are common to TCE debates.[247] These notions complicate the deficiencies inherent in any proposed regime for the protection of TCEs. There have been debates in respect of TK relating to members of an indigenous group being separated into two different states by a border. The challenge would then be which of the two separate entities, and within which state, would have rights to control and own their TK/TCEs, if any[248].[249]

Closely following this problem is that of control of the use of TCEs abroad when they are common to indigenous groups spanning several countries. While each community may have valid claims to the use of such TCEs, it is

[242] Kallinikou D., see n33 above, at page 3.
[243] Gervais D., see n40 above, at page 164.
[244] Ibid.
[245] Dodson M., see n149 above, at page 21.
[246] Gervais D., see n40 above, at page 165.
[247] Kuruk P., see n45 above, at page 804.
[248] Long D., see N28 above, at page 326.
[249] An example of such indigenous communities is the Ewe Community. This community is straddled across both sides of the Ghana-Togo border. If the Ghanaian Ewes claim a particular TCE and a court interprets the law to give them rights to it according to Ghanaian legislation, it is would most likely disallow a competing claim by the Togolese Ewes. This would lead to an unfair decision. See Kuruk P., n8 above, at page 804

unclear how and to what degree the relevant national governments would be justified in asserting rights on behalf of their nationals.[250]

3.7 MODE OF PROTECTION: EXPANSION OF PRESENT IPR CATEGORIES VS. CREATION OF A *SUI GENERIS* CATEGORY FOR TCES

How to protect TK/TCEs properly still remains an unsolved challenge in all forums where the debate has taken place, even among states that have already taken preliminary steps towards such protection.[251] Debates generally revolve around whether the protection to be given to TK/TCEs should be done under the auspices of IP or under a *sui generis* mode of protection.

3.7.1 PROTECTION VIDE EXISTING IP

In spite of the fact that there are essential characteristics of TCEs that make them unsuitable for IP protection as discussed in Chapter Two above, it is argued in some forums that some extant forms of IP would afford a degree of protection to particular TCEs. It is believed that IP regimes that have recognised TCEs would protect works which even happen to fall outside the western IP model.[252] However, thus far, IP has not been used to protect TK/TCEs but has to the contrary been used to usurp them without adequate compensation or even attribution to the owners thereof.[253]

An examination of the forms of IP that can be used in protecting TCEs and the implications of their used is as shown below.

3.7.1.1 COPYRIGHT

Protection of some TCEs by copyright appears feasible as some of them are expressed in the same manner as protected works.[254] Such works include

[250] Kuruk P., see n45 above, at page 805. An example of this is the Kente cloth, used in the United States for making garments, but originates from the Ashanti, Ewe and Nzima communities found in Ghana, the Ivory Coast and Togo.
[251] Dodson M., see n149 above.
[252] Torsen M., see n80 above, at page 174.
[253] South African Department of Trade and Industry, see n99 above, at page 8.
[254] Kallinikou D., see n33 above, at page 2.

paintings, sculptures, designs, drawings, dramas, dances, folktales, and folk songs. The similar modes of expression translate to similar levels of creativity being put into the work and the use of similar means of exploitation.[255]

Copyright can be used to protect TCEs against unauthorised reproduction and exploitation.[256] In a situation where the copyright collectively belongs to a community, there would be no limited lifespan of a "copyright owner". The concept of collective authorship already exists in IP regimes.[257] Thus, there are potential flexibilities on which one can rely as certain TCEs are incorporated into an IP regime.[258] The originating community can then allow outsiders make reproductions via licensing and as such would obtain payment of royalties therefor. According to the South African Department of Trade on the issue of licensing,

> "*Communities could establish collecting societies or trusts that would administer their collective rights and therefore negotiate and receive royalties for sharing. Licensing would result in the continuous payment of royalties as opposed to a once-off payment that would result from the sale of the intellectual property* [in TCEs]".[259]

However, contrary to these assertions, copyright law has not sufficiently addressed the concerns of indigenous people, even though it has to a large extent protected the TCEs from unauthorized exploitation. In the Australian case of Bulun Bulun v R & T Textiles Pty Ltd[260], the court of Australia merely recognised that the individual artist who creates the TCE in question owed a fiduciary duty to his community not to act in a manner likely to harm the communal interests of his clan and also to take action to protect the artistic work in his capacity as the copyright owner. It is worthy of note however that the presiding judge mentioned that if the artist failed to enforce his copyright,

[255] Kuruk P., see n45 above, at page 792 – 793.
[256] Correa M., see n103 above, at page 11.
[257] Examples of these are joint authorship and works for hire.
[258] Long D., see n28 above, at page 324.
[259] South African Department of Trade and Industry, see n99 above, at page 15.
[260] Reported in (1998) 157 Australian Law Reports page 193 at page 211.

equity would intervene and the community would be allowed to bring an action in their own names against the infringer and the copyright owner, claiming against the former, the interlocutory relief to restrain the infringement, and against the latter, orders necessary to ensure that the copyright owner enforces the copyright.[261]

A major limitation of the use of copyright law for the protection of TCEs is its insistence upon material fixation as a precondition for protection.[262] This can however be avoided by statutory amendment which would require that the fixation requirement be waived in cases involving TCEs.

3.7.1.2 MORAL RIGHTS

In addition to copyright, moral rights in TCEs are being pushed as a solution to the problems of distortion and other prejudicial actions that usually follow the unauthorized use of TCEs.[263] The moral rights of publication, paternity and integrity[264] would prevent the publication[265], imitation or reproduction of TCEs without due authorization and attribution[266] and would also prevent its use in a manner inappropriate with the nature of the original work[267].[268] Moral rights should be made to attach to TCEs automatically and the rights should be vested in communities, in which case, the moral right would not be limited to a statutory period and the requirement of fixation should be statutorily waived as in the case of copyright discussed above.

[261] In the words of Ying K., "*This judgment was said to represent "a novel approach to the protection of interests under copyright principles outside of the conventional bounds, as they are understood, of copyright protection pertaining solely to the rights of authors or assignees". This is because the community would be able to sue the infringer in such circumstances, though they might not be the copyright owners*." See Ying K., see n51 above.
[262] Blakeney M., see n110 above, at pages 453 – 454.
[263] Kuruk P., see n45 above, at page 829 – 830.
[264] Blakeney M., see n110 above, at page 454.
[265] The right of publication allows the community to decide whether the TCE should be disseminated. Consequently, protection can be given to sacred TCEs.
[266] The right of paternity ensures that there is due acknowledgement of the source of the works. This right is usually inalienable.
[267] This is protected by the right of integrity which protects works from distortion, alteration and misrepresentation.
[268] Ibid.

3.7.1.3 INDUSTRIAL DESIGNS

IPRs in the form of industrial designs can be used to protect the design of utilitarian craft products such as furniture and garments. Fabrications from ceramics, leather wood etc may also qualify for protection as industrial designs.[269] The community may also register a symbol as a design, so as to prevent its use by third parties in a form of defensive registration.[270]

3.7.1.4 TRADEMARKS

TCEs from one community may be distinguished from those of another community by trademarks and service marks.[271] This is particularly important as trademarks are used in the commercial promotion of goods and services globally.[272] Trademarks could be made to apply to clothing designs, sophisticated marks on agricultural implements, designs, symbols and carvings.[273] Thus, indigenous communities can effectively prevent outsiders from using the same marks in the identification of their products. [274] Also, on account of the fact that TCEs require protection in perpetuity, Trademarks are particularly suitable as they can accommodate this scenario.[275]

Certification marks are a form of trademark. They can be used to certify that a product is made in a manner which has certain characteristics, which are as a result of methodology employed within a particular indigenous community.[276] These would also suffice in the protection of TCEs. There might however be difficulties related to the formalities required for registering and renewing trademarks faced by indigenous communities.

Collective marks, on the other hand, are owned through associations and institutions. For such marks, permission must be obtained to use them. Collective marks are used effectively in the wine and spirits industries of

[269] Correa M., see n103 above, at page 11.
[270] South African Department of Trade and Industry, see n99 above, at page 14.
[271] Correa M., see n103 above, at page 11.
[272] Ibid.
[273] Kuruk P., see n45 above, at page 793.
[274] Kallinikou D., see n33 above, at page 4.
[275] South African Department of Trade and Industry, see n99 above, at page 11.
[276] Ibid.

South Africa, Chile, Peru and France and for other agricultural products in Greece and Bulgaria.[277] The use of collective marks facilitates the economic and representative functions of TCEs and promotes market integrity.[278]

The use of trademarks, both collective and certification marks, by Australian aboriginal groups shows the efficacy of its use in the protection of TCEs.[279] Trademarks and collective marks do not, however, protect TCEs from inappropriate use, especially in the case of sacred TCEs.[280]

3.7.1.5 TRADE NAMES

Indigenous communities may also seek protection under trade names. Once a community is identified with a particular trade name, it can be used to promote the products of the community both within and beyond the borders of the country of origin.[281]

3.7.1.6 TRADE SECRET

TK is usually passed down from one generation to another orally, at times as secrets when they pertain to rituals and other religious functions. Trade secret refers to practices which are kept secure within an entity to give the entity an advantage over competition.[282] A good feature of trade secret, one which makes it particularly germane to the protection of TCEs, is the fact that such information or knowledge can be protected in perpetuity, once it is not innocently discovered by a third party.[283] Thus, it is of great use in the protection of TCEs with special spiritual significance.[284]

[277] SA South African Department of Trade and Industry, see n99 above, at page 11 – 12.
[278] Sturrock M., see n50 above, at page10.
[279] Gervais D., see n40 above, at page 154.
[280] Sturrock M., see n50 above, at page10.
[281] Correa M., see n103 above, at page 11.
[282] South African Department of Trade and Industry, see n99 above, at page 16.
[283] Ibid.
[284] Kuruk P., see n45 above, at page 833.

3.7.1.7 GEOGRAPHICAL INDICATIONS AND APPELLATIONS OF ORIGIN

Geographical Indications (GIs) are normally used to enhance the commercial value of diverse products where their characteristics are attributable to their geographical origin. Thus, TCEs produced by traditional practices attributable to a particular indigenous community can thus be protected. The exploitation and promotion of indigenous geographical indications would make it possible to afford better protection to the economic interests of the indigenous communities.[285]

There are examples of TCEs that have been protected by GIs.[286] Unauthorized persons are not at liberty to use registered GIs. Consequently, indigenous communities should promote the use of GIs by their members once registered for ease of recognition.[287]

The TRIPs Agreement stipulates minimum standards in member states for the protection of GIs.[288] Once legally recognised, GIs would be useful to protect the unique creations of indigenous people as the creations embody particular qualities of their community.[289]

3.7.1.8 REPRESSION OF UNFAIR COMPETITION

Unfair competition laws may also be used to protect TCEs. Acts of competition contrary to honest practices in commercial relations would constitute unfair competition.[290] Traditional knowledge and practices are commonly of some technological and economic value.[291] Thus, when imitators produce TCEs and pass them off as being indigenously made, they threaten

[285] Ibid.
[286] Ibid. These include pottery made in Puebla, Mexico (Talavera de Puebla), jewellery from Jablonec and Nison in the Czech Republic (Jablonec jewellery/crystal wares) and hand painted pottery from Modra, Slovakia (Modranska majolica).
[287] South African Department of Trade and Industry, see n99 above, at page 12.
[288] Torsen M., see n80 above, at pages 184 – 185.
[289] Ibid.
[290] South African Department of Trade and Industry, see n99 above, at page 17. These acts include imitation of TCEs in a way to portray it as being a product of the originating community, when it is not, false allegations in the course of trade aimed at discrediting the competitor, false labelling of competitive products.
[291] Correa M., see n103 above, page 11.

the demand for such products and affect their price as well. [292] Protection of TCEs under these laws would enable indigenous communities monitor access to it, its exploitation and its communication to third parties.[293] This would also help in the control of their commercial exploitation.

This law is of particular importance when the issue is that of unfair competition, not in the country of origin but abroad. When TCEs are mass-produced abroad and passed off as authentic indigenous products, they would also be caught by unfair competition laws, if they are made to apply to TCEs in such a country.

However, because unfair competition laws are concerned with misrepresentations relating to commercial goods or services, they would not necessarily be applicable in the protection of some TCEs, such as musical expressions and dance.[294]

3.7.2 CONCERNS ABOUT IP PROTECTION

There are however some challenges that would be created by the protection of TCEs by extant IP forms. The first, but by no means the least of these is that protection requires identification and registration for IP purposes. Such registration will undoubtedly take a considerable amount of time and be expensive. This would occasion undue hardship on the indigenous communities in the light of their prevailing poverty. [295]

Also, the promulgation of laws or amendment of existing legislation to ensure that it covers TCEs would require more activities on the part of the state to inform affected communities that are supposed to benefit from it of their existence. Aside from this, even with the members of the communities gaining knowledge of the laws, there would be a lack of the requisite expertise in conforming to the laws that is required to afford their works the desired protection. This borders on a lack of capacity to avail themselves of the

[292] Sturrock M., see n50 above, at page 9.
[293] Correa M., see n103 above, page 11.
[294] Kuruk P., see n45 above, at page 832 – 833.
[295] Indonesian Media Law and Policy Centre, see n120 above.

protection thus offered.[296] This problem is one that any form of protection would however have to tackle.

Aside from the above, there are concerns about means of enforcing IP laws. IPRs are usually enforced within national borders. TCEs are mostly misappropriated outside of the country of origin. Most of the proposed solutions to the protection of TCEs under IP thus lack enforceability.[297] Therefore, to adequately and effectively utilize this form of protection, there has to be a measure of reciprocity among the nations of the world and this points to the need for a complimentary international system of protection of TCEs that would address the need for reciprocal enforcement.

3.7.3 *SUI GENERIS* PROTECTION

The term *sui generis* means "of its own kind" and is often times translated to mean "unique".[298] The need for *sui generis* protection for TCEs arises from the failure of the extant IP regime to properly protect it. As a result of the unique nature of TK/TCEs, there is a need for a system of protection that would not follow along the same lines as the current systems in national or international law which do not currently protect them adequately.[299] It is advocated that an appropriate *sui generis* system of protection would stem from the nature of the cultural systems from which the TCEs emanate rather than one imposed on it.[300] Such a system would recognise the right of indigenous people to own and control their TCEs, recognise the relationship between TCEs and the customary law that has hitherto protected them, albeit insufficiently, and ensure that all the benefits of the rights of ownership flow to the originating communities.[301] The customary law applicable in most indigenous communities already make provisions with respect to who has the

[296] Drahos P., see n147 above, at pages 9 – 10.
[297] Indonesian Media Law and Policy Centre, see n120 above.
[298] Dodson M., see n149 above, at page 16.
[299] Dodson M., see n149 above, at page 17.
[300] McCann A., see n41 above, at page 13.
[301] Dodson M., see n149 above, at page 14.

authority to permit the use or reproduction of TCEs.[302] This would inform the *sui generis* protection of when it should be permitted as well.

The provision of *sui generis* protection for TCEs does not necessarily have to be the discarding of IP as a means of protecting them, but rather the formation of a proper regime that would cater for all the peculiarities of TCEs in affording them protection from unauthorized exploitation. In most forums where *sui generis* protection is discussed, it is discussed as a *sui generis* form of protection under the auspices of IP and is hence a creature subject to the same limitations as was highlighted in Chapter Two.[303]

To establish a *sui generis* regime of protection, a number of issues have to be considered. These are the questions

(a) What would constitute a protectable TCE?
(b) What are the requirements to be fulfilled before protection can be afforded? E.g. identification and registration.
(c) What rights would be conferred? E.g. ownership rights, control of commercial exploitation, control of dissemination etc
(d) On whom shall the rights be conferred? (on individuals representing the community or on statutory bodies to administer it on behalf of the community)
(e) For how long shall such protection be afforded?
(f) How shall the rights thus conferred be enforced?[304]

An example of a *sui generis* model of protection is the 1976 Tunis Model Law on Copyright for Developing Countries discussed above.[305] It is however claimed that the Tunis Model Law was not so widely adopted because the availability and scope of protection is overly broad.[306] Thus, the Model Law

[302] Torsen M., see n80 above, at page 181.
[303] Dodson M., see n149 above, at page 13.
[304] Correa M., see n103 above, at page 14.
[305] Ying K., see n51 above.
[306] Ibid.

had little or no influence on western copyright regimes and was only useful to developing countries.[307]

Care must be taken, however, to ensure that the system of protection created does not now afford lesser protection than IP would have given. The protection must be proper and adequate and must not work against the concerns of indigenous people. It must ensure that there is an end to misappropriation of TK/TCEs.[308]

While many states advocate the development of a *sui generis* regime to protect TCEs, others advocate advancement with caution. They suggest that a single system of protection may be too specific and therefore not flexible enough to accommodate the needs of all TCEs.[309]

3.7.4 ALTERNATIVE MEANS OF PROTECTION

Aside from the abovementioned means of protection, there are a number of proposals of alternative means of protecting TCEs and these are:

3.7.4.1 THE PUBLIC DOMAIN AND *DOMAINE PUBLIC PAYANT*

A number of countries enacted legislation for their public domain.[310] These laws prevent the use of works in the public domain that would prejudice their authenticity or identity. Oftentimes, fees are imposed for the use of such works.[311] This is used to restrict the use of works in the public domain. This restriction could also be used to prevent the distortion of TCEs and promote due attribution. It also solves the IP problem of seeking to identify an individual to exercise rights to the TCE in question.[312] However, the extent to which this sort of law can protect traditional works has been questioned.[313] This mode of protection does not cater for all the concerns of indigenous people as they still do not share in the fees collected for the exploitation of

[307] Drahos P., see n147 above, at page 8.
[308] Dodson M., see n149 above, at page 16 – 17.
[309] Drahos P., see n147 above, at page 10.
[310] The IP concept of the public domain is discussed in detail in Chapter Two.
[311] Blakeney M., see n110 above, at page 454.
[312] Kuruk P., see n45 above, at page 830 – 831.
[313] Blakeney M., see n110 above, at page 454.

their TCEs.[314] It should be noted though that this would only be applicable when the dominant legal system is such that TCEs fall into the public domain normally.[315]

3.7.4.2 A MISAPPROPRIATION REGIME

This has been advocated by The Quaker United Nations Office.[316] It would create a system of preventing unauthorized use of TCEs and require users to pay compensation for it. It would require the national laws of whichever states chooses to adopt this approach to deny individuals the right to obtain IP protection for works with elements of TCEs without prior authorization of the originating community and to also mandate attribution of TCEs whenever they are offered for public display or sale.[317] It should be noted that while this serves the purpose of preventing misappropriation, it does not guarantee the participation of the originating community in any economic benefits derived from the exploitation of their TCEs.

3.7.4.3 CONTRACTUAL ARRANGEMENTS

In some circumstances, TCEs can be protected by contractual arrangements and this form of protection is already been afforded in some situations.[318] Contracts between outsiders and the originating community appear to be the easiest way to ensure the sharing of benefits arising from the Commercial exploitation of TCEs.[319] TCEs could be licensed to these outsiders for exploitation and royalties received thereon on agreed terms. Contractual agreements have distinct advantages. These include the fact that rights can be vested in a group and can be of extended duration and they be used to introduce terms that would cater for every peculiarity of the TCEs.[320]

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[314] Kuruk P., see n45 above, at page 830 – 831.
[315] Ibid.
[316] Correa M., see n103 above, at page 19.
[317] Ibid.
[318] In South Africa, New Zealand and Australia, domestic courts have had occasion to protect TK/TCEs through the interpretation of contracts. See South African Department of Trade and Industry, see n99 above, page 15.
[319] South African Department of Trade and Industry, see n99 above, page 15 – 16.
[320] Kuruk P., see n45 above, at page 833 – 836.

3.8 CONCLUSION

From all the above, it is apparent that TCEs are peculiar and therefore require a type of protection that ensures rights that are well suited to the communities and the dominant customary systems from which they emanate.[321] It is also necessary to involve the indigenous people in the process of protection as the laws would be made to address their concerns and satisfy their needs.[322] The fact that the various indigenous communities from which TCEs originate and which are sought to be protected are quite dissimilar necessitates different types and levels of protection, even within the borders of one state. Thus, just as western IP is rigid and inflexible to the various needs of the different communities and different forms of TCEs, one uniform mode of protection for TCEs internationally or even within a nation is in danger of being so.[323]

While a *sui generis* regime of protection seems more suited to the needs of some TCEs and indigenous communities, there are some tenets contained in extant IP laws to cater for any fallouts of such protection. No one law will be adequate to cater for all the different types of cultures and expressions in existence.[324]

As discussed above, it is clear that an international framework is necessary,[325] especially in order to make provisions for means of reciprocity, national treatment and mutual recognition[326] in protecting TCEs.[327] However, the international norms to be developed have to be flexible enough to accommodate the diversity of indigenous communities.[328]

[321] Torsen M., see n80 above, at page 194.
[322] Dodson M., see n149 above, at page 33.
[323] Torsen M., see n80 above, at pages 177 – 178.
[324] Torsen M., see n80 above, at page 173.
[325] Dodson M., see n149 above, at page 20 -21.
[326] Drahos P., see n147 above, at page 4.
[327] Dodson M., see n149 above, at page 25.
[328] Torsen M., see n80 above, at page 181.

CHAPTER FOUR

4.0 EXISTING FORMS OF EFFECTIVE PROTECTION

Having examined the current situation with respect to the protection of TCEs and the inadequacies of the international, regional and the national protection regimes, I would now proceed to analyze forms of protection in force in the multilateral trading system, an intergovernmental organisation (WIPO) and some countries where protection is effectively given to TCEs. These different modes of protection, however, are not pervasive and do not cover all types of TCEs.

4.1 PROTECTION IN THE MULTILATERAL TRADING SYSTEM

4.1.1 THE AGREEMENT ON THE TRADE RELATED ASPECTS OF INTELLECTUAL PROPERTY, 1994

As IP became more important in the global community, countries started including conditions related to IP protection into their trade agreements, both bilateral and regional. Along with the Agreements establishing the World Trade Organization (the WTO) in 1994, like all the WTO agreements adopted by member states via a single undertaking, an agreement entered into force, the Trade Related Aspects of Intellectual Property Agreements (TRIPS). This agreement set minimum standards for the protection of IP for member states of the WTO. This was necessary as the extent of protection of IPRs varied widely around the globe.[329] In addition to the attempt at unification of IPRs, the TRIPS Agreement creates an avenue for the resolution of disputes arising from trade related aspects of IP.[330]

There are some provisions of the TRIPS agreement that can be construed to afford protection to some TCEs. An example of this is Article 14(1) of the TRIPS Agreement which protects the rights of performers with respect to the fixation of their live performances and its reproduction. Performers also have

[329] WTO, Available online at http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm. Last visited 16th April, 2009.
[330] Ibid.

rights related to its broadcast and communication to the public by any means, including wireless broadcasts. Unfortunately, the Agreement does not contain a definition of the term "performer", but it can be construed to cover performers of TCEs[331].[332]

An endeavour by the TRIPS agreement to protect TK can be found in its Article 27(3) (b) which provides that:

> *"3. Members may also exclude from patentability:*
>
> *(a) diagnostic, therapeutic and surgical methods for the treatment of humans or animals;*
>
> *(b) plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, members shall provide for the protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof. The provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement."*

It enjoins member states to seek means of protecting TK vide IP or a sui generis system of protection also allows members to exclude from patentability plants, animals and biological processes for their production.[333] This protection is however limited to medicinal TK and not TCEs.

Subsequent to the entry into force of the TRIPS Agreement, member states engaged in negotiations for the review of Article 27(3) (b) to cover all forms of TK, including TCEs and provide more adequate protection. The review was required to begin in 1999.[334] The DOHA Ministerial Declaration of 14th

[331] Ying K., see n51 above.
[332] This lacuna in the law is avoided by the later WIPO Performers and Phonograms Treaty, which defines the term "performer" to include performers of works of folklore. This is discussed in detail below.
[333] This invariably affects the patentability of processes and practices involved in medicinal TK.
[334] See Article 71(1) of the TRIPS Agreement. See also Drahos P., n147 above, at page 11.

November, 2001,[335] required the Council for TRIPS to examine the issues of the protection of TK and TCEs. During the DOHA round of negotiations, member states negotiated on the degree of protection accorded to TK/TCEs in the Agreement. Developing country member states proposed that Article 27(3) (b) be amended in such a manner that TRIPS would be harmonized with the CBD on matters relating to genetic resources and the protection of TK.[336] Developed country member states were opposed to this. It is believed that this stalemate contributed to the collapse of negotiations.[337] It is apparent that negotiating a review of the TRIPS Agreement, while being worthy of attention would be immensely difficult in light of the length of negotiations involved. Thus, it is a better option to adhere to and seek further solutions to the protection of TCEs within the text of the current TRIPS Agreement.[338] However, the review of Article 27(3) (b) continues to be part of the work programme of the Council for TRIPS.[339]

An advantage that the protection of TCEs vide the TRIPS Agreement gives is the fact that the Agreement does not impose any ownership rules and is therefore not subject, in the course of its interpretation, to the western concept of ownership, which militates against the protection of TCEs under IP regimes.[340]

It should be noted that as laudable as the setting of minimum standards for the protection of IP and its expansibility to cover TK and TCEs is, member states of the WTO are merely guided as to what to do in respect of these. The responsibility of legislating for the protection prescribed still lies on the shoulder of each state, and they are the final determining factor in respect of the degree of protection that would be given. In addition to this, while the flexibilities available within the TRIPS Agreement for the protection of

[335] See WTO document, WT/MIN (01).DEC/1, at paragraph 19.
[336] Drahos P., see n147 above, at page 11 – 12.
[337] South African Department of Trade and Industry, see n99 above, at page 4.
[338] Gervais D., see 40 above, at page 139.
[339] Drahos P., see n147 above, at pages 11 – 12. In addition to this, the protection of TK still remains an issue being dealt with in the MTS through the work of the Committee on Trade and Environment, which was established in 1995 for the purpose of examining the relationship between trade and environment, especially in the light of the manner in which the TRIPS Agreements relates with the CBD.
[340] Gervais D., see n40 above, at page 164.

TK/TCEs favours the indigenous communities with respect to the enforceability of the rights therein conferred, the MTS is solely a forum for sovereign states and as such there is minimal participation of indigenous peoples, those who are most affected by the use of the current TRIPS text and the review thereof.[341]

4.1.2 ARTICLE XX (F) OF GENERAL AGREEMENT ON TARIFFS AND TRADE, 1994

A hitherto unexplored provision that can be used to protect TCEs is Article XX (f) of the WTO General Agreement on Tariffs and Trade (GATT). The Article provides as follows:

> *"Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:...*
>
> *... (f) imposed for the protection of national treasures of artistic, historic or archaeological value;"*

Undoubtedly, TCEs are of artistic and historic value and as such, countries can take measures inconsistent with their GATT obligations in their protection of TCEs. Misappropriation is usually a problem associated with trade in TCEs, especially outside of the country of origin of the TCEs. Thus, countries can take measure against other countries when it comes to the protection of TCEs. This would affect trade in tangible expression of TCEs e.g. sculptures and paintings and their cross-border trade.

Protecting TCEs in this manner lends an edge to such protection. Many countries, both developed and developing are members of the WTO and the dispute settlement mechanism of the WTO lends enhanced power to the

[341] Bluemel E., see n10 above, at page 712.

provisions of all WTO Agreements. Thus, not only would the protection for TCEs under the auspices of the GATT meet the need for such protection, it would have enhanced enforceability against other nations, which is a challenge national laws protecting TCEs are faced with.

4.2 PROTECTION IN THE WIPO SYSTEM

4.2.1 THE WIPO PERFORMERS AND PHONOGRAMS TREATY, 1996

This treaty protects the rights of performers in their performances. Prior to the signing of this treaty, the TRIPS Agreement had reinforced these rights as discussed above.[342] The WIPO Performers and Phonograms Treaty (WPPT) was the first international law instrument to recognise TCEs as objects of IP protection.[343] Article 2 of the treaty defines the term performers as "*actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore*". Thus, the treaty gives protection to performers of TCEs, irrespective of the fact that TCEs do not qualify as literary or artistic works, under the concept of neighbouring or related rights.[344]

Aside from the inclusion of the phrase “expressions of folklore” in the description of the term “performers”, the definition of performers is worded in such a manner that it can be effectively used to protect all forms of TCEs[345] except the tangible expressions such as arts and crafts. This is because the definition refers to “other persons”, which term could be construed to include praise singers and poets and persons exhibiting other traditional oratory skills, and the definition also refers to performers as persons who “interpret or otherwise perform” TCEs, thereby broadening the scope of activities that would be eligible for protection. [346] Thus, the definition can be construed in a manner to protect all persons involved in the creation and public

[342] Taubman A., see n13 above, at page 354.
[343] Taubman A., see n13 above, at page 355.
[344] Kallinikou D., see n 33 above, at pages 3 – 4. See also Ying K., n51 above.
[345] The forms of TCEs that can be effectively protected are the verbal expressions, musical expressions and expressions by action. See Chapter 3 above for the classification of TCEs with a view to protection.
[346] Taubman A., see n13 above, at page 387.

'performance' leading to dissemination of TCEs. It is however uncertain if such protection would extend to the elders and chiefs of indigenous communities who are the repository of such knowledge and often called upon to interpret and transmit these TCEs to new initiates.[347]

It deals with the rights of performers even more extensively than the TRIPS Agreement.[348] WIPO being an intergovernmental organisation, guarantees that this protection of TCEs would be recognised and enforced outside the borders of the nation which has accepted to be bound by it and thus, the usual problem of reciprocal enforcement mentioned in Chapter 3 above would be avoided.

The protection of performer's rights by the WPPT has the desirable effect of recalibrating the public domain.[349] Thus, performances of TCEs which would otherwise have been considered public goods in the public domain without any form of protection would now be removed from the public domain once performed and the rights thereto would belong to the performers thereof.[350] Thus, TCEs are accorded stronger property rights decisively transferring them from the public domain into the private property terrain.[351] Since TCEs are usually performed by members of the communities from which they originate, the rights to such performances continues to reside in the members of the indigenous communities and would thus, to an extent combat misappropriation and facilitate compensation of the relevant persons.

[347] For a full discussion of the implications of the broadening of the scope of performers in the WPPT, see Taubman A., n13 above, at page 383.
[348] Under the WPPT, broader rights are guaranteed for performers with respect to fixation of their performances, reproduction of the fixated performances, distribution of such, commercialization of such either by sale or rental, broadcasting or communication to the public by other means. In cases of unauthorized broadcasting or communication, performers have a right to remuneration for such broadcasts. It also seems worthy of note that under Article 5 of the treaty, the performer has inalienable moral rights of identity and integrity. See further Ying K., n51 above.
[349] For an explanation of the IP concept of the public domain and its relationship with TK/TCEs, see Chapter 2 above.
[350] Taubman A., n13 above, at page 353. It seems worthy of mention that the effect of the WPPT on the public domain does not however affect moral rights in relation to performances that took place before the entry into force of the treaty. See Article 22 (2) of the WPPT. See also Taubman A., n13 above, at page 409.
[351] Taubman A., see n13 above, at page 366.

The WPPT is undoubtedly the singular most effective multilateral international instrument dealing with the law in respect of TCEs and providing concrete protection for it.[352] However, like the TRIPS Agreement, while its provisions are laudable, the focus now shifts from the international dimension of the protection to the national implementation of the law.[353]

4.3 PROTECTION OFFERED IN NATIONAL LEGISLATION: CASE STUDIES OF AUSTRALIA, NEW ZEALAND, PANAMA AND PERU

4.3.1 AUSTRALIA[354]

Australia, in times past, exhibited a revolutionary trend in its protection of TCEs. There have been efforts to protect TK/TCEs with the use of common law, which is an unusual approach to such protection. These have been majorly through the enforcement of copyright in TCEs.[355] The courts of Australia have been involved in creative judicial law making and have interpreted the national legislation in a manner which recognises the rights of indigenous communities to their cultural heritage.

The first case in which the court had to deal with the issue of misappropriation of TCEs and infringement of rights of the creators of indigenous works is the *Johnny Bulun Bulun case*.[356] It involved the reproduction of an indigenous artist's paintings on T-shirts without his prior authorised consent. The artist sued for infringement of his copyright in the paintings. The matter was however settled out of court before the judiciary could have an opportunity to constructively interpret the laws.

[352] Taubman A., see n13 above, at page 356.
[353] Taubman A., see n13 above, at page 363.
[354] All the cases highlighted under this head are discussed in Blakeney M., "Intellectual property in the dreamtime - Protecting the cultural creativity of indigenous peoples", (1999) being a paper presented at the Oxford Intellectual Property Research Centre Research Seminar held on the 9th of November, 1999.
[355] Janke T., see n37 above, at page 57.
[356] The *Bulun Bulun case* was unreported. However, for the facts of the case, see: Golvan, C., "Aboriginal Art and Copyright: The Case for Johnny Bulun Bulun" [1989] 10 EIPR 346 and Golvan, C., "Aboriginal Art and the Protection of Indigenous Cultural Rights" [1992] 7 EIPR 227.

Another case which came up dealing with the issue is the case of *Yumbulul v. Reserve Bank of Australia*.[357] The case was one brought by the representatives of an indigenous community to prevent the use of a traditional design[358] by the Defendant on a commemorative bank note. The design was one produced by an initiated member of the community, who had access to its sacred knowledge. The Plaintiffs alleged that the use of the design in such a manner would be culturally offensive. The Bank admitted liability and settled with the artist by agreement. The issue of the rights of the traditional owners of the knowledge thus misappropriated was raised in the case. It was contended that the artist could not permit a reproduction of such a sacred TCE without their approval and that the artist had an obligation to ensure that the use of the reproduced version was not culturally offensive. The trial Judge however held the artist who had created the pole had successfully disposed of his intellectual property rights through a legally binding agreement with which the bank had settled with him. He held *inter alia* that

> "*Australia's copyright law does not provide adequate recognition of Aboriginal community claims to regulate the reproduction and use of works which are essentially communal in origin... [T]he question of statutory recognition of Aboriginal communal interests in the reproduction of sacred objects is a matter for consideration by law reformers and legislators*".

He thus declined to construe the law as conferring any rights on the indigenous communities while still recognising that copyright exists in TCEs.[359]

Similar issues came up for consideration in the case of *Milpurrurru and Others v Indofurn Pty Ltd and others*.[360] The case involved a reproduction of the designs of aboriginal artists on carpets. In this instance, the court awarded full

[357] The case was reported in (1991) 21 IPR 481.
[358] The design in question was that of the "Morning Star Pole", which the artist and indigenous community asserted was of high significance in Aboriginal ceremonies commemorating the deaths of important persons and inter-clan relationships.
[359] Blakeney M., see n110 above, cited in Correa C., see n103 above, at page 15.
[360] Reported in (1995) 30 IPR 209.

damages for the breach of copyright and the trial judge agreed that the damages sustained had caused personal distress for the artists and could make them objects of contempt within their indigenous communities.[361] The court awarded additional damages for this in the nature of exemplary damages for the culturally based harm.[362] The court however did not award any compensation to the indigenous communities whose sacred images were used in the culturally inappropriate ways.[363]

As a result of these examples of judicial interpretations of Australian IP laws, tangible TCEs have been adequately protected under the Australian legal system. It is however worthy of mention that while the protection given to the TCEs are effective against their misappropriation, the rights of the indigenous communities, either to ownership or misappropriation are not recognised. This position of the law was elaborated upon in the latter case of *Johnny Bulun Bulun and another v. R & T Textiles Pty Ltd*.[364] The case also involved the reproduction of Johnny Bulun Bulun's aboriginal artistic work on clothing fabric. The trial judge, in his obiter dictum, held that the rights of the indigenous community were limited to proceeding against the artist in question for the breach of its confidence and violation of their trade secret. Nevertheless, the community does not possess a lien in the copyright. The Plaintiff merely owed the community a fiduciary duty based on the trust and confidence reposed in him by the community and as such owed the community an obligation to ensure that the artistic work would not be used in a culturally offensive manner. The Plaintiff also had the obligation to commence an action against infringement of his copyright on account of this fiduciary relationship.[365]

[361] There was particular reference to one of the designs which was being used in a culturally demeaning way, as the carpet on which it was reproduced would be walked on.
[362] This was awarded under Section 115(4) (b) of the Australian Copyright Act of 1967. See further Ying K., n51 above.
[363] Blakeney M., see n110 above.
[364] Reported in (1998) 41 IPR 513.
[365] See Ying K., n51 above.

In light of the foregoing, breach of confidence and trade secret laws can be used to protect TCEs. This was done in the case of *Foster v. Mountford*.[366] The Plaintiff was the representative of the Pitjantjatjara Council and the action was brought to stop the publication of a book (entitled Nomads of the Australian Desert) by the Defendant containing details and pictures of tribal sites and items of deep cultural and religious significance.[367] It was held that the information contained in the book was revealed to the Defendant in confidence and an injunction was granted stopping its publication.

It has also been suggested by Ms Terri Janke[368] in a report prepared for Australian Institute of Aboriginal and Torres Strait Islander Studies and the Aboriginal and Torres Strait Islander Commission, that ancient TCEs may protected in perpetuity under the Copyright Act of Australia of 1968 if the work has not been published or performed in public.[369] Section 33(3) of the Act provides that for unpublished copyrightable works, the copyright in them subsists until the expiration of 50years after the calendar year in which such work is first published, performed in public or fixated versions are offered to the public for sale or broadcast.[370] The effectiveness of this provision in the protection of TCEs however remains unexplored as it has not been subject to interpretation by the courts.

There was also an attempt to protect indigenous cultural property under a system of trademarks. A label of authenticity was established in 1999 to evidence the authenticity of TCEs.[371] This label was administered by the National Indigenous Arts Advocacy Association (the NIAAA) but is no longer in operation. During the period of its existence, the NIAAA registered two

[366] Reported in (1977) 14 ALR 71.
[367] Janke T., see n37 above, at page 73.
[368] A Principal Consultant in the law firm of Michael Frankel & Company (Solicitors) at the time and currently a Legal Consultant to WIPO.
[369] Janke T., see n37 above, at page 60.
[370] Janke T., see n37 above, at page 59.
[371] Stein R., '*Trade Mark Protection and ICIP: How does Australia Fare?*', (2006) *Arts Law Centre of Australia Online*. The electronic Journal is available online at www.artslaw.com.au/ArtLaw/Archive/2006/06TradeMarkProtectionAndICIP.asp. Last accessed on the 16th of April, 2009.

certification marks, an authenticity mark and a collaboration mark.[372] Additionally, under the current Australian trademark regime, indigenous words and symbols can still be registered. Arts centres have used this means to register their centres logos successfully.[373]

Though there are no firm rights granted to indigenous communities, the recognition TCEs as objects of IP protection under the Australian legal system have the benefit of creating a greater desire to better protect them and would undoubtedly stimulate further debates on addressing the shortcomings of the law as it is.[374] It is recognised that there is a need for a legislative reform of laws with respect to TCEs in Australia.[375]

4.3.2 NEW ZEALAND

Pursuant to the creation of the WTO, and its agreement to be bound by its agreements, the New Zealand Government amended its IP laws to bring it in alignment with the minimum standards of the TRIPS Agreement. In 1994, the GATT Bill was introduced and it amended the law as it pertains to trademarks, patents, industrial designs and copyright. Concerns were raised subsequent to these amendments by the indigenous Maori communities in New Zealand about the seeming lack of protection for TK/TCEs in these laws.[376] Consequently, the Government formed focus groups to attend to these concerns.[377]

As a result of recommendations made by the Maori Trade Marks Focus Group, a new Trademarks Act was promulgated in 2002 to give statutory

[372] Ibid.
[373] Ibid.
[374] Taubman A., see n13 above, at page 364.
[375] South African Department of Trade and Industry, Rimmer M.'s Comments on the South African Intellectual Property Laws Amendment Bill of 2008 (2008). Available online at http://works.bepress.com/cgi/viewcontent.cgi?article=1062&context=matthew_rimmer . Last accessed on 16th April, 2009.
[376] Tuffery L., '*Protecting indigenous culture in New Zealand and Australia*', (2008) *AJ Park Electronic Journal*. Available online at www.ajpark.com/articles/2008/12/indigenous_rights.php. Last accessed on the 16th of April, 2009.
[377] These are the Maori Trade Marks Focus Group and the Patenting of Life Forms Focus Group.

expression to the concerns of the indigenous communities.[378] Its provisions were couched in such a manner as to prevent culturally offensive use of Maori words, images and symbols[379] in the process of the registration of Trademarks.[380] The Trademarks Act prohibits the registration of trademarks that are likely to be culturally offensive to the indigenous communities,[381] and also provides for the establishment of a Maori Advisory Committee[382] by the Commissioner of Trademarks, which would consider all trademarks that feature Maori words, images and symbols and consequently advise the Commissioner of Trademarks on its suitability or offensiveness.

The New Zealand Trademarks Act of 2002 presented a novel trend in the protection of TCEs in that is makes provisions for representative participation of members of the indigenous communities in the determination of the fate of their traditional words, images and symbols.[383] Thus, in New Zealand, protection is given to TCEs within the ambit of IP.[384] From the beginning of January 2004 till the end of June, 2008, the number of trademark applications filed in New Zealand was 80381of which 2236 were classified as Maori trademarks and 21 of these were determined likely to be offensive to the indigenous communities by the Maori advisory Committee.[385] It can therefore be seen that the New Zealand trademark legislation has to an extent been able to curb the culturally offensive use of TCEs.

In addition to this, there are a series of trademarks[386] which have been registered in New Zealand, that are used to label authentic Maori TCEs, the Maori Made mark ("toi iho"). It was established in 2002 and it covers all forms

[378] Morgan O., *The New Zealand Trademark Act – No place for offence*, (2003) being an Intellectual Property Research Institute of Australia Occasional Paper No. 2. Available online at http://www.ipria.org/publications.html. Last accessed on the 16th of April, 2009.
[379] See Section 3 of the New Zealand Trademarks Act, 2002
[380] Tuffery L., see n376 above.
[381] Section 17(c) of the New Zealand Trademarks Act of 2002. See also South Africa Department of Trade and Industry, see n375 above, at page 4.
[382] Section 177 of the New Zealand Trademarks Act of 2002
[383] Tuffery L., see n376 above.
[384] Morgan O., see n378 above, at page 1.
[385] Tuffery L., see n376 above.
[386] These trademarks are of three types. The Maori trademark, for artists of Maori descent, the mainly Maori trademark, for groups of artists who collectively produce/perform TCEs, most of whom are of Maori descent, and the Maori Co-production trademark for TCEs made by both Maori and non-Maori artists.

of Maori TCEs.[387] Thus within the New Zealand trademarks regime, there is also protection from misappropriation for the TCEs of indigenous communities which have already been commercialized.

4.3.3 PANAMA

In June 2000, the legislative assembly of Panama enacted a law[388] for the protection of the cultural identities and TK as a special part of the IP regime.[389] The purpose of the law is stated as the protection of the collective indigenous rights of the indigenous communities upon their TCEs through a system of registration, promotion and commercialization in order to promote its value and apply social justice.[390]

The law, unlike the regime for the protection of TCEs in Australia, recognises the collectivity of ownership of rights to TCEs[391] and prohibits the ownership of rights to TCEs exclusively by unauthorized third parties and individuals under the IP system.[392] Thus, TCEs or unauthorized reproductions thereof cannot be the subject of other IPRs e.g. copyright, industrial designs, trademarks and geographical indications.

The law established a body to administer the registration process, the General Office for the Registration of Industrial Property of the Ministry of Commerce and Industry (DIGERPI). It does this in conjunction with the National Copyright Office of the Ministry of Education.[393] Within the structure of DIGERPI, provision is made for the establishment of a department of Collective Rights and Folkloric Expression concerned solely with the administration of the provisions of the Law.[394]

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[387] Stein R., see n371 above.
[388] Law No. 20 of June 26, 2000. A copy of the law is available online at www.grain.org/brl/?docid=461&lawid=2002. Last visited 16th April, 2009.
[389] See the preamble to the law.
[390] See Article 1 of the Panamanian Law Protecting the Rights of Indigenous Communities of 2000.
[391] Article 4 of the Panamanian Law Protecting the Rights of Indigenous Communities of 2000.
[392] See Article 2 of the Panamanian Law Protecting the Rights of Indigenous Communities of 2000.
[393] See Article 4 of the Panamanian Law Protecting the Rights of Indigenous Communities of 2000.
[394] See Article 7 of the Panamanian Law Protecting the Rights of Indigenous Communities of 2000.

Unlike the usual IP regime, the rights created under this law are not limited in duration.[395] This addresses the concern of the term of protection of TCEs, which is one of the characteristics of the western IP regime which makes it unsuitable for the protection of TCEs.[396] In a similar vein, indigenous communities are spared the complexities in abiding with such registration requirements as the procedure under the law does not require legal expertise nor does it require the payment of any fees.[397]

Collective marks and guarantees of authenticity are still applicable to TCEs under this law.[398] In addition to this, marks can be applied to TCEs produced by indigenous communities to certify their traditional ingenuity.[399]

For the purpose of ensuring promoting TCEs, the Minister for Commerce and Industry was mandated to endure that indigenous communities are involved extensively in programmes for the exposure of their members' skills and products.[400] Furthermore, the law caters for the conservation of indigenous communities and the onward transmission of culture. The Minister for Education is mandated to include folklore in the curriculum of schools.[401]

The rights of use and commercialization of the TCEs of the indigenous people are based on the traditions of the indigenous communities and are thus regulated by indigenous rules.[402] This guarantees the participation of the indigenous communities in the commercialization of their TCEs. The importation of unauthorized reproductions of TCEs is banned[403] and such unauthorized industrial reproductions are expressly forbidden within the country.[404] There are however circumstances in which reproductions, though not industrial, are permitted. Where non-indigenous artisans are exempted from unauthorized reproduction, they have to give full attribution as they are

[395] Ibid.
[396] For a discussion of the suitability of western IP concepts and its applicability to TCEs, see Chapter 2 above.
[397] Article 7 of the Panamanian Law Protecting the Rights of Indigenous Communities of 2000.
[398] Article 8 of the Panamanian Law Protecting the Rights of Indigenous Communities of 2000.
[399] Article 10 of the Panamanian Law Protecting the Rights of Indigenous Communities of 2000.
[400] Article 11 of the Panamanian Law Protecting the Rights of Indigenous Communities of 2000
[401] Article 13 of the Panamanian Law Protecting the Rights of Indigenous Communities of 2000
[402] Article 15 of the Panamanian Law Protecting the Rights of Indigenous Communities of 2000
[403] Article 17 of the Panamanian Law Protecting the Rights of Indigenous Communities of 2000
[404] Article 20 of the Panamanian Law Protecting the Rights of Indigenous Communities of 2000

obliged to indicate that such is a reproduction of the original and the source of the original must be acknowledged.[405]

In March 2001, the Panamanian Ministry of Trade and Industry issued an executive decree regulating the law of June 2000 and enacting other provisions. Generally, the decree listed the various forms of TCEs that would be the object of protection under the law[406] and states the procedures for the registration of collective rights in TCEs[407]

The Panamanian law is a unique use of the IP regime to protect TCEs while still taking into consideration the peculiar traits of TCEs which makes this form of protection normally unsuitable. The departure from the usual tenets of IP makes it likely to be described as a sui generis mode of protection which caters for the collective ownership of rights, the perpetual duration of protection necessary for adequate protection of TCEs and the participation of the indigenous communities in the determination of the fate of their TCEs and their commercialization.

4.3.4 PERU

In Peru, there is a Protective Regime for the Collective Knowledge of Indigenous People.[408] The regime was designed to conserve the components of biodiversity. While not particularly applicable to TCEs,[409] the regime recognises the collective ownership rights of indigenous communities over their TK in general, including their TCEs as well as their rights of use and commercialization.[410] The protection of TK is done vide a *sui generis* system.[411] The operation of this regime is under the administration of the

[405] See Article 25 of the Panamanian Law Protecting the Rights of Indigenous Communities of 2000.
[406] Article 3 of Decree No. 12 of Panama, 2001
[407] See Article 6 of Decree No. 12 of Panama, 2001. It should be noted that the registration of a collective right in a TCE does not affect its exchange within the indigenous community from which it originates. See Article 11 of the Panamanian Law Protecting the Rights of Indigenous Communities of 2000.
[408] Correa C., see n103 above, at page 16.
[409] See Article 2 of the Peruvian Law (No. 27811 of 2002), introducing a Protection Regime for the Collective Knowledge of Indigenous People Derived from Biological Resources. A copy of the law is available online at www.grain.org/brl/?docid=81&lawid=2041. Last visited 16th April, 2009.
[410] See Article 1 of Peruvian Law No. 27811 of 2002.
[411] Correa C., see n103 above, at page 16.

National Institute for the Defence of Competition and the Protection of Intellectual Property (INDECOPI).[412]

Indigenous communities have the power, under the Peruvian protection regime, to enter into licensing contracts for the use of their collective knowledge.[413] These contracts are to be registered with INDECOPI.[414] Such knowledge cannot be accessed under any condition without the prior informed consent of the originating community.[415]

The regime is particularly revolutionary in that it creates a Fund for the Development of Indigenous Peoples.[416] 10% of the gross sales of products made directly from access to such knowledge accrue to the fund.[417] The law goes further to stipulate that TK would move to the public domain when access to it has been granted via mass communication to the public or where it is extensively known outside the community from which it originates.[418] However, if such knowledge passed to the public domain within 20 years of the enactment of the law, a percentage of the proceeds from the sale of products therefrom are still paid to the development fund.[419] This fund is such that all indigenous people, through their representatives can apply for and draw funds therefrom for development projects.[420]

The rights created under this regime of protection are inalienable and indefeasible.[421] Also, the regime facilitates the participation of indigenous communities in the protection of their knowledge by requiring that they make representations to the INDECOPI.[422]

[412] See Article 18 of Peruvian Law No. 27811 of 2002.
[413] See Article 26 of Peruvian Law No. 27811 of 2002.
[414] See Article 25 of Peruvian Law No. 27811 of 2002.
[415] See Articles 6 and 42 of Peruvian Law No. 27811 of 2002.
[416] See Article 37 of Peruvian Law No. 27811 of 2002.
[417] Article 8 of Peruvian Law No. 27811 of 2002.
[418] Article 13 of Peruvian Law No. 27811 of 2002.
[419] Ibid.
[420] Article 38 of Peruvian Law No. 27811 of 2002.
[421] Article 12 of Peruvian Law No. 27811 of 2002.
[422] Article 14 of Peruvian Law No. 27811 of 2002.

Rights to Peruvian TCEs can be registered by indigenous communities in 3 types of registers.[423] These are the Public national register[424], the Confidential National Register[425] and the Local Registers.[426] Pursuant to the registration of knowledge, INDECOPI disseminates the information in the Public National Register to patent offices worldwide for the opposition of patent applications and as such, this enhances global access to prior art in the form of TK.[427]

In summary, the law is such that it affords protection to the knowledge of indigenous people against its disclosure, acquisition and use.[428] This protection is further reinforced by the provision for situations where there is an allegation of misappropriation of TK. It provides that the Burden of Proof for such an allegation lies on the Defendant, to show that he is not guilty of such.[429]

This paradigm, not being particularly scientific, save for the provisions relating to the opposition of patents and dissemination of information in the Public National Register in furtherance of such, could also serve to protect TCEs adequately. However, the law was not extended to afford such protection and even though the issue of protection for TCEs have been in deliberation in Peru, no law has been promulgated in furtherance of it till date.

4.4 PROTECTION PROPOSED IN THE DRAFT SOUTH AFRICAN IP AMENDMENT BILL

South Africa adopted an Indigenous Knowledge Systems (IKS) Policy in 2004. The policy identified the protection of indigenous knowledge and indigenous communities from exploitation as one of its objectives, with the aim of securing fair and sustained recognition of sources of TK/TCEs and financial

[423] Article 15 of Peruvian Law No. 27811 of 2002.
[424] This is for knowledge that has already passed into the public domain.
[425] This is for confidential knowledge. The register is not to be consulted by the public under any circumstances. This prevents the unanticipated misappropriation of confidential knowledge on account of its registration.
[426] The local registers are for the practices and customs of the indigenous communities. These registers are the register that would accommodate TCEs as opposed to TK.
[427] Article 23 of Peruvian Law No. 27811 of 2002.
[428] Article 42 of Peruvian Law No. 27811 of 2002.
[429] Article 44 of Peruvian Law No. 27811 of 2002.

remuneration for their use. This policy culminated in work on the development of policies and suitable legislative amendments for the protection of TK/TCEs chief among which is the creation of a proposed South African IP Bill. The bill is meant to incorporate TK/TCEs in the IP system and proposes changes to the IP Laws[430] currently in existence. The proposed amendments are couched in a manner that would ultimately benefit the national economy, conserve the environment, prevent bio-piracy and give a basis for the legal protection of TK.[431]

This IP Policy framework deals with the protection of TK/TCEs using the normal IP system. It merely incorporates amendments to the Performers' Protection Act of 1967, the Copyright Act of 1978, the Trademarks Act of 1993 and the Designs Act of 1993. The proposed amendments are summarized as follows:

4.4.1 AMENDMENTS TO THE PERFORMERS' PROTECTION ACT, 1967

The Performer's Protection Act is to be amended in that would enable indigenous communities form business enterprises e.g. collecting societies, to administer and commercialize their traditional IP.[432] The protection of the Act is extended to include traditional works.[433] It also prescribes that royalties be paid from the commercial benefits derived from the recording of a traditional performance to the National Trust Fund for Intellectual Property, which fund shall be applied for the benefit of indigenous people.[434]

[430] These are the Performer's Protection Act of 1967, the Copyright Act of 1978, the Trademarks Act of 1993 and the Designs Act of 1993.
[431] Max Planck Institute for Comparative Public Law and International Law, '*Traditional knowledge in conventional statutory IP context*'. An electronic article by the Max Planck Institute. Available online at www.ip.mpg.de/shared/data/ppt/atrip_van_der_merwe.ppt. Last accessed on the 16th of April, 2009.
[432] See the South African Department of Trade and Industry's summary of provisions of the Intellectual Property Amendment Notice, Bill and Policy, available online at http://www.thedti.gov.za/ccrd/ipbills.htm. Last visited 16th April, 2009.
[433] Section 1 (d) of the South African Intellectual Property Laws Amendment Bill
[434] Section 2 of the South African Intellectual Property Laws Amendment Bill

4.4.2 AMENDMENTS TO THE COPYRIGHT ACT, 1973

The Copyright Act is to be amended to expand the concept of an author to include indigenous communities and to recognise traditional work i.e. TCEs, as protectable work.[435] Ownership of traditional IP is vested in the indigenous communities.[436] The Bill creates a National Council for Traditional Knowledge Intellectual Property (TKIP), a National Database for TKIP and a National Trust Fund for TKIP.[437] The trust fund owns the traditional copyright to protectable works.[438] Traditional works are given IP protection for 50years after their publication with the consent of the originating indigenous communities.[439]

4.4.3 AMENDMENTS TO THE TRADEMARKS ACT, 1993

It is proposed that the Trademarks Act be amended to recognise traditional terms and expressions as capable of being registered as trademarks.[440] However, the registration of such a trademark is only possible when an indigenous community, and not an individual, applies for it through its leader, as only such communities have a right to own such trademarks.[441] Such trademarks are only to be registered when they are sufficiently distinctive.[442] The Bill also covered these terms and expressions being recognised as certification marks, collective marks and geographical indications.[443] Thus the

[435] Section 5 of the South African Intellectual Property Laws Amendment Bill. It however requires that TCEs be fixated in a material form to be eligible for protection under the Copyright Act.
[436] Section 5 of the South African Intellectual Property Laws Amendment Bill.
[437] These three bodies are recognised in all the amendments to all the IP laws and perform the role of managing TKIP.
[438] Max Planck Institute for Comparative Public Law and International Law, see n431 above. See also Section 11 of the South African Intellectual Property Laws Amendment Bill.
[439] Section 7 of the South African Intellectual Property Laws Amendment Bill.
[440] Section 18 of the South African Intellectual Property Laws Amendment Bill.
[441] It should be noted however that The National Trust Fund might be deemed the *de facto* owner of the Trademark when it acts on behalf of an indigenous community as its agent. See Max Planck Institute for Comparative Public Law and International Law, n431 above.
[442] Section 19 of the South African Intellectual Property Laws Amendment Bill.
[443] Section 18 of the South African Intellectual Property Laws Amendment Bill.

law of trademarks would be able to provide protection of certain names/features associated with TK/TCEs.[444]

4.4.4 AMENDMENTS TO THE DESIGNS ACT, 1993

The definition of designs in the Designs Act is to be amended to include traditional designs.[445] To qualify for protection, such design must be recognised by an indigenous community. In addition to this, a traditional design must be derived from the designs of an indigenous community[446] and must be traditional in character.[447] Only indigenous communities can register such designs.[448]

These amendments, if they are ever made to the IP laws of South Africa would result in proper protection of TCEs. The adequacy of such protection is however in doubt. It should be noted that for the reasons enunciated in Chapter 2, the IP system is not the most suitable means of protecting TK/TCEs, especially if not used in conjunction with other mechanisms or if not adapted to TK/TCEs, as was done in the Peruvian law for the protection of TK.[449] Besides, while the bill provides for the creation of a National Fund for TKIP, it does not have provisions with respect to how the funds would be managed and disbursed, like the Fund for the Development of Indigenous People under the Peruvian law. Consequent to this, there is a chance that even though some protection might be available from misappropriation of TCEs, there is limited participation of indigenous peoples, save for their registering their IP, and there are no guarantees with respect to the flow of revenue generated from the commercial exploitation of TCEs to the indigenous communities.

[444] See the South African Department of Trade and Industry's summary of provisions of the Intellectual Property Amendment Notice, Bill and Policy, available online at http://www.thedti.gov.za/ccrd/ipbills.htm. Last visited 16th April, 2009.
[445] Section 27(d) of the South African Intellectual Property Laws Amendment Bill.
[446] What this invariably means is that the design in question need not be original, aesthetic or functional.
[447] Section 27(g) of the South African Intellectual Property Laws Amendment Bill.
[448] Section 54 of the South African Intellectual Property Laws Amendment Bill.
[449] South African Department of Trade and Industry, see n99 above, at page 5.

4.5 CONCLUSION

It is apparent that while there might be traces of protection for TCEs on an international level, the principles of international law leaves the responsibility for the direct protection of TCEs to domestic legislation of nations. Thus, the choice of the mode of protection and the level of conformity to international standards of protection always would vary from country to country.

On the whole, there is a general bias for the protection of TCEs by adapting known IP laws to accommodate them.[450] While this might not be the best approach, it seems the most feasible when an immediate response is required to the cry of indigenous people with respect to the misappropriation of their cultural property. While international action on this front is desirable, it would take a considerable length of time to achieve and the result of such multilateral negotiation/deliberation is difficult, if not impossible, to predict.[451]

[450] This is exemplified in the study of Australia, New Zealand, Panama and the proposed position in South Africa.
[451] Gervais D., see n40 above, at page 139.

CHAPTER FIVE

5.0 IP PROTECTION OF TCES AND SUSTAINABLE DEVELOPMENT

Having examined the various types of TCEs and the manner in which protection is being given to them in the current international, regional and national systems, it has become quite clear that in the light of the prevalence of misappropriation and commercialization without attribution of TK by third parties, governments have sought to provide immediate relief by adapting current IP rules to protect them or creating *sui generis* modes of protection with rules akin to those used in the IP regime.

Although creativity is an important feature of every human society, the function and effect of IP rules are different in developed and developing countries.[452] The evolution of IP law from the colonial era till date is viewed by developing countries as a means of protecting the interests of the developed world in developing countries and not as a means of rewarding creativity or servicing the global system of protection.[453] This position is further reinforced by the TRIPS Agreement being made one of the WTO Agreements, to which members are subject upon accession to the WTO and a part of their single undertaking, and not as a plurilateral agreement, which would have made it optional for states not willing to be bound by the minimum standards set forth therein.

The TRIPS Agreement is fashioned to cater for the western IP model and consequent to this, overlooks knowledge that exists in indigenous societies in developing countries, and at best gives recognition to its existence simply by permitting member states to legislate to protect it without setting any standards for such protection or making member states take up firm commitments in that regard.[454] The TRIPS Agreement is perceived by most developing countries as an economic bargain conferring few benefits on

[452] Loew L., see n155 above, at page 173

[453] Loew L., see n155 above, at page 178. See also Finger J. And Schuler P. (eds.), *Poor People's Knowledge: Promoting Intellectual Property in Developing Countries*, (2004) World Bank Trade and Development Series, Washington: World Bank and Oxford University Press.

[454] The TRIPS Agreement and its provisions relating to TK/TCEs are discussed in Chapter Four above.

them[455] but a necessary evil because concessions were made to them in the other agreements under the condition of their agreeing to it.[456]

Even though the TRIPS Agreement is now the '*grundnorm*' with respect to international IP law, there are still a number of unresolved issues stemming from the implementation of the standards contained therein in developing countries[457].[458] The obligation placed on all countries, members of the WTO, to observe the TRIPS standards, has created conflicting reactions in the global community. On the one hand, some people feel IP protection is necessary for the advancement of developing countries while others feel the western IP model is not suitable for developing countries.

It is worthy of note that the main justification for the creation and protection of IPRs is the economic benefit being conferred on the creator of knowledge and the TRIPS agreement, which dominates IP law globally, treats them as economic and commercial rights.[459] In this chapter, we would examine the costs and benefits of implementing IP laws in general, especially in the light of the fact that legislators turn to it for the protection of TCEs in the interim, and its effects on developing countries.

5.1 THE COSTS OF STRONG IP PROTECTION

In developing countries, since the implementation of the TRIPS Agreement, there has been much debate on the domestic application of IP laws. This debate usually revolves around whether IP laws should be universally applied to developing countries with the same standards used in developed countries or whether there should be lesser protection of IP in developing countries.

[455] At least in the short term this perception has some force in that TRIPS causes rents to flow from users of knowledge assets protected by intellectual property rights to owners of those rights. See World Bank, *Global Economic Prospects and the Developing Countries*, (2002) Washington DC: World Bank, 137.
[456] Drahos P., n147 above, at page 9.
[457] An example is the outcry of developing countries against the standards they are to maintain in respect of patents, when there is an AIDS epidemic spreading fast and the protection of patents made access to medicines extremely difficult. This issue was subsequently addressed though by declarations thereon allowing the compulsory licensing of vital and essential medicines. See Loew L., see n155 above, at 178.
[458] Loew L., see n155 above, at page 176 – 177.
[459] Loew L., see n155 above, at 193.

This is because it is believed that strong IP protection is detrimental to the economic development of developing countries.

The antagonists of strong IP protection argue that strong IP protection would invariably make access to protected knowledge extremely costly for developing countries. These developing countries are such that they require this knowledge to create and enhance their knowledge base and also to enhance their domestic capacity for production. However, access to this knowledge would be at great costs for licences to use the knowledge and payment of royalties, if such knowledge were given the same degree of protection it is given in the developed countries.[460]

In addition to this, it is believed that the western IP model does not sufficiently cater for the needs of developing countries in that it is not cognisant of the forms of knowledge in existence within indigenous communities and the modes of protection in place for it in under customary law in such communities.[461] This is quite true as the concepts that are the backbone of the IP regime do not recognize any other forms of creativity aside from individual creativity and they treat rights to information and knowledge as economic rights and not necessarily inalienable rights of a community. Also, while information existing in communities within developing countries is generally used for communal good, and is required for the fundamental engineering of the society, economic rights to knowledge and information granted in the form of IPRs give an individual the right to control such knowledge and information without regard to its import to the society as a whole. Consequently, a system of protection designed for use by citizens of a nation should take into consideration their values and incorporate it in its design unlike western IP laws being implemented as is.[462]

On the other hand, while some developing countries may favour the adoption of strong IP laws, the legal system in place and the modes of enforcement of their laws have not been fully developed to the level of being able to cope with

[460] Loew L., see n155 above, at pages 172 – 173.
[461] Loew L., see n155 above, at page 183.
[462] Loew L., see n155 above, at pages 179 – 180.

such laws. For example, the creation of a fully functional regime for IP laws would require formal training of official personnel to be employed in the IP law offices in the various forms of IP and the employment of highly skilled legal personnel and draftsmen for the creation of the laws and its adaptation to suit the national circumstances. All these would require funds, technical know-how and basic infrastructure, which are generally lacking in most developing countries.

5.1.1 EFFECTS OF INADEQUATE PROTECTION ON ECONOMIC DEVELOPMENT

The effects of the implementation of strong IP laws in a developing country are diverse and affect almost every endeavour in those countries. First and foremost, it is believed that it would slow down the economic development of the country in question.[463] This is because, if the country had not reached a certain level of economic development before the implementation of these laws, there would be rising costs of access to protected knowledge, inventions and technology, which would be exacerbated by the additional costs of the protection and this would customarily lead to inflation, which would in turn impede the country's economic development. Aside from this, higher commodity prices and limited access to goods and services would adversely affect the development of a nation and its education of its citizens.[464] Thus, it is advised that developing countries in implementing IP laws, should allow a certain economic threshold before the application of IP laws as they exist in developed countries.[465]

Most developing countries import a great number of consumables and subsequently copy them locally, without due regard to IP laws protecting these products from their countries of origin. The implementation of strong IP laws, coupled with the fact that developing countries import their commodities or copy them locally causes a host of problems.[466] The implementation of

[463] Ibid.
[464] Loew L., see n155 above, at page 183.
[465] Loew L., see n155 above, at pages 179 – 180.
[466] Loew L., see n155 above, at page 188.

strong IP laws leads to loss of jobs for persons involved in the counterfeiting business, including industries involved in the manufacture of generics. The decrease in trade in counterfeits and generics translates to a general decrease in trade as the sale of the original is at increased costs which fewer citizens can afford. Decrease in trade in general decreases the welfare on the citizens, consequent to the hike in commodity prices. A ripple effect of this is a reduction in the total income of the citizens of the country and this impacts directly on Gross Domestic Product (GDP) of the country consequent to the reduction in the nation's output for the period under examination.

Moreover, there is a consequent decrease in domestic competition and this leads to the exhibition of monopolistic tendencies in the very few companies still involved in production or outright shifts in production from the developing country to a developed country.[467] This also affects pricing and increases the costs of all products that are not part of a strong domestic industry.[468]

In 2002, the World Bank estimated the cost of upgrading IP laws in a developing country to fall between 1.5 Million US Dollars and 2 Million US Dollars.[469] These cost amounts to a loss and cannot be catered for solely from a developing country's budget without a definite means of recouping the losses. To recoup the loss, recourse would have to be made to taxation and the charging of fees for certain services rendered by the government which undoubtedly shifts the burden of upgrading the IP regime unto the citizens who are already suffering from the effects of the strengthening of the laws.[470]

[467] Ibid.

[468] Maskus K., *Intellectual property rights and economic development,* (2000) being a paper prepared for the series "Beyond the Treaties: A Symposium on Compliance with International Intellectual Property Law", organized by Fredrick K. Cox International Law Centre at Case Western Reserve University, held on the 6th of February, 2000, at page 190.

[469] World Bank, *Global Economic Prospects and the Developing Countries*, (2002) Washington DC: World Bank, 137, cited in Loew L., n155 above, at pages 186 – 187.

[470] The example cited in Maskus K., see n468 above, was that of Chile where 6 Million US Dollars were generated in fees in 1995 with an annual expenditure of 1 million US Dollars. It is doubtful though if other developing countries can match such revenue generation with decreased trade on account of the implementation of stronger IP laws. It should be noted that the burden for the recouping of the losses still remains with the citizens as the revenue is generated from within.

5.2 THE BENEFITS OF STRONG IP PROTECTION

WIPO conducted a study of the economic impact of the implementation of strong IP laws in 6 Asian countries[471] in September, 2007.[472] The results of the study indicated that when IP laws are strengthened, there is subsequent economic growth. The strengthening of IP laws was observed to increase research and development, technology transfer and foreign direct investments. Generally, with respect to economic studies and research, it has been established over time that the strengthening of IP laws lead to wealthier economies and deeper technological sophistication.[473]

Lai E., in 'The economics of intellectual property protection in the global economy',[474] asserts that research models which show that IP protection in developing countries are detrimental to economic growth have their analysis based on a faulty assumption that in these countries, their economies thrive strictly on imitation of inventions of other countries without any innovation being found therein.[475] This assumption creates a faulty premise for all arguments consequent to the fact that it postulates that there is an imbalance of innovation in the world instead of the true position which is that there is an imbalance of the nature of innovation in the world. Thus, the results of these analyses of the economic effects of strengthening IP laws are erroneous.[476]

In truth, the end products of developed countries, especially those protected by IP laws in the form of patents are sourced from developing countries where they exist in the form of TK and a strengthening of the laws with regard to this would ensure the attribution of the source of these products and engender the

[471] These countries are China, India, Japan, Malaysia, Korea and Vietnam.
[472] World Intellectual Property Organization, *Measuring the Economic Impact of IP Systems*, (2008) being a report of the WIPO Japan Office study of the economic impact of IP systems in six Asian countries. A copy of the report is available online at http://www.wipo.int/portal/en/news/2007/article_0032.html. Last accessed 16th April, 2009.
[473] Maskus K., see n468 above, at page 4.
[474] Lai E., *The economics of intellectual property protection in the global economy*, (2004) UCLA Department of Economics, Levine's Working Paper Archive. A copy of the paper is available online at http://www.dklevine.com/archive/refs4122247000000000481.pdf. Last accessed on the 16th of April, 2009.
[475] On the underlying assumptions of empirical research analysts involved in the analysis of the effect of IP on economic growth and development, see Lai E., n474 above, at pages 3 - 5.
[476] Ibid.

sharing of the benefits derived from these end products with the developing countries from which they are sourced.

The area of TK has witnessed the widest array of IP laws for its protection.[477] These approaches have not been harmonized at an international level, neither is there any standard applicable to it.[478] TK is however attributed solely to developed countries through bio-piracy and the patenting of traditional medicines and food and this is partly consequently to the laxity with which IP laws are applied and enforced in developing countries. In the words of an economist, Stiglitz J., in his comments on The TRIPS Agreement,

"...*it is not only that they seek to make money from 'resources' and knowledge that rightfully belongs to the developing countries, but in so doing, they squelch domestic firms that have long provided the products.*"[479]

This lack of strong protection of IP in relation to TK has become an issue of grave concern on account of the fact that it is alleged that if misappropriation continue at its current rate, 90% of the world's cultures, and the TK associated with it will disappear over the next 100 years. [480] Aside from this, there is economic concern raised over the same issue as it is estimated that 9 out of every 10 prescription drugs are based on natural sources.[481] Consequently, the lack of strong protection for IP in this regard is costing developing countries huge revenue that would be flowing to them in the form of royalties for licensing contracts.

5.2.1 EFFECTS OF STRONG PROTECTION ON ECONOMIC DEVELOPMENT

The original motivation for the creation and subsequent evolution of IPRs is the provision of an incentive to create.[482] This is usually achieved by the

[477] For ways in which IP can be used to protect TK/TCEs, see Chapter Three. For ways in which IP laws have been used to protect TK/TCEs, see Chapter Four.
[478] Loew L., see n155 above, at page 194.
[479] See Stiglitz J., 'Globalization and Its Discontents', (2002), cited in Bradford S., see n1 above, at page 1620.
[480] Bradford S., see n1 above, at page 1637.
[481] Ibid. According to Bradford S., the total market value of plant-based medicines sold in OECD states in the year 1985 was 43 Billion US Dollars.
[482] Bradford S., see n1 above, at page 1623.

granting of monopoly rights over an idea, its expression or a particular form of knowledge or invention for a period of time.[483] Thus, the increased economic gain of a creator or inventor is motivation for creation and is believed to stimulate additional creativity and technological innovation.[484] This reason has not faded away due to the evolution of IP but it still remains a reason to protect IPRs till date. A lack of effective protection for IP thus removes the guarantee of accrual of benefit to the creator and as such reduces his incentive to create.

Furthermore, investments in any area of human endeavour are stimulated by the expectation of profit. Ineffective protection for IP in its various forms, TK being inclusive, ensures that investment in research and development of ideas and knowledge would most likely not yield any returns as there are limited economic benefits that can be derived from such ideas and knowledge when they are not protected and become 'free for all' as soon as they are discovered. This is a disincentive for investment, both foreign and domestic. This is position further reinforced by the fact that ineffective protection of IPRs and the recognition and salient support of a counterfeiting industry is inimical to licensing of technological innovation to developing countries vide foreign direct investments.[485] Additionally, if the inventions of developed countries would not be adequately protected in developing countries, developed countries have less motivation to research into problems peculiar to developing countries and find solutions thereto.[486] Therefore, it has been shown that IP protection is a significant determinant of economic growth.[487]

It seems worthy of mention that in the same line as the foregoing argument, a lesser protection of IP in developing countries legalizes copying and this in turn stifles the incentives within the developing country to raise the standards of its domestic production and enhance its production capacity to a level where it can create originals and commit its resources to research and

[483] Ibid.
[484] Loew L., see n155 above, at page 180.
[485] Loew L., see n155 above, at pages 180 – 181.
[486] Ibid.
[487] Gould D. and Gruben W., '*The role of Intellectual Property rights in economic growth*', (1996) 48 *Journal of Development Economics*, 323 at page 350, cited in Lai E., see n474 above, at page 4.

development into improving thereon and adapting technology to its own environment. [488]

IP protection, as noted earlier, not only serves to protect the interests of the developed countries but also benefits indigenous creativity. This is exemplified by the World Bank Africa Music Project.[489] This project was instituted by the World Bank in Senegal as a result of the pervasiveness of music in African life and the potentials of the business in Senegal. It seeks to reproduce Nashville, a city in the United States State of Tennessee, in Africa.[490] Thus, African countries would create wealth by their musical productions, wealth that would not need to be shared with countries outside of Africa and the maximizing of this wealth creation endeavour can only be achieved with the protection of IPRs in the music thus created. Without an effective IP regime, there would be piracy of both the music produced and the technology used in its production,[491] to the detriment of those involved in the music business. This minimizes the returns of those investing in it.

Evidently, this project, which seeks to enhance the business and cultural potential of African music, was designed to go hand in hand with strong IP protection. The effect of this project is yet to be seen in Senegal as reports are not yet available to the public.[492] However, unconfirmed reports indicate that piracy has decreased in Senegal since the commencement of the project and consequently, there has been a substantial increase in royalties for Senegalese musicians.[493]

Another endeavour underscoring this point is the study of the Lebanese entertainment and media industry.[494] The entertainment industry in Lebanon is similar to the music industry in Senegal. There is copyright protection in

[488] Loew L., see n155 above, at pages 180 – 181.
[489] Loew L., see n155 above, at page 181.
[490] Nashville became a successful and economically vibrant city on account of its being the capital of country music in the US even though it was originally poor.
[491] Loew L., see n155 above, at page 183.
[492] Leow L., see n155 above, at page 181.
[493] Loew L., see n155 above, at pages 188 – 189.
[494] Maskus K., *Strengthening Intellectual Property Rights in Lebanon,* Intellectual property and development: Lessons from recent economic research, Carsten F. & Maskus K. (eds.), (2005) Washington: World Bank. Electronic copy available online at http://www.worldbank.org/research/IntellProp_temp.pdf.

Lebanon but the enforcement of the protection is ineffective and as such, there is a lot of piracy. In the study, it was suggested that a strengthening of the IP laws and its enforcement would cause an increase in domestic innovation and film production consequent to guaranteed benefits accruing to persons involved in the industry; the products would be of higher quality for importation to neighbouring countries, where it already has patronage and counterfeiting firms with some production capacities would be encouraged to become legitimate producers having the resultant effect of increased revenue in the industry.[495]

It has also been shown that infringement of IP laws negatively affects domestic creative industries. In China, trademark infringement was detrimental to the Chinese producers of consumer goods, as trademarks were being applied to counterfeit goods of lower quality, thus destroying the reputation of the producers.[496] This situation created kinks in the path of the development of the consumer goods industry in China and this led to the study concluding that slack IP protection is detrimental to industrial development in developing countries.[497]

The key to stronger IPRs serving to increase economic growth and fostering beneficial technological change lies in structuring the IP regime in such a manner that would promote healthy competition within domestic industries in a competitive market structure rather than engendering monopolistic traits,[498] the effect of which was discussed in 5.1.2 above. Furthermore, it has been shown by Gould and Gruben[499] that openness to trade, when coupled with strong IP protection, increases economic growth. It is therefore important that countries liberalize their markets when strengthening the IP protection regimes. This would also make the market more competitive.[500] Thus, the

[495] Loew L., see n155 above, at pages 189 – 190.
[496] Maskus K., et al, *Intellectual Property Rights and Economic Development in China*, being a manuscript prepared for the Southwest China Regional Conference on Intellectual Property Rights and Economic Development, held in Chongqing in September 1998. An electronic copy of the document is available online at www.colorado.edu/Economics/mcguire/workingpapers/cwrurev.doc.
[497] Maskus K., see n468 above, at page 7.
[498] Maskus K., see n468 above, at page 1.
[499] Gould D. and Gruben W., see n487 above.
[500] Maskus K., see n468 above, at page 21.

strengthening of IPRs should not be done in isolation without a corresponding upgrading of complementary policies applicable within the country.[501]

5.3 THE HUMAN DEVELOPMENT ANGLE

A discussion of the effects of the strengthening of IP protection would be incomplete if the discourse is restricted merely to the economic effects of such protection. Seeing that cultural values are one of the major differences creating a debate on standards of IP protection between developing and developed countries, theses values and the implication of their being totally ignored and systematically destroyed also have to be examined to understand the full extent of the effects of strengthening IP protection.

Indigenous communities, which are more prevalent in developing countries, engage in creative endeavours in a different manner than that used in developed countries and also for reasons contrary to those given for creativity in the developed world.[502] Also, the structure of their society and interactions therein are not based on notions of economic viability but rather on kinship ties and communal heritage.[503] It is for this reason that it has been argued that for IP protection to be meaningful, due consideration must be had for these differences and these cultural values must be incorporated into the IP regime.[504]

There are creative cultural industries that would benefit greatly from the strengthening of IP protection in developing countries, for example, the African music industry and the entertainment industry in Lebanon. The development of these industries hinge largely on the level to which they are protected by the national legal systems of the countries in which they exist. The development of these industries creates hope in the citizens of the respective countries it would increase the country's economic development,

[501] Maskus K., see n468 above, at pages 18 – 19. It has been identified that the most conducive policy approach to expanding development and sustaining it in developing countries is for IPRs to be integrated with corollary policies that would "strike a balance of incentives" for dynamic competition. See also Maskus K., n468 above, at page 1.
[502] See Chapter Two for the nature of TK/TCEs and the procedure of creative activity of indigenous communities.
[503] Loew L., n155 above, at pages 183 – 184.
[504] Ibid.

and be an instrument of social change, facilitate political cohesion, and cultural progress.[505] Thus, for the creative industries involved in the production of TCEs, strengthening IP protection would add a sense of cultural solidarity to the indigenous communities in the developing countries.[506] These industries add a degree of richness to human lives and are a source of joy and inspiration in these countries.[507]

While the contribution of cultural coherence might not be measurable in economic terms, the peace, tranquillity and overall well being of a nation is undoubtedly enhanced by these factors. It is undoubted that the effect of this, while not contributing directly to the nation's gross domestic product, would be seen more if absent. The presence of war and strife is known to affect a nation's gross domestic product negatively.

It has also been argued, in response to the theory of the treatment of IPRs as economic rights that before this was the case, significant discoveries and inventions were made on because of the flourishing cultures and institutions of scholarship, which IP laws can be fashioned to protect and engender, especially in indigenous creative industries.[508] According to Bradford S.,[509] cognitive work is never done in isolation but rather as members of a cultural community, linked to the community and its other members. He identifies that the concept of creativity, as expressed in indigenous communities as stemming from consecutive imitation and contributory efforts, is the accurate nature of human creativity.[510]

Human development is fostered by the gearing of efforts towards making changes that define the members of a given society.[511] Such development only takes place if mechanisms are put in place to ensure that exchanges and

[505] Loew L., see n155 above, at page 191.
[506] Ibid.
[507] Ibid.
[508] Bradford S., see n1 above, at pages 1626 – 1627.
[509] Bradford S., see n1 above, at page 1651.
[510] Bradford S., see n1 above, at page 1652.
[511] Sahlfeld M., *Traditional Cultural Expressions and Their Significance for Development in a Digital Environment*, (2007), being a keynote address delivered at the symposium on Traditional Cultural Expressions in a Digital Environment, held in Lucerne, Switzerland between the 8th and 9th of June, 2007.

communication within a society are preserved and protected in such a manner that the members of that society are defined thereby. These are invariable shaped by TCEs as they are the manifestations of cultural identity. If left unprotected, TCEs would corrode and cultural identity would gradually be lost. Traditional patterns of life would be destroyed as its conservation is one of the reasons for the call for the protection of TCEs.[512] Commercialization without authorization and misappropriation of TCEs is therefore a systematic destruction of meaningful patterns of life.[513]

In addition to this, without adequate protection of TK, bio-piracy would continue unchecked and this would invariably lead to a destruction of the environment. Explorations and testing being carried out on the flora and fauna of developing countries for medicines would lead to the obliteration of endangered species of plants and disrupt the natural ecosystem in existence in these countries.

Thus, aside from the economic effects of slackening protection of IP, in the light of the existence of cultural creative industries which would suffer if TCEs remain unprotected or protection afforded it is ineffective, there are more dire effects on the human development of the citizens of the developing country. The maintenance of cultural well-being and the stimulation of connectedness within societies by the preservation of its cultural values and practices are invaluable to national, and consequently, global well-being and its importance should not be undermined.

5.4 CONCLUSION

In conclusion, irrespective of all said, countries that are members of the WTO have little or no flexibilities with regard to the imposition of western standards of IP protection, as this has been enshrined in the TRIPS Agreement, by which they are bound. Therefore, implementation of IP laws and their enforcement is a necessary evil in developing countries.[514] As a result of this, efforts should be geared towards finding middle ground in the protection of IP

[512] See Section 3.4, in Chapter 3.
[513] Sahlfeld M., see n511 above.
[514] Loew L., see n155 above, at pages 196 – 197.

in such a manner that would be cognisant of cultural values and protective of indigenous creative industries, rather than finding reasons for non-compliance with the provisions of an international treaty that has already been agreed to.

It should be noted that there are other factors that are affected by IP protection, just as there are other factors responsible for economic growth and national stability. Thus, the level to which IP laws should be strengthened and enforced in developing countries should be wholly determined by the economic threshold of the country and should be fashioned to reflect the nation's circumstances.[515] Thus, IP protection requires the policy making arms of government to strike a balance between too little and too much protection for IP laws.

Indeed, global welfare can be increased by a true balance of protection between developing and developed countries, both serving to protect each other's interests.[516] Undeniably, the cost of implementing stronger IP laws would be reduced with cooperation between developed countries and developing countries, with developing countries helping reduced the cost of legal expertise in crafting suitable IP laws by providing technical assistance. The cost of fashioning IP laws to cater for TCEs can also be reduced by the use of participatory mechanisms involving representatives of indigenous communities, in which case there would be a reduction in training costs for personnel who would be involved in the registration and protection of such TCEs under the IP protection regime.[517]

[515] Maskus K., see n468 above, at page 1.
[516] Lai E., see n474 above, at page 3.
[517] An example of such is the New Zealand Maori Advisory Committee.

CHAPTER SIX

6.0 CONCLUSIONS AND RECOMMENDATIONS

6.1 CONCLUSIONS

TCEs are an undeniable part of the cultural heritage of indigenous communities all over the world. They form an integral part of the thread running through homes, families, clans etc binding them together cohesively. They contribute to the development of humans, fostering interdependence and creating a sense of identity within members of the same community and state. In addition to this, they are viable properties owned by communities which have the potential of empowering them economically if commercially exploited. The property of the people in their TCEs are worthy of preservation and worthy of protection and the responsibility for this lies in the body handling the affairs of these people and their communities. The responsibility lies in the hands of the government.

Through the course of this research, it is apparent that TCEs are peculiar in nature and do not fit into any of the extant regimes used in protecting intangible property i.e. intellectual property as opposed to real property. They are seldom fixated, they devolve through generations, they are thus improved on by consecutive imitation and are owned communally by persons of a particular heritage or lineage. These peculiarities have made their effective protection a conundrum since the middle of the 20th Century and while debates thereon are rampant and occur in almost every forum of consequence, the results thereof and actions taken pursuant thereto are at best vapid.

Time is of the essence to the protection of TCEs as communities are being broken down, cultural identities are being lost and there is generally a continues depreciation of values among the youth of today of things perceived to be more of cultural value than of global acceptance. Consequently, a means of adequate and effective protection thereof has to be urgently sought to address the dire consequences of the misappropriation of TCEs and their

unauthorized commercial exploitation. The protection of TCEs is also required as a means of addressing global imbalance and bridging the widening divide between the north (industrialized and developed countries) and the south (developing countries).

As a result of the peculiar nature of TCEs, a means of protection that would ensure that would incorporate traditional values and ensure that the protection is well suited to use in the defence of all the purposes and uses to which they are put is required. This form of protection must also be well suited to the communities from which the TCEs emanate and this necessarily means the involvement of persons familiar with the cultural terrain and the needs of the indigenous peoples in the formulation of such a means of protection.

It automatically follows that no singular mode of protection would be suitable for all types of TCEs in all communities. This is because TCEs in themselves are quite dissimilar in nature, some being oral, some being performance based, while others are tangible, and thus the manner in which they are protected would have to differ. Also, the communities from which TCEs originate differ in cultural values and customary processes and practices. It then follows that while the same forms of protection may be applicable to similar categories of TCEs e.g. all tangible TCEs, regard still has to be had to the cultural value of the TCE in formulating laws to protect them. For example, under the circumstances where the TCEs in question, while being tangible are sacred, there would have to be restrictions on public access and commercial exploitation to prevent their use on culturally offensive ways.[518] Therefore, there would be a need to apply different laws for the protection of TCEs even within the borders of one country.

It is apparent that the regulation of TCEs has to be done primarily at a national level. This is because a one-size-fits-all-approach would not be applicable for the protection of TCEs given the fact of its variegated nature as discussed above. Additionally, the participation of members of indigenous

[518] See the Australian Case of *Milpurrurru and Others v Indofurn Pty Ltd and others,* Reported in (1995) 30 IPR 209.

communities would make the formulation of laws extremely cumbersome, be it at the regional level or at an international level. The most effective means of protection in existence so far has been national protection which is cognisant of the needs of its citizens and indigenous communities. This would require cooperation between the indigenous groups within the borders of a state and the national government.

It is however necessary to have a regional and international framework for the protection of TCEs. This arrangement is necessary to enhance mutual recognition of laws formulated for the protection of TCEs and reciprocal enforcement of these laws. The global community has been influenced largely by the multilateral trading system and the most effective way of ensuring recognition of laws and their enforcement is by entering into bilateral and multilateral agreements therefor.

An example of an effective means of recognition of laws and their enforcement is the WIPO Patent Registration system whereby countries register their patents with the organization and other countries signatory to WIPO's Patent Cooperation Treaty of 1970, embodying the international framework for the registration of patents, are charged with the responsibility of recognizing and enforcing them. Also, regional systems have been really effective with the introduction and harmonization of laws, albeit business laws[519] and this system can be adapted to accommodate laws for the protection of TCEs as well.

It should be noted that it is necessary for the international framework to be flexible enough to cater for the assortment of TCEs and the indigenous communities from which they emanate. A lot of time would however be required for the creation of this type of international framework as a lot of negotiation would have to be done, the results of which would be, at best, uncertain at its inception.

[519] Examples of these are the European Union, the East African Community and Organization for the Harmonization of Business Laws in Africa (covering west and central Africa).

On the other hand, it is quite obvious that IP laws or the western IP regime as it exists is unsuitable for the protection of TCEs in light of their peculiarities. IP concepts when applied to TCEs tend to favour its appropriation more than protect it from misappropriation and unauthorised use and commercial exploitation. However, it is quite possible and feasible in the short run, to give proper and effective protection to certain TCEs by adapting IP laws to cater to some of its peculiarities. Examples of this include recognising communal ownership as opposed to individual ownership/authorship, granting perpetual or longer duration of rights in property of cultural origin, prohibiting in perpetuity the use of sacred TCEs by unauthorised persons etc. While extant IPR categories would not cater for all existing types of, it would still be effective for the protection of some TCEs. Even though it is not the best approach, it is the easiest for the provision of immediate redress to misappropriation and unauthorized exploitation of TCEs.

The question of which type of protection would be pervasive and would cater for all types of TCEs still remains. A proper *sui generis* system of protection, specifically designed for the community with detailed adaptation to the particular circumstances of the indigenous communities to be covered would be the best form of protection. It would however involve a lot of consultations with legal experts, due consideration of the legal system of the country in question and full participation of members of the originating communities knowledgeable in their customary laws and systems.

Finally, the protection of TCEs is desirable because of its effects on human lives and society. While economic benefits can accrue to creators of TCEs for their creative work, the meaningful patterns of life and cultural well-being attributable to their existence in communities takes their benefit out of the scope of mere economics.

6.2 RECOMMENDATIONS

(a) Going by the urgency created by the gradual disappearance of culture and languages, states should act to protect their cultural knowledge and practices by adapting existing IP laws for its immediate protection

rather than attempt to start with a consultative process between national governments and indigenous communities for the creation of a regime for the protection of TCEs.

This adaptation can be done as was done in the South African example[520] with the recognition of communal rights in traditional knowledge and practices in the IP laws,[521] granting of ownership thereof to indigenous communities represented before government agencies by associations or chosen representatives,[522] extension of term of protection for rights in traditional knowledge and practices, prohibition of unauthorized access and use thereof, and provision for benefit sharing in instances where access and use is authorized by the owners of the knowledge and practice.[523] The grant of rights to the originating communities is very important because it confers upon them the right of self determination and leaves the choice of commercialization to them. This would limit access to TCEs, control its commercial exploitation and still make it available for free use within the indigenous communities.

In addition to this, there should be established indigenous consultative forums with national citizens well versed in the cultural systems of the indigenous communities within the country attached to the IP offices in the country. These consultative forums would be charged with the responsibility of examining registration applications for patents, copyright, trademarks, geographical indications etc within the country and ensuring that cultural property is not expropriated and attributed to individuals. The New Zealand Maori Advisory Committee is an example in this regard,[524] though its activities are limited to the examination of applications for trademarks. These would serve as the first steps in providing relief from misappropriation of cultural property.

[520] This amendment to extant IP laws was proposed in the South African Intellectual Property Laws Amendment Bill of 2008. For an examination of the details, see Chapter 4, Section 4.4 above.
[521] See Section 1 (d) of the South African Intellectual Property Laws Amendment Bill of 2008.
[522] See Section 5 of the South African Intellectual Property Laws Amendment Bill of 2008.
[523] See Section 2 of the South African Intellectual Property Laws Amendment Bill of 2008.
[524] Established by Section 177 of the New Zealand Trademarks Act of 2002.

Adequate consideration must however be given to existing legal systems, legislation and policy frameworks for this to function effectively.[525]

(b) For proper records of what amounts to cultural property within the nation, there should be established national registers for TCEs.[526] In the same manner in which voters' registration are organized in zones, registration of TCEs should be organized in zones with similar cultural practices and knowledge.[527] It would also be of benefit if there were two registers, a register for sacred TCEs, which cannot be shared under any circumstances and a public register for TCEs. This would facilitate the ease of identification of TCEs and the tracing of their source in cases of misappropriation. The registration process should however be made simple enough to be understood by the people for whom it is created without unnecessary complications and not requiring any form of expertise.[528] It would also be an added bonus if such registration can be carried out without the payment of any fees by the originating communities. It is trite that indigenous peoples are one of the poorest groups in the world.

(c) Over time, nations should work on the development of a comprehensive *sui generis* regime for the protection of TCEs which would stem from the cultural systems from which the objects of the protection originate.[529] The system should vest rights in the TCEs in the indigenous communities and ensure that the benefits arising therefrom accrue to them also. The protection must be cognisant of the needs of the originating communities. The system to be created must

[525] Loew L., see n155 above, at page 195.
[526] Cottier T. and Panizzon M., see n29 above, at pages 588 – 589.
[527] An example of this is the Peruvian system of registration of TCEs which is comprehensive, covering similar indigenous communities with the use of local registers and sacred TCEs being registered in the confidential register where sharing is strictly prohibited. These registers were created under Article 15 of Peruvian Law No. 27811 of 2002. See Chapter 4, section 4.3.4 above for fuller details.
[528] This is exemplified by the Panamanian Law Protecting the Rights of Indigenous Communities of 2000 which dispenses with payment of fees and any form of expertise in complying with registration requirements and procedure for the registration of TCEs. See n69 above.
[529] This position is advocated by McCann A., see n41 above, at page 13.

however be fashioned in a manner that would make it work in tandem with the developmental policies in place in the nation.[530]

(d) Whatever the means of protection adopted, there should be alternative means of protection in use.[531] This would also cater for the forms of TCEs or the indigenous communities, which do not fit into the existent categories being offered protection under specific laws. As such, it would serve as a safety net for all forms of TCEs not caught by the protective net of the law.

(e) Work should continue on the global scene, both regionally and internationally on the creation of a treaty for mutual recognition, cooperation and reciprocal enforcement on laws protecting TK/TCEs.[532] While this might take a lot of time, efforts should still be geared towards the actualization of this goal as it is the surest means of ensuring enforcement of any laws created for the protection of TCEs. The treaty should incorporate established trade standards like national treatment, most favoured nation treatment and should set minimum standards for the protection of TCEs in all countries of the world.[533] Aside from this, dispute settlement, if the international framework is incorporated into the multilateral trading system, would be greatly enhanced by the activities of the Dispute Settlement Body of the WTO. In a similar vein, the WIPO arbitration and mediation centre would also be of great use if the need arises for the resolution of disputes.[534] This would further enhance the enforceability of the international laws against other nations.

[530] How this should be done is discussed extensively by Maskus K., see n468 above, at page 24.
[531] Alternative means of protection are discussed in Chapter 3 above.
[532] Coombe R., *Protecting cultural industries to promote cultural diversity: Dilemmas for international policymaking posed by the recognition of traditional knowledge*, International public goods and transfer of technology under a globalized intellectual property regime, Maskus and Reichman (eds.) (2005) Cambridge: Cambridge University Press, at page 611.
[533] Taubman A., *Saving the village: Conserving jurisprudential diversity in the international protection of traditional knowledge,* International public goods and transfer of technology under a globalized intellectual property regime, Maskus and Reichman (eds.) (2005) Cambridge: Cambridge University Press.
[534] Ibid.

Under the international regulatory framework for the protection of TCEs, declaration of origin, labelling and certification to ensure authenticity should be set as minimum standards. Benefit sharing, where economic benefits accrue from the use traditional knowledge and practice should also be mandated.

(f) Developed countries and intergovernmental organizations should be involved in the process of formulating of laws for the protection of TCEs in developing countries. Their involvement should entail the provision of technical assistance, legal and legislative expertise and in some cases funding for the formulation of these laws and the putting up of institutional frameworks for their enforcement. It also necessary that there be south – south cooperation among developing countries, where some of them have successfully protected their TCEs. They should be willing to share their knowledge of such systems of protection with their fellow developing countries for the good of all mankind.

In conclusion, it is hoped that rather than sit on their oars and watch the wealth and creativity resident in developing countries pillaged and see meaningful patterns of life within indigenous communities systematically leached, governments entrusted with the responsibility of public protection would rise to the occasion and take positive and effective action towards the protection of TCEs, bearing in mind that there is so much more at stake than economic benefits but the welfare and general well-being of its citizens. An immediate response to the inadequate protection of TCEs is necessary.

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