

Examining The Challenges Of Intellectual Property Commercialisation On The Realisation Of The Swakopmund Protocol

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Abstract

This article examines the challenges of intellectual property commercialisation on the realisation of the Swakopmund protocol. Like many other countries, Namibia attempts to preserve Traditional Knowledge (TK) by developing a national legislative and administrative framework. Subsequently, this leads to a growing interest in applying TK, particularly among the San people of Southern Africa. The purpose of the current legislative framework and the Swakopmund Protocol is to protect and conserve Namibia's TK while simultaneously permitting access and long-term use. The Swakopmund Protocol is one of the legislations to protect TK. This study employed a qualitative research approach as the focal methodology. A purposeful sampling was used to select five traditional leaders of the San Community and two Business and Intellectual Property Authority's (BIPA) managers. The data was analysed with an Interpretative Phenomenological Analysis using Atlas.ti 9™. The study examined the efficacy of the Swakopmund Protocol, which went into operation in 2010. Moreover, the study gave answer to questions such as what challenges the San community has faced when implementing the Swakopmund Protocol and how effective the Protocol is in protecting TK within Namibia? In addition, the study explored the ways forward in protecting TK and making the protection as efficient as possible to allow future generations to access such knowledge.

Key words: Intellectual Property Commercialisation, Swakopmund Protocol, Traditional Knowledge, Protection, San Community.

Introduction

Namibia, formerly known as South West Africa (SWA), is a country in southern Africa that endured nearly thirty years of one of Africa's most brutal provincial systems (Sowman & Cardoso,

2010). Namibia acquired independence politically-sanctioned racial segregation system of the Republic of South Africa (RSA) in March 1990. Many traditional communities worldwide, including Namibia, rely on TK for survival and well-being. Before the 1980s, concerns about safeguarding TK began to surface. Indigenous peoples and legal groups wanted equal protection under the TK system when the Republic of Namibia gained independence in 1990. Discussions about indigenous people's intellectual innovation mainly focused on Traditional and Cultural Expression (TCE), also known as folklore expression.

The regional and international goal, Article 27(2) of the Constitution World Trade Organisation on Trade-related Aspects of Intellectual Property Rights Act 1995 (Act No. 8 of 1995), aims to establish legal procedures and agreements to defend TK. Equally important, countries like Indonesia and the Philippines have legislated laws regulating TK and accessing biodiversity and natural resources (World Intellectual Property Organisation, 2017). The World Intellectual Property Organisation (WIPO) verity-finding report on data regarding permitted and lawful anthropological statistics. Data concerning incomplete efforts to develop remedies to the challenge established by demands to protect TK uses various floras for medicine and

survival. Some of these medicinal benefits became extremely valuable (Dutfield, 2017).

Oguamanam (2014) opine that weaknesses in existing laws and policies or the complete absence of laws and policies towards TK make it challenging to protect. Policymakers have several alternatives to implementing adequate international safeguards to protect TK. First, global security can take many forms, including legally binding international treaties. According to Oguammanam (2014), the absence of regulations and policies on TK has several shortcomings that affect the efficiency and efficacy of the system. Second, it lacks non-binding joint recommendations, such as soft-law instruments, that advise implementing existing international laws. Another shortcoming is the absence of essential principles embedded in international treaties dealing with parts of TK, such as the Nagoya Protocol and the Convention on Biological Diversity (CBD). However, in August 2000, the African Regional Intellectual Property Organisation (ARIPO) formally began actively preserving TK. ARIPO resolved to adopt a concerted strategy to become fully participatory and actively engaged in the newly formed The World Intellectual Property Organisation's Intergovernmental Committee on World Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore during that time (WIGC).

Efforts culminated in the Protocol of Swakopmund on the Protection of TK and Folklore Expressions, drafted and implemented within the scope of ARIPO in 2010. (World

Intellectual Property Organisation, 2021). ARIPO developed the Protocol to protect TK and align its initiatives regarding TK protection within WIPO (African Regional Intellectual Property Organisation, 2021). The Protocol establishes worldwide frameworks for shared services or organs essential to the coordination, standardisation, and growth of intellectual property activities that affect its members Swakopmund Protocol Act 2010 (Act No. 5 of 2010). Furthermore, the Swakopmund Protocol defines statutory rights in connection to TK and folklore, laying the groundwork for African countries to implement legislation to safeguard them. In August 2000, work on establishing a locality legislative framework to preserve traditional African knowledge and folklore commenced.

According to the Swakopmund Protocol, when it comes to the protection and recognition of TK, the San community is one of the most affected. The San were negatively impacted when hoodia plants, a genus of succulents consumed for thousands of years to decrease hunger and thirst, were patented and commercialised without the San's agreement and any recognition of the San Community's property rights in the patent.

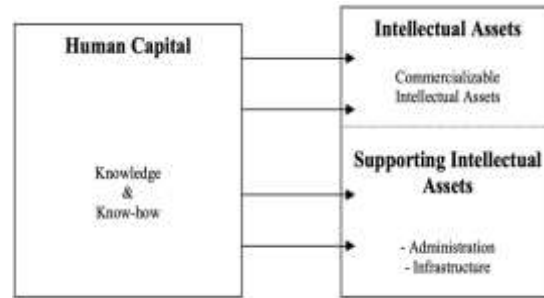
Theoretical underpinning

The Know-How Model

The Sullivan (2000) Know-How model is a model that perceives usefulness, ease, and the development of protecting and commercialising intellectual assets. The Know-How model proposes knowledge about any practice (behaviour) and determines the person's attitude towards conduct, and then the mindset will display through human participation practices (Sullivan, 2000).

Sullivan (2000) point out how imperative the role of human capital is by highlighting that individuals' skills should consist of straightforward ways of 'know-how' as contributions to a rising hierarchy of intellectual values. Sullivan (2000) points out that TK involves skills, ideas, indigenous people's evolved techniques and a body of knowledge in a traditional, formal, and informal fashion to adapt to the necessities imposed by physical and cultural contexts

Figure 1: Know-How Model



Source: Sullivan (2000)

The Know-How model has been used widely and proposes the importance of the theoretical connection of knowledge management in IP (Sullivan, 2000). The Sullivan (2000) conceptual framework further extends the need for administration and infrastructure of intellectual assets to look into the dimensions of know-how as components of supporting intellectual assets.

The Reward Theory

The reward hypothesis was first proposed in 1861 by John Stuart Mill, an English economist and philosopher, who advocated for patents as a justified reward for the inventor. Mill explicitly formulated the idea of a reward theory based on the fundamental principle of justice and focused very specifically on the ruling in the competition practice conditions (Martens, 2014). According to Martens (2013), reward theory supports disclosing and otherwise kept secret results, especially patents containing Traditional Medicinal Knowledge (TMK). The reward theory's application is strictly limited to indigenous communities' claims to TMK rights. The complete compensation would be awarded to the individual who was the first to file a patent based on TMK, not the knowledge's original owners, resulting in an initial challenge holder of TMK. Munzer and Raustiala (2019) concur with the theory and suggest that traditional communities did not receive compensation for disclosing their TK. The incentive theory's application is strictly limited to indigenous tribes' claims to TK rights. Munzer and Raustiala (2019) believe that the reward theory has a limited role in protecting TK.

An overview of the Protocols

WIPO

WIPO provides a common framework for working with the IP information contained in the various Protocols (WIPO, 2021). It uses agreed terminology and information formats, for example, citing prior art in a standard way that helps make the Protocols efficient. WIPO (2021) streamlines IP Office operations, enhances international collaboration, and makes IP information more

accessible to the general public. WIPO has one protocol under its umbrella body, known as the Madrid Protocol (WIPO, 2021).

Madrid Protocol

The Madrid Protocol Relating to the Madrid Agreement concerning the International Registration of Marks (Madrid Protocol) is an international Protocol that allows a trademark owner to apply for registration in any of the Madrid Protocol's member countries by filing a single application, referred to as an international application (WIPO, 2021). WIPO adopted the Madrid Protocol in 1989, and it was revised in 2006 and 2007 (WIPO, 2021). The Madrid Protocol is honoured by 125 nations (WIPO 2021). Afghanistan, Belgium, Botswana, China, Cuba, The Democratic People's Republic of Korea, Eswatini, France, Germany, Hungary, India, Japan, Namibia, Switzerland, Zambia and Zimbabwe are some of the Madrid Protocol's signatories (WIPO, 2021).

The Protocol has two functions. First, it simplifies the process of obtaining trademark protection. Second, because an international registration resembles a collection of national registrations, it is much easier to manage that protection (WIPO, 2021). The challenges to the Madrid protocol identified according to Nakamura, (2014) is the low levels of adoption of regional and international IP treaties and related legislation is a concern.

ARIPO

Figure 2: ARIPO Protocols



Source: Own compilation

The ARIPO Protocols comprise Botswana, Ghana, Kenya, Lesotho, Liberia, Malawi, Mozambique, Namibia, Rwanda, São Tomé and Príncipe, Swaziland, The United Republic of Tanzania, Uganda, Zambia and Zimbabwe. The Protocols were designed, according to ARIPO (2021), to control systems and affairs through diplomatic instruments of governments, primarily treaty agreements. ARIPO created the protocols broadly to combine resources in industrial property cases among its member nations to avoid material and

human resource duplication. These protocols aim to encourage laws and issues relating to intellectual property.

Harare Protocol

The Harare Protocol was accepted by the ARIPO Administrative Council on December 10, 1982, in the capital of Zimbabwe. Within the ARIPO framework, member states signed a Protocol on Patents and Industrial Designs, and it went into effect on April 25, 1984 (ARIPO, 2002). Patents and Industrial Designs Protocol of Harare is the new name for the Harare Protocol on Patents and Industrial Designs. Except for Somalia, all ARIPO member states are signatories to the Harare Protocol and are known as Harare Protocol contracting states. Somalia has failed to ratify the Harare Protocol since no implementing legislation has been established (ARIPO, 2002). The Harare Protocol aims to give the ARIPO Office the authority on behalf of the 18 to provide patents, utility models, and industrial design signatories (ARIPO, 2002).

The challenges with the Harare Protocol are seeking protection for TMK in the patent system as the Harare Protocol ignores the nature of TMK and hence fails to address its specific needs. A lack of recognition for TK systems as they are mainstreaming into national policies and decision-making processes, a lack of documentation, insufficient capacity, and the relationship between intellectual property, creativity, and innovation are all issues that the Harare Protocol faces (Ndembeka, 2013).

Banjul Protocol

The Banjul Protocol was adopted in the capital of The Gambia on November 19, 1993, and it came into force on November 28, 1997. Under the Banjul Protocol are Botswana, Lesotho, Liberia, Malawi, Republic of Namibia, São Tomé and Príncipe, Kingdom of Swaziland, Uganda, The United Republic of Tanzania, Zimbabwe (ARIPO, 2002). The Protocol authorises ARIPO to register and manage trademarks on behalf of the Protocols member states. The Banjul Protocol goal is to allow an organisation to register trademarks for goods and services on behalf of the nine Banjul Protocol contracting governments (ARIPO, 2019).

Challenges with the Banjul Protocol are with the Geographical Indicators (GIs). The Banjul Protocol failed to deal with GIs on TK protection directly and lacked directives on how GIs should be protected. Ndembeka (2013) argues that the lack of specific legislation on GIs protection is enormous. The study examined legal challenges in protecting GIs for enhancing agricultural competitiveness in The United Republic of Tanzania.

Swakopmund Protocol

The Swakopmund Protocol adopted on August 9, 2010, in Swakopmund, Republic of Namibia. The Protocol is founded on the concept that traditional and local communities' knowledge, technologies, biological resources, and cultural history are essential factors to consider, resulting from years of tried and true traditions (ARIPO, 2014). The Protocol emphasises that traditional or the local community guardians of their TK and its associated Genetic Resources (GR) and TCEs allow them to exercise control over their knowledge and information. (ARIPO, 2010).

In this context, the Swakopmund Protocol was drafted and developed using an intellectual property approach to protect TK (ARIPO, 2014). Botswana, The Republic of Namibia, Malawi, The Gambia, Zambia, Zimbabwe, and Rwanda are contracting states. As the technical advisor to establish the legal framework to support the promotion, development, and application of TK (ARIPO, 2014). The Swakopmund Protocols goal is to acknowledge that traditional and local people have long relied on their TK and culture to survive and thrive.

According to Chisita (2016), the administration of justice for TK misappropriations and the implementation of protocols relies on a government through the application of civil and criminal law. Institutional infrastructure will be built to protect the rights of traditional communities. Although TK protection is at the centre of most disputes, Nandjebo (2017) argues that it is still unclear which type of protection should be granted, even though most suggestions point to *sui generis* protection. Due to its complicated nature, Namibia's current IP standards are insufficient to protect TK. The Swakopmund Protocol can only protect TK to a limited level, as there are still groups in Namibia today that have not asserted their TK and cultural expression rights (Chisitia, 2016).

Nagoya Protocol

According to Moody (2016), the Nagoya Protocol is silent on establishing specific duties to preserve traditional knowledge of indigenous and local populations, such as bio-piracy protection. According to Moody (2016), no national policies on IP are audited. Moreover, Moody (2016) opine, the Nagoya Protocol is silent on establishing specific duties to preserve TK of indigenous and local populations, such as bio-piracy protection. Moody (2016) concludes that, no national policies on IP are audited.

Arusha Protocol

The Arusha Protocol's challenges, according to Cardozo (2013), include impoverished small-scale farmers who rely on informal seed exchanges that make up the majority of agricultural farmers.

On this basis, the study (Cardozo, 2013) concluded that the Arusha Protocol's legal system for plant variety protection is unsuitable for ARIPO members because it fails to balance breeders' and farmers' rights to promote food security.

Solutions to address challenges faced by Protocols regarding TK

Madrid Protocol

IP protection policies should be revised to provide a transparent, predictable, and stable business climate conducive to frictionless commerce, foreign investment, and technology transfer (Millot, 2019). Domestication of legislation of IP systems should be enforced to allow accurate information in dealing with IP (Millot, 2019).

Harare Protocol

Sinkala's (2017) study narrated mitigations on protecting TMK by a global sui generis system fundamental to overcoming protection limited by national boundaries. The survey by Sinkala (2017) argues that the formulation of an international instrument, appropriately designed under the umbrella of WIPO, would be a positive development in generally providing uniform protection for TK. Moody (2016) argues that the Harare Protocol remains silent on the issue of TMK protection and concurs with Sinkala (2017) on the recommendation's sui generis protection.

Banjul Protocol

Ndembeka (2013), states that several countries, such as So Tomé and Zimbabwe, have implemented special legislation to safeguard GIs. According to the study, enacting specific legislation is an enhanced tool for protecting GIs. Unlike the current patent regime, specific legislation can establish a registry and define the territorial limits within which an office regulated by the GIs registry may exercise its functions (Ndembeka 2013). The Banjul Protocol should share benefits from applying GIs connected with genetic resources and their utilisation protected by specific legislation.

Swakopmund Protocol

Adopting a sui generis strategy to address the difficulties with the Swakopmund Protocol will guarantee that Namibia keeps on track with international trends. In addition, it will also go a long way toward ensuring that TK holders benefit from their TK usage, such as TMK (Nandjebo 2017).

Nagoya Protocol

Sinkala (2017) states that mitigations such as the provision for the distribution of advantages obtained from using TK associated with genetic resources such as plants and benefits from utilising TK related to genetic resources should be considered *sui generis*. Christie (2016) defines Access to Benefit Sharing (ABS) as having access to genetic resources and sharing the benefits of their use. According to Balasubramanian (2021), the Nagoya Protocol combines the main ideas enshrined in current international treaties dealing with components of TK, such as the CBD's biodiversity and genetic resources provisions. Sinkala (2017) concludes that the *sui generis* would open the path for incentives for promoting and conserving TK through fostering local community development.

Arusha Protocol

According to Cardozo (2018), *sui generis* is the right to share the benefits of using plant genetic resources for food and agriculture. Furthermore, the right to participate in national decision-making can be exercised, essential for protecting and long-term using plant genetic resources for food and agriculture. According to Cardozo (2018), the Arusha Protocol should help member countries achieve their agricultural and economic goals.



Research Methodology

Research design

The study employed a qualitative research approach as the focal methodology. Firstly, the researcher opted for this approach because it emphasises explicit knowledge; secondly, it is an open-ended process; thirdly, data is based on human experiences and observations. Finally, because the design may be built and reconstructed to a greater extent, it is flexible (Maxwell, 2005). When one chooses a particular research approach, it necessitates matching research philosophies and reasoning. The term "research philosophy" refers to a set of beliefs and assumptions about the evolution of knowledge (Creswell, 2014).

Population and Sampling

The target population for this study consisted of the five traditional leaders and two managers of BIPA giving a total population of seven participants. The study opted for purposeful sampling, which attempted to establish a sample with various perspectives that would give both depth and diversity (Creswell, 2016) and respondents who provided information regarding the topic under examination (Maxwell, 2005).

Data analysis

The study used thematic narrative analysis to discuss outcomes and pinpoint the research aims. Also, to determine if any recommendations for future research might be made based on the themes observed during the study. Identifying themes is known as thematic analysis in data that capture meaning relevant to the research topic. The study used Atlas.ti 9™ in data analysis to generate macro-themes and later into codes. The researcher opted for thematic narrative analysis to produce a thematic content analysis (Creswell, 2012). The researcher created a new project in Atlas.ti 9™ and named it challenges of Intellectual Property Commercialisation (IPC) on the realisation of the Swakopmund Protocol Master Thesis. After that, the researcher imported the audio transcripts into Atlas.ti 9™ and created a word file saved with a unique name. A notable example, (TR = transcript: Traditional Leader = #Kao | | 'aesi traditional authority = m = male; Region = Omaheke region).

Trustworthiness

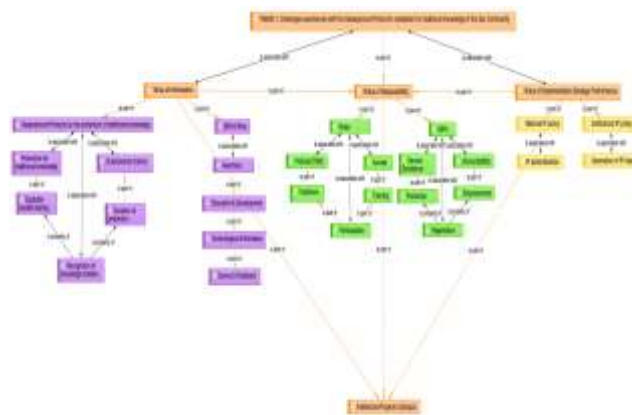
This study encompassed trustworthiness issues such as the credibility of the data collection instrument because credibility provides confidence in how well data and analysis processes addressed the study's intended focus (Schreier, 2018).

Ethical Considerations

The researcher carried out the study with academic honesty, integrity, and modesty. The Namibia University of Science and Technology Ethical Committee was consulted before the commencement of the fieldwork. After receiving ethical clearance from the university, BIPA management and traditional were approached to conduct the study. After BIPA and the required traditional authorities granted permission to contact the study, participants information papers detailing the study's objectives, predicted benefits, and participants' right to withdraw was distributed to the potential participants. Anonymity and confidentiality were maintained.

Results

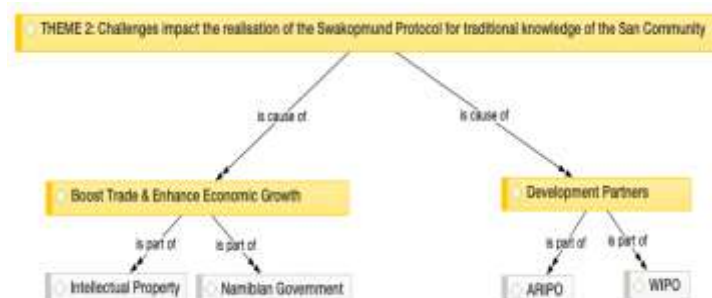
Figure 3: What challenges are experienced with the Swakopmund Protocols realisation for the San Community?



The results in figure 3 above shows the analysis of the central theme. Key deliverables are the virtue of information, responsibility, and strategic implementation performance, each having sub-deliverables. The sub-deliverables are all associated with the key deliverables. Both virtues of information, the virtue of responsibility and the virtue of strategic implementation performance affect the realisation of the Swakopmund Protocol. The majority of respondents expressed that the in-effectiveness and recognition of the sub-deliverables led to the Swakopmund Protocol not being realised since its adaptation in Swakopmund, the Republic of Namibia, on 9 August 2010.

According to the virtue of information in the network heuristic, one of the San community's issues is the protection and commercialisation of IP assets. As a result, the BIPA has been silent on maintaining effective intellectual property rights enforcement, developing IP awareness, strengthening the creative industry, and encouraging intellectual property used in areas where Namibia has comparative and competitive advantages. Those as mentioned earlier are emphasised in the Swakopmund Protocol; however, it is silent on fostering TK as a vehicle for socio-economic development.

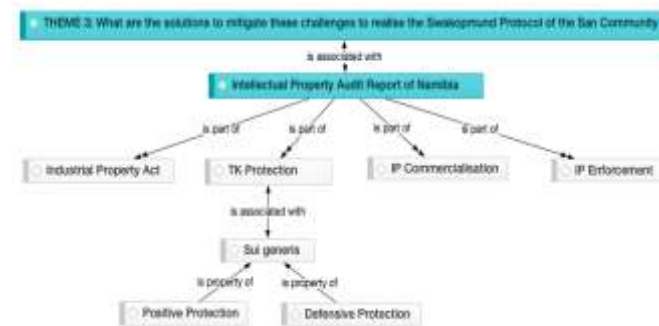
Figure 4: How will these challenges impact the realisation of the Swakopmund Protocol for the traditional knowledge of the San Community?



The Swakopmund Protocol could be realised through the Namibian government boosting trade and enhancing economic

growth using IP. Providing guidance will enable the Namibian government in partnership with BIPA to overcome the difficulties to assure successful use of IP as a vehicle for enhancing the social, economic, cultural, and technological growth of the San Community and living standards. The development partners such as ARIPO and WIPO should ensure continued support in developing IP laws and policies and ensuring that the various protocols are realised (BIPA, 2021).

Figure 5: What are the solutions to mitigate these challenges to realise the Swakopmund Protocol of the San Community?



It would be difficult to know what mitigations could be suggested without an audit report. It may become unclear precisely what protections on IP benefit the San Community's to follow. Namibia's IP audit report would serve as the foundation for the government's development of a National Intellectual Property Policy and Strategy (NIPPS). IP enforcement will make it possible to incorporate IP into national and sectoral development strategies. Sui generis protection of TK does not imply that a legal process must be built from the ground up. Instead, it must remain an effective tool for advancing traditional knowledge protection.

Recommendations

Create legislation specifically geared to preserve TK and prevent TK misappropriation by third parties, resulting in TK owners losing out on what is promised to them. The guidelines for protecting TK should be based on a sui generis framework.

Establish legislation that may be drafted to conserve TK and consider the needs of indigenous groups and their customary laws.

Create a framework for bettering and organising the application and registration of TK.

Adopt a law based on the sui generis system to protect TK. Before passing legislation, the government should engage indigenous groups by conducting workshops to hear their views and proposals.

Establish a draught policy on access to genetic resources and protecting TK.

Facilitate efforts to ensure that member states sign the Protocol, including collaborating with WIPO to develop a register and database that documents TK under the Swakopmund Protocol's requirements.

Conclusion

The study's findings show that Namibia lacks a legal IP framework to safeguard TK appropriately. Furthermore, there is a dearth of awareness about TK and commercialisation. The conclusions of this research will assist traditional authorities, BIPA, and the government in identifying practical answers to the commercialisation challenges that San communities are currently confronting. The article also concludes that the main constraints apply to all traditional authorities in Namibia and the whole managerial cadre of BIPA's IP Division.

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