

PROTECTION OF TRADITIONAL KNOWLEDGE AND TRADITIONAL CULTURAL EXPRESSIONS IN MAINLAND TANZANIA

Baraka Kanyabubinya and Athanas, Juma L.***

Abstract

The legal protection of Traditional Knowledge (TK) and Traditional Cultural Expressions (TCEs) has been under discussion in different forums. The benefits derived from the legal protection of TK and TCEs necessitate the enactment of specific or incorporation of sufficient provisions within the existing legal framework. The international Intellectual Property Community has proposed for the adoption of the *sui generis* approach to the protection of TK and TCEs due to the challenges and inadequacy associated with the application of the existing Intellectual Property Rights. Some countries, like Kenya in the East African Community, have adopted the proposed approach while other countries like Tanzania have not hence facilitating Traditional Cultural Expressions to be exploited by third parties without consultation of, and benefit sharing by, the community from which the expressions originate. This article makes a case for Tanzania to adopt international standards on the protection of TK and TCEs.

* LL.B (Hons) (UDSM) LL.M (Franklin Pierce Law Centre, Concord New Hampshire US, PhD. Holder and Lecturer in Law at the University of Dar es Salaam School of Law. He also served as the Head of Department of Private Law (2015 – 2019), Advocate of the High of the United Republic of Tanzania and subordinate Courts.

** LL.B (Hons), LL.M (UDSM) Assistant Lecturer in Law at the University of Dodoma, Advocate of the High of the United Republic of Tanzania and subordinate Courts.

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1. INTRODUCTION

Traditional knowledge refers to any knowledge which originates from a local or traditional community that is a result of intellectual activity and insight in a traditional context.¹ It includes know-how and skills. Since a large percentage of the world's populations depend on traditional knowledge for survival, that is to satisfy the need for health care or food security, traditional knowledge is gradually being acknowledged as some form of creativity deserving intellectual property protection.²

Subordinate

Traditional Knowledge (TK) and Traditional Cultural Knowledge (TCEs) constitute an area of the global contemporary and emerging intellectual property rights at the moment. This new area of IP protections has however faced some criticism and been subjected to intense debate on the justification for its protection. Whereas some states have formally recognized and legislated on protection of TK and TCEs, others have hesitated to protect the same arguing that they are worthless intellectual property creations.

While most third world and developing countries are rich in TK and TCEs, the current intellectual property regime is western-based. The criteria for protection of various IPRs is based on western thresholds. It is due to that reason that most TK and TCEs have been left out of the ambit of IP protection. This has triggered a call for new benchmarks that recognizes the legal protection of TK and TCEs. In line with these developments, states have

¹ Defined under section 2.1 of the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore, 2010.

² Lopez, A., *International Workshop on Traditional Knowledge: For the Recovery and Protection of Traditional Indigenous Knowledge*, Panama: 2005, at p.2.

promulgated laws to protect TK and TCEs within the existing IP legislation and some have enacted special laws for protection of the same. The latter undertaking is what is termed as *sui-generis* legislation.

African countries have been urged to develop legislative frameworks to protect traditional knowledge and folklore that recognize the collective nature of local innovation and promote its documentation for future enhancement.³ The rationale behind is that the legal framework would also protect their development, application; encourage individual innovation and shield biodiversity as well as traditional knowledge from privatisation.

Some African countries have adopted the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore. It is administered under the auspices of the African Regional Intellectual Property Organisation (ARIPO). The Protocol aligns together important input into efforts to identify an effective international framework for the protection of TK and folklore in Africa. The Protocol so far has been signed by nine ARIPO members, namely: Botswana, Ghana, Kenya, Lesotho, Liberia, Mozambique, Namibia, Zambia AND Zimbabwe. These countries have subsequently enacted local legislations in order to meet their obligations under the Protocol. Kenya, for instance, adopted the Traditional Knowledge and Cultural Expressions Act in 2016. This paper urges that the United Republic of Tanzania can emulate the move by Kenya and enact a specific legislation on protection of TK and TCEs.

2. CONCEPT OF TRADITIONAL KNOWLEDGE

³ GNA, African Countries Asked to Protect Traditional Knowledge with Legislation, available at African Countries asked to Protect Traditional Knowledge with Legislation (modernghana.com) (Accessed on 2 February 2022).

The term Traditional Knowledge has been defined by different scholars whose definitions share some features. Traditional Knowledge (TK) refers to the knowledge, innovation and practices of indigenous people.⁴ It is normally developed from experience and it is orally passed from one generation to another.⁵ Traditional Knowledge is a tool used for identification of a certain community and has a great relationship with the culture of the respective community. According to Rajasekaran, Traditional Knowledge refers to the systematic body of knowledge acquired by local people through the accumulation of experiences, informal experiments and intimate understanding of the environment in a given culture.⁶

The Swakopmund Protocol on the Protection of Traditional Knowledge and Expression of Folklore defines the term Traditional Knowledge to mean any knowledge originating from a local or traditional community that is the result of intellectual activity and insight in a traditional context, including know-how, skills, innovations, practices and learning, where the knowledge is embodied in the traditional lifestyle of a community, or contained in the codified knowledge systems passed on from one generation to another.⁷ Traditional Knowledge can be found in various contexts such as agriculture knowledge, scientific knowledge, technical knowledge, ecological

⁴ *Srividhya Ragavan*, “Protection of Traditional Knowledge”, *Minnesota Intellectual Property Review*, Volume 2, Issue Number 2, 2001, P. 4.

⁵ *Nidhi Kaushal*, (2012). *Traditional Knowledge in the Manacles of Intellectual Property Protection: A Study of Indian Indigenous Communities Rights and Claims*. LL.M Thesis, Faculty of Law-University of Toronto, United States of America. P. 1.

⁶ *Rajasekaran, B.* (1993). *A Framework for Incorporating Indigenous Knowledge System into Agricultural Research and Extension Organisations for Sustainable Agricultural Development in India*. A PhD Dissertation, Iowa State University, Ames, Iowa.

⁷ Section 2.1 of the Swakopmund Protocol on the Protection of Traditional Knowledge and Expression of Folklore, Adopted by a Diplomatic Conference at ARIPO at Swakopmund (Namibia) on August 9, 2010.

knowledge, medicinal knowledge, and biodiversity knowledge.⁸ Being found in these contexts justifies its significance as will be discussed in details below.

Furthermore, the WIPO Draft Article for Protection of Traditional Knowledge defines TK to mean the knowledge that is created, maintained, and developed by indigenous peoples, local communities and that is linked with, or is an integral part of, the national or social identity and/or cultural heritage of indigenous peoples, local communities; that is transmitted between or from generation to generation, whether consecutively or not, which subsists in codified, oral, or other forms; and which may be dynamic and evolving; and may take the form of know-how, skills, innovations, practices, teachings or learnings.⁹

3. CONCEPT OF TRADITIONAL CULTURAL EXPRESSIONS

This term also has no single agreed definition, instead as TK is, it has been defined by different scholars with some similarities in their definitions. Traditional Cultural Expressions refers to the forms through which the traditional culture of a certain community is expressed.¹⁰ They are the forms which identify a community and may include; music, dance, art, designs, names, signs, symbols, performances, ceremonies, architectural forms, handicrafts and narratives and any other artistic expressions.¹¹ It is also defined to mean the production consisting of the characteristic elements of

⁸ Langill S. (1999). Indigenous Knowledge, A Resource Kit for Sustainable Development Researchers in Dryland Africa, available at <https://idl-bnc.dspacedirect.org>, accessed on 21st October 2021.

⁹ Article 1 of the Protection of Traditional Knowledge: Draft Articles, August 31, 2018.

¹⁰ Dionyssia Kallinikou, Protection of traditional cultural expressions or expressions of folklore, available at <http://icme.icom.museum>, accessed on 21st February 2021, at 22:12 pm. And section 2.1 of Swakopmund Protocol on the Protection of Traditional Knowledge and Expression of Folklore.

¹¹ *Ibid.*

the traditional artistic heritage developed and maintained by the community or individuals reflecting the traditional artistic expectations of the respective community.¹² The Swakopmund Protocol defines TCEs to mean any forms, whether tangible or intangible, in which traditional culture and knowledge are expressed, appear or are manifested.¹³

The forms in which expression of folklore may be expressed, appear or manifested includes; verbal expressions, such as but not limited to stories, epics, legends, poetry, riddles and other narratives; words, signs, names, and symbols; Musical expressions, such as but not limited to songs and instrumental music; Expressions by movement, such as but not limited to dances, plays, rituals and other performances; whether or not reduced to a material form; and tangible expressions, such as productions of art, in particular, drawings, designs, paintings (including body-painting), carvings, sculptures, pottery, terracotta, mosaic, woodwork, metal ware, jewellery, basketry, needlework, textiles, glassware, carpets, costumes; handicrafts; musical instruments; and architectural forms.¹⁴ Traditional Knowledge and Traditional Cultural Expressions have a great relationship.¹⁵ This is due to the fact that Traditional Knowledge can be expressed by the forms of

¹² Section 4 of the Copyright and Neighbouring Rights Act, Act No. 7 of 1999 as amended. Section 2 of the Model Law for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions, 1982. Also in the World Intellectual Property Organisation, Intellectual Property and Traditional Cultural Expressions/Folklore, available at www.wipo.int, accessed on 15 February 2021, at 14:22 pm, P. 6.

¹³ Section 2 of the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore, Adopted by the Diplomatic Conference of ARIPO at Swakopmund (Namibia) on 9 August 2010.

¹⁴ Section 2 of the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore.

¹⁵ Lily *Martinet*, (2019) “Traditional Cultural Expressions and International Intellectual Property Law”, 47(1) *International Journal of Legal Information*, p. 10.

Traditional Cultural Expressions like stories, songs, proverbs, paintings and drawings.¹⁶

Notable examples of Traditional Knowledge in Tanzania include herbal medicinal knowledge of Maasai, Sukuma and Kurya communities; and seed selection skills or knowledge by most of the agriculturalist communities. While examples of Traditional Cultural Expressions from Tanzania includes; Maburo, Bumbilingi and Bhugoyangi dances from Sukuma communities; body paintings by Maasai and Haya communities; Musical instruments by Gogo, Haya, Sukuma, Makonde and Nyaturu communities just to mention some. All these TK and TCEs need to be protected to ensure benefits to the community from which the same originate and benefit to the nation as a whole.

4. WHY PROTECTION OF TK AND TCEs

Laws are a set of norms enacted to regulate human behaviour by prohibiting certain misdeeds and promoting acceptable behavioural standards. In the legal realm this is described as curing a particular mischief.

Similarly, in legislating on protection of TK and TCEs, law making authorities of various states aim to cure certain mischief. In light of the protection of TK and TCEs, the mischief behind such legislation is not far from fetching. Reading the objectives section of these laws, the following are notable goals or significance of protecting TK and TCEs.

4.1 Protection of cultural identity and respect

Traditional Knowledge and Traditional Cultural Expressions form an integral part of the culture of a certain community which developed and maintained them. Their protection therefore has a bearing on the culture and identity of the respective community. The protection of TK and TCEs ensures their

¹⁶ *Ibid.*

continued existence and even their further development, something which ensures identification of the community concerned. This is true due to the fact that, when there is a law protecting Traditional Knowledge and/or Traditional Cultural Expressions it will normally put a requirement of acknowledgment of the source of either Traditional Knowledge or Traditional Cultural Expressions. This requirement will therefore play the part of protecting the cultural identity and respect of the owning community.

4.2 Prevention of Bio piracy

In line with the theme of this article, Bio piracy refers to unauthorised exploitation of Traditional Knowledge or Traditional Cultural Expressions by third parties who may be natural or artificial persons. This term is sometimes referred to as free riding and persons responsible for it are called free riders. It is the legal protection which can avoid or prevent the acts of free riding over the Traditional Knowledge and Traditional Cultural Expressions. The said prevention will further ensure sharing of the benefits by the owning community in case their Traditional Knowledge or Traditional Cultural Expressions is exploited for commercial purposes. The absence of legal protection has facilitated misappropriation or bio piracy of TK and TCEs hence affecting the interests of the owning community.

4.3 Management of Natural Resources and Conservation of Environment

The traditional skills, know-how, practices and innovations plays a great role in the management of natural resources as well as conservation of environment. Members of the community have traditional ways like shifting cultivation, reservation of some lands, traditional means of hunting and fishing as well as methods of waste management which indeed has a great contribution to natural resources and environmental management. It is legal protection which acts as an incentive to members of the community to apply their traditional means and devote the time and efforts in developing new traditional means which are necessary in managing natural resources and

conserving the environment. This management and/or conservation of natural resources and environment helps in ensuring food security. However there is the need to encourage the cooperation between traditional knowledge and global science towards the management of natural resources as well as environmental conservation.

4.4 Medicinal and Health Benefits

Traditional Knowledge, as pointed out above, is found in different fields, one being the medicinal field. Most of the artificial medicines or drugs are the result of the application of traditional knowledge of the communities. Traditional medicinal knowledge, for many years, has been a focal point for most scientists when conducting their scientific researches. In the countries where there is no legal protection of Traditional Knowledge, members of the communities found in those countries do not disclose their traditional medicinal knowledge. The reason for such non-disclosure is the absence of legal protection after disclosure of their Traditional Knowledge. This has affected much scientific research and hence delaying the discovery of appropriate medicines for curing health problems.

4.5 Protection of Human Rights

The Protection of Traditional Knowledge and Traditional Cultural Expressions ensures respect, promotion and protection of basic human rights and fundamental freedoms. Under the United Nations protection of Traditional Knowledge is considered to be a human right matter.¹⁷ The same is reflected under the African Regional system particularly, For instance the African Charter on Human and People's Rights provides that, "The right to property shall be guaranteed. It can only be encroached upon in the interest of public need or in the general interest of the community and in accordance

¹⁷ *Article 31* of the UN Declaration of the Rights of Indigenous Peoples (UNDRIP), adopted by the UN General Assembly on 13 September 2007, and Article 8 (j) of the Convention on Biological Diversity (CBD), 1992.

with the provisions of appropriate laws”.¹⁸ The same Charter further provides that, “All people shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the heritage of mankind”.¹⁹ Traditional knowledge is the vehicle towards social and cultural development, therefore states, including Tanzania, are under an obligation of ensuring protection of traditional knowledge of their people so as to comply with the provisions of this charter as well as the provisions of the UN Human Rights Instruments.

5. INTERNATIONAL LEGAL FRAMEWORK ON THE PROTECTION OF TK AND TCEs

The international protection of Traditional Knowledge and Traditional Cultural Expressions is the result of the efforts of developing countries as opposed to developed countries.²⁰ Below is an analysis of the international instruments and the extent of protection of TCEs and TK offered by them:-

5.1 The Berne Convention

The Berne Convention for the Protection of Literary and Artistic Works is one of the first international instruments for the protection of intellectual property. It was adopted in 1886 and passed through several revisions and amendments.²¹ Tanzania is a member state to it hence bound by its provisions. Since its adoption, this Convention did not have provisions which had a bearing on the protection of Traditional Knowledge or Traditional Cultural Expressions. The influence of developing countries led

¹⁸ *Article 14 of the African Charter on Human and People’s Rights, 1981.*

¹⁹ *Ibid.* Article 22 (1) and (2).

²⁰ *Scoping Paper No. 3, February 2019, Protection of Traditional Cultural Expressions in India, available at www.irs.org.in, accessed on 21st February 2021, at 12:09 pm.*

²¹ *Revised at BERLIN on November 13, 1908, completed at BERNE on March 20, 1914, revised at ROME on June 2, 1928, at BRUSSELS on June 26, 1948, at STOCKHOLM on July 14, 1967, and at PARIS on July 24, 1971, and amended on September 28, 1979*

to the 1967 revision of the Berne Convention.²² The revision resulted in the introduction of a new provision whose interpretation stipulates the protection of TK and TCEs offered by the Berne Convention.²³ The said provision states that,

In the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union.²⁴

The use of the Phrase “unpublished works” makes TK and TCEs to be eligible for protection under the Berne Convention, however the protection is faced with the challenges discussed in details hereunder namely; the term of protection, nature of ownership as well as the requirement of fixation.

5.2 The TRIPS Agreement

The Agreement on Trade-Related Aspects of Intellectual Property Rights is a known comprehensive multilateral intellectual property instrument.²⁵ This agreement was formally adopted on 15th April 1994 and came into force on 1st January 1995.²⁶ It is said to be a comprehensive International intellectual property instrument due to its precise and expanded protection of

²² *Scoping Paper No. 3*, February 2019, Protection of Traditional Cultural Expressions in India, P. 8.

²³ *Ibid.*

²⁴ Article 15 (4) (a) of the Berne Convention for the Protection of Literary and Artistic Works, 1886, revised and amended several times.

²⁵ Introduction to the TRIPS Agreement, available at www.wto.org, accessed on 21st February 2021, at 22:48 pm, P. 9.

²⁶ *Ibid.* P. 7.

Intellectual Property Rights (IPRs). This agreement also introduced the enforcement mechanisms at international level, an aspect which was not addressed by the previous international IP instruments. Tanzania is a member of the World Trade Organisation hence bound by the agreements made under it, one of the agreements is the TRIPS Agreement.

The TRIPS Agreement does not have an express provision for the protection of Traditional Knowledge and/ or Traditional Cultural Expressions. However, the protection of TK and TCEs in the TRIPS Agreement can be derived from the non-derogation principle or rather on the provisions incorporating the provisions of the Berne Convention.²⁷ The TRIPS Agreement requires member states not to derogate from their obligations under the Berne Convention. One of the provisions member states to the World Trade Organisation (WTO) are prohibited to disregard is article 15 (4) of the Berne Convention which offers protection of TK and TCEs as clearly discussed above. This therefore shows the extent the TRIPS Agreement, like the Berne Convention, guarantees protection of TK and TCEs however with an addition of enforcement mechanisms when compared to the nature of the Berne Convention.

5.3 The WIPO Performances and Phonograms Treaty (WPPT), 1996 and the Beijing Treaty

This is one of the two WIPO internet treaties, the other being the WIPO Copyright Treaty adopted in the same year, 1996. They were adopted to supplement the existing Copyright and Neighbouring rights instruments. The purpose being to address and/ or respond to the challenges brought by technological development. The protection of Traditional Cultural Expressions is reflected under article 3 of the WIPO Performances and Phonograms Treaty which provides that, “Contracting parties shall accord

²⁷ Articles 2 (2) and 9(1) of the Agreement on Trade-Related Aspects of Intellectual Property Rights, 1994/1995.

the protection provided under this treaty to the performers and producers of phonograms who are nationals of other contracting parties". The term performer is also defined under the treaty to include performers of expressions of folklore.²⁸ Also article 2 of the Beijing Treaty on Audio-Visual Performances, 2012 defines a performer in the same way as it is defined under article 2 of the WPPT. Tanzania is not party to these treaties and therefore not bound by them.

5.4 The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), 2007

This is an instrument adopted under the auspices of the United Nations.²⁹ It is a declaration and hence having no binding nature but rather playing the role of providing a guideline to member states to the United Nations on the protection of the rights of indigenous people. The declaration has some provisions which have a bearing on the protection of Traditional Knowledge and Traditional Cultural Expressions of indigenous peoples. It provides to the effect that, indigenous people have the right to maintain, protect and develop the past, present and future manifestations of their cultures.³⁰ It further provides that, indigenous people have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge and traditional cultural expressions.³¹ Tanzania, being a member of the United Nations, is required to follow this declaration and develop or adjust her national laws so as to ensure effective protection of traditional knowledge and traditional cultural expressions of its people.

²⁸ Article 2 of the WIPO Performances and Phonograms Treaty, 1996.

²⁹ Adopted in 2007.

³⁰ Article 11 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), 2007.

³¹ *Ibid.* Article 31 (1).

5.5 The Convention on Biological Diversity (CBD), 1992

This is an international instrument also adopted under the auspices of the United Nations.³² It is the convention adopted for the purpose of promoting and encouraging conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of benefits arising out of the utilisation of the genetic resources.³³ On the protection of Traditional Knowledge, this convention provides that, each contracting party shall, as far as possible and as appropriate, subject to its national legislation respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional life styles relevant for the conservation and sustainable use of biological diversity and promote their wider application with approval and involvement of the holders of such knowledge, innovations and practices and encourage equitable sharing of the benefits arising from the utilisation of such knowledge, innovations and practices.³⁴ Tanzania has been a member of this Convention since 1996 and is bound, under the principle of *pacta sunt servanda*, to comply with the provisions of this convention.³⁵

5.6 International Treaty on Plant Genetic Resources for Food and Agriculture, 2001

This treaty was adopted in 2001 during the 31st session of the conference of the Food and Agriculture Organisation of the United Nations and entered into force in 2004. This treaty is in line with the provisions of the Convention on Biological Diversity. The purpose for adoption of this treaty was to ensure conservation and sustainable use of plant genetic resources for food and agriculture and the fair and equitable sharing of the benefits arising out of

³² Adopted in 1992.

³³ Article 1 of the Convention on Biological Diversity, 1992.

³⁴ *Ibid.* Article 8 (j).

³⁵ Article 26 of the Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969, entered into force on 27 January 1980.

their use.³⁶ It has some provisions which aim at protecting the traditional knowledge of the people and the benefits associated with the genetic resources which have a connection with the traditional knowledge. It provides that, each contracting party should, as appropriate and subject to its national legislation take steps to protect and promote farmer's rights including; protection of traditional knowledge relevant to plant genetic resources for food and agriculture, right to equitably participate in sharing benefits arising from the utilisation of plant genetic resources for food and agriculture and also the right to participate in decision making on matters related to the conservation and sustainable use of plant genetic resources for food and agriculture.³⁷Tanzania is a contracting party to this treaty hence bound by its provisions.³⁸

5.7 The Protection of Traditional Knowledge: Draft Articles, 2018

The influence of developing countries and some few developed countries led to the movements for adoption of an international legally binding instrument on the protection of traditional knowledge. In 2000 the WIPO General Assembly established the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC).³⁹ The committee worked on making analysis and looking for the best way of protecting traditional knowledge. In 2005 the committee came up with a document entitled "Draft Provisions for the Protection of Traditional Knowledge: Policy Objectives and Core Principles". This document focused on prohibition of illicit uses and misappropriation of Traditional Knowledge.

³⁶ Article 1 of the International Treaty on Plant Genetic Resources for Food and Agriculture, 2001.

³⁷ *Ibid.* Article 9.

³⁸ List of contracting parties-Food and Agriculture Organisation, available at <https://www.fao.org>, accessed on 21st October 2021, at 18:00 pm

³⁹ Saema Farooq, *et al*, "Legal Framework on Protection of Traditional Knowledge: A Review", *International Journal of Advance Research in Science and Engineering*, Volume No. 8, Issue No. 01, January 2019, P. 103.

Up to date the document which is in the process of being a legally binding instrument is called, “The Protection of Traditional Knowledge: Draft Articles, 2018”. It has a nature of the *sui generis* instrument on the protection of traditional knowledge like the UPOV Convention. This document provides for, *inter alia*, definition of the term traditional knowledge, the subject matter of protection, beneficiaries, scope of protection, defensive protection, sanctions and remedies, exceptions and limitations, term of protection, formalities, relationship with other agreements as well as non-derogation principle. The negotiations are still proceeding in different forums, one being within the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC). Adoption of this *sui generis* instrument will mark a cornerstone on the international protection of Traditional Knowledge. The challenge however will be on the enforcement mechanisms when the circumstances so require. This is because the instrument will be adopted under the WIPO framework, the framework which does not have effective enforcement mechanisms as opposed to the WTO framework.

6. AFRICAN REGIONAL LEGAL FRAMEWORK ON THE PROTECTION OF TK AND TCEs

The African Regional Intellectual Property Organisation (ARIPO) adopted the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore.⁴⁰ This protocol deals with the protection of two matters namely; traditional knowledge and the expressions of folklore. It provides for a number of issues relating to the protection of the two aforementioned matters. It requires member states to comply with its provisions when enacting or adjusting their national laws on the protection of traditional knowledge and Traditional Cultural Expressions.

⁴⁰ Adopted by the Diplomatic Conference of ARIPO at Swakopmund (Namibia) on August 9, 2010.

Some of the issues provided by the Swakopmund Protocol include; definition of Traditional Knowledge and Expressions of Folklore, criteria and formality for protection, beneficiaries, rights conferred to beneficiaries, assignment and licensing, benefit sharing, recognition of the source, exceptions, and term of protection, administration and enforcement, sanctions, remedies as well as issue relating to compulsory licensing of traditional knowledge.⁴¹ Tanzania, being a member of ARIPO, and by considering the international standards for protection of Traditional Knowledge, is required to adjust its copyright law on the protection of expressions of folklore and enactment of a comprehensive legislation on the protection of Traditional Knowledge.

7. LEGAL POSITION OF TANZANIA ON THE PROTECTION OF TK AND TCEs

The United Republic of Tanzania is one of the contracting parties to a number of international instruments as well as international organisations which call for the protection of Traditional Knowledge and Traditional Cultural Expressions. These instruments include; the Berne Convention for the Protection of Literary and Artistic Works,⁴² The TRIPS Agreement,⁴³ The Convention on Biological Diversity,⁴⁴ and the International Treaty on Plant Genetic Resources for Food and Agriculture.⁴⁵ The international institutions or organisations to which Tanzania is a party include: The World Intellectual Property Organisation (WIPO),⁴⁶ and The World Trade

⁴¹ Part II and Part III of the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore, adopted by the Diplomatic Conference of ARIPO at Swakopmund (Namibia) on August 9, 2010.

⁴² Adopted in 1886, Revised at BERLIN on November 13, 1908, completed at BERNE on March 20, 1914, revised at ROME on June 2, 1928, at BRUSSELS on June 26, 1948, at STOCKHOLM on July 14, 1967, and at PARIS on July 24, 1971, and amended on September 28, 1979.

⁴³ Adopted in 1994.

⁴⁴ Adopted in 1992.

⁴⁵ Adopted in 2001.

⁴⁶ Established in 1970.

Organisation (WTO),⁴⁷ The United Nations.⁴⁸ At the African regional level, Tanzania is a member of the African Regional Intellectual Property Organisation which has a protocol for protection of Traditional Knowledge and Expressions of Folklore.⁴⁹

Despite being a member of the above international instruments and institutions/organisations, Tanzania does not have a comprehensive legislation which is relevant to the protection of Traditional Cultural Expressions. However some elements of protection of TCEs are incorporated under Part III of the Copyright and Neighbouring Rights Act.⁵⁰ The protection of TCEs under the copyright law is faced with three major challenges namely; the term of protection, nature of ownership and the requirement of fixation as discussed in details in the next part hereunder. With regard to Traditional Knowledge, Tanzania has neither a comprehensive legislation nor incorporation of some provisions, in any of the existing legislation, which offers protection of traditional knowledge. This situation waives and/or affects the attainment of the significance associated with the effective protection of traditional knowledge which are discussed in this article.

7.1 Challenges in the Current Legal Framework

In Tanzania as it has been pointed out above, there is no specific legislation for the protection of either Traditional Knowledge or Traditional Cultural Expressions. However, the protection of Traditional Cultural Expressions is incorporated in the copyright law⁵¹ while the protection of Traditional Knowledge is not incorporated in any law operating in Mainland Tanzania.

⁴⁷ Established in 1995.

⁴⁸ Came into existence on 24 October 1945.

⁴⁹ Established under Article 1 of the Lusaka Agreement, reprinted in March 2016.

⁵⁰ Act No. 7 of 1999 as amended.

⁵¹ Part III (sections 24-30) of the Copyright and Neighbouring Rights Act, Act No. 7 of 1999.

With regard to absence of a law for protection of Traditional Knowledge there is a possibility that Traditional Knowledge and Traditional Cultural Expressions has been and may still be subjected to unauthorised exploitation by third parties if no comprehensive legal framework is adopted. The incorporation of Traditional Cultural Expressions in the Copyright and Neighbouring Rights Act has been proved to be insufficient on the protection of community's cultural expressions. The reasons for this insufficient protection are based on three major areas namely; ownership, fixation and the term of protection. These areas are explained in detail below.

Copyright law grants protection to authors or joint authors as opposed to communal ownership.⁵² Traditional Cultural Expressions are owned by the whole community regardless of the contribution of every member of the community in developing and maintaining such expressions. The joint authorship recognized by the copyright law is subject to the condition that, every person claiming to be a joint author of a certain work has to prove his substantial contribution to the form of expression of such work (s). This stipulates the extent to which copyright is not an appropriate means of protecting Traditional Cultural Expressions.

Regarding the term of protection, copyright law protects works of authors or joint authors for a specific period of time, simply means there is a time limitation.⁵³ For instance, the term of protection of most of literary and artistic works is the life of the author or of the surviving author, in case of joint authorship, plus fifty years,⁵⁴ except for some works which are protected for fifty years, and 25 years from the date of their publication.⁵⁵ Since the Expression of Folklore is the self-expression and social identity of the nation

⁵² Section 15 (1) of the Copyright and Neighbouring Rights Act,] CAP 218 R.E 2002].

⁵³ *Ibid*, section 14, and Article 12 of the Agreement on Trade Related Aspects of Intellectual Property Rights, 1994.

⁵⁴ Section 14 (1) and (2) of the Copyright and Neighbouring Rights Act, Act No. 7 of 1999 as amended.

⁵⁵ *Ibid*. Section 14 (3), (4) and (5).

or community, it is inappropriate to grant specific time for its protection. This also shows how copyright law cannot offer effective protection to the Traditional Cultural Expressions.

On the requirement of fixation, the Copyright and Neighbouring Rights Act provides for the requirement of fixation of the work for it to qualify for protection under copyright law.⁵⁶ This requirement is not friendly to the protection of expressions of folklore because most of these expressions are not embodied or fixed in tangible objects. This means only a small percent of the forms of expressions of folklore can benefit from the protection offered under copyright law. This situation proves a gap on the protection of Traditional Knowledge and insufficient protection of Traditional Cultural Expressions in Mainland Tanzania hence calling for necessary actions to be taken by the responsible authorities and the community at large.

8. LESSONS FROM KENYA

Kenya is one of the countries forming part of the East African Community. It has developed its legal framework on the protection of both Traditional Cultural Expressions and Traditional Knowledge. This is evidenced from the provisions of the Constitution which provides that, the state shall promote all forms of national and cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publication, libraries and other cultural heritage.⁵⁷ The state is further put into an obligation of recognizing the role of science and indigenous technologies in the development of the nation.⁵⁸ Furthermore, the state is required to protect intellectual property rights of the people of Kenya where forms of expressions of folklore also qualify to be intellectual property rights.⁵⁹ In

⁵⁶ *Ibid.* Sections 3, 5(3), 24, 31, 32 and 33.

⁵⁷ Article 11 (2) (a) of the Constitution of Kenya, 2010.

⁵⁸ *Ibid.* Article 11 (2) (b).

⁵⁹ *Ibid.* Article 11 (2) (c).

addition, the Constitution provides that, the state shall protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities.⁶⁰ The Constitution's obligation to the state ensures recognition, promotion and protection of traditional knowledge as well as Traditional Cultural Expressions of the people of Kenya. This position is different from Tanzania where the Constitution does neither provide for Traditional Knowledge nor Traditional Cultural Expressions.

Kenya, apart from having some provisions in the Constitution which impose obligations to the state on the promotion, protection and enhancing of traditional knowledge and traditional cultural expressions, has, through its parliament, enacted a specific legislation on the protection of Traditional Knowledge and Cultural Expressions.⁶¹ This Act provides for, *inter alia*, the definition of Traditional Knowledge and Cultural Expressions, Protection criteria, maintenance of registers, rights conferred to the holders, Duration of protection, formalities, exceptions and limitations as well as enforcement mechanisms. Indeed Kenya has developed a *sui generis* legislation on the protection of both Traditional Knowledge and Traditional Cultural Expressions unlike the position in Tanzania as it has been observed above.

The Kenyan Act does not include the requirement of fixation for Traditional Knowledge or Traditional Cultural Expressions to be protected. It requires no formality for TK or TCEs to enjoy legal protection.⁶² The Act also provides to the effect that, the owners of Traditional Knowledge and Traditional Cultural Expressions are the communities from which the TK and TCEs originates.⁶³ These communities have the exclusive right to

⁶⁰ *Ibid.* Article 69 (1) (c).

⁶¹ Protection of Traditional Knowledge and Cultural Expressions Act, Act No. 33 of 2016.

⁶² Section 7 of the Protection of Traditional Knowledge and Cultural Expressions Act, Act No. 33 of 2016.

⁶³ *Ibid.* Sections 2 and 9

authorise the exploitation and prevent any person from exploiting their TK or TCEs without their prior consent, this implies the right to consultation prior to the exploitation.⁶⁴ Regarding the term of protection, the Kenyan Act offers protection to Traditional Knowledge and Traditional Cultural Expressions for indefinite time provided the same meets the qualifications prescribed under it.⁶⁵

9. CONCLUSION AND RECOMMENDATIONS

The protection of Traditional Knowledge and Traditional Cultural Expressions is essential for the benefit of the holders as well as for national development. The importance of protecting Traditional Knowledge and Traditional Cultural expressions include; safeguarding cultural identity and cultural diversities, management of environment and natural resources, insurance of food security, medicinal or health benefits, human rights protection as well as prevention against bio-piracy. The application of the existing Intellectual Property Rights on the protection of TK and TCEs has proved failure due to the holistic nature of these two aspects. The international community's call for adoption of the *sui generis* approach for protection of Traditional Knowledge and Traditional Cultural Expressions is an appropriate means of ensuring effective protection of TK and TCEs rather than embarking on the use of the existing IPRs. It is therefore recommended that, Tanzania, like Kenya, should, through the relevant authority:-

- (a) Reform and/ or amend the Copyright and Neighbouring Rights Act, particularly Part III, so as to be in line with the international standards on the protection of Expressions of Folklore/ Traditional Cultural Expressions, and

⁶⁴ *Ibid.* Section 10 (1) (a) and (b).

⁶⁵ *Ibid.* Sections 13 and 17.

- (b) Enact a new and comprehensive legislation for the protection of Traditional Knowledge, taking into account the practice from other countries like Kenya as well as in accordance with the standards set out in the international IP instruments, both binding and non-binding instruments, on the protection of Traditional Knowledge, or
- (c) Enact a new and comprehensive legislation, with a *sui generis* approach, on the protection of both Traditional Knowledge and Traditional Cultural Expressions as Kenya did in 2016 when enacting the Protection of Traditional Knowledge and Cultural Expressions Act.
- (d) Review her Constitution and state the protection of TK and TCEs as Constitutional rights. This will go in line with other countries which have recognized the same and granted Constitutional protection. Some of these countries are the republics of Kenya, Brazil, Botswana, South Africa and India.