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THE PLIGHTS OF AFRICAN RESOURCES PATENTING THROUGH THE LENSES OF THE WORLD TRADE ORGANISATION: AN ASSESSMENT OF SOUTH AFRICA'S ROOIBOS TEA'S LABYRITH JOURNEY

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Abstract

Background: Just as developing states are blessed with natural resources capable of transforming their economies into a positive direction, the imposed World Trade Organisation's (WTO) mores continue to relegate them to status of underdevelopment. The consequences of this on investment, trade and finance in Third World States (TWSs), especially Africa, are disarticulation of the economy, exploitation, disinvestment, unemployment, political instability and unavailability of relevant technology to move TWSs forward, among others. This gives rise to the politics behind Rooibos (*Aspalathus linearis*) patenting (a medicinal plant found only in South Africa) by various multinational corporations (MNCs).
Materials and methods: This study adopted political economy approach with emphasis on both primary and secondary sources of data collection using content analysis.
Result: There is need to adhere strictly to the issues of intellectual property rights (IPRs), geographical indications (GIs), prior informed consent (PIC), and access and sharing benefits (ASB). These have not been observed by the western states because of their economic of neo-imperialism to the disadvantage of developing states.
Conclusion: This paper recommends that there is need for a regional regime such as African Regional Intellectual Property Organisation (ARIPO), on indigenous knowledge (IK) to patent the continental biodiversity resources.

Key words: WTO, IP, PIC, GI; Biopiracy, Rooibos.

Introduction

Africa is always at the receiving end of every international arrangement, be it economic, political or socio-cultural developments. Bio-piracy and the removal of bio-resources constitute the core of this discussion with special emphasis on recent developments in Rooibos patent, a tea whose origin can only be traced to South Africa, but ironically, some non-South African companies have attempted severally, to have it registered. This move attracted international attention in 1995 and 2013 as Burke International and Compagnie de Trucy, American and French companies, respectively attempted to claim ownership of this South African natural heritage - rooibos tea. This arrangement was premeditated by MNCs in trying to turn it into a royalty-collection agency simply because the WTO could apply trade sanctions if South Africa tried to invoke the Convention Biological Diversity (CBD) treaty on Rooibos accessibility (Bhagwati, 2004). The tea is a medicinal product, which could be described as a tea of life and "the new pomegranate juice."[1] It is one of the South African products which projects the country to limelight and gives her importance at the international level.

One of the major problems of the 21st century is the exclusive right, in privatisation as against common goods (Carmody, 2011; Thompson, 2010). In line with the WTO, Trade-Related Aspects of Intellectual Property Rights (TRIPS), World Intellectual Property Organisation (WIPO), and CBD, the plant is expected to be registered as IP, GI and Trademark (TM) through domestic law. Unfortunately, South Africa's IP is still in the offing as the Department of Trade and Industry's (DTI) draft tabled before the Parliament needs reframing in order to accommodate the issue of Rooibos. One of the major problems which various international organisations have established to protect biodiversity, especially in developing areas, is conflict with the law. For instance, CBD and TRIPS are not in agreement with the ownership of IP. While the CBD considers that it belongs to the sovereign state/s and its communities, TRIPS on the other hand, opines that IP should be for either private individuals or a corporation which registered it. This is where the issue of precedence has continued to generate discussions in TWSs. Plants and animals make up the treasures of Africa but have helped to build empires overseas as well as yellow and black gold (Thompson, 2010: 299).

The formation of the CBD in 1992 was considered an idea to meet the demands of developing areas, but America is not a signatory. Instead, Washington supports the WTO, which is a single undertaking, agreement entered into by 159 states. To ensure WTO effectiveness, WIPO was established with the aim of regulating IP, but its activities are always to the benefit of developed states.

The establishment of many centres for the filing of IP is one of the major problems that African states are contending with, coupled with the lack of finance, know-how and relevant professionals to handle cumbersome filings. Some professionals who are ready to work *pro bono* for African states such as a US- based International Non-Profit Organisation, Public Interest Intellectual Property Advisors (PIIPA) are not without conditions such as it should be in the interest of the public, supportive of the interest of developing states, financial incapability to pay for professional assistance and organisational test to determine eligibility. There are different nuances to the interpretation of these conditions, which in the long run, may not be in the interest of Africa (Davis & van den Berkhof, 2013: 7).

Areas of concern that remain unsettled despite the unequal exchange in the IPRs are ASB and PIC. These need some clarifications. Royalties on the patented plants and animals dubiously pirated from Africa in general with special focus on Rooibos by various MNCs need academic interrogation. This is against the much acclaimed ethical, social and environmental responsibilities of MNCs (Epstein, 2011: 185-99; letto-Gillies, 2012; Wilks & Nordhaug, 2013: 286-305).

The problem associated with this, constitute the main focus of this paper is the nexus between the government, community and individuals. It is the opinion of this paper that paying to the government, in line with the CBD, is going to be another means of exploitation because of the corrupt practices of government officials and red-tape. The stealing of IK is unabated from pre-colonial Africa to the neo-colonial period. The formation of databank in the form of a proposed Global Bio-collecting Society (GBS) as proposed by Peter Drahos (EIPR, 2000) is believed to be the way out of this problem and to resolve multi-patenting is not without its lapses of cyber-espionage. There is need for ARIPO to challenge the imperialistic IPRs of WIPO. Alternatively, an international regime, as a rival organisation, *Organisation africaine de la Propriéte Intellectuelle* (OAPI) consisting of 16 Francophone states (Adams & Adams, 2012: 410-32) need to join hands with ARIPO through AU/NEPAD as a united force against imperialistic IPRs. The formation of OAPI is not too far from attempt to divide the continent the more to encourage western exploitation based on colonial legacy. For the purpose of this paper, the main focus will be ARIPO.

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Rooibos and its Politics

Rooibos and its Development

The source of this tea can be traced to the IK of the Khoi and San people who occupied Cederberg, about 200 kilometres north of Cape Town. These are the people, according to the African Commission on Indigenous Peoples (IPs), referred as indigenous people because they are pastoralists and hunter-gatherers (Wachira, 2010: 313). IPs may be defined as "groups and communities who self-identify themselves as such and who seek the protection of their fundamental rights within the indigenous rights regime as developing in international law" (Wachira, 2010: 297).

The use of rooibos by Khoi and San predated the arrival of Jan van Reebeick to the Cape of Good Hope. It is known as a source of food and medicine for nearly every ailment for the IPs who occupy the area. A Swedish botanist, Carl Peter Humberg's relations with the people of the community enhanced the bio-piracy/*stealing of* the wonder Rooibos and recommended the same for use in treating different diseases in 1772. He marketed it in Germany under the name "Rooibos" or "Massai Tea". In 1904, a Russian immigrant Benjamin Ginsberg went further to exploit the poverty of the area and became a merchant of the product which he packaged and sold in the country and exported part of it to Europe. History holds that in 1968, Annique Theron (Joubert & Ferreira, 1996: 79) realised that "a rooibos infusion, when administered to her baby, cured the infant of chronic restlessness, vomiting and stomach cramps. This further promotes rooibos tea as a health drink.

Annique wrote a book, *Allergies: an Amazing Discovery* on Rooibos in 1970 (Cason, 2004). This globalised the tea and brought it to prominence in America, Europe and Japan as a multipurpose product. The tea, sometimes referred to as Mountain Tea, because it is a plant that grows in an unusual terrain of the mountainous area of Cederberg, brought South Africa into limelight despite its apartheid policy. Annique registered Forever Young Company in America which produces skin-care products using rooibos. This further popularised rooibos and led to an increase in demand. In 1993, she filed a TM application for Rooibos with the US Patent and Trademark Office (USPTO) and obtained its registration in 1994. Rooibos Limited, a South African company, challenged the registration as the export of the product in the name of rooibos was to be curtailed in the US if not classified as a generic name. The company received support from the South African government and the Western Cape Province. Theron, a South African transacting with a dubious American friend, Ms Virginia Burke-Watkins of Burke International in the sales of the patent at a ridiculous price of $10 is considered to be another source of concern. Could this therefore be considered an act of good faith to a long-standing friendship or an out of poverty?

The issue that is awaiting academic explanation is who should pay for the benefit shared to the community that is the owner of this mystery plant, since the original patent was transferred to another company without the knowledge of the state that is in control of the plant as discussed by Jay McGown (2006). This is where the issue of conflict of interest remains a mystery between the CBD and TRIPs as mentioned above. Burke International's demand for $5000 in compensation from small tea cafes in the US made many of them change the name to either Red Tea or Red Bush which slowed down sales and brought confusion among consumers. In an attempt to better the lot of the rooibos producer in South Africa, Rooibos Limited attempted to register the same product with USPTO in 2002 with the name "Rooibos the Red Tea". With the inclusion of the word rooibos, it was subjected to Burke International challenge. After almost a decade of legal battle between the two, and the payment of almost $1 million for legal fees, the case was later settled out of court. Burke International and Rooibos Limited eventually registered the product and used the word rooibos in conjunction with other stylised words, symbols or designs in form of TM in 2006. In 2007, after the settlement, Rooibos Limited also registered the product TM with Benelux Office for IP (BOIP). Is this a win-win achievement by both parties as the tea is reduced to a generic term and public domain/goods? Or does it imply that the Khoi and San peoples have finally lost their IK to the arrangement of WTO in the name of globalisation?

Of the four common genotypes of rooibos, "Nortier" is produced at commercial quantity while "Cederberg" is found in the wild in the region of Clanwilliam (Pretorious, n. d.: 70). The name Nortier is derived from a local doctor and a Rhodes Scholar, Le Fras Nortier who was encouraged by Ginsberg in the 1930s to experiment the cultivation of the plant; while Cederberg type is derived from the actual location where the plant is naturally found. Cederberg is considered an organic and fair trade certified as it is original in the genetic composition compared with the plantation ones that have undergone some degree of genetic modification for improved production (Hawkins, et al 2011). Rooibos is considered as a wonderful plant because it only thrives in a specific climatic condition, which is peculiar to the western part of South Africa. According to Schulz et al, (2000), Rooibos Tea prefers a mild Mediterranean climate. While older Rooibos plants are usually adapted to cold winters and hot, dry summers, the young plants display some sensitivity to frost. Dirk Troskie (2007: 6) observes further that other characteristics of Rooibos tea are the following:

It must (be) in the winter rainfall area; the substrate must be a derivative of Table Mountain Sandstone; it must be deep, well drained sandy soils; the pH of the soil must be below 7; and it must be in the *Fynbos* (fine bush) biome."

Based on the above features, it is clear that the planting of this wonderful tea qualifies for GIs status which is favoured by the eurocrats of Brussels as a source of royalty payment to the community that originally has owned this product for several centuries now (Fraser, 2013).

Because of its unique features, it has become a source of employment for more than 5000 South Africans in the region and about 350 farmers are identified in the active production of the Mountain Tea which has attracted international attention in recent time. The supposedly neglected sparsely populated region is being elevated as a globally recognised tea industry. Building of schools and support for the disadvantaged people by the Rooibos Limited and some cooperative societies for rooibos business are feasible in the region.

Rooibos: A Must for Every Household: Rooibos is considered the natural heritage of South Africa, a benefit to a people, a legal system, a nation and the cheapest tea that cures many ailments among the IPs.

A research conducted by A Journey into Herbal and Natural Healing Research Centre (2009) attested to its universal ailment treatment such as boosting the immune system, acne, arthritis, athletes foot, candida, cellulite, cracked heels, eczema, fissures, headaches, haemorrhoids, insomnia, jock itch, moles, nail fungus, psoriasis, restless legs, rosacea, scars, skin tags, stretch marks, varicose veins, warts, wrinkles and hay fever. By 1984, Japan discovered that it is an anti-aging product when used as an ingredient in cosmetics and soap making. It is also confirmed that it is better than green tea because it contains less than 5% of tannin (http://www.thewhistlingkettle.com/about-rooibos-honeybush).[2] It is rich in copper, iron, protein, potassium, calcium, fluoride, zinc, manganese, alpha-hydroxyl (great for the skin) and magnesium. Based on these properties, it is good for anti-viral, anti-spasmodic and anti-allergic. A study at the Oxidative Stress Research Centre at the Cape Peninsula University of Technology has proven the ability of rooibos to improve liver function and protect the liver against oxidative damage (http://www.sarooibos.co.za).[3]

Like any other biological diversity, developed states are always interested in bio-pirating African resources through many channels as discussed in Patrick Bond's Looting Africa (2006). Attempts to strike a fair deal for the producers brought about the formation of the South African Rooibos Council (SARC) with the aim of striking a good deal and to embark on research and development for the improvement of the plant. The need to do this, as discussed above, is to maintain the national heritage of the state.

WTO is the only regime supported by the West because it promotes the economic exploitation of the developing African continent. During the formative years of the regime, African representatives hardly contributed to its development because of the complexity of diplomatic

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negotiations; any contrary position by developing areas would be met with economic and military reprisals. Many of the Rounds were conducted in secrecy between the West and their MNCs (Keet, 2006).

ABS Sharing formulas

Who is entitled to rooibos' ABS, the exact location where Thereon took the sample for filing is not known. Many communities are in control of rooibos. The difference between the Khois and the Sans seems to be a source of concern on who should royalty be paid by the patented companies eventually. Who gets what percentage and on what condition is ABS to be awarded may lead to a resource curse as many communities and states in Africa are currently contending with the situation in the platinum producing province of North West (Mbenga & Manson, 2010: 139-53). The nexus between the community and government is another issue. Is it the national government represented by SARC or the provincial government of the Western Cape that will be the rightful beneficiary of the financial reward if eventually settled through court or out of court? These issues will likely shape politics that could ensue after the crisis of ownership is settled. It is established that rooibos falls within the category of piracy based on the definition advanced by McGown (2006: i) and the Edmond Institute that:

Where there is access to or acquisition of biodiversity (and/or related traditional knowledge) without prior informed consent, including prior informed consent about benefit sharing, on the part(s) of those whose biodiversity (or traditional knowledge) has been "accessed" or "acquired", there is bio-piracy - i.e., theft. In his own definitions, Thompson (2010: 300) considers bio-piracy as:

...taking of plants, seeds and animals for pirate gain as well as pillaging local plants riches by genetic or chemical contamination. ...is removal of the organism, whether by laterally taking the plant, animal, seed or genetic material and claiming ownership, or by destroying it. Piracy refers to refusal to compensate or even acknowledge the original cultivators of the bio-resources.

These definitions therefore bring this paper to the twin concepts of defensive and positive protections.

According to Dutfield (2006: 22), positive protection refers to the acquisition by the TK holders themselves of IPRs such as a patent or an alternative right provided in a *sui generis* system. Defensive protection refers to provisions adopted in the law or by the regulatory authorities to prevent IPRs claims to knowledge, a cultural expression or a product being granted to unauthorised persons or organisations. Following these definitions, the case of rooibos rightly falls within the positive protection theory. Therefore, there is a need for many governments and non-governmental organisations to get involved in seeking any meaningful redress in the form of making the holders of TK pay royalties to the community that is being deprived of its rights without PIC (Dutfield, 2006: 22).

There is need to examine entitlement regime, which is sub-divided into two categories: property regime and liability regime. A property regime vests exclusive rights in owners, with the rights to authorise and determine conditions for access to the property in question the most fundamental. The owner of this right should be able to enforce law on how, when, where and who to use the right. On the other hand is the liability regime, within which the issue of Rooibos falls. This is a regime that calls for 'use-now-pay-later' system according to which use is allowed without the authorisation of the rights holders. But it is not free access. Ex-post compensation is still required (Dutfield, 2006: 22). When IK falls within the public domain, it does not mean that it has become a public good, but the IK holders can still claim its ownership through compensation. Liability regime, for instance, entitled Namibia, Angola, Botswana and South Africa to benefit from patented Hoodia when the South African Council for Scientific and Industrial Research (CSIR) paid part of the royalties realised from patents sold to Phytopharm (British own company) to the Sans. What comes to mind from this transaction is the politics embedded in the sales of the rights to Phytopharm, which in turn, sold the same to Pfizer. Another question that comes to mind is whether Pfizer should be liable for payment of royalties or Phytopham should inherit the payment? A situation where an indigenous research centre patented biodiversity without the knowledge of the communities that own the resources needs more interrogation. This could have influenced some African states to establish ARIPO and OAPI as international regimes to cater for the continent IP.

ARIPO and IP Regime

ARIPO was established in 1976 with the responsibilities to hear applications for patents and registered trademarks among its member states. It replaced the African Regional Industrial Property Organisation.

According to the Banjul, The Gambia, Protocol, (1993) and the Swakopmund Protocol which led to the protection of TK and expression of folklore (2010), ARIPO remains the major voice of the continent in achieving its Article III (c) objectives which spells out the followings:

In accordance with the objectives of ARIPO, generally and in particular Article III (c), which provides for the establishment of such common services or organs as may be necessary or desirable for the coordination, harmonisation and development of the intellectual property activities affecting its member states; *Recognising* the intrinsic value of traditional knowledge, traditional cultures and folklore, including their social, cultural, spiritual, economic, intellectual, scientific, ecological, agricultural, medical, technological, commercial and educational value; *Convinced* that traditional knowledge systems, traditional cultures and folklore are diverse frameworks of on-going innovation, creativity and distinctive intellectual and creative life that benefit local and traditional communities and all humanity; *Mindful of* the need to respect traditional knowledge systems, traditional cultures and folklore, as well as the dignity, cultural integrity and intellectual and spiritual values of traditional and local communities; to recognise and reward the contributions made by such communities to the conservation of the environment, to food security and sustainable agriculture, to the improvement in the health of populations, to the progress of science and technology, to the preservation and safeguarding of cultural heritage, to the development of artistic skills, and to enhancing a diversity of cultural contents and artistic expressions.

Like other international regimes formed in Africa, ARIPO remains a lame dog as most of its protocols are still to be enforced. The Swakopmund (Namibia) Protocol, the basis of protection for the TK and sources of ASB appears to have been in a comma since 2010. It is worth noting that only 18 states are members (Anglophone countries exclusive) except for Rwanda and Mozambique. Also, the major powers in Africa like Nigeria, South Africa, Libya, Egypt, Ethiopia, Algeria and Angola are only observers as against participating actively for the development of NEPAD. This cannot be too far away from the imperialistic ambitions of developed states as discussed below.

Registration of Rooibos and its Implications for Africa's Development

The demand for Rooibos increased as people began to realise the economic and medicinal benefits of the plant. Unknowingly, Ginsberg realised that his business strategy brought about demand both at the local and at the international level. Without thinking of patenting rooibos, he would supply in large quantities to tea industries which repackaged and sold rooibos tea under their own brands.

The effects of climate change and the negative impacts of commercial farming further drove away indigenous from rooibos business as the price of the commodity was seriously dropping to the extent that income realised in 2003/4 could not pay for the inputs. These factors forced small scale farmers (Khoisan) to resort to wild rooibos which is heat-and-drought resistant. At the same time, it is facing extinction from climate change and unsustainable management and harvesting method. As much as fire plays a critical role in the existence of wild rooibos, too much of

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it tends to prevent adequate veld recovery which may lead to loss of the rooibos plant (Pretorious, n. d.: 70). Wild rooibos "grows more slowly and can store up water reserves in its enlarged roots, enabling it to survive greater extremes of climate than its cultivated cousin." It is noted that small farmers are also in the business through farmers' co-operatives to supply 100% of the organic, fair trade rooibos to consumers and retailers (Majavu, 2010). These are the farmers who rely on the spring rainfall to feed their three metres root bush for sustenance. The cultivated rooibos can last for only six years while the wild rooibos can survive and be productive for up to 50 years. The wild rooibos is hardier than the tame variety and thrives on regular natural fires caused by summer lightening (Pretorious, n. d: 70). Potassium generated from bush fire will enhance the growth of the plant in poor-nutrient soil.

Various attempts have been made before now on need for the rooibos growers to form cooperative societies in order to better the lots of farmers on the mountain. In 1948, the Clanwilliam Tea Cooperative was formed, and it brought about the recognition of rooibos by the Department of Agriculture in the country in 1954 through the establishment of the Rooibos Control Board (RCB) (the Tea Board) after the World War II. The Tea Board is aimed at stabilising the price of rooibos, regulating the product, improving the quality and bringing the tea to the global market. By 1993, probably because of the imposed privatisation on the African states, the Tea Board was forced to privatise and as such, became Rooibos Limited. With the politics behind bio-piracy in the industry, Rooibos Limited and other producers of the tea formed a non-profit SARC to promote the interest of the plant at the local and international levels, most especially, against the MNCs who have tried severally to claim ownership of Rooibos through patenting, but in the guise of bio-prospecting. SARC also engaged various NGOs in protecting Rooibos through R & D, food safety and certification (Bond, 2006).

Since 2011, Rooibos Limited has been able to create more jobs and market the Mountain tea of which not less than 15,000 metric tons of rooibos are produced each year. Out of this, about 5, 000 metric tons are consumed by local industries while the rest are for export to developed countries such as the US, Japan and the EU. The industry contributes about R500 million each to the economy of South Africa. This production is expected to hit 25, 000 metric tons by 2015. The issue of privatisation of nature by the WTO applied a break to the ownership of Rooibos tea. It is estimated by various students of African economic development that the continent keeps on losing more than $50 billion each year to various investments. Financial mal-practices and different economic programmes imposed on Africa through the Fund and the Bank have further relegated the continent to the background. This is more prevalent in extractive industries and biodiversity resources. MNCs are very active on the continent to perpetuate economic disarticulation in various forms, but claiming they are agenda of economic development (Rodney, 1972; Ake, 1983; Onimode, 1988 & 2000; Bond, 2003, 2005 & 2006; Stephan et al., 2006; Reinert, 2007; Mills, 2010; Thompson, 2010; Acemoglu & Robinson, 2012). For instance, Bolton, (2008: 209) has this to say about the exploitation of Africa TK through IPR bio-piracy in many of Africa's biodiversity resources with little or no ABS:

Most of the time, however, there has been little progress in Africans getting any reward for profits made on their traditional knowledge or natural resources. It is hardly surprising: to take on a large Western company in Western courts requires complex understanding of local law, expensive lawyers, and deep pockets. Among other natural resources patented so far are brazzein, a protein 500 times sweeter than sugar from plant in Gabon; teff, the hardy grain used in Ethiopia's flat *injera* bread that provides the staple for almost the whole country's diet; and an extract of the *Aloe ferox* plant from Lesotho, which helps lighten skin.

The settlement arrangement of the WTO is also cumbersome for African states. Though at the theoretical level every state is equal before the law, developed states always have their way through non-tariff barriers against developing states (Stephan, et. al 2006).

To stop Compagnie de Trucy from having exclusive rights to rooibos TM, South Africa "had to hastily find a translator, since challenges to TM applications must be submitted in French." Only four day notice was given to South Africa to respond. If not, because of the help from an ex-Capetonian working in the South African embassy in Paris and a French research institute, filing an observation to stop the company might have remained a mirage as a result of the complexity and the time frame (Smith, 2013). At the same time, DTI raised the issue with the French Embassy and EU Representatives in Pretoria in a diplomatic bid to resolve the crisis. It is the intention of this paper to look into the concept of IP vis-à-vis the rooibos business at the domestic and global market.

South Africa, International regimes on IP and the Plight of Developing Areas

Article 1 of CBD, which South Africa is a party to, describes its objectives as quoted from John Dugard (2005: 401) as:

The conservation of biological diversity, the sustainable use of its components and the fair trade and equitable sharing of the benefits arising out of the utilisation of genetic resources.

CBD Art. 15 (1), (4) and (5) call for the fair and equitable sharing of proceeds derived from the use of generic resources. It also advocates the need to take various steps to conserve biodiversity resources within their jurisdictions with more emphasis on *in situ* as against *ex situ* to accommodate the need to preserve traditional lifestyles and local communities. Unfortunately for developing areas, the US is not a signatory to this international regime, rather, in conjunction with MNCs, came up with the Marrakesh agreement on TRIPS with the intention of increasing their profit and market through expansion of rent extraction and increase in the number of foreign territories into which they could consider expanding. Art. 27 of the TRIPS agreement provides for 'the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof. Though contested by developing states as an imperialistic ploy, the rules continue to govern international trade and investment' (Dagne, 2012).

Also worth noting is the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). In its appendices, it lists species threatened or likely to be threatened with extinction and prescribes regulations for trade in such species (Dugard, 2005: 400). According to the CITES, about three species of wild rooibos are with some threatened status (near threatened [NT], vulnerable [VU], endangered [EN] or critically endangered [CR] (Hawkins, et al. (2011: 5). Reduction of the word rooibos to a generic term is another neo-imperialist means to subject Africa's resources to public domain of which their exclusive rights are not meant for the IPs that own the resources. This arrangement may soon be introduced to other African products such as honeybush, buchu, marula fruit and Karoo lamb. These unique products exclusively found in some African states have the same properties as champagne, port and sherry (Marais, 2013). This is an attempt to reduce the continent to the level of inputs producer to continue biopiracy. It also subjects the concept of IK to a rigorous academic interrogation. The out-of-court settlement after lots of fortune meant for the economic development of the state has been wasted on litigation further perpetuates underdevelopment. The procedure is described by Soekie Snyman, the SARC coordinator, as complicated by vague rules and a legal quagmire (Marais, 2013). After a series of imperialistic blows from the North, South Africa, in 2007, realised the need for GI to lay claim to rooibos and other plants and animals that are unique to the country. The importance of GIs and TM protection over biodiversity if backed by local legislation will enable developing states to control their resources through ASB. An amendment bill on IP laws of 2007 was referred back to parliament by Jacob Zuma in 2012 to accommodate TK and to meet international standard. Pending the final draft for the President's assent, a *sui generis* system was considered "to protect traditional intellectual property (TIP) through a separate piece of legislation as in China, Peru and Thailand" (Karrim, 2009). Until 2013, the bill did not receive the necessary debate from parliamentarians. Twenty thirteen (2013) could be said to be a watershed on the need to protect small scale and commercial farmers from biopiracy. The Merchandise Marks Act proposed by the DTI in 2013

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states that "The name rooibos can only be used to refer to the dry product, infusion or extract that is 100% pure rooibos derived from *Aspalathus linearis* and that has been cultivated or wild-harvested in the geographical area (of Cederberg) (Smith, 2013). This was when another MNCs, a French company, Compagnie de Trucy applied to register a number of trademarks incorporating the terms "South African Rooibos" and "Rooibos" in 2012. If the company succeeded in the registration, it would have implied implies that it would own exclusive rights to the names of any rooibos product sold in France, a key market in the European Union (Marais, 2013). Before Compagnie de Trucy ever attempted to register rooibos, Nestle and its sister cosmetic company, L'Oreal had attempted to register rooibos in 2010. When challenged for bio-piracy, the companies denied any contravention of South Africa Biodiversity Act 10 of 2004, the Berne Declaration and Natural Justice principle (Mail &Guardian, 2010: May 28). Paris, going by history, should drop her ambition to patent rooibos because in the 1930's, South Africa relinquished the use of the term "Champaign" in exchange for free access of Pretoria's crayfish to France (Troskie, 2007). For the need to qualify for international protection granted to GI, the state applied to register the term as a Certification Mark under the South African Trade Marks Act (Marais, 2013). GI registration is being considered useful IPRs for Africa because it adds value and improves the socio-economy of rural dwellers as it involves less cost. This is to explore the EU's accommodation of registration of non-EU countries' GIs. Rooibos, as discussed above, meets every condition to be qualified as GI.

It is only grown in one part of the world; the properties of the plant are a direct result of the unique geographical conditions in which it grows; there is a strong link between rooibos and the farmers who grow it, as they have traditional knowledge on the correct way to cultivate and produce the plant; and the plant is truly part of South Africa's identity (http://www.wipo.int/ipadvantage/en/details.jsp?id=2691).[4]
This is supported by Sople (2012: 182) who considers it as goods that have a specific geographical origin and possess qualities or a reputation that are due to that place of origin. Agricultural products typically have qualities derived from their place of production and are influenced by specific local factors, such as climate and soil. The need for GI as championed by Rooibos Limited and SARC are stated as:
...to protect the name from usurpation while allowing all those involved in the rooibos industry in the region – from farmers to exporters – to use it without fear of litigation in foreign markets. A GI comes with specific guidelines for how a product should be produced, and this will ensure that all rooibos is of the same high quality. It (will) add value for the producers, and a GI would put more power in the hands of the producers and farmers. Because the GI links an area to a product, it would be a powerful marketing tool for the region, and could be used to promote other activities such as tourism. Rooibos is produced in a fragile ecosystem and a GI will help protect the unique biodiversity of the region. A GI will ensure that rooibos tea blends are in fact genuine and not diluted, by requiring the product to contain at least 80% rooibos in order for it to be (labelled) as an official rooibos product (http://www.wipo.int/ipadvantage/en/details.jsp?id=2691).

Conclusion and recommendations

WTO approach to IP is based on a long, but singular, tradition of Anglo-Saxon thought as advanced by John Locke of private property (Thompson, 2010: 302). From the international law perspective, it means that TK is not accommodated into the IP regime. The advocates of this only operating primarily within 'human rights' and 'preservation' approaches. These approaches appear more hospitable to TK advocates than the conventional IP approach, especially given the latter's focus on *ex ante* 'incentives to create' (Varadarajan, 2011: 419). To enhance fair trade certification, small farmers should expand their production through government's effort. It is noted that the land available for them is too small to expand production since commercial genetically modified rooibos farmers who contribute 95% of the total production dominate the industry. There is need to encourage wild rooibos to avoid extinction.

The issue of ASB is problematic in many ways. There are several propositions on the need to abide by the CBD through IK preservation. These are in the form of secrecy, database, PIC and property regime. As discussed above, property regime is not possible in the case of rooibos as against liability regime. One issue that is still to be resolved is the ASB. Who is supposed to receive the benefit from the sharing? Is it government, the community or private individuals? In line with the history of South Africa, the sharing of the benefit may further generate crises. Allocating the proceeds to government is not the best option as the community that is deprived of its biological resources which had served as a means of their livelihood may be permanently at the receiving end. From the time of colonialism in South Africa, when the British colonialists took the land from the Khois and Sans to the apartheid era, and its forceful eviction of people from their land, more problems have been created. Who is going to receive the benefit? Is it the people who occupied the land before the 1913 Land Act that the government fixed as the terminal date of land claim or those who are in control of the land now? How can we confirm that the present occupiers, even small scale farmers are the original owners of the land? This brings about the need to re-examine the definition of IPs as those who rely on traditional lands and natural resources for their livelihood, economic sustenance as well as religious and cultural life (Wachira, 2010: 299). In line with this definition, the issue of who should benefit from ASB is not a thing that could be resolved in the case of rooibos. The Khoi and San that should benefit from it are fruit gatherers and hunters scattered around Western Cape, Northern Cape, part of the Eastern Cape and Botswana. The implication of this is that such proceeds may be difficult to share in line with ASB.

In African settings, there are mechanisms of access, use, and management of natural resources that are implemented by clan elders, including access to water, salt licks, wood fuel, herbal medicine, grazing and ceremonial sites (Wachira, 2010: 309). Based on this, how can we substantiate this quality with the present occupier of the rooibos producing communities? After the collapse of the apartheid system in South Africa, the new regime has little interest in the concept of development and unity in diversity when it comes to the issue of land. The ANC government considers it a sensitive issue worth an incremental approach for the stability of the state. The same could have explained the politics behind the land claim issue. The colonial arrangements before the South African war (Anglo-Boer) remain untouchable. As long as the colonial era is left unaddressed, the issue of rooibos and ASB may not receive any meaningful justice. It will, as discussed above, perpetuate the exploitation of indigenous people by government and its officials on the one hand, and various NGOs and community elite on the other hand. No attempt has been made so far by the South African government to give recognition to the Khoi and San in terms of policy process; they have no inputs through consultation and are therefore, forced to be assimilated to other cultures in the Cape area. This is coupled with the principle of *terra nullius* adopted by several governments in the country when it is believed that land belongs to the state and not individuals, most especially lands without title holders. Lack of "effective occupation" brought about allocation of the lands to the Afrikaners during the apartheid era for "better" use.

Another problem that calls for more questions than answers is the concept of community and private individual. Who are the right people to benefits from the ASB? Is it the present people who are mixed of Khoi and San or the indigenous people that are scattered around the area? If the communities are entitled to the benefit, how is the money going to be shared and who is going to be the custodian of such income? Is the income meant for all the Khoi and San found in Botswana, Angola, Namibia and South Africa? The Redbush Tea Company claims that "Our Redbush Tea is not Fairtrade ™, but we do however, donate a percentage of our profits to the Kalahari Peoples Fund" raise many more questions than answers to the problem of ASB. The same position was held on the pirated Hoodia when it was claimed that royalty of 0.003% was paid to the Kalahari Peoples Fund (KPF) from retail sales of commercialised products (McGown (2006: 8; Bolton, 2008: 209). The not-for-profit organisation is for all Sans and other indigenous peoples of the Kalahari Desert covering Botswana, Namibia and South Africa[6]. When Pfizer

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realised the need to address the issue of ASB in line with CBD's Nagoya Protocol (de Sousa Dias, 2012), the company abandoned the plan. *Hoodia* patent was later sold to Unilever, a Dutch/British food giant, a maker of Slim-Fast (Bolton, 2008: 209).

Discoveries of antibiotics from termite hill in the Gambia, cosmetics from Africa's iconic baobab trees, and anti-impotence remedies from Congo Brazzaville received greater details in McGown's book as discussed above, but with no royalty payment to IPs for IK. Government and its bureaucracy are noted for their high level of corruption, and at the same time, protective protection type of rooibos needs government intervention. Does it mean that after the settlement of the IPRs, government would only be an onlooker without having any benefit out of the proceeds? These are the issues that further research will proffer likely solutions to.

It is expected that NEPAD should be able to energise ARIPO, but the personal interest of the member states. South Africa, for instance, is in most cases working against the interest of the AU and NEPAD perhaps for its hegemonic ambition, and in most cases, for economic development. Cases of the state's membership of Cairns Group and the question of tariff liberalisation within WTO are instructive of South Africa's lack of interest in Africa's development in general (Keet, 2006: 167; *NewAgenda*, 2012: 9). To achieve ARIPO's mission statements, the continent needs to come up with praxis solutions to the issue of economic development. Products such as Botswana beef, Mozambican prawns and Namibian oysters qualify for GI which would improve the lives of rural-dwellers. Marula fruit which is the source of Amarula liquor should be patented to avoid more crises. The identified sub-regional trading blocs established, hopefully, should bring about a custom union to promote south-south trade and economic integration (Todaro & Smith, 2011: 617). Problems inherent on this position such as the colonial legacy, globalisation and conflict in various African states need to receive solutions. It is noted above that Francophone states are not party to ARIPO. This may be because of the colonial factor whereby the influence of France on these states continues to work against the economic development of the continent. It is the contention of this paper that the issue of biodiversity resource registration should not be too cumbersome otherwise, that may lead to a continuation of biopiracy in Africa to the detriment of developed states.

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