

Integration of Article 8(j) and provisions related to indigenous peoples and local communities in the work of the Convention and its Protocols

RSA contribution
Malta Qwathekana

Brief biography

I am Malta Qwathekana, the CBD National Focal Point for South Africa. I work for the Department of Environmental Affairs in South Africa as a Senior Policy Adviser: International Advisory Services and I am responsible for coordinating and management of Biodiversity related MEAs and facilitating their implementation at a national level.

2. Based on your experience on traditional knowledge (TK) and indigenous peoples and local communities (IPLCs), share some views regarding the future work on TK within the CBD and its Protocols

South Africa has submitted views in this regard which are contained in document **CBD/COP/14/INF/5/REV.1**

Views regarding the future work on TK within the CBD and its Protocols

- Develop standards and guidelines for the protection, promotion, development and management of Indigenous/tradition knowledge systems with the full and effective participation of IPLCs.

Views regarding the future work on TK within the CBD and its Protocols

That must facilitate the development of sui generis systems, as per VII/16 (H) on the elements to be considered in the development of sui generis systems of protection for Indigenous/traditional knowledge taking into consideration customary laws, values and world-view. Most importantly, the legal framework must recognize the communal characteristics of Indigenous/traditional knowledge.

Views regarding the future work on TK within the CBD and its Protocols

- Develop standards and guidelines for the documentation and recording of indigenous/traditional knowledge. Develop implementing processes to facilitate collection, documentation, storage and dissemination of uncaptured indigenous knowledge on an active and continuous base through IKS Documentation Centres.

Views regarding the future work on TK within the CBD and its Protocols

- Development of guidelines to provide material and non-material support mechanisms and incentives to Indigenous Peoples and local communities for capacity building initiatives towards promotion of Indigenous knowledge, innovations and practices, institutional strengthening and negotiating capacity. Furthermore, material and non-material incentives for maintaining and enhancing biodiversity.

Views regarding the future work on TK within the CBD and its Protocols

- To develop elaborate guidelines and establish mechanisms with an international scope for the application and implementation of Art. 8j) of the CBD and other articles related to the rights of Indigenous Peoples and local communities.

Views regarding the future work on TK within the CBD and its Protocols

- Building mechanisms for community based bio-cultural protocol. Developing a platform to engage in dialogue with external stakeholders, so that communities could engage constructively under their own terms and priorities. Development of an instrument that sets out clear guidelines in engaging communities.

Views regarding the future work on TK within the CBD and its Protocols

- The repatriation of indigenous knowledge associated with genetic resources held in ex situ databases/registries

RSA Experience

- Our current focus of attention is on the development of the National Recordal System with the primary intention of documenting and recording oral knowledge of indigenous peoples and local communities.
- A National Recordal System will secure the rights to knowledge where communities, guilds and other indigenous knowledge holder's knowledge who can record their knowledge holdings and lifestyle sequentially to assist their interest in the future knowledge economy, educational and economic benefits and social good, based on IK.

Further views

- **Capacity Building:** To promote and strengthen community-based initiatives that support and contribute to the implementation of Article 10(c) regarding issues of building the capacity of indigenous and local communities to engage effectively in decision making, to take the leadership role where appropriate; we have undertaken the establishment of an accreditation and certification of practitioners and holders of indigenous knowledge.
- **Accreditation and Certification framework or standard** exist in South Africa for indigenous knowledge holders and practitioners. The development of a framework for the Accreditation and Certification of Indigenous Knowledge holders and practitioners will provide a system for the recognition, standardisation and professionalisation of knowledge holders' skills, experiences, learning and practices

3. Importance of the objective

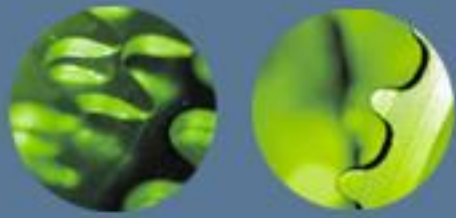
- The objective will address:
 - Illegal use/misappropriation of IK/TK
 - Selective involvement, less active engagement
 - Record and identification of holders of IK/TK and securing of the rights to knowledge

4. Outcomes if Parties achieve the Objective

- Protection of the IK/TK from illegal use/misappropriation
- Full and effective participation of IPLSs
- Protection of rights of indigenous/traditional knowledge holders
- Regulatory mechanism will provide for access to IK/TK and conditions of such access

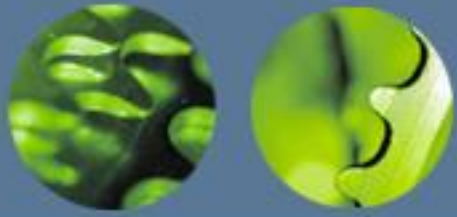
5. Lastly, please add a question for the audience in relation to this objective. Thank you!

- **Protection of IK/TK from new developments/emerging issues such as Digital sequence information**
- **involvement of iplcs in new technologies such as engineered gene drives for their effective and full participation and meaningful engagement**

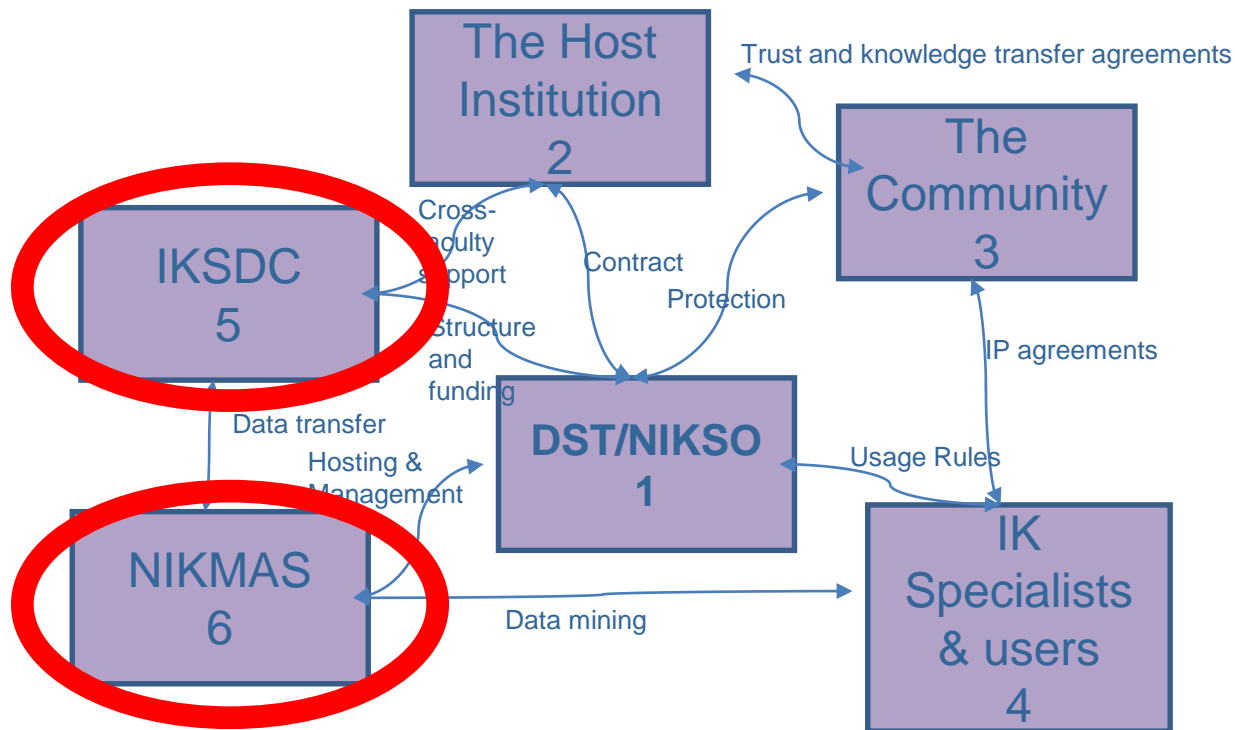


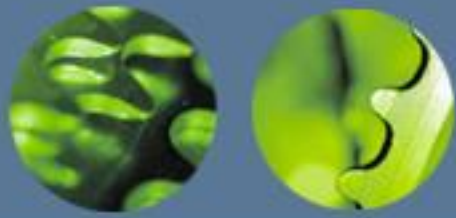
National Recordal System

- NRS is an IKS policy mandate aiming to record, document, preserve, protect, and promote IK and to where appropriate proactively secure Knowledge holders and practitioners legal rights;
- It is an conglomeration of different institutions and government departments IK projects.



NRS Role Players & Relationships



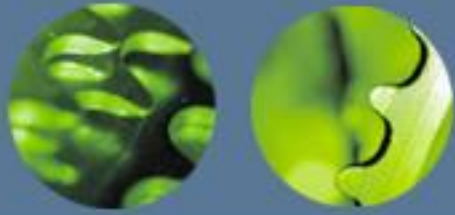


NRS and Policy implications

- Database Protection Policy- aims to protect unauthorized access to data from commercial exploitation, misappropriation and misrepresentation and to govern the use of IK at institutes;
- Issues around ownership of the national database- governance, management and administration of the national database as it aims to serve a number of government departments. Identify lead departments.
- Standardization of IK information storage and capture onto a common IT infrastructure platform e.g. currently no IK taxonomy exist. Identify lead departments.
- Location of the national database.
- Language and translations- language can serve as a protection mechanism.
- Authentication/verification and validation of IKS.
- Levels of access to the national database- decisions who gets access to the national database and at what level.

Accreditation and Certification of Indigenous Knowledge Holders

- The IKS Policy (Chapter 3.3) mandates the DST to implement the Accreditation and Certification Framework for IK Holders and Practitioners
- The main aim of the IKS Policy imperatives is to reverse the injustices of the past
- The implementation should bring harmonization amongst IK Holders and Practitioners
- The recognition of many different IK domains
- The governance of A&CF should be vested in the **Practitioners**



WHAT IT INTENDS TO DO?

- Lack of recognition of existing IKS communities of practice as part of the global body of knowledge and innovation;
- Lack of understanding of IKS and its importance in sustainable community livelihood and development;
- IKS communities of practice lack institutional platforms and policy frameworks to leverage their practices;
- Lack of coherent policy frameworks to harmonize and integrate the various communities of practice.
- The absence of regulatory mechanism to enhance and empower IK holders and practitioners in their diverse fields.



Epistemological Foundation for IKS Implementation

Universal Construction of Knowledge

- Claim to objective knowledge
- Regarded local knowledge as qualitatively inferior, traditional, irrational and superstitious
- Exclusionary stance labeling and classifying other KS as non-formal, uninformed and non-contemporary and hence unscientific
- Projection of Western Science as superior to other knowledge systems
- A Western discourse about the “Other” (Odora Hoppers; 2002)

Social Construction of Knowledge

- Claim that knowledge is a social construct and an expression of relations of power
- All knowledge (IK or Scientific) is inherently local
- Different knowledge systems may differ in their epistemologies, methodologies, logics, cognitive structures and socio-economic contexts
- IKS is a way of knowing as valid as other ways of knowing
- Deconstruction, decentering of knowledge
- The Post-modern moment
- The Neo-Liberal conjuncture

- (source: Philip Higgs, “In Defence of local knowledge: A theoretical reflection”, *Intelligence* vol. 7, June 2006) 19

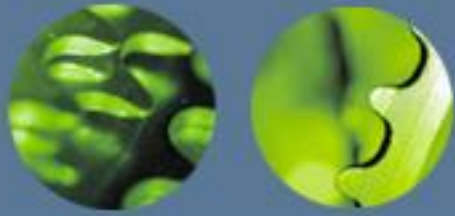




Epistemological Foundation for IKS Implementation (2)

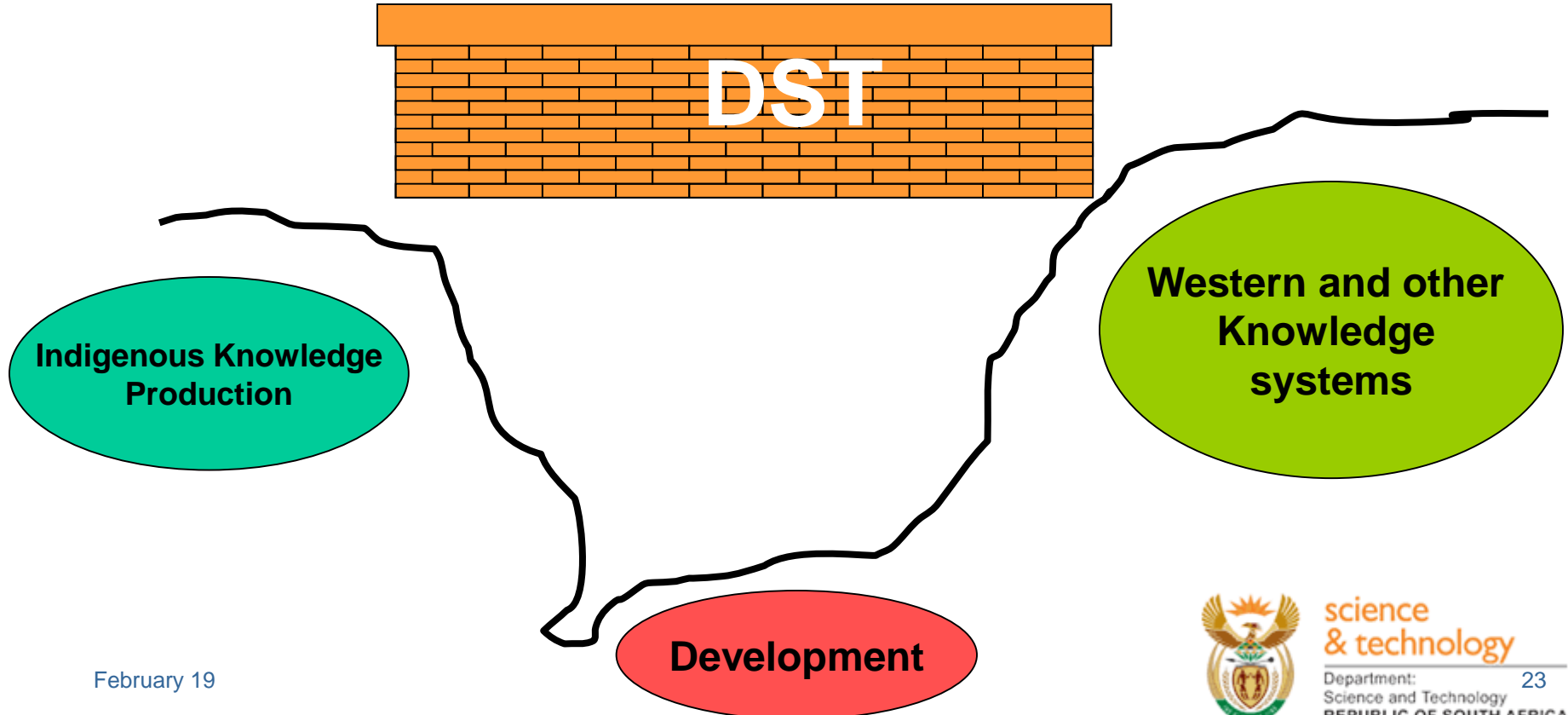
3. Asymmetrical Extension of Knowledge

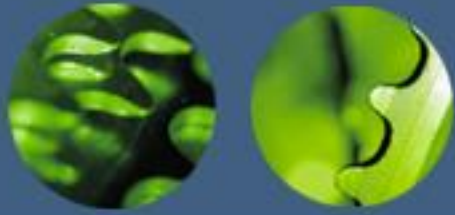
- Bruno Latour's asymmetrical extension of knowledge suggests the interdependence of African indigenous Knowledge systems with global network of local knowledge systems in the pursuit of knowledge production
- Sees the world as a plurality of local practices
- The universal is nothing more or less than an extension of a particular local practice
- Beyond every local practice we will find another local practice and never a practice that can be considered to universal
- Asymmetrical extension of knowledge denotes that some networks are bigger and stronger than others
- Latour's asymmetrical extension of local knowledge practices provides us with a framework for interfacing IKS with other knowledge systems
- Latour's concept of metrology is key to understanding the nuanced contribution of his theory of knowledge production.



Knowledge and Innovation Chasm

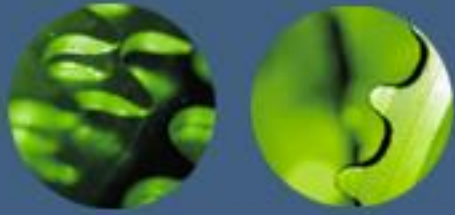
Bridging the “Knowledge and Innovation Chasm”





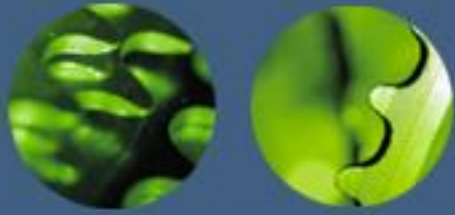
PROTECTING IK/TK: SOUTH AFRICAN INITIATIVES

- on national level: the SA government has sponsored research and put forward different policy instruments on the value, protection and commercialisation of IK
 - by DACST: Policy on the Recognition of IKS (1999)
 - by DST: Indigenous Knowledge Systems (IKS) Policy (2004)
 - by DTI: Policy on Protection of IK through the IP System (2007)
- the DST policy on the recognition of IKS contained comprehensive proposals; this was accepted by Cabinet
 - the policy recommended the integration of IK into education, research and development systems
 - the policy proposed the establishment of recordal and administration systems for IK
- in implementing the DST policy, a national IKS office (NIKSO) and a national framework of IKS knowledge management institutions were established



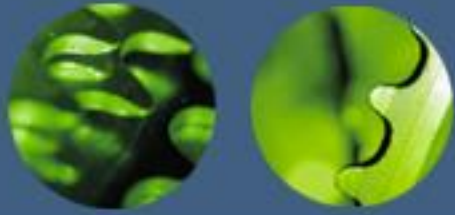
PROTECTING IK/TK: SOUTH AFRICAN INITIATIVES

- the Department of Trade and Industry (DTI) policy document and a draft Bill to provide statutory protection for TK under existing IP laws were introduced to parliament (January 2008)
- the DTI policy framework on the protection of TK is based on a number of fundamental principles
 - that TK is the substance of knowledge resulting from intellectual activity and insight in a traditional context
 - that TK has intrinsic economic value and can be applied in scientific, technological, ecological, educational and commercial context
 - that TK is generally unwritten and undocumented and should thus be recorded
 - that TK is generally not coordinated or managed and that TK should be managed by a national authority



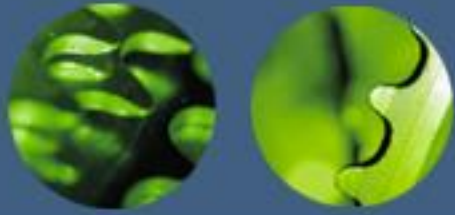
PROTECTING IK/TK: SOUTH AFRICAN INITIATIVES

- the DTI policy identifies two main aspects of concern
 - the first relates to the ownership issue: collective ownership of IK/TK by communities present problems in practice, eg defining a community and the legal personality of such a community
 - the second relates to so-called “poaching” of IK/TK by third parties, eg through unauthorised registration of IP rights incorporating such IK/TK
- the DTI policy thus considers the benefit of so-called defensive protection measures
 - this entails creating databases and registers to record IK/TK
 - such recorded information would create a body of prior art to prevent misappropriation of IK/TK by unauthorised registering of IP rights by third parties (“poaching”)
 - the establishment of national authorities to coordinate, manage and monitor the recorded material is recommended



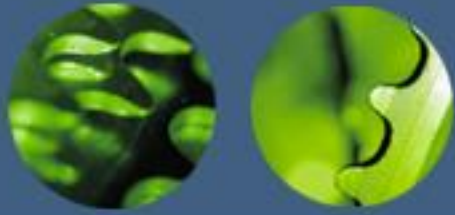
PROTECTING IK/TK: SOUTH AFRICAN INITIATIVES

- the DTI draft Bill follows a two-level approach to implement the DTI policy on the recognition and protection of TK
- on a general level it will amend four existing IP laws to create an appropriate national framework for TK
 - by establishing a national council for TK which will have appropriate responsibilities, duties and functions
 - by establishing a national database for the recordal of existing and future manifestations of TK
 - by establishing a national trust for administering the financial benefits arising from the commercialisation of TK
- on a statute-specific level it will introduce into the four existing IP law provisions to define and protect different manifestations of TK as species of IP



Communities concern

- that intellectual property rights are just one set tools in the protection of indigenous knowledge systems. There are other forms namely recording, documenting, and sui generis forms of protection etc.
- That the amendments are seen purely from a trade perspective;
- That the amendments do not take into account the idiosyncrasies of indigenous knowledge in terms of duration, originality, material forms etc. regarding duration However, the act only applies to recent indigenous knowledge, and indigenous knowledge before 1958 will not benefit.



Communities concern (2)

- A fundamental concern is the lack of exceptions and limitations to the exclusive rights that are granted to the indigenous knowledge rights-holder.
- Concern is raised by the transborder nature of indigenous knowledge. Some communities exist across two or more jurisdictions rendering the need to provide benefits under a South African initiative will be complex.
- The Bill is silent on resolution of disputes. Mechanisms of dispute resolutions must also accommodate indigenous conflict resolution mechanisms

Mechanism Adopted to address IP gaps- SA experience ✓

- Development of national policy on the protection of IKS
- Development of guidelines or regulations to ensure benefit sharing with the community for commercial use of indigenous knowledge (Dept of Environmental Affairs)
- Amendment to the IPR Laws in relation to IKS needs (DTI)
- Development of alternate legislation (sui generis) to provide for the protection of community intellectual rights
- Setting up of a documentation and registration system for informal innovations
- Mainstreaming IKS/ ATM in the National system of Innovation
- The Development of a Pharmaceutical Industry based on ATM



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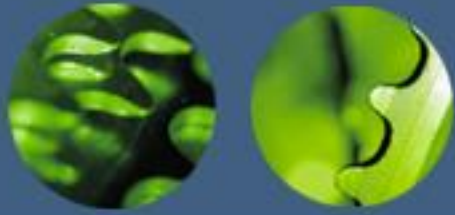
4. Defensive protection of IK

- Concerns continued:
 - The period of protection is problematic to indigenous and local communities.
 - Lastly, on an operational level, the cost of filing in registration of IPR is prohibitive, as are the costs of enforcement and infringement proceedings.



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sui generis

Why a Sui Generis regime?

“Regime of a different kind”

- Recognition that indigenous and local communities are the guardians of their indigenous knowledge and have the right to protect and control the dissemination of that knowledge;
- That the cultural and intellectual property rights of indigenous and local communities are vested with those who created them;
- That existing protection mechanisms are insufficient for the protection of indigenous cultural and intellectual property rights.



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4. Defensive protection of IK

What are the elements of a sui generis system?

- Definitions of IK and indigenous and local communities in accordance with indigenous customary law;
- Collective (as well as individual) ownership and origin;
- Coverage of historical as well as contemporary works;
- Protection against debasement, misappropriation, misuse of culturally significant items
- Co-operative rather than a competitive framework;
- Beneficiaries of that knowledge;
- Cross-generational coverage span;



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4. Defensive protection of ATM

- Exemptions from the requirements of inventive step and non obviousness;
- Duration of protection in perpetuity;
- Evidence of prior informed consent and benefit sharing to the community from where the knowledge has been accessed;
- Establishment of agencies/institution to allow indigenous and local communities to charges fees; and
- Requirements for disclosure of the geographical source or community from which indigenous knowledge has been derived and sanctions for deliberate concealment or misrepresentation of the knowledge.



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National Recordal System

To be the leading Indigenous Knowledge Systems treasure hub for communal socio-economic development



Preservation, Protection, Promotion of IK and Development of indigenous products for communal socio-economic development



NRS Objectives



Mobilising, aligning and empowering communities and related stakeholders

Building and supporting appropriate networks



Achieving national IP objectives for the appropriate protection of IK

Public domain
Ownership
Patents
Licensing
Novelty
Rights
Sui Generis
Laws
Invention
Trade marks
Confidential
Authorship
Rights holder
Trade secrets
IK holder
Communities



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NRS Objectives

Initiating, enabling and maintaining a secure accessible national repository for the management, dissemination and promotion of IK



Enabling the discovery, cataloguing, capturing, validation and use of the national IKS heritage in an appropriate framework



NRS Overview

Preservation

- Community members
- IK Holders



Community access

Promotion

- General Public
- Learners
- Teachers



Public access

Protection

- IP offices
- Registered scientists & researchers



Restricted access

Development

- Approved and registered scientists



Confidential access

NRS
Central
Operations

supported by the
National IK
Management
System (NIKMAS)

Indigenous Knowledge
Documentation Centres
(IKSDC)

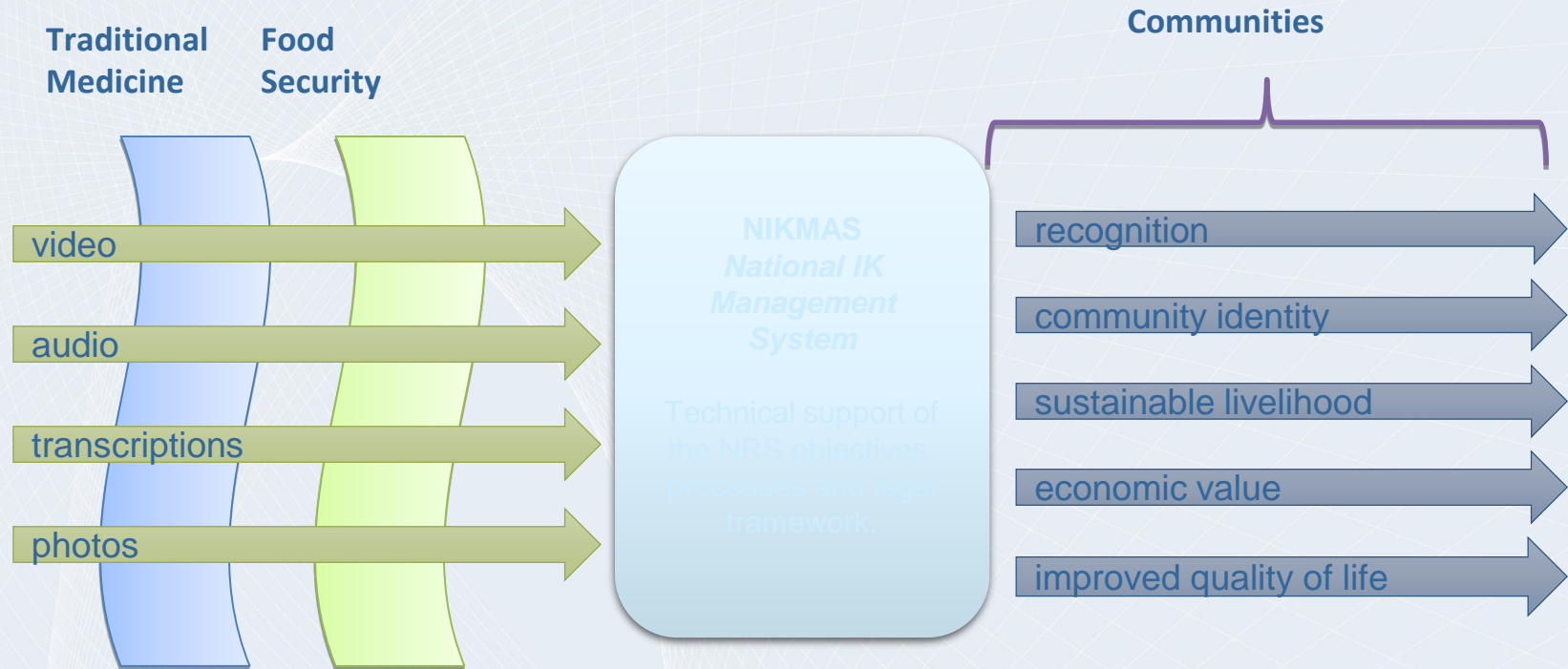


Community



NRS Processes

NRS Benefits to Communities



uMhlabuyalingana Community

Zululand District Municipality, Kwazulu Natal, South Africa

uMhlabuyalingana Community has currently 911 IK holders, 1181 claims and 7 recorded IK entries.



911 IK holders



[View IK Entries](#)




Matamela Nthambeleni

 Claims: 1

Aluminium Pots

ALUMINIUM POTs Mrs Matamela Sophy Nthambeleni was [More...](#)

 IK Entries: 0



Flora Nthite

 Claims: 1

Traditional Healer

Performs Traditional, African Rituals Diagnoses a [More...](#)

 IK Entries: 0



Muofhe Radzuma

 Claims: 1

Medicinal plants

She has knowledge on plants that heals like Muton [More...](#)

 IK Entries: 0



Poppy Molopyane

 Claims: 1

"Sangoma" Traditional Healer

Use of "ditaola" (bones) and Traditional Herbs Sp [More...](#)

 IK Entries: 0



Anna Pieters

 Claims: 1

Traditional Medicines

Anna believes in using traditional medicine for a [More...](#)

 IK Entries: 0

Isijabane

Isijabane

- Ithanga (is used in Isijabane)
- Peanuts (is used in Isijabane)



Andries Dlomo



Food name: Isijabane

Preparation method: Make fire
Put a pot with clean water on a fire and bring to boil
Cut the pumpkin fruit into small pieces (2 cm)
Cut the pumpkin leaves and flowers also into pieces
Add pumpkin fruit, leaves and flower pieces to the water
Boil for 3 to 5 minutes
Grind peanuts with salt until a coarse powder
Cut tomatoes into pieces
Add the tomato pieces and peanut to the pot
Boil until the pumpkin is soft
Stir the the dish until all the ingredients are mashed and well mixed

Additives used: Salt, water, tomatoes

Rituals during preparation: None

Storage of medicine: -

Shelf life of medicine: -

Consumption description: Anytime



Accreditation and Certification of IK Holders and Practitioners



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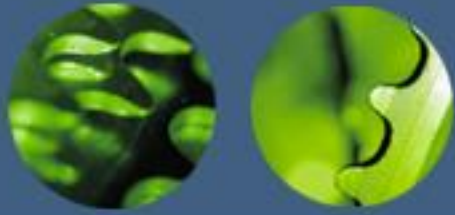
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OBJECTIVES FOR THE ACCREDITATION AND CERTIFICATION OF INDIGENOUS KNOWLEDGE HOLDERS AND PRACTITIONERS



The main objectives of the Accreditation and Certification of Indigenous Knowledge holders and practitioners are:-

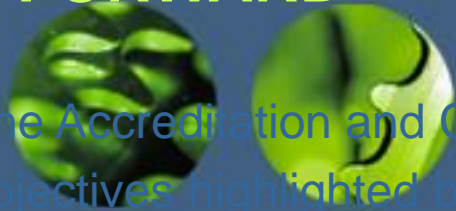
- to affirm Indigenous Knowledge as a knowledge domain on its own merit;
- to recognise and acknowledge the professional status of the Indigenous Knowledge holders and practitioners;
- to recognise the institutions, governance structures, approaches to quality assurance, rules and codes of practice inherent in this system;
- to provide guidelines for the development of the Accreditation and Certification approach which complies with the SAQA and NQF prescripts; to establish a regulatory body to oversee the operation, functionality, administration and governance of the newly established system for the accreditation and certification of IK holders and practitioners;
- to create a single integrated national matrix for learning achievements which incorporates IKS;
- to promote social justice by facilitating access to, as well as mobility, and progression within, education and training career paths; and
- to provide for the protection of the public through the establishment of competency standards and quality assured practices.



ACHIEVEMENTS

- Two national consultative workshops were held in 2010, and 2011 for the introduction of the concept document and endorsement respectively.
- Two tasks teams were appointed to facilitate the development of the norms and standards for two Communities of Practice knowledge domains and the work was completed by end of March 2012.
- High Level draft pilot norms and standards for African Traditional Healing and Practices and Traditional Leadership and Governance was developed by practitioners and leaders from North West and KwaZulu-Natal provinces;
- The draft Accreditation and Certification Framework and pilot norms and standards documents are prepared for submission for approval by the Minister for public and stakeholder consultation in the second half of the 2012/13 financial year.

WAY FORWARD



The Accreditation and Certification System will in future support the strategic objectives highlighted by the National Research and Development Strategy, IKS Policy and the Ten Year Innovation Plan.

The system will also support the work of the National Department of Health In complementing the Traditional Health Practitioners Act No. 22 of 2007 as norms and standards will enable the Interim Traditional Health Council to perform their regulatory work effectively within the Traditional Health System.

Financial Resource Considerations

- The development of a Framework for the accreditation and certification of Indigenous Knowledge holders and practitioners) will require financial and human capital. Resources will be used to develop standards and train personnel to execute the responsibilities of the accreditation and certification structures.
- National consultative workshops also need to be conducted to solicit input into the draft documents before the document can be tabled at Cabinet earmarked for 2013/14 as indicated in the operational plan.



3. ADOCCACY AND POLICY DEVELOPMENT DIRECTORATE

- Advocacy
- Policy Development
- Sui Generis legislation Development



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END

Thank you