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The Protection of Traditional Knowledge, Traditional Cultural Expressions, Expressions of Folklore and Genetic Resources Within the African Continental Free Trade Area – Alignment with International and Regional Developments

By Caroline B. Ncube

The adoption of the Protocol on Intellectual Property Rights under the Agreement on the African Continental Free Trade Area presents an opportune moment to consider a continental framework for the protection of Traditional Knowledge, Traditional Cultural Expressions, Expressions of Folklore and Genetic Resources. This *SouthViews* considers lessons which can be drawn from national laws, using South Africa as an example, for the relevant Annex to be negotiated under the protocol.

L'adoption du protocole sur les droits de propriété intellectuelle dans le cadre de l'accord portant création d'une zone de libre-échange continentale africaine est une bonne occasion d'envisager un cadre continental pour la protection des savoirs traditionnelles, des expressions culturelles traditionnelles et du folklore et des ressources génétiques. Le présent article examine les leçons qui peuvent être tirées des lois nationales, en prenant l'Afrique du Sud comme exemple, dans le cadre des négociations relatives à l'annexe au protocole.

*La adopción del Protocolo sobre Derechos de Propiedad Intelectual en virtud del Acuerdo sobre la Zona de Libre Comercio Continental Africana presenta un momento oportuno para considerar un marco continental para la protección de los Conocimientos Tradicionales, las Expresiones Culturales Tradicionales, las Expresiones del Folclore y los Recursos Genéticos. En este *SouthViews* se examinan las lecciones que se pueden extraer de las leyes nacionales, tomando a Sudáfrica como ejemplo, para el Anexo pertinente que se negociará en el marco del Protocolo.*

The African Union (AU) has created an opportunity for Africa to craft a development-orientated regulatory framework for traditional knowledge (TK), traditional cultural expressions (TCEs), expressions of folklore and genetic resources. The AU's [Agreement on the African Continental Free Trade Area](#) (AfCFTA)'s Protocol on Intellectual Property Rights (IP Protocol) was adopted by the 36th Ordinary Session of the Assembly of Heads of State and Government in February 2023.[1] The IP Protocol sets out certain standards which must be met by State Parties together with agreed areas of co-operation between them. In addition, the protocol mandates the State Parties to negotiate and adopt an Annex on TK, TCEs and genetic resources (articles 41 and 42.1) which will become an integral part of the Protocol upon adoption (article 42.3) and be binding on State Parties. This opportunity provides impetus for the development of a continent-wide regulatory and co-operation framework which should move African States from the current varied national and sub-regional frameworks.

Existing frameworks

Some AU Member States have relevant national laws and the African Regional Intellectual Property Organization (ARIPO) has adopted the [Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore](#) which came into force in 2015 for some of its Member States.[2] The Organisation Africaine de la Propriété Intellectuelle (OAPI) has commenced

working towards the adoption of an instrument on TK expected to be adopted as Annex XI of the Bangui Agreement. Prior to this opportunity presented by the AfCFTA IP Protocol, the only continent-wide regulatory initiative was the non-binding African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources (African Model Law), adopted by the AU's predecessor, the Organisation of African Unity, in 2000. Another relevant and related AU initiative is [the Continental Strategy for Geographical Indications in Africa \(2018 – 2023\)](#), to the extent that it relates to TK-based products. However, it is not a regulatory instrument and is only cited here as an indication of continental-level intention to address these issues.

A unique opportunity

Four things distinguish these two continental regulatory opportunities from each other. First, the African Model Law is non-binding whilst the AfCFTA IP Protocol and its Annexes are binding, being integral parts of the AfCFTA Agreement. Second, the AfCFTA Agreement context places the protection of TK, TCEs and generic resources within the trade context of the single African market.

TK, TCEs, folklore and genetic resources are core to the creation of many goods and services that are traded for significant amounts. For example, BioTrade accounted for a significant portion of revenue earned in Southern African States participating in the Access & Benefit Sharing (ABS) Compliant Bio-trade in South(ern) Africa (ABioSA) phase 1 project (2018 – 2021). The participating entrepreneurs recorded an increase of US\$5 million in turnover with a 51% growth in local sales and 178% growth in export sales.[3] Another example is aquaculture, which is extensively reliant on

[1] Decision on the Annual Report of the Union and its Organs Including the Specific Thematic Issues by the Heads of States, Champions, Assembly/AU/Dec.854 (XXXVI), para. 14.

[2] It came into force on 11 May 2015 for Botswana, Liberia, Malawi, Namibia, Rwanda, The Gambia, Zambia and Zimbabwe. For commentary on national implementation see, for example, Jovine Costantine, "The Swakopmund Protocol for the protection of expressions of folklore: a review of implementation in Rwanda and Tanzania", *Journal of Intellectual Property Law & Practice*, Volume 17, Issue 10 (October 2022), pages 834–843. Available from <https://doi.org/10.1093/jiplp/jpac088>.

[3] ABioSA, *Building African Biotrade: ABioSA Project Highlights Summary Report Feb 2018 – Oct 2021*, p. 5. Available from https://www.abs-biotrade.info/fileadmin/Downloads/1.%20PROJETS/ABioSA/Repository/ABIOSA_Summary_Report/ABioSA-summary-and-highlights-report-2022.pdf.

biological and genetic resources and accounted for 18% (2.2 million tonnes) of total fish production in Africa, which constituted about 2.7% of global aquaculture output.[4] For as long as there is lacuna in the protection of TK, TCEs, folklore and genetic resources, Africa will continue to miss the opportunity to leverage these extensive and valuable resources for its full socio-economic benefit. Therefore, norm-setting and co-operation under the AfCFTA Agreement through relevant protocols are very significant for indigenous and local communities because they present them with an opportunity to deliberate and agree on continental standards.

Third, the development of this African continent-wide regulatory framework is being conducted alongside the build-up to the World Intellectual Property Organization (WIPO)'s Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC)'s [diplomatic conference in 2024](#) on genetic resources (GRs) and associated TK.[i] This means that there is a window to concretize an African position through the continental framework, which can then inform engagement at the planned diplomatic conference. Fourth, the continental framework is being developed after several African States, such as Kenya,[ii] South Africa[iii] and Zambia[iv] have developed

customized national TK protection frameworks. This context is very important because the AfCFTA IP Protocol encourages its State Parties to be informed by existing African and international regulatory instruments when they develop national frameworks.

A binding continental standard

The provisions of the AfCFTA IP Protocol address obligations relating to the protection of TK, TCEs, folklore and genetic resources, geographical indications and plant variety protection. The AfCFTA IP Protocol places a binding obligation on State Parties to protect TK (article 18.1), TCEs and expressions of folklore (article 19.1) and genetic resources (article 20.1). In each case the exact nature of protection is not prescribed, leaving State Parties policy space and discretion to determine their national regimes.

State Parties are obliged to ensure that their laws require applicants for IP rights to: (i) disclose the source of TK, TCEs, folklore and genetic resources used in the invention or creation, (ii) provide evidence of informed prior consent and (iii) provide proof of "fair and equitable benefit sharing under the relevant national regime" (articles 18.2, 19.2 and 20.2). These requirements are similar to those found in the current WIPO IGC latest draft provisions on TK and TCEs.[9] This is both expected and desirable because articles 18.4, 19.4 and 20.4 of the AfCFTA IP Protocol state that the development of these national rules ought to be to be informed by "relevant African and international instruments on the subject that prioritise development-oriented [national] interests."

[4] Fran Humphries, Charles Lawson, John A. H. Benzie & Clare Morrison, "African Aquaculture: Genetic Resource and Traditional Knowledge Access and Benefit Sharing Measures", *Reviews in Fisheries Science & Aquaculture*, Vol. 31, No. 2 (2023), pp. 180-196, at 180, DOI: [10.1080/23308249.2022.2027866](https://doi.org/10.1080/23308249.2022.2027866).

[5] For further context, see Chidi Oguamanam, "WIPO-IGC 45: Bold and Strategic Moves Toward TK and TCE Text(s)", openAIR, 14 December 2022, <https://openair.africa/wipo-igc-45-moves-toward-tk-tce-texts/>; Viviana Muñoz Tellez, "A Breakthrough in Negotiations on Intellectual Property, Protection of Genetic Resources and Traditional Knowledge in WIPO?", Policy Brief, No. 113 (Geneva, South Centre, 2022), <https://www.southcentre.int/policy-brief-113-11-october-2022/>.

[6] The Protection of Traditional Knowledge and Cultural Expressions Act, 2016 (Kenya).

[7] Protection, Promotion, Development and Management of Indigenous Knowledge Act 6 of 2019 (South Africa).

[8] Protection of Traditional Knowledge, Genetic Resources & Expressions of Folklore Act 16 of 2016 (Zambia).

[9] For IGC draft text, see Update of the Technical Review of Key Intellectual Property-Related Issues of the WIPO Draft Instruments on Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions within the Framework of Indigenous Human Rights, [WIPO/GRTRK/IC/SS/GE/23/INF/5](https://www.wipo.int/ip/IGC/SS/GE/23/INF/5).

In accordance with the IP Protocol, State Parties are bound to “take measures to prevent and prohibit the unauthorised utilisation” of TK, TCEs, folklore and genetic resources “in all categories of intellectual property rights” (articles 18.3, 19.3 and 20.3). The approach is both to protect and to defend these resources against misappropriation under relevant national laws.

Since these provisions are contextualised within a single African market, it is important to address infringement and misappropriation that may occur during cross-border trade. Article 29 of the AfCFTA IP Protocol requires State Parties to provide enforcement procedures that can be used by right holders who have “valid grounds for suspecting that the importation of ... misappropriated traditional knowledge, traditional cultural expression and genetic resources may take place, to lodge an application in writing with competent authorities, administrative or judicial, for the suspension by the customs authorities of the release into free circulation of such goods.”

Continental co-operation on the protection of IP

AfCFTA IP Protocol State Parties are required to “foster transboundary cooperation and share best practices” on TK, TCEs, expressions of folklore and generic resources in cases where they are held or practiced across borders or in more than one State Party (articles 18.5, 19.5 and 20.5). State Parties may “cooperate, as appropriate, on granting prior informed consent of the right holder, access, and benefit sharing based on mutually agreed terms as well as the disclosure of the source” of the TK, TCEs, expressions of folklore and genetic resources (articles 18.6, 19.6 and 20.6). Similarly, they may cooperate to exchange information contained in their relevant national databases. The establishment of national databases is optional for State Parties, and once created they are expected to be notified to the

AfCFTA Secretariat. Thereafter the AfCFTA Secretariat is required to create databases on TK based on information notified by State Parties (articles 18.9). There is no requirement for the establishment of a continental database on TCEs, expressions of folklore and genetic resources. As can be seen, except for the different database requirements, the provisions on TK, TCEs, expressions of folklore and genetic resources are the same.

Lessons from South Africa

As shown above, the AfCFTA IP Protocol requires that State Parties protect TK, TCEs, expressions of folklore and genetic resources without prescribing the nature of such protection; therefore the option of how to best do this in national contexts is left to individual States. A closer look at how South Africa has exercised its regulatory mandate may be a source of inspiration for other AU Member States and is worth considering in the development of the AfCFTA’s Annex on TK, TCEs, expressions of folklore and genetic resources.

South Africa amended Patents Act 57 of 1978 in 2005 by the [Patents Amendment Act 20 of 2005](#) to address disclosure, informed consent and benefit-sharing.[10] Section 30(3A) - (3B) requires a patent applicant to disclose “whether or not the invention for which protection is claimed is based on or derived from an indigenous biological resource, genetic resource, or traditional knowledge or use” and to submit proof of consent to use such resource or knowledge. Such consent is often subject to compensation or benefit sharing. Such provisions are important to protect the interests and rights of indigenous communities and are a key aspect of the draft provisions that will be discussed

[10] For evaluation, see Margo A. Bagley, “Toward an Effective Indigenous Knowledge Protection Regime, Case Study of South Africa”, CIGI Papers No. 207 — December 2018, Available from <https://www.cigionline.org/static/documents/documents/Paper%20no.207web.pdf>.

at the upcoming WIPO IGC Diplomatic Conference.[11] They serve multiple purposes including securing “mutual supportiveness with international agreements; ... transparency in the IP/Patent system” and ensuring that “IP Offices have access to the appropriate information so as to prevent misappropriation through the granting of erroneous IP/patent rights”.[12] A key reason for the ongoing regional and global focus is to ensure some harmonization of national approaches which have been shown to be very diverse, leading to lack of clarity and difficulties in compliance.

In addition to this, South Africa has two statutes relating to the protection of TK, TCEs and expressions of folklore. The first is the Intellectual Property Laws Amendment Act 28 of 2013 which extended intellectual property protection to TK, TCEs and expressions of folklore by amending the following statutes:

1. the [Performers' Protection Act 11 of 1967](#), to protect performances of traditional works;
2. the Copyright Act 98 of 1978, to (a) recognize and protect traditional works, indigenous works and derivative indigenous works; (b) establish a National Council for indigenous knowledge; (c) create National Databases for indigenous knowledge; and (d) establish a National Trust Fund for indigenous knowledge;
3. the [Trade Marks Act 194 of 1993](#) to recognize and protect indigenous terms and expressions as trade marks in a new part of the trade marks register created for that purpose; to enable the recording of indigenous terms and expressions; and cater for further protection of geographical indications;

4. the [Designs Act 195 of 1993](#) to recognize and protect indigenous designs by their registration in a further part of the designs register created for that purpose.

This Act has not yet come into force because the necessary regulations that would detail further procedures and provide applicable forms have not yet been adopted.

The second statute is the [Protection, Promotion, Development and Management of Indigenous Knowledge Act 6 of 2019](#) (IKS Act) which creates a customized or *sui generis* protection framework. This Act has also not yet come into operation. Draft Regulations were published in 2022,[13] so it appears that the Act may soon come into force after the finalization and adoption of the regulations.

These two statutes are intended to work together and section 32 of the IKS Act states that it “does not alter or detract from any right in respect of any statute or the common law,” nor does compliance with it “constitute compliance with any procedures or requirements imposed in any other Act.” A summary of the protection provided by these two statutes follows.

A. IP protection

The IP Laws Amendment Act’s amendments were intended to overcome the difficulties in applying IP law to TK and TCEs. For example, most TK and TCEs are not in material form through writing or other form of recording and therefore are not eligible for copyright protection.[14] To meet this challenge, the

[11] See Draft International Legal Instrument Relating to Intellectual Property, Genetic Resources and Traditional Knowledge Associated with Genetic Resources, September 8, 2023, WIPO/GRTKF/IC/SS/GE/23/4 ANNEX. Available from https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_ss_ge_23/wipo_grtkf_ic_ss_ge_23_decisions.pdf.

[12] WIPO, Information Note for IGC 36 prepared by Mr. Ian Goss (then IGC Chair), p. 3. Available from https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_36/wipo_grtkf_ic_36_ref_chair_info_note.pdf.

[13] Regulations relating to the Protection, Promotion, Development and Management of Indigenous Knowledge, GN 2647 of 2022, *Government Gazette* 47292, 14 October 2022; Regulations relating to the Protection, Promotion, Development and Management of Indigenous Knowledge, GN2722 of 2022, *Government Gazette* 47453, 4 November 2022.

[14] For further discussion, see WIPO, The Protection of Traditional Knowledge: Updated Draft Gap Analysis, 2018, WIPO/GRTKF/IC/37/6. Available from https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_37/wipo_grtkf_ic_37_6.pdf.

IP Laws Amendment Act amends the Copyright Act to state that a traditional work would meet the material form requirement if it is written down, recorded or “represented in digital data or signals, or otherwise reduced to a material form or is capable of substantiation from the collective memory of the relevant indigenous community.” Relying on a community’s collective memory is a concession to the unique nature of TK and TCEs. However, the amendments do not stipulate how such memory is to be collected, collated and presented. Such details are expected in the regulations that should be passed before the amendments become effective.

The term of protection will be as provided for in the relevant IP statute. For example, the Copyright Act will be amended by the addition of a new s28F to cater for a 50 year term of protection for a derivative indigenous work from “the end of the year in which the work was first communicated to the public with the consent of the author or authors; or the date of the death of the author or all authors concerned, whichever term expires last.” The same section provides that an indigenous work will be protected “in perpetuity”. This example shows the adaptation of copyright protection for indigenous works in a way that is in keeping with the expectations of traditional communities.

The IP Laws Amendment Act adds disclosure and benefit sharing requirements. For instance, the Copyright Act amendments require that a person applying for the registration of their rights in a derivative indigenous work must have:

- (a) Obtained prior informed consent from the relevant authority or indigenous community;
- (b) Disclosed the indigenous cultural expressions or knowledge to the Companies and IP Commission; and
- (c) Signed a benefit-sharing agreement with the relevant authority or indigenous community.

B. Customized protection

The IKS Act, as is evident from its name, is not only about protection but extends to the promotion, development and management of TK, TCEs and genetic resources. Its preamble states that it is grounded in South Africa’s commitment “to the economic, cultural and social upliftment and well-being of its people, free of discrimination” and an appreciation that “indigenous knowledge is a national asset and that it is therefore in the national interest to protect and promote indigenous knowledge through law, policy and both public and private sector programmes.” It proceeds to state that the IKS is a tool to “encourage the use of indigenous knowledge in the development of novel, socially and economically applicable products and services” and accepts that “indigenous innovation is a unique approach to social innovation.” These perspectives resonate strongly with the AfCFTA IP Protocol.

Section 11 states that to be eligible for protection, indigenous knowledge must have been:

1. transmitted from “generation to generation within an indigenous community”
2. “developed within an indigenous community” and
3. “associated with the cultural and social identity” of that community.

Protection will only be extended if the knowledge is registered (section 9) at the registration office run by the National IKS Office (NISKO) (section 17). Such protection will continue for as long as the knowledge meets the eligibility criteria (section 10(1)). It confers the following rights in the knowledge: (a) benefits or returns from its commercialization, (b) attribution as its source or origin and (c) the right to limit its unauthorized use (section 13). The indigenous knowledge and rights in it vest in the relevant community’s trustee (section 12(1)-(2)). If the community cannot be identified then NISKO will play the role of trustee (section 12(3)).

The IKS lists several circumstances under which indigenous knowledge can be used without seeking prior informed content. These are when the knowledge is used for “(a) criticism or academic review; (b) reporting news or current events; (c) judicial proceedings”; (d) purposes that are incidental or related to (a) - (c); and (e) in “national emergencies or natural disasters” provided that the relevant community must be compensated for the use of the knowledge (section 26(4)).

A license to make commercial use of indigenous knowledge must be granted by NIKSO (sections 13(2) and 26). Applications for licenses must state the relevant indigenous community, the place from which the knowledge originated, whether the relevant community has given their prior informed consent and whether a benefit sharing agreement has been concluded.

Where a member of the relevant indigenous community wants to commercialize indigenous knowledge they must seek the community's permission and, once obtained, can only use the knowledge subject to terms and conditions as agreed to in an agreement signed by the community's trustee (section 13(3)).

NIKSO will support indigenous communities in the commercialization of their knowledge (section 25). Where several communities have a claim to the relevant knowledge, amounts paid pursuant to benefit sharing agreements must be shared equally (section 30(1)) and, where necessary, such agreements will be revised to include the trustees of all relevant communities (section 30(2)).

Disputes about rights in indigenous knowledge where licenses have been granted will be resolved by a Dispute Resolution Committee established at the discretion of the Minister responsible for the IKS Act (section 27(1)). Customary law that is relevant to a dispute must be considered by the

Committee (section 27(2)). Remedies that can be issued against license holders by the Committee are (1) written warnings, (2) notices prohibiting unauthorized use and (3) recommendations that NIKSO cancel the relevant license (section 27(3)). It is an offence for third parties to knowingly breach the terms of an agreement under which they were permitted to use indigenous knowledge and thereby infringe that community's rights (section 28). The penalty, upon conviction, will be a fine.

Finally, the IKS Act acknowledges the transboundary nature of indigenous knowledge in two ways. First, it states that knowledge with origins in other States will be protected in the same way as knowledge that originates in South Africa provided that the laws of that other State also protect knowledge emanating from South Africa (section 29(1)). Such provisions encourage the enactment of similar laws in other African States. Second, where knowledge comes from indigenous communities found in South Africa and other States, NIKSO must assist the foreign authorities and the South African community to agreement on equitable benefit sharing (section 29(2)).

Conclusion

The lesson from this two-strand protection approach is that to overcome the misalignment between intellectual property protection and TK, it is advisable to craft *sui generis* protection regimes. This bi-furcated approach is worth considering in the negotiation of the AfCFTA IP Protocol's Annex on TK, TCEs and expressions of folklore and genetic resources, but it is important to recognize that such a dual approach exhibits some misalignment and competing views between responsible government ministries. It also then requires a mechanism to ensure that both options can work together. Further, the dual implementation processes and the support required to assist the relevant communities to secure and protect their rights will add strain to national resources, which could be avoided by

selecting a single (not a parallel dual) approach. The factors identified above stall progress in implementing national approaches and it is of concern that neither of South Africa's legislative approaches has been implemented as of October 2023, many years since their adoption. It is not possible to fully discuss the reasons for the delays in this short piece, but it is worth noting that they include delays in drafting and finalizing the necessary regulations to make implementation possible. Draft regulations under the IP Laws Amendment Act have not been published. Draft regulations under the 2019 IKS Act have been published^[15] but have not yet been promulgated, so the *sui generis* approach is not yet in effect. In contrast, the Zambian and Kenyan *sui generis* legislation enacted in 2016, referred to above, has come into force. Implementation is a critical aspect and it is important not only to have a sound regulatory approach, but to also implement it in a timely manner. Negotiators of the AfCFTA Annex on TK, TCEs, expressions of folklore and genetic resources ought to pay attention to this aspect.

Based on these conclusions, three key recommendations for the negotiations are to include provisions in the Annex that:

1. set common standards for significant aspects such as the appropriate protection approach and disclosure requirements to enable better understanding and compliance;
2. create a means for facilitating discussions between relevant national departments or ministries so that their approaches can be aligned or better coordinated; and
3. facilitate or support capacity-building and technical support for implementation.

Author: Caroline B. Ncube is DSI-NRF SARChI Chair - Intellectual Property, Innovation and Development, University of Cape Town.

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[15] See Department of Science and Innovation (Republic of South Africa), Protection, Promotion, Development and Management of Indigenous Knowledge Act, 2019 (Act No. 6 of 2019), Regulations Relating to the Protection, Promotion, Development and Management of Indigenous Knowledge, *Government Gazette*, 14 October 2022, No. 47292, Notice 2647, https://www.gov.za/sites/default/files/gcis_document/202210/47292gon2647.pdf; and *Government Gazette*, 4 November 2022, No. 47453, Notice 2722, <https://gazettes.africa/archive/za/2022/za-government-gazette-dated-2022-11-04-no-47453.pdf>.



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**For more information, please contact Anna Bernardo of the South Centre:
Email abernardo@southcentre.int, or telephone +41 22 791 8050.**

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