


RESEARCH ARTICLE

A Critical Examination of the African Legal Framework for Indigenous Knowledge

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(Accepted 19 July 2022)

Abstract

Indigenous or traditional knowledge (TK) systems are the springboard of authentic African innovation and creativity. However, there has been no adequate attempt to determine whether Africa internalizes its comparative advantage in Indigenous knowledge systems in its continental frameworks for socio-economic and development collaboration and aspirations. Despite TK's presumed significance and Africa's proactive promotion of Indigenous knowledge in international fora, TK is treated marginally in key instruments, perhaps as a legacy of colonially entrenched contempt for Indigenous knowledge systems. For Africa to effectively participate in the science and technology revolution, it is necessary to have an introspective and critical appraisal of the present traction around Indigenous knowledge, which is a logical starting point for effective science, technology and innovation policy-making in furtherance of African socio-economic and development collaboration in the knowledge economy.

Keywords: Africa; Indigenous / traditional knowledge; science; technology and innovation; knowledge economy; intellectual property

Introduction

Countries and regions of the world pursue developmental aspirations by leveraging their comparative advantages in specific sectors. Among other factors, creativity and innovation constitute catalytic domains for development. Africa's comparative advantage in those domains is easily, but not exclusively, located in its rich heritage of "Indigenous" or "traditional" knowledge (terms used interchangeably in this article). For example, Indigenous knowledge systems and Indigenous peoples and local communities, as actors in innovation and knowledge production, are increasingly drawn into the global knowledge economy. Specifically, the onset of the global bioeconomy, the breaking down of trade barriers, ongoing pressure to accommodate traditional knowledge (TK) within the intellectual property (IP) system or on a sui generis basis, and the malleability and adaptability of digital technology are a few developments that underscore the traction around Indigenous knowledge. Africa's ability to benefit optimally from current evolutions in technology and innovation cannot be divorced from how the continent recognizes its comparative advantage in TK, particularly

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given the intensification of technological convergences in the Fourth Industrial Revolution (4IR) that have the capacity to absorb, dilute or even obliterate stakes and interests around TK.¹

Concerted efforts by a majority of developing and less developed countries of the Global South – including African countries and, of course, Indigenous peoples and local communities across the world – have drawn attention to TK as a crucial aspect of their interest in the knowledge economy.² In their national and regional capacities, African countries have remained globally proactive over the valorization of TK in socio-cultural and economic development. This is evident through the concerted efforts of Africa, alongside the group of like-minded countries of the Global South, to champion the protection and safeguarding of TK in critical international instruments over the past several decades.³ For example, in addition to key international human rights treaties and declarations, the instruments include the Rio 1992 set of international instruments, most notably the Convention on Biological Diversity (CBD) and subsequent protocols, the International Treaty on Plant Genetic Resources for Food and Agriculture, the Framework Convention on Climate Change and the United Nations Declaration on the Rights of Indigenous Peoples.⁴ Other sites include various thematic programmes of the World Intellectual Property Organization (WIPO) through its Intergovernmental Committee (IGC) and the WIPO Development Agenda.⁵

This article is solely a result of legal doctrinal desk research.⁶ Its main objective is to explore how sub-Saharan Africa has framed and accommodated TK in primary, secondary, tertiary and miscellaneous regional instruments and to appraise the extent to which Africa has positioned and adequately recognized its TK as a critical factor endowment. It explores constitutive and policy instruments under the auspices of the African Union (AU) and select regional economic, cultural, trade, environmental, food, health and other related instruments that are directly or indirectly relevant to TK. Such scrutiny unravels the marginal way in which Africa positions its interest in TK and the need to re-think that approach beyond the seemingly overly political and prevailing hot air and rhetoric.

As a legal doctrinal desk project, this article involves a “TK audit” of select categories of legal materials and significant policy instruments of continental scope and those that have regional relevance across trade, socio-economic, cultural, environmental and developmental cooperation. The examined instruments were selected based on their principal subject matters, overarching objectives and preambular or substantive provisions with reference to the use and relevance of terms such as

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- 1 K Schwab *The Fourth Industrial Revolution* (2017, Crown Business); C Oguamanam “From science, technology and innovation to fourth industrial revolution strategies in Africa: The case for indigenous knowledge systems” in Z Mazibuko-Makena & E Kraemer-Mbula (eds) *LEAP 4.0: African Perspectives on the Fourth Industrial Revolution* (2021, MISTRA) 66; C Oguamanam “Transition to the fourth industrial revolution: Re-thinking African indigenous knowledge systems” (unpublished manuscript, on file with the author).
 - 2 C Oguamanam “Understanding Africa and LMC’s position at the WIPO-IGC” (2020) 60/2 *IDEA: The Law Review of the Franklin Pierce Center for Intellectual Property* 151.
 - 3 *Ibid.*
 - 4 Convention on Biological Diversity (5 June 1992) 1760 UNTS 69 (entered into force 22 December 1993); International Treaty on Plant Genetic Resources for Food and Agriculture (3 November 2001) 2400 UNTS 303 (entered into force 29 June 2004); United Nations Framework Convention on Climate Change (4–14 June 1992) 1771 UNTS 107 (entered into force on 21 March 1994) (see Centre for International Environmental Law “Indigenous peoples and traditional knowledge in the context of the United Nations Framework Convention on Climate Change” (2018) *Indigenous Forum on Climate Change*, available at: <<https://www.ciel.org/wp-content/uploads/2018/12/Indigenous-Peoples-and-Traditional-Knowledge-in-the-Context-of-the-UNFCCC.pdf>> (last accessed 22 February 2022)); United Nations Declaration on the Rights of Indigenous Peoples, UN doc A/61/295.
 - 5 World Intellectual Property Organization “WIPO Development Agenda” (2009), available at: <<https://www.wipo.int/ip-development/en/agenda/>> (last accessed 19 January 2023).
 - 6 T Hutchinson and NJ Duncan “Defining and describing what we do: Doctrinal legal research” (2012) 17/1 *Deakin Law Review* 8.

“traditional knowledge”, “Indigenous knowledge”, “local knowledge”, “Indigenous knowledge systems”, “local communities”, “community knowledge” and other relevant phrases in the context of African socio-economic and development cooperation and aspirations. Recognizing that most of these instruments have objectives that do not relate directly to TK, the audit captures other dimensions associated with TK as a cross-cutting subject. Such dimensions include natural resources, science, technology, food, agriculture and the environment. It is important to note that the instruments examined in this article are not exhaustive. Nevertheless, they are pivotal to and constitutive of African socio-economic and development cooperation, and provide inspiration for other secondary instruments, including those not explored here.

In no particular order, instruments of specific interest include, but are not limited to, the Constitutive Act of the African Union; the African Economic Community (AEC); the statutes of the Pan-African Intellectual Property Organization (PAIPO), the African Regional Intellectual Property Organization (ARIPO) and the Organisation Africaine de la Propriété Intellectuelle (OAPI); the Agreement Establishing the African Continental Free Trade Area (AfCFTA); the Charter for African Cultural Renaissance; the Revised African Convention on Conservation of Nature and Natural Resources; the African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources; the New Partnership for Africa’s Development (NEPAD); the African Union Framework Document on Agenda 2063; Africa’s Science and Technology Consolidated Plan of Action (CPA); and the Science, Technology and Innovation Strategy for Africa (STISA). Also included are the instruments establishing three (out of eight) representative African Regional Economic Commissions (RECs) – the Southern African Development Community (SADC), the Economic Community of Western African States (ECOWAS) and the East African Community (EAC) – and the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore. [Figure 1](#) illustrates the key instruments examined and cited.

The outcome of the audit and ensuing analysis is presented as an insight into the African legal and policy landscape on TK. As the world transitions into a new technological phase, such information assists in understanding Africa’s positioning around next-generation technologies within the purview of technological convergences, which some have designated as the 4IR, a subject explored elsewhere.⁷ The resulting analysis unravels discernible patterns as well as the strengths, weaknesses and gaps in the way TK is projected as Africa’s factor endowment in the knowledge economy. It is not clear why Africa’s proactive approach to TK in international fora has not been matched with corresponding regional initiatives. Whether this lacuna is due to a colonial legacy of disdain for TK, constraining international pressure or lack of political will is not clear. Overall, however, this article contributes to foreshadowing strategic policy approaches to TK at national, regional, continental and global levels.

Traditional knowledge systems in perspective

Pigeonholing TK into a definitional box as, for example, WIPO’s IGC has been doing at the international level for two decades, is a distraction.⁸ Definitions tend to be narrow and serve a legalistic gatekeeping role over what is and is not TK. Relationships of power, rooted in the colonial experience, make the definition of TK a contested exercise.⁹ Such definitions are further limited by the language and orientation of the definer, which are often complicit in some form of power

7 Schwab *The Fourth Industrial Revolution*, above at note 1; Oguamanam “Understanding Africa”, above at note 2.

8 Established in 2000, the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (WIPO-IGC) is mandated to undertake text-based negotiations to finalize an agreement on (an) international legal instrument(s) for the effective protection of TK, traditional cultural expressions and genetic resources.

9 C Oguamanam “Pressuring ‘suspect orthodoxy’: Traditional knowledge and the patent system” in M Rimmer (ed) *Indigenous Intellectual Property: A Handbook of Contemporary Research* (2015, Edward Elgar) 313.

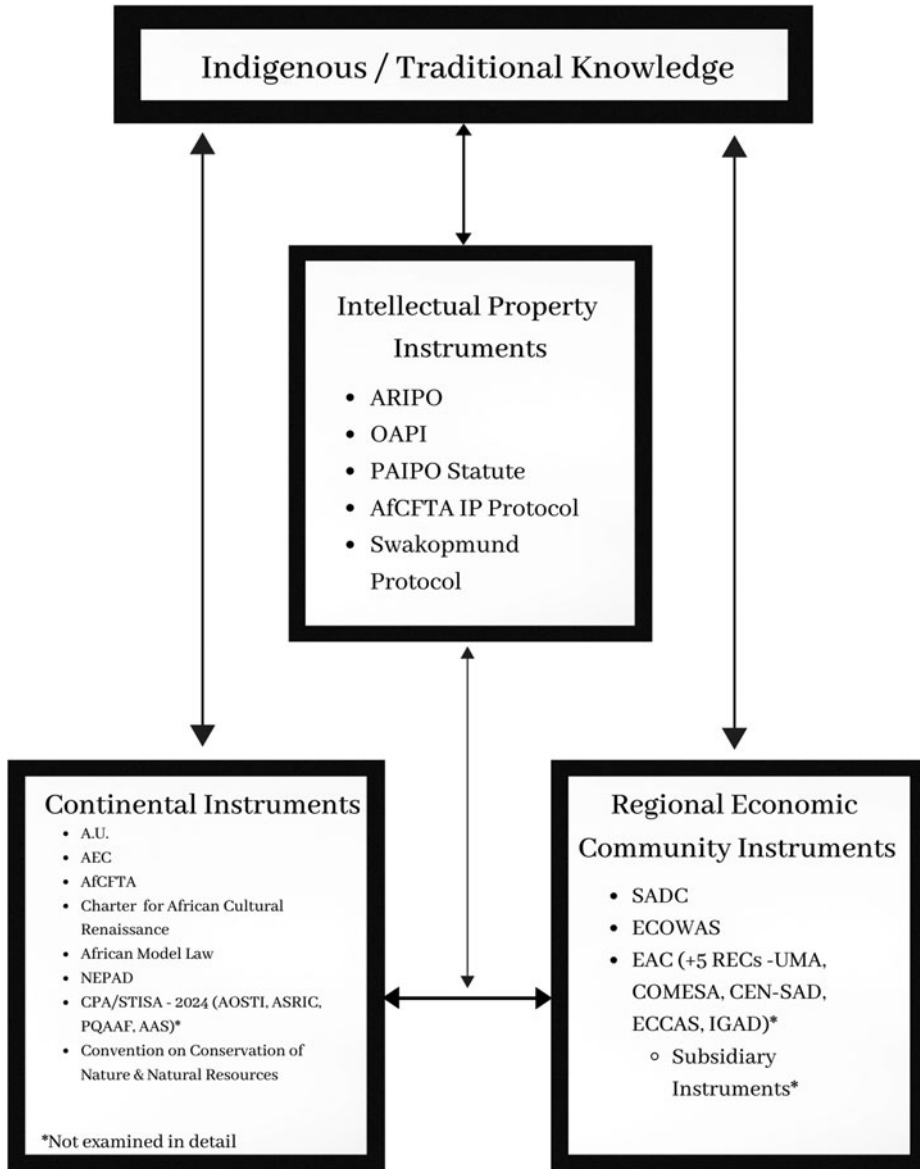


Figure 1: Key Legal and Policy Framework Instruments for Indigenous Knowledge in Africa

*AOSTI = African Observatory in Science Technology and Innovation; ASRIC = African Scientific Research and Innovation Council; PQAAF = African Quality Assurance and Accreditation Framework; AAS = African Academy of Sciences; UMA = Union du Maghreb arabe; COMESA = Common Market for Eastern and Southern Africa; CEN-SAD = Community of Sahel-Saharan States; ECCAS = Economic Community of Central African States; IGAD = Intergovernmental Authority on Development.

relationship. For example, rarely does understanding about TK get conveyed in the language, ontologies and legal traditions of its custodians and practitioners. Language is a conduit to worldview, knowledge, culture, identity and more.¹⁰ The convergence of these constitutes a complex epistemological ecosystem. In that regard, TK – as a term of art and of convenience – is a reference to the contexts for the practice and manifestations of the ways in which non-western peoples and

10 See P Riley *Language, Culture and Identity: An Ethnolinguistic Perspective* (2007, Bloomsbury).

civilizations understand, engage with, negotiate, interpret, deploy and adapt phenomena sustainably for their progress, socio-economic existence, benefit and survival. Consequently, it is a “knowledge system”, comprising complex ways of knowing, doing, learning, etc., and on its merit vis-à-vis other more formalized and highly empowered knowledge systems that make a patent-like claim to “science” or, more appropriately, “western science” and its so-called methodology.¹¹

The plurality of ways of knowing and doing demonstrates the validity and interconnectivity of knowledge, rather than reinforcing the broad binaries between TK or non-western knowledge systems and western science or knowledge systems.¹² The traffic of transfer, interaction and sometimes exchange of knowledge across this dubious binary is established across a vast range of disciplines.¹³ In recent times, such transfers are mediated by embedded power relations in which formal or western scientific knowledge and its R&D industrial complex are implicated in some form of predatory relation with TK and its custodians. However, its more visible characterization is captured in the inquiry for equitable knowledge governance and inclusive benefit-sharing in the new bioeconomy.¹⁴ That inquiry is catalysed by the phenomenon of biopiracy, a reference to brazen exploitation of TK by external interests.¹⁵

Aside from TK’s propensity to be applied in different cultural and economic sectors, it is a knowledge system on its own merit, a way of life best understood in civilizational and sustainability terms. Knowledge, including TK, enables peoples, nations or ethnic formations and civilizations to survive and retain identities. In that context, contrary to the “traditional” qualifier, knowledge is not frozen in time, as it continues to evolve to sustain civilizations through lived experiences and emergent challenges. From language, poetry, incantation, religion, astrology, belief systems, rituals, ceremonies, legal traditions, social ordering, political formations, gender roles and relations, arts, design, crafts, technology, aesthetics, dancing, choreography, food, agriculture, farming, aquaculture, animal husbandry, medicine, health, pharmacology, education, knowledge transfer, knowledge governance, ecology, environment, innovations and associated protocols and practices to dealings with natural and unnatural phenomena, TK defies exhaustion by any conceivable enumeration scheme, no matter how liberally framed. The second part of this article examines the extent to which TK is captured in major constitutive instruments of African regional cooperation.

Major continental treaties

The Constitutive Act of the African Union

The Constitutive Act of the African Union marked the official transition from the Organisation of African Unity (OAU) to the African Union as the highest political organization with superintendence over African solidarity across all relational paradigms with the rest of the world.¹⁶ In addition to reinforcing the established principles of African solidarity pursuant to the Charter of the OAU, the AU Act aims to position Africa to confront political and socio-economic changes, including technological changes and those brought about by globalization, in order to “enable the continent to play its rightful role in the global economy and in international negotiations”.¹⁷ Its framework of operation is premised on solidarity and cohesion in promoting African peoples and their cultures, including defending “African common positions on issues of interest to the continent and its

11 Oguamanam “Pressuring ‘suspect orthodoxy’”, above at note 9.

12 G Dutfield “If we have never been modern, they have never been traditional: ‘Traditional knowledge’, biodiversity, and the flawed ABS paradigm” in C McManis & B Ong (eds) *Routledge Handbook on Biodiversity and the Law* (2017, Routledge) 276.

13 Oguamanam “Pressuring ‘suspect orthodoxy’”, above at note 9.

14 On bioeconomy and its intersection with TK, see P Oldham “Biopiracy and the bioeconomy” in P Glasner, P Atkinson and H Greenslade (eds) *New Genetics, New Social Formations* (2006, Routledge) 114.

15 I Mgbeoji *Global Biopiracy: Patents, Plants and Indigenous Knowledge* (2006, UBS Press); D Robinson *Confronting Biopiracy: Challenges, Cases and International Debates* (2010, Earthscan).

16 The Constitutive Act of the African Union (7 November 2000) 2558 UNTS 3 (entered into force on 26 May 2001).

17 Id, art 3(i).

peoples”.¹⁸ The AU is committed to pursuing African economic integration, self-reliance, sustainable and balanced economic development at all levels, raising the living standard of its peoples and promoting research in all fields, particularly science and technology.¹⁹

Article 13 of the act outlines the functions of the AU Executive Council,²⁰ which include coordinating and taking decisions “in areas of common interests”. In Article 13(a)–(l), a clustered list of several areas of common interest is presented in an open-ended fashion. Among those with relevance to TK is foreign trade, which has ramifications for trade in TK-based products and in IP policies. Others include energy, food, agriculture, animal resources, livestock production, forestry, environmental protection, education, culture, health, human resources development, and science and technology. While the AU Act makes no mention of TK and correlating terms, the aforementioned areas are sites for knowledge production in which Africa’s participation in the global knowledge economy is engaged. The AU’s specialized technical committees consider these areas of common interest and propose projects and programmes for their advancement.

The Treaty Establishing the African Economic Community

An important instrument associated with the AU Act is the 1991 Treaty Establishing the African Economic Community.²¹ It is referenced several times in the preamble to the AU Act, which was enacted in conformity with both the Charter of the OAU and the AEC Treaty.²² The AU Act is unequivocal about the Union’s desire to accelerate the implementation of the AEC Treaty “in order to promote the socio-economic development of Africa and to face more effectively the challenges of globalization”.²³ Like the AU Act, a review of the AEC Treaty shows there is no direct mention of TK and associated terms. The AU Act was inspired by the text of the AEC Treaty; save for emphasis in the AEC Treaty on economic solidarity, the two instruments are synergistic with each other.

An overarching objective of the AEC is achieving balanced and integrated economic development and enhanced well-being of Africans through the development and deployment of African human and natural resources in all fields of human endeavour. Like the AU, the AEC is framed around the pursuit of solidarity, economic justice, self-reliant development and collective self-reliance. The AEC also pursues the harmonization of national policies on the continent in the fields of food, agriculture, culture, forestry, livestock, fisheries, plant and animal production, natural resources, technology and scientific research, all of which are sites for the development and deployment of TK as Africa’s factor endowment.

Under the title “Industrial Development”, article 49 AEC Treaty lists 10 basic industrial sectors as priority economic sectors of interest for the industrialization and promotion of collective self-reliance in Africa.²⁴ Strikingly, there is neither a direct nor a veiled reference to TK in this important article. Only by deliberate extrapolation can the relevance of TK in, arguably, at least three of the industrial categories be conceived, namely the food, agriculture and forestry industries. However, the AEC Treaty’s articles 69 and 70 align the instrument with the Protocol on Education, Training and Culture and to the Cultural Charter for Africa (examined later). Further, article 47 enjoins members’ cooperation pursuant to the Protocol on Food and Agriculture. Nonetheless, not only does the AEC Treaty as an African regional economic template not reckon substantively with Africa’s comparative advantage in TK, it also does not pre-empt the ensuing technological transformations and their relevance in advancing the AEC.

18 *Id.*, art 3(d).

19 *Id.*, arts 3(j), (k) and (m) and 4(k) and (n).

20 Ideally, this consists of ministers for foreign affairs of AU member states.

21 Treaty Establishing the African Economic Community (3 June 1991) 30 ILM 1241 (entered into force 12 May 1994).

22 *Id.*, para 11.

23 *Id.*, preamble to para 6.

24 Food and agriculture; building and construction; metallurgy; electricals and electronics; chemicals and petrochemicals; forestry; energy; textiles and leather; transport and communication; and biotechnology industries.

Yet notice is taken of the identification of “biotechnology” and the bundling of “communication” with transport as basic and priority industrial sectors for Africa. In addition, article 51 is dedicated to the strengthening of scientific and technological capabilities in a wide range of areas, including agriculture, health and hygiene, education, environmental conservation, industry through institutional building, training and exchange of information, and research and development for Africa’s socio-economic transformation. Pursuant to the AEC Treaty, the African technological road map includes coordination of African “position[ing] on all scientific and technological questions forming the subject of international negotiations”.²⁵ In addition, it supports the documentation and establishment of data networks, databanks and statistical information as well as the adaptation of education and scientific capacity to serve and drive regional and continental needs.²⁶ A progressive understanding of TK situates it in the pluricultural pantheon of science, technology and innovation.²⁷ But that is in need of positive reinforcement in these instruments, which is currently lacking. The implicit (rather than unequivocal) inclusion of TK in these foundational instruments reflects aspects of historical colonial power relations, wherein TK is othered or seen as a subaltern knowledge form antithetical to science and innovation.²⁸

The Agreement Establishing the African Continental Free Trade Area

Inaugurated in 2018, the AfCFTA Agreement – arguably one of the boldest initiatives on African economic integration yet – is a relatively recent continent-wide instrument for economic development and collaboration.²⁹ It is designed to deepen African economic integration, cooperation and solidarity through regional trade liberalization pursuant to the overarching principles of the AU, the AEC and African Regional Economic Communities. Although the AfCFTA Agreement is a specialist trade instrument, it is anchored in the use of trade in the pursuit of continental policy coherence and the advancement of critical aspects of the African economy. Like associated instruments, the AfCFTA Agreement makes no reference to TK as a resourceful site of African trade, economic development or integration. However, its focus on trade liberalization and the creation of a single African market for goods and services advances African trade and economic development in a range of areas, including value chain and agricultural development, food security, public health, environment and cultural diversity, all of which are sites for the production and promotion of TK.

As with the AU Act and the AEC Treaty, the extent to which the AfCFTA Agreement fails to factor TK could be best assessed based on potential AfCFTA-inspired subsidiary instruments. The AfCFTA Agreement is unique in this regard because the text is continuously amplified through successive rounds of negotiations on specific areas, to progressively align with evolving regional and international developments. The AfCFTA Agreement came with three ready-made protocols³⁰ and is also set to negotiate protocols on investment, IP rights (negotiations are ongoing) and competition policy. Of all the AfCFTA protocols, the anticipated protocol on IP, discussed below, can be expected to provide insights into how seriously the AfCFTA regime will reckon with TK in African innovation and economic development.³¹

25 Id, art 51(2)(d).

26 Id, arts 51(2)(e) and (h) and 49(j).

27 Oguamanam “Pressuring ‘suspect orthodoxy’”, above at note 9.

28 Ibid; C Oguamanam “Local knowledge as trapped knowledge: Intellectual property, culture, power and politics” (2008) 11/1 *The Journal of World Intellectual Property* 29.

29 The African Continental Free Trade Area (21 March 2018, entered into force 30 May 2019).

30 The Protocols on Trade in Goods, on Trade in Services, and on Rules and Procedures on the Settlement of Disputes (21 March 2018).

31 A du Plessis “The proposed AfCFTA Protocol on Intellectual Property Rights” (17 May 2019) *Trade Law Centre Blog*, available at: <<https://bit.ly/2XC9BBC>> (last accessed 22 February 2022); C Ncube, T Schonwetter, J de Beer and C Oguamanam “A principled approach to intellectual property rights and innovation in the African Continental Free Trade Agreement” in D Luke and J MacLeod (eds) *Inclusive Trade in Africa: The African Continental Free Trade*

The AfCFTA Agreement occupies a special place in Africa's economic integration. Its provisions take precedence over any conflicting provisions of existing regional agreements,³² and perhaps more importantly, its provisions shall not be interpreted "as derogating from the principles and values contained in other relevant [regional] instruments for the establishment and sustainability of the AfCFTA, except as otherwise provided for in the Protocols to this Agreement".³³ In essence, the protocols are strategic tools to amplify gaps in the AfCFTA Agreement and, to some degree, in existing instruments on African economic cooperation and integration, even the RECs. The next part of this article explores how TK is situated in select regional economic instruments within the African continent.

African Regional Economic Communities (RECs)

The AU and its associated continent-wide economic community recognize eight RECs.³⁴ The preamble to the AfCFTA Agreement acknowledges that the RECs are its precursors, specifically the "building blocks towards the establishment of the African Continental Free Trade Area".³⁵ Despite having different histories, the eight RECs have roughly similar structures, objectives, principles and relationships with the AU and AEC. Of the eight, this study reviews three representative RECs, selected based on their jurisdictional coverage and their visible track records on African sub-regional collaboration. They are the Southern African Development Community, the Economic Community of West African States and the East African Community.

The Southern African Development Community

The SADC is the regional development coordination body for the 16 countries of Southern Africa, with an estimated population of about 345 million. It dates to the liberation struggles against white minority governments in the region in the 1980s and has continued to transform since to its present standing, in which the pursuit of coordinated economic development appears to be its most visible *raison d'être*. Like the other RECs examined, SADC pursues specific areas of integration, and like all the RECs, it does not directly position TK as an area of cooperation for economic development.

Insight on whether TK is considered a factor in socio-economic development cooperation under the REC framework in Africa is found in core areas of integration and identified areas of cooperation. In the Consolidated Text of the Treaty of the Southern African Development Community,³⁶ these are outlined in articles 12(2)(a)–(vi) and 21(3)(a)–(h), respectively, which provide an overlapping list of areas of core integration and cooperation, including trade, food security, land and agriculture, natural resources, environment, human development, science and technology, information and culture. Clearly, even though TK is not mentioned in the SADC Treaty, there is ample room to accommodate TK in secondary and other downstream cooperation instruments. Notably, SADC has

Area in Comparative Perspective (2019, Routledge) 177; JJ Osei-Tutu "IP in the African Union: Opportunity for new discourse?" in S Ragavan and A Vanni (eds) *Intellectual Property Law and Access to Medicines: TRIPS Agreement, Health and Pharmaceuticals* (2021, Routledge); N Ekandzi "The importance of traditional knowledge and traditional cultural expressions in AfCFTA" (9 September 2019) *AfronomicsLaw Blog*, available at: <<https://www.afronomicslaw.org/2019/09/09/the-importance-of-traditional-knowledge-and-traditional-cultural-expressions-in-the-afcfta/>> (last accessed 22 February 2022).

32 AfCFTA, above at note 29, art 19(1).

33 *Id.*, art 21.

34 The Arab Maghreb Union; the Common Market for Eastern and Southern Africa; the Community of Sahel-Saharan States; the East African Community; the Economic Community of Central African States; the Economic Community of West African States; the Intergovernmental Authority on Development; and the Southern African Development Community.

35 *Id.*, preamble to para 10.

36 As amended 1 August 1992.

a robust set of 27 protocols.³⁷ Some of them have phrases or words that directly or indirectly reference TK systems, such as cultural heritage and language,³⁸ as factors in African development and integration and, consequently, as instrumental to the advancement of SADC's objectives.³⁹

The most relevant SADC protocols include those on culture, information and sport; education and training; fisheries; forestry; health; science, technology and innovation; and trade and wildlife conservation. Scrutiny of the texts of these protocols affirms the role of TK in their specific subject matters. For example, article 2(h) of the 2008 Protocol on Science and Technology provides that one of its objectives is to "recognize, develop and promote the value of indigenous knowledge systems and technologies".⁴⁰ Even though the Protocol is oriented towards western scientific approaches, its recognition of TK systems within the matrix of science, technology and innovation (ST&I) is in tandem with a postmodern and progressive orientation. It also confirms the context for the potential inclusion and participation of TK systems and their custodians in next-generation technologies, other programmes and policy interventions relevant to ST&I for development.⁴¹ Second, article 7(4) of the 1999 Protocol on Wildlife Conservation and Enforcement requires that community-based wildlife management "integrate[s] principles, and techniques derived from traditional knowledge systems".

The Economic Community of West African States

ECOWAS was established in 1975 and has evolved under its revised Treaty of 1993 as a consolidated charter for 15 countries of West Africa.⁴² The region, which has mostly francophone state members but an anglophone majority population, is home to an estimated 350 million people. Like SADC and the EAC, its objectives and principles are anchored in both the AU and the AEC. Part of ECOWAS's mission is to improve living standards and expedite harmonized economic development on the principles of equality, solidarity, interdependence, cooperation and collective self-reliance.

Compared to the SADC and EAC founding instruments, the ECOWAS Treaty is detailed and complex in terms of its scope, coverage, institutions and governance structure.⁴³ Aside from spelling out core areas of policy harmonization in the preliminary articles,⁴⁴ the Treaty dedicates nine chapters, spanning articles 25 to 67, to detailing specific and categorized areas of development cooperation and integration. Like the SADC Treaty, there is no substantiation of TK, even though it is implicated to a variable degree in several articles, including food and agriculture;⁴⁵ industry, science and technology and energy;⁴⁶ environment and natural resources;⁴⁷ communication and tourism;⁴⁸ trade;⁴⁹ information; and social and cultural affairs.⁵⁰

37 SADC "SADC Protocols", available at: <<https://www.sadc.int/about-sadc/overview/sa-protocols/>> (last accessed 22 February 2022).

38 See for example the SADC Protocol on Culture, Information and Sport (14 August 2001), arts 11(e), 12 (3) and 17(e) (entered into force 7 January 2006).

39 SADC Treaty, art 5.

40 The eighth objective out of 16.

41 Eg see para 3 of the preamble to the SADC Science and Technology Protocol referring to programmes on sustainable and equitable economic growth, poverty eradication, the Regional Indicative Strategic Development Plan, AU declarations, NEPAD, the African Science and Technology Consolidated Plan of Action, etc.

42 Economic Community of West African States Treaty (as revised on 24 July 1993), available at: <<https://www.ecowas.int/wp-content/uploads/2015/01/Revised-treaty.pdf>> (last accessed 22 February 2022).

43 Two major subsidiaries of the body are the West African Economic and Monetary Union (open to eight francophone countries) as a common currency union, which is a counterbalance to the West African Monetary Zone pursued by the anglophone countries. This is indicative of the colonially routed schism that historically features in the ECOWAS dynamic.

44 ECOWAS Treaty, above at note 42, art 3(2)(a)–(o).

45 Id, art 25.

46 Id, arts 26–28.

47 Id, arts 29–31.

48 Id, arts 32–34.

49 Id, art 35.

50 Id, arts 60–66.

An important governance feature of ECOWAS is the use of technical commissions, which are parallel to the committee model under SADC. These commissions are specialist bodies mandated to provide detailed policy direction, potentially including specific accommodation of TK as an important site for economic development, coordination and policy harmonization.⁵¹ Notably, under the ECOWAS Treaty, eight technical commissions corresponding to above-identified areas of development cooperation and integration have been established.⁵² The inquiry over the level of accommodation and seriousness or lack thereof attached to TK in Africa is a matter that is better unravelled in subsidiary legal and administrative instruments and organs. For ECOWAS, the work of its technical commissions, such as those on food and agriculture, industry, science and technology, energy, environment and natural resources, social and cultural affairs, trade, and communication and tourism, are sources of insight.⁵³

References to TK in the ECOWAS Treaty, even if by implication, are not entirely lacking. For example, article 27 on science and technology refers to “proper application of science and technology” in specific fields.⁵⁴ It also refers to reduction of dependence on foreign technology and “special emphasis on indigenous and adapted technologies” in member states.⁵⁵ Finally, under science and technology, the Treaty encourages members to “carry out permanent exchange of information and documentation and establish community data networks and data banks”.⁵⁶ The other illustrations are captured under tourism, natural resources and cultural affairs.⁵⁷ These include the promotion of tourism products that showcase the natural and socio-cultural values of the region and optimal deployment of the region’s human resources in the field of tourism. Despite the “raw material-centric” focus of the provision on natural resources, the Treaty refers to use of “better knowledge” to assess the region’s natural resources potential.⁵⁸ It provides for the ECOWAS Cultural Framework Agreement and for the propagation and utilization of cultural industries, as well as for the learning and dissemination of the so-called West African language.⁵⁹

Like the SADC Treaty, the ECOWAS Treaty has a long list of protocols, but unlike SADC, ECOWAS is gradually moving away from the protocol model.⁶⁰ This is in part because of its detailed provisions on the areas of cooperation in specific chapters. It is also part of the organization’s unique administrative approach to now de-emphasize the use of protocols owing to the bureaucratic delays associated with their operationalization. Rather, ECOWAS uses regulations, directives and supplementary acts, or special subsidiary instruments to operationalize its mandate. Among others, two major instruments – the ECOWAS Policy on Science, Technology and Innovation (ECOPOST) of 2012 and the ECOWAS Cultural Framework Agreement⁶¹ – provide insight on the status of TK within ECOWAS.

ECOPOST is part of ECOWAS Vision 2020, enunciated in 2007, and the ECOWAS Protocol on Education and Training,⁶² as well as the ECOWAS Community Development Program. ECOPOST serves as a broad regional and national framework for strategies on ST&I in West Africa. As an overarching objective, ECOPOST aims to deploy ST&I to expedite sustainable regional economic

51 *Id.*, art 23.

52 *Id.*, art 22.

53 *Ibid.*

54 *Id.*, art 27(1)(b).

55 *Id.*, arts 27(1)(c) and 27(2)(c).

56 *Id.*, art 27(2)(e).

57 *Id.*, arts 34, 31 and 62.

58 *Id.*, arts 31(1) and 31(2)(a).

59 *Id.*, art 62(1)(b) and (c). This is in addition to recognition of the region’s official colonial languages of English, French and Portuguese.

60 The catalogue of ECOWAS supplementary instruments and protocols is available at: <<https://ecowas.int/ecowas-law/>> (last accessed 22 February 2022).

61 Pursuant to ECOWAS Protocol A/P1/7/87 (10 December 1999).

62 ECOWAS Protocol on Education and Training A/P3/1/03 (31 January 2003).

development coordination. Though ECOPOST adopts a “broadest sense” of science, the instrument has no overt accommodation for TK save the sandwiching of “local knowledge” (an undefined term) between reference to promotion of “technological culture and intellectual property”.⁶³ ECOPOST’s approach to ST&I is anchored on conventional scientific and technological development models, including promotion of centres of excellence, mobility of scientists, development of high-tech economies and projected investment of 1 per cent of GDP in conventional R&D pursuant to the ECOPOST Plan of Action. ECOPOST’s abridged definition designates science as “systemic knowledge in any field whatsoever applicable generally in the search for verifiable laws”.⁶⁴ Its summation of technology refers to it as “the nomenclature employed by science when it relates to products and processes regarding the human industry”.⁶⁵

The ECOWAS Cultural Framework Agreement

In 1987, ECOWAS member countries signed the ECOWAS Cultural Framework Agreement (CFA).⁶⁶ The agreement is an attempt to harness the intersections of culture and development for the pursuit of economic growth and social progress in the region. Generally, it aims to foster a sense of cultural identity within a unified community through cultural exchange and culture-inclusive collaboration in a range of fields, including education, training, science, technology, research, communication, cultural exchange, tourism, production and creativity among members.⁶⁷

Except for reference to “traditional craft technologies”, “traditional medicine and pharmacopeia” and “oral tradition and intensive use of local languages”, the CFA is typical of most of the instruments on African regional development.⁶⁸ Though the agreement has robust provisions on R&D, it makes no direct mention of TK systems.⁶⁹ Rather, it is biased towards both formal disciplinary and institutional agencies for science, technology, technicians and researchers and the processes of their validation via “universities”, “centres of excellence” and through the award of “science prizes”.⁷⁰ Ever since the CFA, along with other RECs, ECOWAS remains involved with initiatives on culture, including continuing conversation in regard to repatriation of cultural properties.⁷¹ Along with the framework agreement, these initiatives leave a wide gap on the mapping, conception and construction of TK’s potential for boosting economic development in the ECOWAS region and, certainly, Africa.

The East African Community

The precursor instruments that eventually culminated in the 1999 Treaty for the Establishment of the East African Community date to the colonial era.⁷² With the initial troika of Uganda, Kenya and Tanzania (the first signatory countries that gave life to the treaty in July 2000), the EAC, which has since expanded to a total membership of six countries, including Burundi, Rwanda and South Sudan, is a framework for cooperation in East Africa. Unlike SADC and ECOWAS, the results of the EAC’s coordination efforts are more evident in the progress made in areas such as a customs

63 Directive on Science, Technology and Innovation (STI) A/DIR1/06/12 (29 June 2012), art 2(e).

64 *Id.*, art 1.

65 *Ibid.*

66 Cultural Framework Agreement for the Economic Community of West African States (ECOWAS) A/P1/7/87 (19 July 1987).

67 *Id.*, arts 6, 7, 8, 9, 12 and 16.

68 *Id.*, arts 11(5), 11(8) and 6(10).

69 *Id.*, arts 7 and 8.

70 *Id.*, arts 8(7) and 8(8).

71 ECOWAS “A regional action plan for the return of African cultural property to their countries of origin” (2019), available at: <<https://www.ecowas.int/a-regional-action-plan-for-the-return-of-african-cultural-property-to-their-countries-of-origin/>> (last accessed 22 February 2022).

72 Treaty for the Establishment of the East African Community (30 November 1999, entered into force 7 July 2000), paras 2–3; LN Njenga “Legal status of the East African Community” (2018) 22/3 *RUDN Journal of Law* 370.

union, a common market, anticipated monetary union and an aspirational political federation. EAC governance is like SADC and ECOWAS in terms of objectives and a commitment to deepened integration via identified areas of cooperation.⁷³

The EAC Treaty is a complex document emphasizing economic policy coordination and deepened integration in virtually all sectors with notable recognition. Like the SADC and ECOWAS treaties, the EAC Treaty disperses responsibilities and authorities via its Summit, Council, Sectoral Council, Coordination Committee, Legislative Assembly, Secretariat, etc. These are sources of amplifying subsidiary decisions through directives, protocols, regulations, covenants, acts and recommendations, with flexibilities to fill gaps in the Treaty and respond to emerging priorities. While the details of these are outside the scope of this article, suffice to say that the gaps or emerging priorities could include TK systems and cognate matters. However, considering the cross-cutting nature of TK, of all the 19 substantive heads of cooperation, spanning chapters 11 to 27 of the Treaty, arguably about seven have palpable relevance to TK and associated terms.⁷⁴

Like the ECOWAS and SADC treaties, the EAC Treaty marginally recognizes TK systems as a substantive factor in African economic development and collaboration. Nonetheless, there are isolated areas of actual and potential reference to TK in specific chapters of the Treaty.⁷⁵ First, encouraging “the use and development of indigenous science and technologies” is provided under science and technology cooperation.⁷⁶ Second, elaborate provisions on cooperation over agriculture and food security make an isolated reference to “developing traditional irrigation systems”.⁷⁷ Third, the same is true of adoption of “community environmental programmes” under cooperation in environmental and natural resources.⁷⁸ Fourth, chapter 21 on cooperation in health, social and cultural activities provides for “promoting research and the development of traditional, alternative or herbal medicines” and “popularisation of indigenous foods”.⁷⁹ Specific to cultural cooperation is provision for “the promotion of cultural activities, including the fine arts, literature, music, the performing arts, and other artistic creations and the conservation, safeguarding, and development of the cultural heritage of Partner States, including historical materials and antiquities”.⁸⁰ It also includes “the development and promotion of indigenous languages, especially Kiswahili as a lingua franca”.⁸¹

Notable features of the RECs

Several features of the examined REC instruments are worth noting. First, in all three texts, areas of development coordination are not closed; there is administrative capacity and flexibility to evolve over time. Second, while these instruments failed to give prominence to TK systems and cognate concepts, there are areas where the nexus to those systems is obvious. Third, in terms of the administrative outlook of the RECs, even of the pan-African instruments, the core implementation organ is the Ministerial Committee or Council, with the Foreign Affairs Ministry or a ministry dedicated to a specific instrument or organization serving as the default ministry. Fourth, the organizational and operational architecture takes a political and diplomatic tenor, delegating details of development coordination relevant to TK to third-tier sectoral councils or specialist coordination committees. Fifth, the foregoing approach is important to support another feature of these instruments: they are positioned to ensure that Africa coordinates its positions in international negotiations. Sixth, while these instruments imply a weak foundation for TK systems, substantive insight on

73 EAC Treaty, id, art 5.

74 Id, caps 12, 16, 19, 20, 21 and 27.

75 Id, art 27 (referring to “co-operation in other fields”).

76 Id, art 103(1)(c).

77 Id, art 109(c).

78 Id, art 112(2)(l).

79 Id, arts 118(f) and 118(h) respectively.

80 Id, art 119(c).

81 Id, art 119(d).

the quality of accommodation for TK can be gleaned elsewhere from associated protocols, decisions, covenants and administrative instruments. Recognizing that this article is not exhaustive, based on the features of the instruments examined the following areas of palpable connection to TK are evident (in no particular order): ST&I, environment and natural resources, agriculture and food security, health, and social and cultural activities. The fourth part of this article identifies a potpourri of other relevant instruments and examines the extent to which they accommodate TK.

Miscellaneous instruments

The AU Charter for African Cultural Renaissance

As is evident in the ECOWAS CFA, the RECs have diverse subsidiary instruments with some degree of relevance to TK. Some of these are inspired by continent-wide cultural manifestos courtesy of the OAU and the AU. In their historical evolution, these include the 1969 Pan-African Cultural Manifesto, the 1976 Cultural Charter for Africa and the latter's successor instrument, the AU's 2006 Charter for African Cultural Renaissance.⁸² These foundational instruments map both continental and national cultural policies.

The AU Charter for African Cultural Renaissance builds on previous documents, consistent with the OAU's transformation to the AU and the vision of situating African economic and developmental aspirations in the context of globalization. Among other things, the Charter is an attempt to counterbalance the threat of globalization's cultural homogenization with Africa's rich cultural diversity. That effort is rooted in Africa's long-standing historical struggle for cultural decolonization and reclamation to overcome centuries of colonial suppression and devaluation. These sentiments are aptly articulated in one of the preambular proclamations, which recalls that:

“despite cultural domination which during the slave trade and the colonial era led to the depersonalization of part of African peoples, falsified their history, systematically disparaged and combated African values, and tried to replace progressively and officially their languages by that of the colonize[r], the African peoples were able to find in African culture the necessary strength for resistance and the liberation of the Continent.”⁸³

Like successor instruments, the Charter for African Cultural Renaissance does not directly situate TK systems as pivotal to African culture or positively affirm the symbiotic relationship between culture and TK. But it does contain some marked departures from earlier instruments. First, it offers an indirect definition of culture that implicitly interweaves it with an understanding of TK.⁸⁴ Second, the Charter locates TK in parity with conventional epistemic frames. One of its objectives is “[t]o promote in each country the popularization of science and technology including traditional knowledge systems as a condition for better understanding and preservation of cultural and natural heritage”.⁸⁵ Third, as one of the principles in the realization of its objectives, the Charter includes “strengthening the role of science and technology, including endogenous systems of knowledge, in the life of African peoples”.⁸⁶ Fourth, it vaguely refers to – while still failing to define – “traditional sources of culture”.⁸⁷

82 Charter for African Cultural Renaissance (ACR) (24 January 2006).

83 Id, preamble to para 6.

84 The third paragraph of the preamble affirms “[t]hat any human community is necessarily governed by rules and principles based on culture, and culture should be regarded as the set of distinctive linguistic, spiritual, material, intellectual and emotional features of the society or a social group, and that it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs”.

85 Charter for ACR, above at note 82, art 3(j).

86 Id, art 4(d).

87 Id, art 17.

The African Convention on Conservation of Nature and Natural Resources

The revised African Convention on Conservation of Nature and Natural Resources is a vital instrument for a coordinated continental approach to enhanced conservation, environmental protection and management, as well as sustainable use of natural resources.⁸⁸ The Convention recognizes Africa's generous endowment in natural resources across diverse ecosystems, not to mention the continent's richness in species diversity. It acknowledges these natural resources as an irreplaceable part of African heritage and the need to empower local communities' conservation efforts, including their participation in planning processes over the management of these resources. It endorses equitable benefit-sharing of biotechnologies and associated uses of genetic resources and TK of local communities. For the latter, it encourages measures to enhance their traditional and IP rights, including farmers' rights.

However, despite the recognition of the contributions and interests of local communities to natural resource conservation and sustainable environmental management, the Convention fails to identify TK and practices as a site for innovation and their crucial role in the attainment of the Convention's objectives. Rather, the Convention emphasizes the need for cooperation in "scientific and technological research" over the management of natural resources, without any regard to TK systems as an integral part of such research.⁸⁹ On a critical appraisal, the Convention denotes local communities merely as consumers of external science and technology research outcomes, encouraging the transfer of technologies that can be used locally by individuals, local communities and small enterprises.⁹⁰ Acceptable application of TK is premised on its scientific validity, with the Convention referring to the "scientifically based and sound traditional conservation, utilization and management" of natural resources.⁹¹

Science, technology and innovation policy instruments

There are other continental instruments relevant to TK, including instruments dealing with ST&I policy. Notable in this category is Africa's Science and Technology Consolidated Plan of Action.⁹² The CPA is a framework instrument for implementing the decisions on science and technology of heads of states and governments, ministerial organs, the AU Commission and NEPAD, in a consolidated form.⁹³ It is also aligned to the AU Agenda 2063 for economic transformation through science and technology.⁹⁴ The CPA captures five clusters, matching each with actionable targets for R&D and policy priority on science and technology. TK is captured under the "biodiversity, biotechnology, and indigenous knowledge" cluster. The CPA recognizes that Africa is rich in TK and associated technologies, which are relevant to solving developmental and environmental problems. It acknowledges that Indigenous knowledge and technologies are not adequately protected on the continent and have weak links with institutional R&D.⁹⁵ It links optimal uptake and harnessing of TK and technologies with paragraphs 140–41 of NEPAD.⁹⁶

In NEPAD, the AU recognizes the intersection of culture with TK, as well as "all other tradition-based innovations and creations", as an integral part of continental development aspirations.⁹⁷ In

88 African Convention on Conservation of Nature and Natural Resources (revised in Algiers in 1968), available at: <<https://bit.ly/2W3deTD>> (last accessed 22 February 2022).

89 Id, art 18.

90 Id, art 19.

91 Id, art 17.

92 (August 2005), available at: <<https://bit.ly/3yRGR8T>> (last accessed 22 February 2022).

93 Id at 5–6.

94 See the African Union Framework Document "Agenda 2063: The Africa We Want", available at: <<https://au.int/en/agenda2063/overview>> (last accessed 22 February 2022); see also Oguamanam "Transition", above at note 1.

95 See CPA, Programme 1.2 "Securing and using Africa's Indigenous knowledge base", above at note 92 at 17.

96 Ibid.

97 Ibid.

harmony with NEPAD, the CPA outlines two projects for the promotion of Indigenous knowledge and technologies. The first is the “Development of African Databank of Indigenous Knowledge and Technologies”.⁹⁸ Among other things, it relates to preparing detailed guidelines for the documenting, auditing and procuring of TK and technologies, as well as protocols for accessing and using them equitably, building capacity and developing skills and networks for strengthening the protection of Indigenous knowledge and technologies. The second is the “Promotion and Integration of Indigenous Knowledge and Practices in the Education Curriculum” through, among other things, revising the TK component of the existing curriculum, incorporation of international best practices for integration of TK into formal education and development of a continental framework or methodology for the integration of Indigenous knowledge into education and training.⁹⁹

As indicated, the CPA reflects the aspirations of NEPAD, the AU Agenda 2063 and the latter’s emphasis on four thematic areas (agriculture, clean energy, education and health) of ST&I-based R&D for sustainable development in Africa. NEPAD is the development arm of the African Union Commission within its Department of Human Resources, Science and Technology. Courtesy of the Bureau of African Ministers in Charge of Science and Technology, the AU reviewed the CPA framework preparatory to launching the new and phased continental Science, Technology and Innovation Strategy for Africa 2024 (STISA-2024).¹⁰⁰ STISA-2024 is integrated with Agenda 2063 and aligned with the AU orientation toward accountability and programme impact assessment.¹⁰¹ It resulted from an elaborate consultative process involving major institutional stakeholders, international partners, RECs, the public and private sectors, educational and research entities and so on. Notable is the participation of specialist ST&I entities and stakeholders, including the African Observatory of Science and Technology Innovation, the African Academy of Sciences, the Pan-African Quality Assurance and Accreditation Framework, the African Centre for Disease Control and the African Scientific Research and Innovation Council.¹⁰² Backed by enabling instruments, these are representative and influential institutional and disciplinary agencies in the making of STISA as the core road map for the transition to an innovation-driven society and knowledge economy in Africa. Although reference to TK is not totally missing in STISA’s thematic detail,¹⁰³ the institutional architecture for the making and implementation of STISA-2024 neither reckons with TK nor with its custodians as relevant to African ST&I policy.¹⁰⁴ On the basis of this lacuna, I have noted elsewhere that:

“Africa’s approach to [ST&I] as captured from the CPA to STISA-2024 essentially follows a linear model. Rather than an inclusive orientation that actively integrates African indigenous knowledge systems, the latter receive a tangential mention. ... [T]here is little reference or inclusion of the interests and stakeholders on the side of African indigenous knowledge systems ... [and w]hat is evident is the lack of concrete investment in mobilization; in courting representation; in institutional building and active integration of those knowledge systems as part of [an ST&I] policy framework.”¹⁰⁵

98 Id at 18 (“Project 1”).

99 Id at 18–19 (“Project 2”).

100 Available at: <<https://bit.ly/3AIF0sj>> (last accessed 22 February 2022).

101 Oguamanam “Transition”, above at note 1.

102 Ibid.

103 Priority 2 of STISA-2024 (prevention and disease control) recognizes the development of research capacity in the areas of traditional medicine and the socio-cultural ramifications of health for alleviation of the burden of disease in Africa.

104 Oguamanam “From science, technology and innovation” and Oguamanam “Transition”, both above at note 1.

105 C Oguamanam “Transition to the Fourth Industrial Revolution: Africa’s Science, Technology and Innovation Framework and Indigenous Knowledge Systems” (2023) 15 *African Journal of Legal Studies* 1 at 23, available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4205101> (last accessed 19 January 2023).

The following section turns attention to the intersection of TK with IP in selected African continental and sub-regional instruments of economic cooperation.

Instruments at the intersection of Indigenous knowledge and intellectual property

Indigenous knowledge has a fraught relationship with IP, which is the conventional mechanism for knowledge protection and reward in the classical market economic framework. The IP regime – rooted as it is in colonial relations of power, the capitalist-centred worldview of innovation and the privileging of “western science” and its methods – is limited in its ability to accommodate African TK systems and their cultural contexts.¹⁰⁶ African epistemic and civilizational identity feeds off a holistic worldview of phenomena, a collaborative dynamic,¹⁰⁷ and a communal ethos of knowledge production via a complexly layered repertoire of TK systems, all of which are outside the orientation of conventional IP rights.

Through a mishmash of specialist instruments of varying legal status and jurisdictional scope, Africa engages IP with a combination of ironic reluctance and exigency born of necessity. Evident in that tension is the parallel projection of TK systems from the margins onto a sui generis knowledge governance model alongside Africa’s continued participation in conventional IP processes globally.¹⁰⁸ This is symbolic in the creation of the Pan-African Intellectual Property Organisation (which is yet to take off) as a continental institution for the pursuit of “intellectual property standards that reflect the needs of the African Union, its Member States and RECs, ARIPO and OAPI”.¹⁰⁹

The African Regional Intellectual Property Organisation and the Organisation Africaine de la Propriété Intellectuelle

ARIPO and OAPI are two specialist African sub-regional IP coordination bodies. Established by the Lusaka Agreement of 1976 (as amended), ARIPO has mostly anglophone African countries in its membership,¹¹⁰ while OAPI, established by the Bangui Agreement of 1977 (as amended), is composed of francophone African countries.¹¹¹ The two organizations are designed to advance harmonized capacity for development of competence in IP law and administration, with a special interest in tackling evolving needs and emergent IP and related issues in their respective regions and in their members’ national contexts.¹¹²

In their operational experiences and activities as institutional policy-influencing and capacity-development agencies, ARIPO and OAPI continue to deal with an inevitable dilemma. On the one hand is their wholehearted embrace of conventional IP pursuant to external and homogenizing pressures from relevant international organizations. On the other hand is their striving for strategic and common African positions on emerging IP-related issues that account for African needs. The

106 I Mgbeoji “Patents and traditional knowledge of the uses of plants: Is a communal patent regime part of the solution to the scourge of bio piracy” (2001) 9/1 *Indiana Journal of Global Legal Studies* 163; JJ Osei-Tutu “A sui generis regime for traditional knowledge: The cultural divide in intellectual property law” (2011) 15/1 *Marquette Intellectual Property Review* 147; V Shrivastav “Protection of traditional knowledge within existing framework of intellectual property rights: Defensive and positive approach” (2014) SSRN, available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2463017> (last accessed 22 February 2022).

107 J de Beer, C Armstrong, C Oguamanam and T Schonwetter (eds) *Innovation and Intellectual Property: Collaborative Dynamics in Africa* (2014, UCT Press).

108 Oguamanam “Understanding Africa”, above at note 2.

109 Statute of the Pan-African Intellectual Property Organization (31 January 2016), art 3.

110 Agreement on the Creation of the African Regional Intellectual Property Organization (last amended 27 November 1996). Of the 19 ARIPO members, non-anglophones include Mozambique (Portuguese), Sao Tome & Principe (Portuguese) and Somalia (Somali, Arabic, etc.).

111 2 March 1977, entered into force 8 February 1988, as amended 23 February 1999.

112 See generally the preambles to the two instruments.

jury is still out as to how effectively these two organizations have fared with the latter expectation and indeed on how well they have been able to balance these competing interests. Recently, ARIPO and OAPI have attuned themselves towards operationally synergizing their mandates by entering into cooperation agreements.¹¹³ Meanwhile, it is notable for our present purpose that ARIPO member states took a seminal step in the promotion and protection of TK through the adoption in 2010 of the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore, explored later.

The Pan-African Intellectual Property Organization (PAIPO)

In 2016, the AU took a bold step in establishing PAIPO, marking the introduction of a continent-wide strategy on IP coordination against the backdrop of 40 years of OAPI and ARIPO's sub-regional focus.¹¹⁴ The birth of PAIPO was clouded with concern about a replication of IP bureaucracy and reservations over Africa's ratcheting up of IP protection under the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).¹¹⁵ While there is a credible basis for such concerns, a critical review of the PAIPO Statute shows a deliberate, broad-based approach and recognition of the cross-cutting nature of IP for advancing the vision of Africa as a knowledge-based and innovative society and for harnessing the continent's intellectual assets.

Alongside the above sentiments, PAIPO associates IP with sustainable development, the creative and cultural industries and the promotion of the cultural and socio-economic development of Africa and the WIPO Development Agenda.¹¹⁶ The PAIPO Statute notes that "Indigenous Knowledge in the continent has become a vital source of wealth while at the same time local communities have become increasingly marginalized in the use, appropriation and commercialization of their knowledge and cultural resources."¹¹⁷ In addition to Indigenous knowledge, PAIPO puts a spotlight on advancing African policy direction on cross-cutting issues at the intersection of IP and TK, including "genetic resources, and associated TK, geographical indications and expressions of folklore among others".¹¹⁸ Further areas of interest of PAIPO include "the establishment of continental databases on genetic resources, traditional knowledge and traditional cultural expressions and folklore, matters pertaining and arising from the CBD and emerging topics on the field of intellectual property".¹¹⁹

Since it is not yet operational, there is no basis for a credible assessment of PAIPO, save in the realm of conjecture or projection. However, PAIPO's statute, perhaps more than the inaugural ARIPO and OAPI instruments, lays the foundation for manifestly recognizing Indigenous knowledge as constitutive of a significant site for African socio-cultural, economic and development cooperation.

AfCFTA's Intellectual Property Protocol

Given the pre-eminent status of AfCFTA, its anticipated protocol on IP provides an important opportunity for harmonization of IP across the continent in readiness for the coming into effect of PAIPO. As a result of the COVID-19 global pandemic, the January 2020 deadline for submission

113 Cooperation Agreement between the African Intellectual Property Organization (OAPI) and the African Regional Intellectual Property Organization (9 February 2017); Cooperation Agreement between the African Intellectual Property Organization and the African Regional Industrial Property Organization (16 September 2005).

114 See PAIPO Statute, above at note 109.

115 JJ Osei-Tutu "Prioritizing human development in African intellectual property law" (2016) 8/1 *WIPO Journal of Intellectual Property* 23.

116 PAIPO Statute, above at note 109, art 4(p) and preambles to paras 10 and 14.

117 Id, preamble to para 15.

118 Id, arts 13(2)(d) and 1(b).

119 Id, arts 4(i) and 4(n).

of the first draft of the IP protocol could not be met, thereby opening the opportunity for a more consultative, inclusive and transparent process, which was not the case with the negotiation of the protocol.¹²⁰ In the meantime, analysts continue to weigh in on the historic opportunity that beckons, courtesy of the anticipated protocol.¹²¹ Not only have they emphasized the need for a process based on transparency, consultation and openness, they have underscored the necessity for an IP protocol that clarifies and outlines fundamental African priorities that take into account the socio-economic context for innovation in Africa, especially the collaborative, communal and informal nature of knowledge production.¹²² Further, with regard to TK, the AfCFTA IP protocol is an opportunity to shape continental IP strategy that recognizes and positions Africa as a net exporter of TK alongside being a net importer of most other IP.¹²³ There is an opportunity to place the continent on a path to optimize development-oriented aspirations, through internationally sanctioned flexibilities which have eluded the continent. Naturally, TK is pivotal in all these calculations regarding IP and knowledge governance renaissance on the continent. Finally, and perhaps most importantly, the AfCFTA protocol is expected to lay the groundwork for synergizing the fragmented IP architecture in Africa and to facilitate the eventual launch of PAIPO. According to one analysis:

“Currently, Africa’s IP regulatory framework is fragmented. As a result, the AfCFTA agreement regarding IP must seek to overcome challenges on three levels: multiple sub-regional IP organizations, the proliferation of IP matters in RECs and misalignment with the continent’s overall development agenda.”¹²⁴

There are great expectations from the AfCFTA IP protocol as a milestone opportunity for harmonizing and energizing Africa’s fractured IP legal and policy architecture and for driving African ST&I strategies. It remains to be seen how much traction TK systems could garner in this protocol. Given the increasing pre-eminence of TK, it may not be out of place to envision a dedicated AfCFTA-inspired protocol specifically on TK. To its credit, ARIPO has the first dedicated African regional protocol, the Swakopmund Protocol, focusing on TK. That protocol constitutes a source of insight on how TK can be enhanced in African socio-cultural and economic development cooperation.

The Swakopmund Protocol

The Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore of 2010 is dedicated to the elaboration and administration of rights to TK and expressions of folklore (also known as traditional cultural expressions or TCEs) under a harmonized regional approach and a partnership framework between ARIPO and the national competent authorities of each member state.¹²⁵ Under the Protocol, ARIPO and national competent authorities are vested with responsibility for awareness-raising, dispute resolution over concurrent or transboundary claims of local communities of more than one member state over TK, and TCEs. The text demonstrates an understanding of these subject matters and their intersection with contemporary issues, including those in which IP rights are implicated, such as TK associated with genetic resources.¹²⁶ It clearly situates

120 W Wedland “Multilateral matters #7” (7 October 2020) *Info Justice*, available at: <<https://infojustice.org/archives/42674>> (last accessed 5 January 2023), focuses on AfCFTA’s IP protocol and provides annotations on genetic resources, TK and cultural expressions at the ongoing negotiations.

121 Ncube et al “A principled approach”, above at note 31; Osei-Tutu “IP in the African Union”, above at note 31.

122 Ibid; see also de Beer et al (eds) *Innovation and Intellectual Property*, above at note 107.

123 Ibid.

124 Ncube et al “A principled approach”, above at note 31 at 179.

125 Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore within the Framework of the African Regional Intellectual Property Organization (ARIPO) (9 August 2010, entered into force 11 May 2015).

126 Id, sec 15.

TK in innovation, creativity and distinctive intellectual and creative experiences and practices of the local communities, spanning environmental and biological resources conservation, cultural heritage and identity, spiritual values and sacralization, food security, sustainable agriculture, science and technology transfer, etc.

The Swakopmund Protocol recognizes not only the role of community customary laws and protocols in the protection of TK and TCEs but also “that legal protection must be tailored to the specific characteristics of traditional knowledge and expressions of folklore”.¹²⁷ This is an indirect reference to the sui generis character of TK and expressions of folklore and an attempt toward their protection. Yet the text of the protocol evinces a balancing of elements or aspects of the formalism of IP, such as the scope, registration, transfer and compulsory licensing of rights to TK, alongside disavowal of formality regarding protection of expressions of folklore.¹²⁸ It is also unequivocal over the recognition of customary laws and practices of communities relevant to knowledge protection. The Protocol lists rights owed to TK holders as well as infractions from which TK and TCEs ought to be protected. The latter category includes all forms of misappropriation and unlawful exploitation. The instrument underscores the communal character of the production of TK and expressions of folklore and the idea of fair and equitable sharing of the benefits of commercial uses of them. It provides for the duration of these rights, contexts for their limitations and application of exemptions, in addition to the processes for the transfer and acquisition of rights in TK and expressions of folklore.

The Protocol’s definition of TK and expressions of folklore takes an open-ended form. It is an attempt to capture a holistic outlook in African TK systems, where it is self-evidently implausible to wrap the protection of TK and TCEs within the conventional IP system. Section 2.1 defines TK as:

“Any knowledge originating from a local or traditional community that is the result of intellectual activity and insight in a traditional context, including know-how, skills, *innovations*, practices and learning, where the knowledge is embodied in the traditional lifestyle of a community, or contained in the codified knowledge systems passed on from one generation to another. The term shall *not be limited to a specific technical field*, and may include *agricultural, environmental or medical knowledge, and knowledge associated with genetic resources.*” (emphasis added)

The same section defines expressions of folklore as manifestations of tangible and intangible aspects of TK and TCEs across a range of media: verbal (including stories, legends, poetry, riddles, words, signs, names and symbols), musical (including songs and instrumental music), movement (including dances, plays, rituals and performative genres) and tangible (including productions and manifestations of art via drawings, designs, paintings, carvings, sculptures, pottery, mosaic, woodwork, jewellery, basketry, needlework, textiles, glassware, carpets, costumes, musical instruments and architectural forms).¹²⁹

The African Model Law

In 2000, a decade before ARIPO’s Swakopmund Protocol, the then-OAU endorsed the African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources (AML). By intention and objective, the AML does not have the status of a treaty and is not a TK instrument. However, its focus on farmers, breeders and local communities in the context of biological resources implicates substantive sites for TK production by African Indigenous and local communities, especially farmers. Indigenous small-holder farming practices constitute part of community-based conservation and sustainable livelihood, supplying approximately 90 per cent of the continent’s food and feeding over one billion

127 Id, preamble to para 15.

128 Id, sec 17.1.

129 Id, secs 2.1(i)–(iv).

people.¹³⁰ The AML is an interventionist instrument articulating Africa's common policy response amid conflicting international pressures.

Under the TRIPS Agreement, countries are required to extend IP to life forms, including genetic resources, seeds, etc.¹³¹ Similarly, pursuant to the International Treaty for the Protection of New Varieties of Plants (UPOV), the proprietary rights of plant breeders over seeds are reinforced above the traditional practice of farmers to save and freely use farm-saved seeds.¹³² The TRIPS Agreement further strengthened the UPOV model, opening genetic resources to private or corporate proprietary control.

The UPOV and TRIPS Agreement orientations raise ethical reservations over the privatization of life forms and of communally held knowledge and resources, in ways that stoke biopiracy. That approach is perceived to conflict with the CBD. "The CBD had not only recognized and institutionalized Indigenous knowledge, but has subsequently also called for the same to be valued, given the same respect and considered as useful and necessary as other forms of knowledge."¹³³ The AML aligns African responses to that approach and provides for the protection of the rights of traditional African farmers and Indigenous communities in conservation and agricultural contexts, which are the heart of TK. It elaborates preferred approaches to accessing African genetic resources, the concept of prior informed consent, farmers' rights, equitable access and benefit-sharing, and more empowered Indigenous and local communities. Thus it draws a policy road map for African countries to effectively participate in and benefit from emergent biotechnologies and the bioeconomy.

There was over a decade between the AML and the CBD's Nagoya Protocol, which established a global regime for access and benefit-sharing over genetic resources and associated TK in the same year that the Swakopmund Protocol was signed. Based on their proximity in time, the Swakopmund and Nagoya Protocols are more up to date in terms of language than the AML. However, the impact and influence of the AML in shaping the African continental response to the perceived conflict between the TRIPS Agreement and the CBD is not lost. When the AU embarked on adopting a continentally coordinated approach to implementation of the Nagoya Protocol, it relied on the AML as a starting point by commissioning a study to identify and analyse any gaps in law and technology at the international level relating to conservation of biodiversity and access and benefit-sharing of genetic resources that were not pre-empted in the AML.¹³⁴ Despite this fact, the AML was the foundation for the 2015 African Union Strategic Guidelines for Coordinated Implementation of the Nagoya Protocol on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising from their Utilization.¹³⁵ Therefore, the AML has become an important quasi-legal policy instrument, shaping African participation in various fora such as the WIPO-IGC and WIPO Committee processes and for understanding the status of TK in the context of African development coordination and emerging international legal and technological progress on the subject. Regrettably, however, many policy somersaults at national and regional levels on the continent have tended to undercut the ideals espoused in the AML.¹³⁶

130 P Munyi et al "A gap analysis report on the African Model Law on the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources" (February 2012) *ABS-Initiative* at 10, available at: <http://www.abs-initiative.info/uploads/media/GAP_Analysis_and_Revison_African_Model_Law_FINAL_2902_01.pdf> (last accessed 22 February 2022).

131 Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization (15 April 1994, entered into force 1 January 1995), at art 27.

132 International Treaty for the Protection of New Varieties of Plants (2 December 1961, as amended 19 March 1991).

133 P Munyi et al "Gap analysis report", above at note 130 at 11.

134 *Ibid.*

135 Available at: <http://www.abs-initiative.info/fileadmin/media/Knowledge_Center/Pulications/African_Union_Guidelines/AU_Strategic_Guidelines_On_ABS_-_20150215.pdf> (last accessed 22 February 2022).

136 The impact of the AML appears to be threatened by policy reversals especially regarding farmers' and plant breeders' rights. For an insightful perspective, see T Adebola "Access and benefit sharing, farmers' rights and plant breeders'

Conclusion

The inquiry over how and the extent to which TK is entrenched as a factor in Africa's socio-economic and development solidarity has required an all-encompassing analysis for many reasons. Those reasons reflect a combination of the approach this article has taken as well as its findings and the justification for the following concluding observations. First, TK is a fundamentally cross-cutting and multidisciplinary subject matter with no clear contours. As a result, it is best explored from the convoluted regime complex in which it is implicated in the continent's constitutive instruments of socio-economic, development and political solidarity. This is the case notwithstanding Africa's proactive approach to the promotion of TK at international fora and the unquestionable presumption over the status of TK as part of the continent's factor endowment in the knowledge economy. It is not clear whether the mismatch at global and African regional levels in the ways African countries express their interest in TK is a factor of international constraints, lack of political will or a legacy of colonial disdain towards TK and its custodians.

Second, it is hardly surprising that only a handful of legal and policy instruments of African continental and regional economic cooperation make direct, albeit weak, references to TK. Third, and as a consequence of this, substantive provisions or accommodation of TK are unveiled at more detailed levels of subsidiary and tertiary legal and administrative instruments, including protocols, regulations, directives, decisions, covenants, statutes, supplementary acts and such like, which are associated with constitutive continental, REC and other stand-alone specialist instruments. Fourth, specific subject areas of socio-economic solidarity, cooperation and integration in which knowledge systems are implicated to varying degrees have been identified. Without being exhaustive, these areas include food, agriculture, culture, land, forestry, livestock, fisheries, plant and animal production, natural resources, health and hygiene, education, environmental management and conservation, tourism, trade, industry through institutional building, training and exchange of information, and research and development.

Fifth, and deserving of special attention, is the progressive association of Indigenous knowledge with ST&I, even though such an association is not evidently pronounced. Rather, it is hinted at across core instruments of African socio-economic cooperation and solidarity. This approach to TK reflects a postmodern orientation.¹³⁷ It has ramifications for both TK's real and potential significance for inclusive wealth creation now reified through contemporary convergences in ST&I and the melding of conventional, albeit elusive, epistemic boundaries. This new reality compels a more deliberate continental outlook on Indigenous knowledge systems. Such a response is required to accomplish a move away from the current traction around TK to ensure that it is truly recognized as a substantive aspect of Africa's ST&I strategy necessary to (re)position the continent as a serious and equitable stakeholder in the new knowledge economy and dynamics of the 4IR.

Conflicts of interest. None.

rights: Reflections on the African Model Law" (2019) 9/1 *Queen Mary Journal of Intellectual Property* 105; C Oguamanam "Breeding apples for oranges: Africa's misplaced priority over plant breeders' rights" (2015) 18/5 *The Journal of World Intellectual Property* 165.

137 Oguamanam "Pressuring 'suspect orthodoxy'", above at note 9; F Wilmer "Narratives of resistance: Postmodernism and Indigenous world views" (1996) 3/2 *Gender, Race & Class* 35; DGJ Sefa "Re-thinking the role of Indigenous knowledge in the academy" (2010) 1/2 *International Journal of Inclusive Education* 111.