Transboundary knowledge and regional cooperation in the protection of traditional knowledge in Kenya

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Introduction

In 2016, the 'Protection of Traditional Knowledge and Cultural Expressions Act' (hereafter, 'the Act') was passed in Kenya.[1] The Act aims 'to provide a framework for the protection and promotion of traditional knowledge and cultural expressions' in Kenya, giving effect to articles 11, 40 and 69(1)(c) of the revised Constitution of 2010.[2]

The question of whether and how to provide sui generis intellectual property (IP) protection for traditional knowledge (TK) and traditional cultural expressions (TCEs) has been controversial. In this article, we will not revisit questions about whether traditional knowledge[3] deserves sui generis IP protection, or the merits and methods of developing an international legal instrument to do so. Instead, we consider a few of the questions that arise when IP protection of TK becomes a legal reality at the national level, for example under the Kenya Protection of Traditional Knowledge and Cultural Expressions Act of 2016.

Most of the commentary on the Act to date has focused on provisions for implementation at the national level.[4] It is also very important to consider provisions for transboundary TK and cross-border cooperation because much TK is shared across national boundaries. The shared nature of TK is very evident in Africa, where nineteenth-century colonial administrations negotiated many borders without reference to local settlement patterns. Rights in TK are highly likely to be infringed by third parties across national borders, not just through misappropriation by large multinationals in the global North but also, as African industry grows, within the

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This article

- In 2016, the 'Protection of Traditional Knowledge and Cultural Expressions Act' (hereafter, 'the Act') was passed in Kenya. The Act aims to 'to provide a framework for the protection and promotion of traditional knowledge and cultural expressions' in Kenya.
- Much of what is defined as Traditional Knowledge (TK) in legislation such as this is shared across national boundaries, and infringements of rights in TK are likely to take place across national borders too. However, provisions for protection of rights in TK differ widely between states in the absence of an international standard-setting instrument in this area. The lack of a strong regional mechanism in Africa for cross-border cooperation on TK creates opportunities for conflict over shared transboundary TK, reduces opportunities for addressing cross-border infringement and reduces regional negotiating power on third-party licensing.
- This article will analyse provisions in the Act for protection of transboundary traditional knowledge and cultural expressions (collectively, TK) and for cross-border cooperation at a regional level. This analysis may inform the further development of the Act and associated legislation or regulations, and suggest ways of developing stronger regional mechanisms for cross-border cooperation on the protection of TK.

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1 Protection of Traditional Knowledge and Cultural Expressions Act (no. 33, 2016). It was assented to 31 August 2016 and entered into force on 21 September 2016. Hereafter, the Act.

2 The Constitution of Kenya (2010).

3 TK and TCEs are somewhat confusingly also collectively referred to as TK, as in this article; for our purposes the differences between TK and TCEs are not significant.

4 See V. Nzomo, 'Kenya's Protection of Traditional Knowledge and Cultural Expressions Act No. 33 of 2016 Comes into Force', IP Kenya Blog, 23 September 2016, and 'Comments on the Protection of Traditional Knowledge and Traditional Cultural Expressions Bill, 2015', IP Kenya Blog, 16 December 2015, accessed at https://ipkenya.wordpress.com/. On an earlier version of the Bill, see E. Nwauche, 'The Swakopmund Protocol and the Communal Ownership and Control of Expressions of Folklore in Africa' (2014) 17 *Journal of World Intellectual Property* 5–6 191–201.

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region. Many African states have passed, or are considering, TK legislation,[5] but their laws are very diverse in the absence of an international standard-setting instrument in this area. There is also no strong regional mechanism in Africa for cross-border cooperation on registration and enforcement of rights in TK, or indeed on IP in general.

This article analyses provisions for protection of transboundary (shared) TK and cross-border cooperation in the Act, especially at a regional level. This analysis may inform the further development of the Act and associated legislation or regulations, and highlight some ways of developing stronger regional mechanisms for cross-border cooperation on the protection of TK.

The international context

Conventionally, all IP rights are territorial, as the nature of protection is defined by national law and the scope of protection is limited to the boundaries of the states that grant it. This generally means that only the law of the country for which protection is sought (lex loci protectionis) applies when determining, for example, what IP rights exist, whether they have been infringed and what remedies exist.[6] Because many IP actions have a transnational dimension,[7] however, a system of multilateral agreements (such as the Paris and Berne Conventions) has been negotiated. These agreements, which generally only cover conventional IP and not TK, have achieved a certain degree of uniformity between states by requiring domestic IP laws to make provision for substantive minimum rights. Some degree of cross-border protection is achieved by requiring provision for national treatment, where foreign IP rightholders are given the same protection as citizens of a country.[8]

One of the main attractions of negotiating the TRIPS agreement (1994)[9] under the World Trade Organization (WTO) was that it offered for the first time a multilateral dispute resolution mechanism for IP-related issues.[10] So far, this mechanism has primarily been used by the United States, Canada, the European Union and Australia in disputes among themselves, rather than in disputes with or between developing states.[11]

TRIPS does not confer any specific IP protection on TK as such, and there has been some debate as to whether it can be regarded as intellectual property at all under TRIPS.[12] In the late 1990s, TK briefly became a mainstream negotiating issue in the TRIPS negotiations.[13] At this time, Dutfield described the role of TK within the TRIPS negotiations as:

> an issue formulated and promoted by NGOs, subsequently adopted by trade negotiators, and then introduced into a highly unpromising forum for achieving solutions on TK, yet the most effective forum for the pursuit of a rather different agenda: that of justifying decelerated compliance with TRIPS [by some developing states] and perhaps even rolling back the strong IPRs it requires WTO members to provide.[14]

Partly as a sidelining tactic, the discussion on IP protection for TK was shifted from the WTO to the World Intellectual Property Organization (WIPO) around the time of the Doha Declaration in 2001,[15] although the issue still comes up in TRIPS negotiations around articles 27.3(b) and 29bis.[16]

5 For example, Zambia, The Protection of Traditional Knowledge, Genetic Resources and Expressions of Folklore Act (no. 16 of 2016); South Africa, 'Protection, Promotion, Development and Management of Indigenous Knowledge Systems Bill' (B6-2016).

6 On this complex issue see A. Peukert, 'Territoriality and Extraterritoriality in Intellectual Property Law', in G. Handl, J. Zekoll and P. Zumbansen (eds), *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (Brill Leiden/Boston, 2012).

7 L. Bently and B. Sherman, *Intellectual Property Law* (4th edn, Oxford University Press Oxford, 2014) 1227.

8 In recent years, with the emergence of multinational companies and digital commerce, extraterritorial application of IP laws has become more common and the principle of territoriality itself has been criticized as both inadequate to describe how the current system works, and ripe for reform. See, for example, G. Dinwoodie, 'Developing a private international intellectual property law: the demise of territoriality?' *William & Mary Law Review* 51 (2009) 711.

9 Trade Related Aspects of Intellectual Property agreement 1869 UNTS. 299, 33 ILM 1197 (1994) (hereafter, TRIPS).

10 M. Kennedy, *WTO Dispute Settlement and the TRIPS Agreement* (Cambridge University Press Cambridge, 2016).

11 Ibid., p.45.

12 C. Oguamanam, *Intellectual Property in Global Governance: a development question* (Routledge Abingdon, 2012); A. Ansong, 'Is Traditional Knowledge Intellectual Property?' *GIMPA Law Review* 1 (2014) 89–108.

13 WTO, Report by the Director-General, 'Report on Issues Related to the Extension of the Protection of Geographical Indications Provided for in Article 23 of the TRIPS Agreement to Products other than Wines and Spirits and those Related to the Relationship between the TRIPS Agreement and the Convention on Biological Diversity', 21 April 2011, WT/GC/W/633.

14 G. Dutfield, 'TRIPS-related Aspects of Traditional Knowledge' (2001) *Case Western Reserve Journal of International Law* 33 238.

15 WTO, Ministerial declaration, WT/MIN(01)/DEC/1, 20.11.2001 (hereafter, Doha Declaration).

16 See, for example, WTO Director-General, 'Report on Issues Related to the Extension of the Protection of Geographical Indications Provided for in Article 23 of the TRIPS Agreement to Products other than Wines and Spirits and those Related to the Relationship between the TRIPS Agreement and the Convention on Biological Diversity', 21 April 2011, WT/GC/W/633.

At WIPO, in spite of some successes in the area of related rights,[17] member states have not yet been able to reach agreement on an international instrument that sets minimum standards or normative guidelines for protection of TK. The Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) was tasked to develop an international instrument for protecting IP rights associated with genetic resources (GRs), TK and TCEs.

Significant distance still remains between the positions of the negotiating parties in WIPO's IGC.[18] Viewed in historical perspective, the differences between member states' positions cannot be explained only in terms of the specific character of TK. They are linked to differing national interests in trade and commerce. IP rights regimes have expanded in many ways in the last few decades in areas that have benefited the global North; many of these states only sought to be part of international agreements on IP as these became economically advantageous to them.[19] At the same time, for developing states, TK is not just part of a negotiating strategy in trade forums on the international level. Promulgating national sui generis laws for TK can be part of a populist (or even nationalist) development discourse highlighting the value of reclaiming 'national' or 'indigenous' assets and benefiting communities at the national level. It also holds out possibility of generating benefits for state agencies and local commercial enterprises, for example through compulsory licensing and state ownership of TK.[20]

Other international instruments related to the protection of TK

Significant attention has been paid to the question of TK (at least in a narrower sense of knowledge associated with biogenetic resources) within the UN Convention on Biological Diversity (CBD).[21] This forum provided developing states with a negotiating toehold on the issue internationally as it acknowledged the value of TK and the need for benefit sharing.[22] The CBD's Nagoya Protocol (2014),[23] now ratified by nearly 80 states, requires that when GRs and associated TK are accessed and used by third parties, fair and equitable access and benefit sharing (ABS) agreements have to be entered into with relevant communities (or states parties) on mutually agreed terms.[24] While the Nagoya Protocol is not an agreement about IP rights, and only covers access to and use of TK associated with GRs (the Protocol does not refer to TCEs), it provides ways of establishing enforceable contracts between providers and users of these resources, even across national borders. To this end, article 11 calls for transboundary cooperation on the protection of TK shared across national borders.

The case for protecting IP rights in TK at the international level has been further strengthened because of the increased attention paid to issues of cultural rights, social justice and misappropriation of culture in various international forums. For example, article 11 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP, 2007)[25] states that indigenous peoples have the right to 'maintain, protect and develop' their cultural expressions. States shall provide mechanisms for redress in regard to 'cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs'. The 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, which acknowledges the rights of communities to manage and benefit from the practice of their intangible heritage (broadly contiguous with TK in the general sense), and encourages states to protect these rights using intellectual property law, among other means.[26] Although it was initially promoted at

17 The WIPO Performances and Phonograms Treaty (WPPT, 1996) and the recently concluded Beijing Treaty on Audiovisual Performances (2012) do provide some protection to performers of TCEs.

18 See for example WIPO IGC, 'The Protection of Traditional Knowledge: Draft Articles', Thirty-First Session, Geneva, 19–23 September 2016, Document WIPO/GRTKF/IC/31/4, Annex.

19 G. Dutfield and U. Suthersanen, 'Global Intellectual Property Law and Policy' (2010) I *The Global Community Yearbook of International Law & Jurisprudence* 12.

20 For a commentary on Asian trends, see C. Antons, 'Asian Borderlands and the Legal Protection of Traditional Knowledge and Traditional Cultural Expressions' (2013) 47 *Modern Asian Studies* 4 1403-33; C. Antons *Traditional Knowledge, Traditional Cultural Expressions, and Intellectual Property Law in the Asia-Pacific Region* (Kluwer Alphen aan den Rijn, 2009).

21 1760 UNTS 79.

22 Doha Declaration, 19.

23 Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (2010), UNEP/CBD/COP/DEC/X/1 of 29 October 2010.

24 Nagoya Protocol, article 5.

25 UN General Assembly Resolution 61/295.

26 Operational Directives for the implementation of the Convention for the Safeguarding of the Intangible Heritage (2016) 104.

the international level by non-Western and developing states concerned about European dominance in the UNESCO World Heritage Convention,[27] this Convention has now become popular in Western European states eager to promote food and craft products.

Even though the Intangible Heritage Convention does not itself affect IP rights,[28] its international listing mechanisms have been used in some cases as a way of asserting moral claims to cultural 'ownership' over heritage. Although international cooperation is one of the stated purposes of the Convention in article 1, this has led in some circumstances to increased regional tension over competing claims to transboundary heritage.[29] Similar tensions are likely to arise in relation to claims to IP rights protection in TK.

Given the multifaceted and fractured international framework relating to TK, and the uncertain prospects for any agreement on a sui generis instrument at the international level, a number of states have put significant effort into the development of mechanisms for regional cooperation. This can include establishment of regional TK databases, efforts to harmonize differences between national legislation, and mechanisms for the adjudication of cross-border disputes.[30] Regional cooperation can help to increase bargaining power of TK holders in negotiations with third parties and to reduce conflict between stakeholders at the regional level.[31] Although the development of a common ABS framework under the Nagoya Protocol has been slow at the international level, African Union (AU) guidelines developed for member states implementing the Nagoya Protocol highlight the importance of regional cooperation for precisely this reason.[32] Regional cooperation within Africa may become even more strategically important as more commercial ventures are established to exploit resources within the continent.

Kenya and the protection of TK in Africa

Developing states like Kenya have played an important role in debates about TK at the international level. Kenya is a member of the WTO and is compliant with TRIPS through national legislation such as the Copyright Act (2001, revised 2014), Trademarks Act (1955, revised 2009), Industrial Property Act (2001), and the Seeds and Plant Varieties Acts (1972 and Amendment Act 2012). Kenya is also a signatory to the CBD and its Nagoya Protocol, which are implemented in Kenya under the Environmental Management and Control Act (1999, revised 2012). Kenya abstained from the vote on the UNDRIP Declaration, but in its revised Constitution and the TK Act has taken a very similar position. Kenya has also ratified the 2003 UNESCO Convention, which requires it in articles 11–12 to establish an inventory of intangible heritage in the territory.

International instruments like these have direct effect in Kenyan law,[33] but none confer any IP rights on communities in respect of their TK. The granting of sui generis IP rights in TK at the national level is thus a significant statement of intent to pursue the issue at the international level, even where economic gains therefrom are uncertain and international enforcement mechanisms are likely to remain weak. The Constitution of Kenya provides the rationale for such legislation in Kenya, prefigured by the National Policy on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions (2009). Article 40(5) of the Constitution commits the state to supporting, promoting and protecting the IP rights of the 'people of Kenya', and article 69(1)(c) specifically tasks it to 'protect and enhance' IP and 'indigenous knowledge' associated with biodiversity and the 'genetic resources of the communities'. Article 11 provides the basis for enacting legislation to ensure that 'communities receive royalties for the use of their cultures and cultural heritage' (TCEs) and that indigenous GR and associated TK are recognized and protected. The Constitution of Kenya, and the Act itself, thus frame the benefits of IP protection of TK as primarily local (for communities in Kenya) and national (for Kenya as a nation state).

In Africa, regional instruments and mechanisms for protecting TK have been relatively weak. Kenya is a member state of the African Regional Intellectual

27 UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage, 1972.

28 Article 3(b).

29 See for example M. Clark, 'The Politics of Heritage: Indonesia-Malaysia Cultural Contestations' (2013) *Indonesia and the Malay World*, *41*(121), 396–417.

30 See, for example, Pacific Model Law for the Protection of Traditional Knowledge and Expressions of Culture (2002); Secretariat of the Pacific Community, 'Guidelines for Developing National Legislation for the Protection of Traditional Knowledge and Expressions of Culture Based on the Pacific Model Law 2002' (Secretariat of the Pacific Community Noumea, 2006). Another example is the Andean Community Decision 391: Common system on access to genetic resources.

31 G. Dutfield, 'Transboundary Resources, Consent and Customary Law' (2013) *Law Env't & Dev* 9 259.

32 AU Commission, 'African Union Practical Guidelines for the Coordinated Implementation of the Nagoya Protocol in Africa' (African Union Addis Ababa, 2015) 29.

33 The Constitution of Kenya, article 2(6).

Property Organization (ARIPO).[34] Kenya signed but has not yet ratified ARIPO's Swakopmund Protocol, which entered into force in 2015.[35] The Swakopmund Protocol offers protection to a broad range of TK and makes provision for dispute resolution mechanism through ARIPO although this does not yet seem to be operational. The Protocol deals with the diverse approaches of its members by restoring 'the ownership of expressions of folklore to communities' on the one hand while still recognizing 'state control and management of expressions of folklore' on the other, which has been the source of some criticism.[36] The predominantly francophone membership of the African Intellectual Property Organization (OAPI)[37] has unified IP protection for members. The OAPI Bangui Agreement only protects literary and artistic works created by or within a 'traditional community', however, and thus has a narrower scope than the Protocol.[38] Partly because key states such as South Africa, Nigeria and Egypt are not members of either ARIPO or OAPI, a new Pan African Intellectual Property Organization (PAIPO) has been proposed under the umbrella of the AU.[39]

Other mechanisms for regional cooperation on TK will be created through IP chapters in free trade agreements that may create a continent-wide free trade area as early as 2017.[40] Kenya is also a signatory to a Tripartite Free Trade Area Agreement between the Southern Africa Development Community (SADC), the East African Community (EAC) and the Common Market for Eastern and Southern Africa (COMESA), in which the IP chapter is still under discussion. Early drafts indicate an intention to continue developing national legislation on TK, pressing for change at an international level, and fostering further cooperation within Africa on the issue.[41] The East African Community Treaty requires Partner States 'to promote co-operation in the development of science and technology within the Community' through, among other things, 'the encouragement of the use and development of indigenous science and technologies' and 'the harmonisation of policies on . . . promotion and protection of intellectual property rights'.[42] Article 43 of the Protocol on the Establishment of the EAC Common Market requires partner states to provide legal protection for TK. Some research has begun on harmonization of IP laws in the EAC in anticipation of the development of a new commonly-held IP regime, but no directives on international cooperation on IP have yet been drafted.[43]

Cross-border cooperation on the protection of TK is thus an important consideration in Africa, and the subject of new initiatives such as the establishment of PAIPO and the finalization of free trade agreements, as well as proposed mechanisms for the implementation of the Nagoya Protocol. Provisions at the national level for the protection of TK in Kenya will need to facilitate regional cooperation within this changing context. To discuss this further, we now turn to a closer examination of the Act and its provisions for transboundary TK and cross-border cooperation.

A brief summary of provisions in the Act

Broadly following the framework of the Swakopmund Protocol,[44] the Act defines a wide range of subject matter as TK, including that which may come under the ambit of patents, copyright, designs, trade marks and geographical indications, whether or not it is 'reduced to a material form' or documented.[45] The Act refers to 'cultural expressions' rather than 'traditional cultural expressions', which is the conventional term in international negotiations, and was the preferred term in the 2015 Bill[46] and the earlier National Policy on TK (2009). However, the term 'cultural expressions' in the Act clearly covers the same subject matter as TCEs; it refers to 'any forms, whether tangible or intangible, in which traditional culture and knowledge are expressed, appear or are manifested'.[47]

The Act narrows the subject matter by providing protection only to TK[48] 'generated, preserved and transmitted' over generations in a community with

34 C. Ncube, *Intellectual Property Policy, Law and Administration in Africa: Exploring Continental and Sub-regional Co-operation* (Routledge Abingdon, 2016) 287. Page references are for digital legal deposit version.

35 Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore within the Framework of the African Regional Intellectual Property Organization (ARIPO) (2010) (hereafter, Swakopmund Protocol).

36 Nwauche, 'The Swakopmund Protocol' (n 4) 193.

37 Ncube, *Intellectual Property Policy* (n 34) 308.

38 Bangui Agreement Relating to the Creation of an African Intellectual Property Organization (Hereafter, Bangui Agreement).

39 Ncube, *Intellectual Property Policy* (n 34) 212.

40 Ncube, *Intellectual Property Policy* (n 34) 212.

41 See Annex 9, Annex on Intellectual Property Rights Under Article 27(1) of the SADC-EAC-COMESA Tripartite Free Trade Area Agreement (20 December 2010).

42 East African Community, Treaty for the Establishment of the East African Community (amended 2006 and 2007) article 103(1)(c) and (i).

43 Ncube, *Intellectual Property Policy* (n 34) 233.6

44 Sections 2 and 4.

45 Section 2.

46 Protection of Traditional Knowledge and Traditional Cultural Expressions Bill (2015), section 2.

47 Section 2.

48 That is, TK and TCEs.

which they are 'distinctively associated' and 'integral to [its] cultural identity'.[49] These expressions are only protected against unauthorized use outside of the 'traditional context'. 'Owners' or 'holders' of TK are limited in section 2 to 'local and traditional communities' and those recognized within these communities as having special authority over TK. The terminology 'local and traditional communities' differs from that in the WIPO context, viz. 'indigenous and local communities', because of concerns about the relevance to Africa of 'precolonial' and 'aboriginal' (first resident) concepts in the broad understanding of indigenous peoples that was generally accepted in Europe and the Americas. Thus, as proposed by the African Commission's Working Group (2005), the term indigenous is used mainly for hunter-gatherer or pastoralist communities associated with a specific territory, identity and culture, and sharing a common experience of marginalization.[50]

The Act offers both defensive and positive protection for TK through a rights-based approach that follows some of the ideas discussed in the WIPO IGC.[51] It confers both moral[52] and economic[53] sui generis rights on 'owners' and 'holders' of TK (or in their absence, a state agency), providing similar kinds of protection as in copyright, trade marks, patents and geographical indications law. These rights are conferred without formalities and exist in perpetuity as long as the subject matter complies with the requirements for protection.[54] The Act provides for both criminal and civil penalties for infringement, and mediation or alternative dispute resolution procedures or customary protocols not inconsistent with the Constitution.[55] It establishes requirements for prior informed consent (going beyond provisions in the Swakopmund Protocol)[56] and benefit sharing agreements with any third parties in connection with the exploitation of TK outside the 'traditional context'.[57]

Provision is made for a county or national level registration process on a Traditional Knowledge Digital Repository (TKDR), managed by the Kenya Copyright Board (KECOBO), but registration is purely declaratory and does not confer rights in itself.[58] It is not clear from the Act whether KECOBO is the Authority or National Competent Authority (NCA) referred to in sections 32 and 42.[59] The Cabinet Secretary, working with county officials[60] and holder or owner communities, is given considerable responsibility to record, manage and resolve disputes about user agreements, licenses, assignments and compulsory licenses.[61] Some disputes can also be resolved by KECOBO.[62] Dispute resolution by these different agencies, including communities themselves in section 30(1), may have slightly different outcomes. For example, where the Cabinet Secretary refers disputes to those claiming to be holders under section 30(1), they may be unable to reach agreement, but in disputes over concurrent claims under section 7(6) for inclusion of TK on the register, KECOBO or the county government may make a ruling even where holders are still in dispute.

In the Act as a whole, as Nzomo suggests, there is 'an overlap of responsibilities' between county and national governments, and between KECOBO and the Cabinet Secretary. These include responsibilities for administering the register, licenses or assignments and settling disputes over ownership of rights. To reduce problems that may arise from overlapping roles, Nzomo argues that most of the responsibilities of the Cabinet Secretary, aside from compulsory licensing, could be taken over by KECOBO, which already manages the Register.[63]

Having briefly reviewed the Act, which provides for extensive rights in perpetuity over a wide range of new subject matter, we now examine how it deals with questions of transboundary TK and cross-border cooperation, especially at the regional level.

Provisions for transboundary TK and cross-border cooperation

The National Policy on TK (2009) promoted both regional and international cooperation and cross-border mechanisms such as the Swakopmund Protocol (then

49 Sections 6 and 14.

50 J. Gilbert 'Indigenous Peoples' Human Rights in Africa: the Pragmatic Revolution of the African Commission on Human and Peoples' Rights' (2011) *Int'l & Comp. L.Q.* 60 249–50.

51 On this see S. Ghosh 'The Quest for Effective Traditional Knowledge Protection: Some Reflections on WIPO's Recent IGC Discussions', BIORES blog, 18 June 2012, accessed at http://www.ictsd.org/bridges-news/biores/news/the-quest-for-effective-traditional-knowledge-protection-some-reflections.

52 Sections 19(2) and 21.

53 Sections 18, 20, 22 and 24.

54 Sections 6 and 14.

55 Sections 37–40.

56 Nwauche, 'The Swakopmund Protocol' (n 4) 196.

57 Sections 19, 20(3) and 24. This also fulfils requirements under the Nagoya Protocol, article 16.

58 Sections 4, 5 and 7(7). See also section 2.

59 Nzomo 'Kenya's Protection of Traditional Knowledge and Cultural Expressions Act' (n 4).

60 Section 7(6).

61 See section 22, 25, 27. Sections 5 and 7 of the Act make it clear that Cabinet Secretary refers to the Attorney General (Nzomo, 'Kenya's Protection of Traditional Knowledge and Cultural Expressions Act' (n 4)).

62 Section 7(6).

63 Nzomo, 'Kenya's Protection of Traditional Knowledge and Cultural Expressions Act' (n 4).

in draft form) were explicitly mentioned.[64] In contrast, perhaps to avoid overlap with the proposed National Culture Bill, or with the Swakopmund Protocol, the Act does not mention ARIPO, its Protocol or international cooperation, focusing instead on cooperation between county and national government.[65] The Act makes rather patchy provision for administering transboundary TK, and does not mention communication and cooperation with agencies in other states, or regional organizations. At present, neither Kenya nor its neighbouring states have ratified the Swakopmund Protocol.[66]

Administration of transboundary TK

According to the Swakopmund Protocol, the owners of transboundary TK should be registered by the 'relevant national competent authority of the Contracting States and [the] ARIPO Office'.[67] This approach makes sense in order to ensure that transboundary TK is registered at the national level.

The administration of transboundary TK is handled in a rather inconsistent way in the Act. As mentioned above, the Act refers to a NCA but does not clearly say this is KECOBO. The Act does not specify channels of communication with agencies in other states, or any regional IP organization such as ARIPO (or indeed PAIPO, at some later date), regarding negotiation of benefit-sharing agreements with communities across national borders.[68] Under section 7 of the Copyright Act, KECOBO has been given powers to enter into associations with bodies or organizations in or outside Kenya 'in furtherance of the purposes for which the Board is established', so this may include cross-border cooperation relating to its new duties under the TK Act.

The Act divides duties for the administration of transboundary TK between the Cabinet Secretary and KECOBO. The registration of 'owners' of transboundary TK is done by the national and county governments.[69] KECOBO manages the register, but applications for the transfer of IP rights 'in or outside Kenya' based on TK 'obtained in Kenya' require the prior approval of the Cabinet Secretary.[70] Applications for consent to use TK are to be given directly to 'the holders' of that TK,[71] which could potentially include co-owner communities of transboundary TK listed on the TK register in Kenya, who are citizens of other countries. This kind of direct cross-border information sharing may not be the intention of the Act, however, since notices identifying the holders of TK who will be consulted for consent to its use,[72] and disputes over ownership[73] will only be published by the Cabinet Secretary in Kenyan newspapers 'with nationwide circulation'.

It is not clear how KECOBO and/or the Cabinet Secretary would interface with the Competent National Authorities (CNAs) appointed under article 13 of the Nagoya Protocol, or with regional mechanisms for dispute resolution under that Protocol. The National Environment Management Authority (NEMA) has sole responsibility for implementing all environmental policies in Kenya including the Nagoya Protocol. NEMA is empowered in section 11 of the Environmental Management and Co-ordination Act to 'enter into association with other bodies or organisations within or outside Kenya' to this end.

Mechanisms for cross-border dispute resolution

In the Swakopmund Protocol, the ARIPO Office is tasked with 'raising awareness, education, guidance, monitoring, dispute resolution and other activities' in regard to transboundary TK.[74] ARIPO may mediate in cases of concurrent claims to transboundary TK, using 'customary law, local information sources, alternative dispute resolution mechanisms, and any other practical mechanism'.[75] The newly drafted PAIPO Statutes promote international cooperation and harmonization of IP systems across the continent, propose some general mechanisms for dispute resolution, specifically focus on the protection of TK as IP and the creation of continent-wide TK databases to aid in its protection. More detailed plans have yet to be set out, especially regarding PAIPO's relationship with ARIPO or OAPI, and harmonization of IP law in the region.[76]

64 National Policy on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions (2009) 2.3(j) and footnote 4, accessed at http://www.wipo.int/edocs/lexdocs/laws/en/ke/ke022en.pdf.

65 Section 8(5).

66 WIPO website, 'Contracting Parties to Swakopmund Protocol'. Accessed at http://www.wipo.int/wipolex/en/other_treaties/parties.jsp?treaty_id=294&group_id=21.

67 Swakopmund Protocol, sections 5.4 and 17.4.

68 See sections 32–3.

69 Section 7(4) and 15(4). The same provision is also made for TK and TCEs cutting across county borders, sections 7(5) and 15(5).

70 Section 35(6).

71 Section 28(1)(a).

72 Section 29.

73 Section 30(3).

74 Swakopmund Protocol, sections 14.3 and 22.4.

75 Section 24.3.

76 AU, Statute of the Pan African Intellectual Property Organization, 31 January 2016. Ncube, *Intellectual Property Policy* (n 34) 379.

In the meantime, legislation continues to be developed in the region. Zambia has ratified the Swakopmund Protocol, and the Zambia Protection of Traditional Knowledge Act specifically aims to give effect to it. It allows for the registration of transboundary TK and related agreements about its use on the national register and with ARIPO, and gives their national competent authority (the Registrar) powers to refer disputes to ARIPO or other regional or international bodies.[77] South Africa is not a member of ARIPO, and it has not ratified the Protocol, but the South African Indigenous Knowledge Systems Bill nevertheless sets up a channel of communication between their NCA and state agencies in other countries to conclude prior informed consent and benefit sharing agreements[78] in regard to transboundary 'indigenous knowledge'.[79] These NCAs would also need to work with PAIPO, when it is operational.

There may be some overlap between the cases that are referred by the NCA under the Act to organizations like PAIPO, and those referred by NEMA under the Nagoya Protocol to regional mechanisms for dispute resolution. AU guidelines for member states implementing the Nagoya Protocol recommend establishment of a Regional Committee of Experts to cooperate in negotiating agreements with bioprospectors over the use of their common GR and associated TK.[80] The Committee could help to mediate disputes 'between Member States, between a Member State and communities, or between communities' regarding access to GRs and associated TK.[81] The guidelines point out that the African Court on Human Rights and Justice could also potentially hear cases on exploitation of TK if they concern the African Charter on Human and Peoples' Rights and any other relevant human rights instruments. This court 'has a mandate to make binding decisions including orders of compensation and reparation'.[82]

Cross-border cooperation and choice of law

In addition to provisions for transboundary TK, the Swakopmund Protocol requires the 'national competent authority and ARIPO' to establish measures for protecting TK for the benefit of holders 'from foreign countries'.[83] The Swakopmund Protocol gives the following guidance on choice of law in national courts in such cases:

> Eligible foreign holders of traditional knowledge and expressions of folklore shall enjoy benefits of protection *to the same level* as holders of traditional knowledge and expressions of folklore who are nationals of the country of protection, *taking into account as far as possible* the customary laws and protocols applicable to the traditional knowledge or expressions of folklore concerned [emphasis added].[84]

When assessing mutually agreed terms in ABS agreements for specific uses of transboundary TK associated with GRs, article 15 of the Nagoya Protocol obliges States Parties to ensure that they comply with 'access and benefit-sharing legislation or regulatory requirements of the other Party where such indigenous and local communities are located'.

Because of the nature of TK as knowledge regulated by communities themselves, it is thus considered important in regional or international instruments to take customary law and community protocols associated with the specific owners of that TK into account when making determinations about IP rights. In the case of transboundary TK, or TK held by foreign citizens, it remains important to take community protocols and laws in other states into account, as well as aspects of foreign law.

How does the Act deal with this issue? It already makes provision for national treatment, but only where reciprocal agreements are in place,[85] and it does recognize the importance of considering customary law, whether codified or uncodified, but it is not quite clear what approach should be adopted in cross-border cases. What balance, for example, should be sought between the principle of national treatment (treating foreign IP rightholders no less favourably than citizens), and recognition of IP rights conferred in another country?

This is an important question because national laws on TK may differ widely between neighbouring states. Communities in Kenya are given extensive IP rights over their TK, for example, while in many other African states the IP rights in TK are conferred on state agencies acting on behalf of communities. In Malawi, for example, copyright in 'expressions of folklore' vests in the Government 'on behalf and for the benefit of the people'.[86] If an infringement case is successfully

77 Sections 4(4), 6(d), 11 and 15(4).

78 Clause 29(2). South Africa was not a signatory to the Swakopmund Protocol in 2010, but it could accede to it at some later date.

79 These are defined collectively as 'indigenous knowledge', clause 1.

80 AU Commission, 'African Union Practical Guidelines' (n 32).

81 AU Commission, 'African Union Practical Guidelines' (n 32) 29.

82 AU Commission, 'African Union Practical Guidelines' (n 32) 33.

83 Section 24.2.

84 Section 24.1.

85 Section 44.

86 Nwauche, 'The Swakopmund Protocol' (n 4) 192. Malawi, Copyright Act (1989, revised 2001).

brought in Kenya regarding a TCE found in both Kenya and Malawi, would the entire transboundary community be considered a beneficiary in the case, according to Kenyan law, or would the foreign beneficiary be the Malawian state?

Control over access to and use of TK at the community level may be exercised in different ways, whether through informal agreements or through different kinds of customary law.[87] These different kinds of customary law may well conflict, especially in respect to transboundary TK. Kenyan courts can take foreign law into account, based on evidence presented by a person skilled in that area of law.[88] The Judicature Act (1977), which governs conflict of laws in Kenya, indicates in section 3(2) that customary law may 'guide' the court insofar as it is not inconsistent with the written law or repugnant to justice and morality. However, it is not quite clear whether and how customary law from other states might be taken into account, and whether it would be subject to the limitations in section 3(2) of the Judicature Act.

In the Act, the Cabinet Secretary, KECOBO or county governments are given powers to adjudicate TK-related disputes using customary law (as well as 'other means as are agreed to by the parties',[89] 'local information sources and any other means',[90] or other unspecified means).[91] This flexibility could assist in resolving conflicts between different kinds of customary law at the national level. It does not, however, give guidance on how Kenyan agencies would work with agencies or communities in other states to adjudicate cross-border cases using foreign law or protocols.

National treatment and TRIPS compliance

The Act provides that Kenya 'may' ensure national treatment for TK from other states, but only in 'accordance with reciprocal arrangements' (ie bilateral or multilateral agreements).[92] It thus leaves open the possibility that such protection may not be provided. This may create problems for TRIPS compliance if TK is regarded as intellectual property under TRIPS. TRIPS requires that members provide for national treatment with regard to 'the protection of intellectual property', ie treating nationals of other member states no less favourably than their own.[93]

Privileges given to nationals of one country should be given 'immediately and unconditionally' to those of another.[94] In a WTO dispute resolution case about European protection of geographical indications (GIs), the Panel found that the availability of GI protection constituted such a privilege.[95] GIs were regarded as intellectual property because provisions for their protection are included in articles 22–3 of TRIPS. No such provision is made for TK in TRIPS. Although protecting rights in TK involves protecting rights in knowledge rather than nomenclature (as in the case of GIs), it represents a similar model of collective creation, ownership and control of access to GIs.[96] TK is explicitly regarded as intellectual property by the AU in the PAIPO Statutes,[97] and, as evidenced in paragraph 19 of the Doha Declaration, African states such as Kenya support the recognition of TK as IP under TRIPS.

The South African Indigenous Knowledge Systems Bill does guarantee national treatment, but also only where 'reciprocal international agreements' are in place with the foreign jurisdictions concerned.[98] Although it acknowledges the possibility that communities outside Zambia may have access to rights and benefits associated with transboundary TK,[99] no specific provisions are made for national treatment or mutual recognition in the Zambia TK Act, any disputes being left to a mediation by the Registrar or regional organizations such as ARIPO.

It could be argued that in all these cases, any advantage from protection is thus not conferred 'immediately and unconditionally' on TK from any other country, as required under TRIPS article 4. Thus, where there are no reciprocal agreements, TK from other countries faces an 'extra hurdle' in gaining protection.[100] Selective provisions for national treatment in section 44 of the Act do thus potentially violate the terms of the

87 P. Drahos, *Intellectual Property, Indigenous People and their Knowledge* (Cambridge University Press Cambridge, 2014) 19.

88 R. Oppong, *Private International Law in Commonwealth Africa* (Cambridge University Press Cambridge, 2013) 14.

89 Section 30(1).

90 Section 7(6).

91 For example, see 25(3)(c).

92 Section 44.

93 TRIPS article 3.1.

94 TRIPS article 4.

95 WTO Panel Report, European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs (US) (DS174), WT/DS174/R 15 March 2005, 7.703–7.704.

96 Ansong, 'Is Traditional Knowledge Intellectual Property?' (n 12). See also WTO Secretariat, The Protection of Traditional Knowledge and Folklore, Summary of Issues Raised and Points Made. IP/C/W/370/Rev.1 9 March 2006.

97 AU, Statute of the PAIPO (n 76)

98 Clause 29(1).

99 Section 6(d).

100 This was an issue in WTO Panel Report (n 95) 7.139, and WTO, European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs (Australia), WT/DS290/R, 7.189.

TRIPS Agreement. Kenya has not yet been subject to any disputes under the WTO dispute resolution process, and most disputes have been between developed states. However, nothing prevents any member state from opening such a dispute against Kenya, especially if their industries are being affected by this Act. Such action may become increasingly likely within Africa too, as Kenyan industry develops greater capacities for commercializing TK.

The Act could adopt a similar formulation to section 24.1 of the Swakopmund Protocol to make the legislation TRIPS compliant. All foreign holders of TK are offered the same *level* of protection as citizens (ie treated no less favourably), while foreign law and community protocols in the communities where the TK originates are also recognized. If and when the Protocol is ratified, the Act may in fact need to be amended to reduce any conflict with provisions in the Protocol.

Conclusion

In conclusion, cross-border cooperation and protection of transboundary TK are important aspects of any sui generis regime for TK, especially in regions like Africa where national borders cut across culturally similar communities and where in the absence of an international standard-setting instrument, provisions for TK differ widely. Neglecting cross-border cooperation, especially at the regional level, can increase conflict over ownership and benefit from TK, and reduce capacity to negotiate benefit sharing agreements with third parties.

Cross-border cooperation on TK is thus highlighted in regional IP instruments such as the Swakopmund Protocol, in the AU's PAIPO Statutes, in regional trade agreements and in guidelines for implementing the Nagoya Protocol. National TK legislation in Zambia and the TK Bill in South Africa also mention the importance of international cooperation and provide mechanisms for cross-border communication. In Kenya, the importance of cross-border cooperation was flagged in the National Policy on TK (2009), but while the Act of 2016 confers broad sui generis protection on TK, it does not make clear provision for cross-border cooperation for either the protection of transboundary TK or the protection of TK originating in other states. Pursuing cross-border cooperation mainly through reciprocal bilateral agreements with other states (as the Act seems to suggest in section 44) may create a patchwork of very inconsistent approaches.

Kenya may ratify the Swakopmund Protocol, which makes provision for cross-border cooperation and administration of transboundary TK between signatory states. Nevertheless, not all African states will ratify the Swakopmund Protocol. Either in the Act or some related instrument, it may therefore be useful to highlight the importance of cross-border cooperation in principle, and perhaps also to make some general provision for it. This might include clarifying the identity of the NCA responsible for liaising with responsible agencies in other states, and with regional organizations such as ARIPO or PAIPO, as well as agencies set up within Kenya for implementing other instruments, such as the Nagoya Protocol. Responsibilities for administration of records and agreements associated with the ownership and use of transboundary TK could be streamlined.

The establishment of PAIPO, implementation of the Nagoya Protocol in the AU, and provisions in regional trade agreements may create new regional mechanisms for administration of transboundary TK, regional cooperation, dispute resolution and perhaps also (although this is less likely) harmonization of laws on TK. The Swakopmund Protocol may be used as a model in addressing some issues, such as choice of law in cross-border cases and standards for national treatment. The approach taken in the Swakopmund Protocol could also however be updated to reflect a growing acknowledgement of the need for free, prior and informed consent of communities for the use of their TK, as evidenced in the Act. Such regional mechanisms will have to take into account the fact that databases of TK are being set up for the implementation of international instruments such as the Nagoya Protocol and the 2003 UNESCO Convention, and an African Regional Committee of Experts under the Nagoya Protocol or the African Court on Human Rights and Justice could also be involved in dispute resolution or enforcement relating to misappropriation of TK.