

PROTOCOL TO THE AGREEMENT ESTABLISHING THE AFRICAN CONTINENTAL FREE TRADE AREA ON INTELLECTUAL PROPERTY RIGHTS: AN OPPORTUNITY FOR A *SUI GENERIS* PROTECTION OF INDIGENOUS KNOWLEDGE IN AFRICA

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ABSTRACT

In Africa's intellectual property (IP) landscape, protecting Traditional / Indigenous knowledge (TK/IK) remains a significant concern. There is a potential to create a *sui generis* system that combines IP rights, human rights, and customary law within the scope of the Protocol to the Agreement Establishing the African Continental Free Trade Area on Intellectual Property Rights (IP Protocol). This paper evaluates this potential, leveraging how the Protocol can fill the gaps in the existing regional and international frameworks. This paper makes the case that the IP Protocol might be a revolutionary legal tool for safeguarding associated Traditional/Indigenous knowledge (ATK/IK) by examining Africa's legal system and learning from a few African nations. It draws attention to the difficulties in balancing regional commitments with national regulations and makes legislative proposals to provide a community-driven, financially sustainable protection system. Eventually, this paper aims to promote and foster an Africa-focused and sustainable strategy for preserving traditional knowledge while encouraging innovation and regional integration under the AfCFTA Agreement.

KEYWORDS: Traditional/Indigenous knowledge (TK/IK), *sui generis* protection; intellectual property (IP) rights, TK/IK systems, sustainable development, AfCFTA IP Protocol

1. INTRODUCTION

The African Continental Free Trade Area (AfCFTA) Agreement, a collection of ambitions of the African Union (AU), offers an opportunity to develop the African continent. As a tool to foster the achievement of the AU's Agenda 2063,¹ this Agreement aims to establish a single market for goods and services, to facilitate the movement of people, capital, and investments, thus

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1 Preamble to the AfCFTA Agreement.

promoting African intra-trade.² Signed by 54 and ratified by over 40 African states, the AfCFTA Agreement emerges as an essential symbol of African unity and independence. At its core is the vision to transform structural capacity and industries and promote inclusiveness within the continent by fostering knowledge-based competitiveness in relation to global markets.

Africa ought to use innovation and intellectual property (IP) to achieve the aforementioned.³ In the process of doing this, Africa faces challenges of possible dual existence within the arena of promoting IP and losing its cultural property. This challenge is more visible in the IP-TK/IK sphere. These indigenous resources have long existed and fostered the lived experiences of the Indigenous Peoples. Ironically, these resources continue to benefit the big pharmaceutical, agricultural, cosmetic, and technological companies, at the expense of the custodians, the Indigenous Peoples.

The unlawful appropriation of Traditional/Indigenous knowledge (TK/IK) can be attributed to the lack of adequate binding frameworks on the protection of these resources, particularly within the IP regime, for example, the World Trade Organization (WTO)'s Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The Agreement was drafted when the Global South's participation in international frameworks was not well established. For this reason, the Agreement mirrored the Eurocentric ideologies of knowledge and property economy. This is because the Agreement recognised the individual, codified, and industrially applicable knowledge over the communal and orally transmitted knowledge of the Indigenous Peoples.

The 2024 WIPO Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge marks the first binding global framework on protecting TK/IK, genetic resources (GRs), within the IP space. The Treaty requires party states to adopt rules on disclosure of origin, where TK/IK has been used.⁴ While this Treaty offers a transformational solution to protecting TK/IK, its success will depend on the ratification, implementation, and execution, especially in Africa.

Against this backdrop, the Protocol to the Agreement Establishing the African Continental Free Trade Area on Intellectual Property Rights (IP Protocol), adopted in February 2023 by the AU during its 36th Ordinary Session, offers some insights on how TK/IK and GRs should be protected. This protocol provides an opportunity for the protection of its kind, infusing rights of Indigenous Peoples, IP perspectives, and customary rules of the African Indigenous Peoples. The envisioned annex to this protocol would outline the obligations to implement access and benefit sharing (ABS), free and prior informed consent (FPIC), and prior art disclosures, the considerations of human rights, customary rules, and some administrative duties, to achieve the objective of the AfCFTA Agreement.

2 Article 3 of the AfCFTA Agreement.

3 Articles 4, 6, 7, 8, and 23 of the AfCFTA Agreement.

4 WIPO 'WIPO GRATK Treaty Resource Centre', available at: <https://www.wipo.int/en/web/traditional-knowledge/wipo-treaty-on-ip-gr-and-associated-tk> (accessed on 16 July 2025).

Therefore, this article examines the IP Protocol's potential to achieve the socio-economic objectives of the AfCFTA Agreement through protecting TK/IK. It argues that the Protocol is a foundation for a *sui generis* regime to protect TK/IK in Africa. This Protocol will be a success with additional obligations as stated in art 18(10) of the IP Protocol, which should be community-centric, coherent, and sustainable. Eventually, the paper contributes to scholarly debates on the protection of TK/IK within the IP sphere and calls for the finalisation of the annex to the IP Protocol.

2. CONCEPTUAL AND THEORETICAL FRAMEWORKS FOR THE PROTECTION OF TK/IK

2.1 The definitional and conceptual meaning of TK/IK

Although there is no universal definition of TK/IK, this article adopts the World Intellectual Property Organization's description of TK/IK, describing it as a set of creative and innovative skills, techniques, know-how, and practices developed and passed from generation to generation by Indigenous Peoples in their Indigenous communities.⁵ This knowledge forms part of these Indigenous Peoples' cultural and spiritual heritage. It is used in various fields such as medicine, agriculture, ecology, science and technology, art, and biodiversity conservation. This definition outlines the diversity in Indigenous Peoples' spaces, evident by TK/IK's span across various fields, accommodating Indigenous Peoples' unique livelihoods. Therefore, it is essential to include a comprehensive definition and conceptualisation of TK/IK in the context of the AfCFTA Agreement.

A framework recognising the communal, generationally transmitted, living and unique nature of TK/IK and the associated resources would ensure equitable sharing of benefits generated from using TK/IK and related resources. At the same time, this would foster the economic development of the holders of rights over TK/IK, achieving the AfCFTA Agreement's objectives.⁶

2.2 The rationale for protecting TK/IK

2.2.1 Introduction

Protecting TK/IK in the context of the AfCFTA Agreement has been approached from various conceptual and theoretical perspectives: FPIC, decolonial theory, intellectual property rights (IPR) theories, and economic theory. These justify protecting this knowledge in the light of the Sustainable Development Goals (SDGs). Therefore, these theories should be used to develop rules for protecting TK/IK in the context of the AfCFTA Agreement.

5 WIPO 'Traditional knowledge', available at: [https://www.wipo.int/tk/en/tk/#:~:text=Traditional%20knowledge%20\(TK\)%20is%20knowledge,its%20cultural%20or%20spiritual%20identity](https://www.wipo.int/tk/en/tk/#:~:text=Traditional%20knowledge%20(TK)%20is%20knowledge,its%20cultural%20or%20spiritual%20identity) (accessed on 16 July 2025).

6 See arts 3 and 5 of the AfCFTA Agreement.

2.1.2 Decolonial theory

The application of decolonial theory to understand the need to safeguard TK/IK in the context of the AfCFTA Agreement requires careful consideration. While the theory advocates dismantling all the institutional frameworks and the legacy of the colonial power,⁷ it must be noted that the Indigenous Peoples still need to interact with other nations globally, especially in the context of trade. The decolonial theory promotes hearing the voices of Indigenous Peoples.⁸ This, therefore, justifies the inclusion of Indigenous Peoples in the decision-making processes concerning TK/IK and associated resources.

Sithole argues that the importance of TK/IK in various contexts, such as agriculture, politics, biodiversity, and education,⁹ warrants its decolonised protection for future generations.¹⁰ Conversely, Smith argues that the decolonisation of knowledge achieves social justice for the people concerned.¹¹ Masenya submits that social justice is achieved if the Indigenous Peoples are engaged respectfully, considering their concerns regarding issues,¹² such as their knowledge.

As the colonisation of TK/IK systems is viewed as a Western tool for degrading environmental diversity, causing economic instability, and violating ethical considerations and human rights,¹³ a decolonised approach to protecting TK/IK seeks to address these challenges. Furthermore, it ensures that people (colonisers) who unfairly benefit can no longer do so.¹⁴

While the same Indigenous Africans need to be protected from the West and others who adopt the colonial mindset, it is essential to guard against moving Africa away from the rest of the world. As a driving force of globalisation, trade would need Africa to interact with other continents. As a result, the Afrocentric perspectives should foster a system allowing Africa to compete in the global market, especially in commercialising TK/IK and associated resources.

In support of the above, Murove argues that TK/IK issues should be pursued to foster inclusivity.¹⁵ Murove submits that recognising TK/IK's cultural,

7 B Olivier 'Decolonisation, identity, neo-colonialism, power' (2019) 20 *Phronimon* 3065, available at: <https://upjournals.co.za/index.php/Phronimon> (accessed on 16 July 2025).

8 TM Masenya 'Decolonization of indigenous knowledge systems in South Africa: Impact of policy and protocols' (2022) 18(1) *International Journal of Knowledge Management* 1, available at: <https://www.igi-global.com/article/decolonization-of-indigenous-knowledge-systems-in-south-africa/310005> (accessed on 16 July 2025).

9 Masenya (n8) 1–2.

10 J Sithole 'The challenges faced by African libraries and information centres in documenting and preserving indigenous knowledge' (2007) 33(2) *International Federation of Library Associations and Institutions Journal* 117, available at: <https://journals.sagepub.com/doi/10.1177/0340035207080304> (accessed on 16 July 2025).

11 LT Smith *Decolonizing Methodologies: Research and Indigenous Peoples* (2021).

12 Masenya (n8) 2.

13 Masenya (n8) 4.

14 Ibid.

15 MF Murove 'Indigenous knowledge systems discourse and inclusionality: An Afro-centric quest for recognition in a globalised world' (2018) 31(1) *Journal for the Study of Religion* 159, available at: https://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1011-76012018000100010 (accessed on 16 July 2025).

intellectual, and context-based characteristics can be achieved.¹⁶ Therefore, integrating TK/IK into the AfCFTA Agreement should recognise the cultural identity of the knowledge. Secondly, knowledge, being an intellectual asset, affords it property rights. Lastly, TK/IK is context-based, as it applies to various areas differently depending on the community concerned.

Therefore, a decolonised and Afrocentric approach should be seen as a method of removing all that is not beneficial and retaining what is valuable to Africans, including situating Indigenous Peoples within globalised commercial spaces. Through this, Africans can compete and engage with global trading partners and advance the safeguarding of their TK/IK globally. However, what must be noted is that safeguarding TK/IK from this perspective puts the African approaches at the centre, ensuring that the interests of Indigenous Africans are advanced.¹⁷

2.1.3 Access and benefit sharing

The *Hoodia Gordonii*¹⁸ and Rooibos¹⁹ cases are some of the most successful access and benefit sharing (ABS) and free and prior informed consent (FPIC) stories ever implemented in Southern Africa. In both cases, ABS agreements have been concluded, benefiting the indigenous Khoi-San communities from the financial benefits of the commercial endeavours of the above biological

16 Murove (n15) 159.

17 S Adetayo 'Afrocentricity, African agency and knowledge system' in A Afolayan et al (eds) *Pathways to Alternative Epistemologies in Africa* (2021), available at: https://www.academia.edu/53935695/Afrocentricity_African_Agency_and_Knowledge_System and https://doi.org/10.1007/978-3-030-60652-7_5 (accessed on 16 July 2025).

18 See R Wynberg 'Access and benefit-sharing agreements in the commercial development of *Hoodia*' in Secretariat of the Convention on Biological Diversity, *Access and Benefit-Sharing in Practice: Trends In Partnerships Across Sectors* (CBD Technical Series No 38, 2008) 83, available at: <https://www.cbd.int/doc/publications/cbd-ts-38-en.pdf>, (accessed on 16 July 2025). See also Benefit-Sharing Agreement between the CSIR and the South African San Council, March 2003. See further D Schroeder 'Informed consent: From medical research to traditional knowledge' in R Wynberg et al *Indigenous Peoples, Consent, and Benefit Sharing: Lessons from the San-Hoodia Case* (2009) 27, available at: https://www.researchgate.net/publication/293148873_Indigenous_Peoples_consent_and_benefit_sharing_Lessons_from_the_san-Hoodia_case (accessed on 16 July 2025); S Vermeulen 'Trading traditional knowledge: San perspectives from South Africa, Namibia and Botswana' in R Wynberg et al *Indigenous peoples, consent, and benefit sharing: Lessons from the San-Hoodia case* (2009) 193 and 206, available at: <https://ebookcentral.proquest.com/lib/ukzn-ebooks/reader.action?docID=993851> (accessed on 16 July 2025).

19 See D Oriakhogba 'Reflections on the San and Khoi Rooibos benefit-sharing agreement' (2019) 6 *Benin Journal of Public Law* 356, available at: https://www.researchgate.net/publication/348065573_REFLECTIONS_ON_THE_SAN_AND KHOI ROOIBOS BENEFIT-SHARING AGREEMENT (accessed on 16 July 2025); BE Van Wyk 'A review of Khoi-San and Cape Dutch medical ethnobotany' (2008) 119(3) *Journal of Ethnopharmacology* 331, available at: <https://www.sciencedirect.com/science/article/abs/pii/S037887410800398X> (accessed on 16 July 2025); Department of Environmental Affairs 'Traditional knowledge associated with Rooibos and honeybush species in South Africa' (2014), available at: <https://naturaljustice.org/wp-content/uploads/2014/10/Traditional-Knowledge-Rooibos-Honeybush-Species-SA.pdf> (accessed on 16 July 2025); C Meyer & K Naicker 'Collective intellectual property of indigenous peoples and local communities: Exploring power asymmetries in the rooibos geographical indication and industry-wide benefit-sharing agreement' (2023) 52(9) *Research Policy* 1, available at: https://www.sciencedirect.com/science/article/pii/S004873332300135X?ref=pdf_download&fr=RR-2&rr=9aecb986d8140700 (accessed on 16 July 2025).

resources. These two cases present an opportunity where the expropriation of TK/IK and associated resources requires the consent of the respective Indigenous Peoples.

The ABS framework advocates equal and fair compensation of Indigenous Peoples for the benefits that accrue from the use of TK/IK and associated resources. To give effect to this arrangement, free prior and informed consent (FPIC) is essential for ABS to ensure a comprehensive protective regime for TK/IK.²⁰ This is because it would ensure that Indigenous Peoples agree to things they understand, as third parties wishing to access this knowledge must disclose all the relevant information about their endeavour.²¹

2.1.4 *Intellectual property rights and economic theories*

The IP Protocol covers key IPR including TK/IK.²² The inclusion of TK/IK in the IP framework offers hope for the Indigenous Peoples whose intellectual property has been unfairly expropriated over the years. While this is beneficial, intellectualising TK/IK has been criticised, such as the fear of eroding cultural and spiritual identity.²³ While this may be a valid concern, this article argues that commodifying TK/IK should not be mandatory. Therefore, only parties who wish to commercialise their knowledge may do so.

The primary submission made from this theoretical perspective is that Indigenous Peoples invest in the intellectual development of TK/IK and, therefore, should be rewarded for their efforts. The economic purpose of commercialising TK/IK stems from the objective of economically uplifting Indigenous Peoples as the holders of the rights over the knowledge and associated resources.

2.1.5 *Preliminary review*

Integrating TK/IK into the scope of the AfCFTA Agreement is appropriately justified through the lens of the following combined theories: biopiracy, decolonial, intellectual property, and economic theories, forming an integrated

- 20 United Nations Human Rights, Office of the High Commissioner 'Free, Prior and Informed Consent of indigenous people' (2013) 1–2, available at: <https://www.ohchr.org/sites/default/files/Documents/Issues/IPeoples/FreePriorandInformedConsent.pdf> (accessed on 19 July 2025). See also K Slack 'Sharing the riches of the Earth: Democratizing natural resource-led development' (2004) *Ethics & International Affairs*; AK Abebe 'The power of indigenous peoples to veto development activities: The right to Free, Prior and Informed Consent (FPIC) with specific reference to Ethiopia' (Unpublished LLM dissertation, University of Mauritius, 2009) 1; E McCulloch 'Free, Prior Informed Consent: A struggling international principle' (2021) 44(5) *Public Land & Resources Law Review* 241. See R Goodland 'Free, prior and informed consent and the WB Groups' (2004) 4(2) *Sustainable Development Law and Policy* 1.
- 21 See P Tamang 'An overview of the principle of Free, Prior Informed Consent and indigenous peoples in international and domestic law and practice' (2015) *Workshop on Free, Prior Informed Consent, United Nations*.
- 22 Article 1(b) of the IP Protocol.
- 23 J Mugabe 'Intellectual property protection and traditional knowledge: An exploration in international policy discourse' (1998) *World Intellectual Property Organization*, available at: www.wipo.int/docs/mdocs/tk/en/wipo_unhchr_ip_pnl_98/wipo_unhchr_ip_pnl_98_4.pdf (accessed on 19 July 2025).

TK/IK protection theory. From this theoretical perspective, this article argues the need to uplift the Indigenous Peoples economically by balancing their interests in TK/IK and associated resources. The following section explores the IP regime's prospects of protecting TK/IK.

3. AfCFTA'S IP PROTOCOL: AN OVERVIEW

Adopted by the African Union during its 36th Extraordinary Session in February 2023, the Protocol to the Agreement Establishing the African Continental Free Trade Area on Intellectual Property Rights (the IP Protocol) aims to achieve the socio-economic objectives of the AfCFTA Agreement.²⁴ This would be achieved through promoting innovation, creativity, policy framework, legal coherence, access to knowledge and technology, and transmission of information,²⁵ harmonising IP frameworks across Africa, and balancing the private and public rights, such as IPRs and access to medicines.²⁶ Most importantly, art 3 includes non-traditional IP regimes such as IK.

The wording in the IP Protocol implies the creation of a *sui generis* regime to protect TK/IK and the associated resources. For example, art 18 requires that applicants for patents involving TK/IK disclose the source of the ideas, produce proof that the Indigenous Peoples, as the custodians of the knowledge, have consented to their knowledge being utilised, and that an equitable and fair agreement to share the benefits between the appropriator and the Indigenous Peoples has been entered into.²⁷

The Protocol also requires preventing the use of IPRs in unlawfully appropriating TK/IK.²⁸ To achieve this, together with implementing FPIC, ABS, and prior art disclosures, member states must draw inferences from international, African, and national instruments focused on development.²⁹ Additionally, the Protocol introduces administrative duties on member states, where they are required to support governance and protection of TK/IK. For example, member states must cooperate on security, information exchange, technology transfer, and capacity building.³⁰ Creating an IP office in terms of art 31 would promote good governance and coordination, whose duties would be outlined in the annex to the Protocol. Further, the creation of databases in terms of art 18(7)³¹ would ensure the preservation of information related to the existing TK/IK and associated resources.

The inclusion of TK/IK within the IP sphere lays the foundation for a regime of its kind, which is grounded on innovation, equity, justice, and cultural identity. As indicated in arts 7(2), 18(10), and 41(h),³² the annex to

24 Article 4 of the IP Protocol.

25 See art 2 of the IP Protocol.

26 Article 21 of the IP Protocol.

27 See art 18(2) of the IP Protocol.

28 See art 18(3) of the IP Protocol.

29 See art 18(4) of the IP Protocol.

30 Article 24 of the IP Protocol.

31 Article 18(7) of the IP Protocol.

32 See arts 7(2), 18(10), and 41(h) of the IP Protocol.

the Protocol, covering additional obligations on TK/IK, aims to operationalise and foster implementation of ABS, FPIC, prior art disclosure, and IPRs. This requires the examination of these key principles, in conjunction with customary norms, human rights standards, and the administrative duties introduced by the Protocol.

These elements, as mandated by the Protocol, lay a foundation for a *sui generis* regime for the protection of TK/IK. The next section discusses how the IP regime can achieve the protection of TK/IK despite the debate on the compatibility between these two systems.

3.1 Intellectual property framework

3.1.1 Introduction

The inclusion of TK/IK within the AfCFTA's IP sphere marks a significant era, with the ongoing debate on whether IP frameworks are adequate to protect the intellectual and cultural property of Indigenous Peoples. While the conventional IP regime was designed to only acknowledge the individualistic, fixed-term, and identifiable subject matter, the IP Protocol recognises TK/IK as one of the IPRs, which is mainly collective, perpetual, and intergenerational. In this section, the article explores the possibility of utilising the conventional IP regime to accommodate TK/IK, thus achieving the objectives of the AfCFTA Agreement.

3.1.2 Patents

There are two approaches to protecting TK/IK through patents recognised by the WIPO: defensive and positive protection.³³ The decision to use either of the two depends on the needs of each country.³⁴ A positive approach enables the communities to exercise their rights over their property to benefit from the commercial proceeds of such property. This may be achieved by using the current IP regime.³⁵ On the other hand, a defensive approach prevents third parties from obtaining and exercising otherwise wrongly obtained IPR over TK/IK.³⁶

Although a combination of positive and defensive approaches would benefit the Indigenous Peoples, this article argues that integrating TK/IK into the patent systems should take the form of a defensive strategy, as discussed below. It draws from the recently adopted WIPO treaty and the South African patent framework. This article indicates how various defensive mechanisms, such as databases and prior art disclosures, may buttress the safeguarding of TK/IK in the context of the AfCFTA Agreement.

33 R Rohaini & N Ariani 'Positive protection: Protecting genetic resources related to traditional knowledge in Indonesia' (2017) 11(2) *FIAT JUSTITIA* 123, available at: <https://www.mendeley.com/catalogue/56e234a0-54f2-3893-8128-0525b72d78cc/> (accessed on 19 July 2025).

34 Rohaini (n33) 127.

35 WIPO (n5).

36 Ibid.

The defensive approach taken by the WIPO is evident in the WIPO Treaty on Intellectual Property, Genetic Resources, and Associated Traditional Knowledge, 2024, and in the South African Patent Amendment Act.³⁷ It is a defensive approach that seeks to prevent unauthorised, unethical, and unfair access to and use of TK/IK and the associated resources by external parties.

3.1.3 *Disclosure requirements and access and benefit sharing*

The WIPO Treaty strengthens the patent system while ensuring adequate safeguarding of TK/IK and associated resources by requiring the disclosure of origin in patent applications.³⁸ The Treaty seeks to strengthen the patent system to safeguard genetic resources and TK/IK.³⁹ Requiring the applicant to indicate the country they sourced tangible TK/IK or an indigenous source will ensure that the relevant body grants only legitimate patents.⁴⁰

This article argues that one commendable provision of the Treaty is art 5(1) and (2), which states that member states may impose measures they deem fit in cases of fraud and misrepresentation.⁴¹ Similarly, in the South African legal context, the Patent Amendment Act requires that patent applicants indicate, where applicable, that their inventions are built on/based on TK/IK and associated resources.⁴² Building on ABS and prior art disclosure requirements, disclosure requirements in this context foster the need to acknowledge Indigenous Peoples and fairly compensate them for using their knowledge and associated resources.

Viewed from the biopiracy theoretical perspective, disclosure requirements prevent the misappropriation of TK/IK and associated resources while ensuring that the appropriate TK/IK rights holders are fairly and relatively compensated where it is accessed. Arguably, this requirement ensures transparency and accountability, as patent examiners would diligently verify whether a patent applied for is legitimate.

3.1.4 *Information systems databases*

In addition, documentation of TK/IK is another form of defensive protection. The WIPO Treaty provides that member states may create databases for storing information related to genetic resources and associated TK/IK.⁴³ In so doing,

37 Act 20 of 2005.

38 World Intellectual Property Organisation Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge, available at: <https://www.wipo.int/en/web/traditional-knowledge/wipo-treaty-on-ip-gr-and-associated-tk> (accessed on 19 July 2025).

39 Article 1 of the World Intellectual Property Organisation Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge.

40 See art 3(1) and 3(2) of the World Intellectual Property Organisation Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge.

41 Article 5(1) and (2) of the World Intellectual Property Organisation Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge.

42 Section 3A of the Patents Amendment Act 20 of 2005.

43 Article 6 of the World Intellectual Property Organisation Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge.

member states must consult with Indigenous Peoples to ensure the documented knowledge is accurate.⁴⁴ Likewise, South Africa has established the National TK/IK Management System (NIKMAS), the National Recordal System (NRS), a mechanism for recording TK/IK and its associated resources.⁴⁵

When patent examiners assess patent applications, they may rely on this database to ensure they do not grant a patent over TK/IK not disclosed in the patent application. Khalala reflects on the benefits of a recordal system and argues that documenting TK/IK maintains the existence and protection of TK/IK, as it is accessible to anyone who wishes to validate the existence and legitimacy of any aspect of TK/IK.⁴⁶

Therefore, it may be argued that it is essential to ensure that these repository databases are accessible to everyone at any time. Further, they must be updated to ensure that real-time information exists and is available to the public and those who wish to patent their inventions. While it is beneficial to document TK/IK, respect must be afforded to Indigenous Peoples whose information is secret, taboo, or spiritual. Then, it does not have to be publicised. Balogun and Kalusopa submit that for an effective recordal system, a policy framework must be designed to ensure correct procedures, including those of the management system.⁴⁷

3.1.5 *Trademarks and geographical indications*

Article 10 of the IP Protocol mandates member states to use and encourage the use of marks to foster sustainable development.⁴⁸ This section determines how marks can be used to safeguard TK/IK to foster African economic development.

Trademarks can be used to protect various aspects of TK/IK. Indigenous Peoples can use trademarks to protect their marks and symbols.⁴⁹ For a mark to be registered, it must be a sign of names, letters, figurative and colour combinations and elements, and numerals.⁵⁰ TK/IK can be categorised into one or more of the above non-exhaustive requirements of a mark.⁵¹

44 Ibid.

45 Department of Science and Innovation 'National Indigenous Knowledge Management System', available at: <https://nikso.dst.gov.za/> (accessed on 19 July 2025).

46 G Khalala 'Protecting and benefiting from indigenous knowledge: The National Indigenous Knowledge Management System' (2021) 17 *Science Scope* 56, available at: <https://www.studocu.com/en-za/document/university-of-south-africa/applied-research-methodology/khalala-2021-protecting-and-benefiting-from-indigenous-knowledge-the-national-indigenous-knowledge-management-system/122140434> (accessed on 19 July 2025).

47 See T Balogun & T Kalusopa 'A framework for digital preservation of indigenous knowledge system (IKS) in repository in South Africa' (2021) 31(2) *Records Management Journal* 177, available at: <https://www.emerald.com/rmj/article-abstract/31/2/176/363697/A-framework-for-digital-preservation-of-Indigenous?redirectedFrom=PDF> (accessed on 19 July 2025).

48 Generally, see art 10 of the IP Protocol.

49 S Frankel 'Trademarks and traditional knowledge and cultural intellectual property rights' (2011) 1(6) paper no 36/2011 *Victoria University of Wellington Legal Research Papers*, available at: <https://www.semanticscholar.org/paper/Trademarks-and-Traditional-Knowledge-and-Cultural-Frankel/652e8a8799f34cc37f2d225749e38c6f5ad550af> (accessed on 20 July 2025).

50 Article 15(1) of the TRIPS Agreement.

51 Frankel (n49) 13.

The fact that a trademark was registered concerning rooibos indicates that even indigenous marks that distinguish certain products from others can be registered as IP.⁵² Therefore, marks that tend to distinguish indigenous products and processes from others can be recognised and registered in the context of the AfCFTA Agreement.

The appropriateness of using trademarks to safeguard TK/IK lies in its ability to minimise confusion for those who may not know that a particular aspect of TK/IK has been registered as an IPR. This promotes lawful competition while minimising the search costs.⁵³ Trademarking specific TK/IK may also distinguish African TK/IK from TK/IK found on other continents.⁵⁴

Furthermore, art 9 of the IP Protocol states that member states should safeguard geographical indications (GI).⁵⁵ Frankel believes that GIs are closely related to trademarks.⁵⁶ African Indigenous Peoples can protect their TK/IK relevant to a particular geographical jurisdiction. While trademarks and GIs do not protect TK/IK *per se*, they can help prevent others from marketing and selling products with confusing indications of TK/IK. This relates to trademarks in that a specific mark may identify a particular aspect of TK/IK, such as Africa's expertise and associated resources. GI recognise the collective rights embedded in particular expertise and, therefore, are relevant for safeguarding TK/IK belonging to the members of the AfCFTA Agreement. For example, rooibos is attributed to Southern Africa

3.1.6 Copyrights and related rights

Reddy and Aswath define copyright as an exclusionary right granted to a creator for their artistic work, which prevents others from reproducing, adapting, translating, distributing, and performing without consent from the creator.⁵⁷ Article 11 of the IP Protocol provides that member states must safeguard copyrights and the associated rights.⁵⁸ This copyright and the related rights must encourage 'the preservation of cultural materials for advancing public welfare and sustainable development'.⁵⁹ Arguably, cultural materials referred to herein include TK/IK.

The preceding copyright can, therefore, be used to safeguard the artistic work of TK/IK holders against unlawful access, use, and distribution. These works could include, but are not limited to, tales, poems, traditions, music, and artefacts. Related rights could safeguard the performance of the above-

52 Z Ismail & T Fakir 'Trademarks or trade barriers? Indigenous knowledge and the flaws in the global IPR system' (2004) 31(12) *International Journal of Social Economics* 173.

53 Frankel (n49) 28–33.

54 Frankel (n49) 30–32.

55 Article 9 of the IP Protocol.

56 Frankel (n49) 23.

57 A Reddy & L Aswath 'Understanding copyright laws: Infringement, protection and exceptions' (2016) 2(1) *International Journal of Research in Library Science* 48, available at: https://www.ijrils.in/journal_category/volume-2-issue-1/198-understanding-copyright-laws-infringement,-protection-and-exceptions (accessed on 19 July 2025).

58 Article 11(1) of the IP Protocol.

59 Article 11(2) of the IP Protocol.

mentioned artistic works. Therefore, copyrights can be used to protect the original adaptations of IKS for the benefit of their authors.

3.1.7 *Plant breeders' rights*

If the AU does not consider extending patent protection to plant biological varieties, plant breeders' rights are a solution. The requirements are the same as those of patents; therefore, this section does not repeat the argument about patents. Article 8 of the IP Protocol states that states should safeguard new plant varieties.⁶⁰ This may be read with art 20, which requires the protection of genetic resources.⁶¹ In this manner, plant breeders' rights safeguard the new inventive steps for plant varieties.

3.1.8 *Designs*

Article 14 of the IP Protocol states that member states should safeguard industrial designs.⁶² Indigenous Peoples also have ways of designing things, such as building their huts and kraals. This is an evolving field, and indigenous designs still influence the contemporary era. Therefore, the new and distinct designs may be protected as an IPR.

3.1.9 *Reflections on IP frameworks*

Despite the criticisms against using conventional IP regimes, this section highlighted that the IP regime can safeguard TK/IK when adequately adapted. This section indicates how patents, copyrights, related rights, designs, trademarks, plant breeders' rights, and GI can be adapted to accommodate TK/IK under the AfCFTA Agreement. Copyrights can be used to safeguard the artistic and literary work of the Indigenous Peoples. Patents, on the other hand, can protect indigenous innovations and inventions. Plant breeders' rights can be used to safeguard new plant varieties. On the other hand, designs can be used to protect the designs of indigenous products. Furthermore, GI can preserve certain indigenous goods from a specific area. Trademarks such as names, symbols, and slogans can be used to safeguard TK/IK. The following section explores additional solutions to the unlawful access and use of TK/IK.

3.2 **A framework for ABS, FPIC, and prior art disclosure**

3.2.1 *Introduction*

As an alternative approach to safeguarding TK/IK in the AfCFTA Agreement, a *sui generis* system holds promise and, therefore, is explored in this section. *Sui generis* is a Latin phrase that means 'special and unique kind'.⁶³

60 Article 8 of the IP Protocol.

61 Article 20 of the IP Protocol.

62 Article 14(1) of the IP Protocol.

63 M Wekesa 'What is *sui generis* system of intellectual property protection?' (2017) *The African Technology Policy Studies Network*, available at: https://atpsnet.org/wp-content/uploads/2017/05/technopolICY_brief_series_13.pdf (accessed on 19 July 2025).

Protecting TK/IK would mean a unique system outside the ordinary and known protection system. Sand argues that the continued exploitation of TK/IK and associated resources proves there is a need for a specific regime to safeguard this knowledge.⁶⁴ She argues that since the conventional IP regime may not comprehensively cover the customary norms and cultural and spiritual rights associated with TK/IK, there is a need to develop a system that covers a wide range of these issues.⁶⁵

Mpanza submits that a *sui generis* framework is characterised by a customised set of rules depending on the subject matter.⁶⁶ Paul believes that a *sui generis* framework safeguards TK/IK outside the conventional Western-centred systems like the IP regime.⁶⁷ She states that this framework fosters fairness by ensuring that only the legitimate owners of TK/IK are granted legal rights over the knowledge.⁶⁸

The following are the key aspects of a *sui generis* framework developed by the WIPO to address the protection of TK/IK: providing the meaning and scope of TK/IK; identifying holders of rights/beneficiaries; scope of protection; disclosure requirements; administrative mechanisms; creation of databases; cross-border protection and cooperation; dispute-resolution mechanisms; and sanctions and penalties.⁶⁹

3.2.2 Access and benefit sharing agreements

The AfCFTA Agreement suggests an ABS for safeguarding TK/IK and the holders thereof.⁷⁰ An ABS mechanism is, therefore, an opportunity to balance the rights of TK/IK holders and the external parties wishing to access TK/IK. This section determines how the ABS mechanism can be shaped in the AfCFTA framework to safeguard TK/IK effectively. ABS can be incorporated and implemented through a multifaceted approach and legislative, institutional, and procedural mechanisms.

The AfCFTA's IP Protocol already includes a provision mandating the use of ABS to safeguard TK/IK, which leaves it to the states to develop rules for implementation.⁷¹ The benefits to be shared accrued due to the access to and the use of TK/IK and associated resources. The ABS mechanisms should be aligned with international and African regional frameworks such as the CBD, The Bonn Guidelines on Access to Genetic Resources and the Fair and Equitable

64 S Sand 'Sui generis laws for the protection of indigenous expressions of culture and traditional knowledge' (2003) *The University of Queensland Law Journal* 188, available at: <https://search.informit.org/doi/pdf/10.3316/ielapa.833718758914539> (accessed on 19 July 2025).

65 Sand (n64) 188–190.

66 X Mpanza 'Protecting traditional knowledge' (2014) *De Rebus* 23, available at: <https://journals.co.za/doi/pdf/10.10520/EJC153433> (accessed on 19 July 2025).

67 J Paul 'Traditional knowledge protection and digitization: A critical decolonial discourse analysis' (2023) 36 *International Journal of the Semiotics of Law* 2133, available at: <https://link.springer.com/content/pdf/10.1007/s11196-023-09989-8.pdf> (accessed on 19 July 2025).

68 Paul (n67) 2135.

69 WIPO (n5).

70 Article 18(c) of the IP Protocol.

71 Ibid.

Sharing of Benefits Arising Out of Their Utilization (Bonn Guidelines); and the 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 (Nagoya Protocol) — to ensure consistency.

The annex to the IP Protocol should mandate states to adapt their national laws to align with its framework, creating a coherent system of protecting TK/IK. The annex to the IP Protocol may establish a secretariat for ABS to assist with support and compliance matters as part of its institutional mechanisms. In addition, the annex to the IP Protocol must ensure that a procedure for accessing TK/IK and associated resources is clearly stated, including obtaining FPIC from the TK/IK rights holders, and in a prescribed form. There must be standard templates for ABS agreements to guide prospective parties on how to draft their agreements.

Protective measures will be effective if the annex to the IP Protocol establishes a checks and balances system. This could be through audit and reporting mechanisms. Through this, the AfCFTA Secretariat and other relevant stakeholders will be able to determine where the implementation is lacking and impose the necessary measures to remedy the defect. As provided in art 33 of the IP Protocol, capacity-building can be achieved through educational programmes, public campaigns, and awareness campaigns.

3.2.3 *FPIC and prior art disclosure*

FPIC and prior art disclosure are other essential principles for safeguarding TK/IK. Giving freedom to the Indigenous Peoples on who and when to consent to access their understanding ensures that people respect their craft and access it only when granted consent. On the other side, prior art disclosure ensures transparency. This section illustrates how these principles (FPIC and prior art disclosures) can be combined to safeguard TK/IK in the context of the AfCFTA Agreement.

The annex to the IP Protocol must incorporate terms of access and use and indicate that Indigenous Peoples have the right to consent to access and use their TK/IK. They must indicate that, upon obtaining consent, every person should first use TK/IK and the associated resources. In so doing, the annex to the IP Protocol may require that the state parties consider the guidelines in the United Nations Declaration on the Rights of Indigenous Peoples, which require the following: the inclusion of Indigenous Peoples in decision-making processes and consulting in good faith and acknowledging Indigenous Peoples as the owners or holders of rights over TK/IK.⁷²

The annex to the IP Protocol can also establish institutional bodies that will oversee ABS Agreements negotiations, consent giving, and conclusions. The negotiation procedures should consider the rules developed by respective

⁷² See generally, the United Nations Declaration on the Rights of Indigenous Peoples, VilBLE, available at: <https://www.ohchr.org/en/indigenous-peoples/un-declaration-rights-indigenous-peoples> (accessed on 19 July 2025).

communities as outlined in their respective community protocols. The annex to the IP Protocol should also establish a recordal system that responds to the digital era, making tracking how FPIC is being implemented easy.

Prior art disclosure may also be included in the patent law aspect of the AfCFTA Agreement. Through this, applicants for patents for TK/IK must mention whether their inventions or creations involve a step or product derived from TK/IK. TK/IK databases would then be used to search existing TK/IK. This means the annex to the IP Protocol should ensure adequate documentation of TK/IK. Capacity-building would include training relevant stakeholders on conducting proper searches and examining patents.

The annex to the IP Protocol should indicate clear rules on what prior art disclosure entails. This would include the information that should be disclosed and to what extent. For example, an applicant would have to disclose what plant or medicinal processes they wish to patent to the extent that it becomes clear to everyone what that product or process is. However, they should still maintain secrecy about the sensitive aspects of the subject matter. Trade secrecy law would be applicable in this sense. The annex to the IP Protocol should establish procedures that would assist Indigenous Peoples in objecting to patents and, subsequently, revoking them should it be proven that indigenous patents have been infringed upon. This would include filing notices following the circulation of proposed patents over TK/IK and associated resources through various modes of communication, such as radio, newspaper, and television.

3.2.4 *Indigenous Peoples' rights*

The provisions of the United Nations Declaration on the Rights of Indigenous Peoples imply the importance of recognising Indigenous Peoples' rights over TK/IK and the associated resources. Recognising these rights would ensure that the AfCFTA Agreement fosters justice and equity for Indigenous Peoples. The annex to the IP Protocol can explicitly refer to human rights instruments, such as the African Charter on Human and Peoples' Rights and the United Nations Declaration on the Rights of Indigenous Peoples. These instruments are the basis and justification for why the rights of Indigenous Peoples should be protected and respected. Through this, the annex to the IP Protocol can attribute certain rights to Indigenous Peoples over TK/IK and associated resources, namely, the right to ownership, equitable benefit sharing, socio-economic rights, and self-determination.

The annex to the IP Protocol may establish institutional bodies to oversee and ensure Indigenous Peoples' rights are respected. For example, these could be committees, councils, and boards. Training officials and Indigenous Peoples and educating them about their rights would create awareness; they would know whom to approach for assistance when their rights are violated. This can be achieved through educational, legal, and technical support mechanisms.

The annex to the IP Protocol should promote the participation of the Indigenous Peoples in decision-making processes on issues concerning their TK/IK. For example, third parties who wish to access and use TK/IK must

consult with Indigenous Peoples and offer them an equal and fair representation. The annex to the IP Protocol should ensure that Indigenous Peoples have the option to raise their grievances about the access and use of their TK/IK by third parties. The mediation and arbitration approach also saves the costs of taking disputes over TK/IK and associated resources to court.

The annex to the IP Protocol may establish a monitoring and reporting mechanism to monitor the upholding of Indigenous peoples' rights considerations. Through this, there must be a reporting procedure where the AfCFTA Agreement's regulatory body is informed of the status of the Indigenous people. Setting benchmarks will help determine whether there is any lack of upholding the rights of Indigenous people.

Customary law is a legal system comprising Indigenous practices that govern Indigenous people's lives.⁷³ Customary law, therefore, represents the reality of the African Indigenous people. Thus, customary norms can safeguard TK/IK in the context of the AfCFTA Agreement, as they govern how Indigenous people use and manage their TK/IK, associated resources, and expressions of folklore. The discussion below outlines how this can be possible.

The annex to the IP Protocol should explicitly recognise customary law as a point of reference for safeguarding TK/IK. Advisory bodies should be established to advise on how ABS, FPIC, and prior art disclosure requirements may be executed. Therefore, these bodies would help interpret customary law, practices, and dispute-resolution mechanisms. The capacity-building mechanisms should focus on educating officials, Indigenous Peoples, and IP professionals on the importance of customary law in safeguarding TK/IK.

The annex to the IP Protocol should endeavour to support the development of community protocols, which shall outline Indigenous people's rights and responsibilities over TK/IK and determine ABS per Indigenous Peoples' practices and norms. Customary law, therefore, promotes the inclusion of Indigenous Peoples and entails norms and standards for them.

Audits could be used to determine whether the access and use of TK/IK is being done as per customary laws and practices of the respective Indigenous Peoples. The annex to the IP Protocol could include establishing a procedure where Indigenous Peoples would provide feedback on accessing, using, and safeguarding TK/IK. Failure to adhere to customary norms and practices should result in culturally applicable sanctions that are enforceable within the ambit of the law. The annex to the IP Protocol should reflect this.

3.2.5 *Administrative mechanisms*

Rules are one thing, and implementation/enforcement is another. The administrative mechanisms help with the implementation of rules. In this context, they must contribute to effectively implementing rules for safeguarding TK/IK in the

73 C Himonga & RT Nhlapo (eds) *African Customary Law in South Africa. Post-Apartheid and Living Law Perspectives* (2015).

annex to the IP Protocol. This section outlines how the annex to the IP Protocol may feature an administrative functionary framework for protecting TK/IK.

The annex to the IP Protocol could establish a body responsible for administrative duties to safeguard TK/IK. A specialised unit responsible for TK/IK would coordinate the additional obligations in the annex to the IP. The specialised unit would also offer expert advice on the experiences and best practices in safeguarding this knowledge. The annex to the IP Protocol should mandate member states to design a body that will liaise with Indigenous Peoples on issues concerning their expertise and monitor adherence to the annex's rules.

Some administrative mechanisms not provided in the annex to the IP Protocol include legal and general assistance. Under this, the AfCFTA Agreement's framework could mandate member states to assist Indigenous Peoples with general support and legal aid in safeguarding their TK/IK. This could include legal representation and advisory services regarding negotiations, dispute-resolution mechanisms, and reporting.

3.2.6 *A hint at the annex to the IP Protocol*

As mentioned earlier, the IP Protocol obligates member states to develop and annex Traditional Knowledge, Traditional Cultural Expressions, and Genetic Resources to the IP Protocol. Development and negotiations of the annexes are underway. In structuring the annexes, the AfCFTA Secretariat and the member states must consider the guides obtainable from IP, human rights, customary laws, and administrative mechanisms discussed above. This would ensure the balancing of interests of the Indigenous Peoples and those of private stakeholders who want to access TK/IK and the associated resources.

The annex to the IP Protocol must conceptualise and define key terms such as TK/IK, FPIC, and ABS. Secondly, the annex should outline the scope of the annex, which should address sustainable development and safeguarding of TK/IK and the associated resources. Thirdly, the annex should outline the conditions under which TK/IK would be protected, touching base on the beneficiaries of the knowledge, rights of the beneficiaries, duration, and the limitations to the terms of protection.

Furthermore, the annex should outline the terms and conditions under which disclosure requirements, FPIC, and ABS would be executed. Additionally, this section should outline the consequences of not abiding by the rules on the above critical measures for safeguarding TK/IK and the associated resources. Regarding administrative mechanisms, the annex could establish rules for establishing databases and monitoring and reporting institutional frameworks. The annex should outline the sanctions that might be imposed on parties that contravened the rules in the annex, including both civil and criminal sanctions.

Lastly, the annex should outline how access to TK/IK and the associated resources would be regulated. It should determine the implementation plan, including dispute resolution mechanisms, review, and amendment.

4. CONCLUSION

The IP Protocol offers a unique approach to protecting TK/IK and associated resources within a community-centred framework. It provides an opportunity to align the IP framework with human rights, customary law, and sustainable development goals, laying a foundation for a *sui generis* system. Despite the adopted Protocol, the realisation of its objectives depends on the adoption and implementation of its annex, outlining additional obligations for IPRs, including TK/IK. This annex should outline how ABS, FPIC, prior art disclosures, technology transfers, and administrative duties will be carried out. When concluding this annex, it is essential to acknowledge that customary norms and rights of the Indigenous People are central to the protection of TK/IK within the AfCFTA framework. Therefore, the annex needs to be explicit on ‘Indigenous Peoples’ and their rights.