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CONTENTS

MAINSTREAMING CROSS-BORDER ARBITRATION AT THE EACJ: ROLE OF INTELLECTUAL PROPERTY IN REGIONAL INTEGRATION

Eugene Otieno Owade[*]
Ben M. Sihanya[**]

ABSTRACT

Although the East African Court of Justice (EACJ) has arbitral jurisdiction over international commercial disputes, little to no attention has been paid to how this jurisdiction can be effectively harnessed for the resolution of cross-border intellectual property (IP) disputes among East African Community (EAC) member states. This paper acknowledges and appreciates that various communities in the EAC bloc share cultural values, practices and beliefs which constituted shared indigenous knowledge as an intellectual property right. While EAC countries like Kenya have legislation on IP including the Kenyan Traditional Knowledge and Cultural Expressions Act, 2016, these laws fail to sufficiently address how to resolve disputes that emerge outside the national territorial jurisdiction. Further, there are no uniform criteria for determining issues like cross-border access and benefit sharing (A&BS), promoting sustainable development, social equity and cultural diversity which may pose challenges when citizens of EAC member states seek redress for any infringement of individual or collectively owned IP rights.

A casual view of EACJ's Reports demonstrates the untapped potential of the EACJ as a regional adjudicator of cross-border disputes. On the one hand, it may be hypothesized that EAC member states prefer and trust national as opposed to judicial institutions. On the other hand, the lack of data on the number of intellectual property disputes resolved at the EACJ through arbitration, if any, points to legal, regulatory, policy and jurisprudential gaps which limit the capacity of the EACJ to be a reliable and effective regional dispute resolution mechanism for IP disputes. Therefore, this paper makes a case for an expansive application of, the reconceptualization and redefinition of the scope, nature and extent of the arbitral jurisdiction of the EACJ to promote regional integration through the amicable resolution of IP disputes within the EAC bloc.

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I. INTRODUCTION

Many communities in East Africa trace their history and origin to more than one (1) territorial jurisdiction. For instance, the history of the Luo of Kenya can be traced from the Congo, Sudan through Uganda.[1] Relatedly, various researchers, scientists and anthropologists have also demonstrated that during such migration, communities shared cultural heritage[2] through assimilation, intermarriages and socio-economic interactions like barter trade.[3] This is why the Preamble of the East African Community Treaty acknowledges that the member states "*have enjoyed close historical, commercial, industrial, cultural and other ties for many years*."[4] And Professor Ben Nwabueze notes that Preambles are a foundational element of African constitutions that proclaim the shared objectives and values of a society.[5]

EAC had seven (7) member states including Kenya, Uganda and Tanzania who were the founding member states, and Burundi, Rwanda, South Sudan and the Democratic Republic of Congo which officially joined the regional bloc on July 11, 2022.[6] As at the time of this writing, the Federal Republic of Somalia officially became a member of EAC on December 15, 2023 upon ratification of the EAC Treaty.

Therefore, it can be deduced that it was the intention of the drafters of the EAC Treaty to ensure that regional comity goes beyond common markets and governance to also cover socio-cultural and historical ties.[7] Prof James Otieno-Odek points out that part of the "*thematic areas of cooperation in the EAC are: … health, social and cultural activities…*" among others.[8] This is further clarified by Article 16(1)(i) of the EAC Treaty which directs member states to pursue a harmonized approach towards the protection of intellectual property rights (IPRs).[9]

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1 DW Cohen, 'Luo History without Court Chronicles-History of the Southern Luo,' in BA Ogot, eds., *Migration and Settlement* (East African Publishing House, The Journal of African History, 1968), 480-482.

2 ES Atieno Odhiambo, 'African perspectives on cultural diversity and multiculturalism,' [32.3-4)] Journal of Asian and African Studies (1997) 185-201.

3 H Sereke-Brhan, 'Coffee, Culture, and Intellectual property: Lessons for Africa from the Ethiopian fine coffee initiative,' [11] Boston University(2010); P Kabanda (2016) The Arts, Africa and Economic Development: The Problem of Intellectual Property Rights.

4 B Katembo, 'Pan Africanism and Development: The East African Community Model,' [2.4] Journal of Pan African Studies (2008).

5 BO Nwabueze (2003) *Constitutional Democracy in Africa* (Spectrum Books Ltd: Ibadan 2003 Vol. 1); BO Nwabueze (1982) *Presidential Constitution of Nigeria* (C. Hurst & Company in association with Nwamife Press, Enugu and Lagos).

6 <https://www.eac.int/overview-of-eac> (accessed 20 October 2023).

7 EO Owade, *Reconceptualizing Nationhood in Kenya and Africa vis-à-vis Citizen Wanjiku: The Norm Versus Practise of Popular Sovereignty*, LLB Diss. University of Nairobi Law School.

8 Otieno-Odek, 'Law of Regional Integration – A Case Study of the East African Community,' in J Doveling, H Majamba, R Oppong & U Wanitzek eds., *Harmonisation of laws in the East African Community: The State of Affairs with Comparative insights from the European Union and other Regional Economic Communities* (LawAfrica Publishing (K) Ltd), Nairobi, 2018) 17-55.

9 TB Kuti, 'Towards effective Multilateral Protection of Traditional Knowledge within the Global Intellectual Property framework' (LLM, University of Western Cape, 2018).

Regional comity involves amicable dispute settlement as provided for under Article 6(c) of the EAC Treaty as read with Article 6(b) which promote mutual and "peaceful coexistence" with neighbouring states.[10] One of the inherent mechanisms in the Treaty is the resolution of any emerging disputes through the EACJ as provided for under Article 32(b).[11] The EACJ has jurisdiction "*to hear and determine disputes arising from a dispute between the Partner States regarding this Treaty if the dispute is submitted to it under a special agreement between the Partner States concerned*." The precondition under this subsection is that disputing parties must submit their dispute to the Court. This is because the EACJ lacks inherent jurisdiction to resolve a matter *suo moto* or without being referred to it.[12]

Article 32(c) of the Treaty provides that the EACJ can also exercise jurisdiction over matters arising from arbitral clauses in commercial agreements between parties. This is pivotal in asserting arbitration in TK and TCE disputes since it implies the existence of institutional mechanisms to resolve disputes within EAC through arbitration.[13] Remarkably, the *EAC Treaty* only mentions arbitration three (3) times under Article 32 (arbitration clauses and special agreements) in the entire Treaty. Others argue that despite this potential, the arbitration clauses under Article 32 have not been effectively utilized in EAC due to regional preference for international arbitration. The next step is understanding how to actually enjoy this obligation. Kariuki Muigua defines arbitration as '*private and consensual process where parties to a dispute agree to present their grievances to a third party for resolution*.'[14]

From this definition, arbitration has at least four (4) elements including: First, there must be a dispute. Second, the arbitral process is private between the parties and subject to public exposure and ridicule. As compared to litigation, arbitral awards and proceedings are not open to the public nor covered in law reports. Third, the parties must voluntarily grant consent to pursue arbitration. Fourth, the parties surrender their dispute to a neutral third party for resolution.[15] Thus, arbitration would be an effective strategy for addressing TK TCE cross-border disputes due to its inherent nature of maintaining the interpersonal relationship between the parties as compared to litigation which is mainly adversarial. These four (4) features of arbitration shall be substantively discussed under Part V of this paper.

10 Article 6(b) and (c) of the EAC Treaty.

11 F Kariuki, 'Challenges facing the recognition and enforcement of international arbitral awards within the East African Community,' [232] Dispute Resolution Journal (2014) pp. 233.

12 FW Gathoni, 'An analysis of Article 32 (c) of the EAC treaty the efficacy of arbitration in bolstering the EAC integration Agenda,' (2020).

13 PM Muriithi & GO Oduor, 'Effectiveness of the East African Court of Justice as an International Arbitral Tribunal,' [7(1)] Alternative Dispute Resolution Journal (2019).

14 K Muigua, 'Arbitration Law and the Right of Appeal in Kenya,' (2021).

15 ENA Torgbor, *A comparative study of law and practice of arbitration in Kenya, Nigeria and Zimbabwe, with particular reference to current problems in Kenya* (Diss. Stellenbosch: Stellenbosch University, 2013).

While arbitration is mainly perceived as a single and comprehensive disputes resolution mechanism, arbitration also has at least two (2) forms: First, *ad hoc* arbitration and institutional arbitration. *Ad hoc* arbitration is defined as a mutual or collaborative but voluntary arbitral process where the parties agree on the forum and guidelines or rules to be followed.[16] On the other hand, institutional arbitration refers to where a dispute is referred to an arbitration institution with its own set rules, guidelines and procedures. Parties are bound by these rules once they refer the dispute to the arbitral institution.[17] Are TK and TCE disputes of a nature that can be subjected to arbitration? The next section identifies some of the shared TK and TCE in East Africa and the nature of emerging cross-border disputes.

II. CONCEPTUALIZING TRADITIONAL KNOWLEDGE (TK) AND CULTURAL EXPRESSIONS

According to section 2 of the Kenyan *Traditional Knowledge and Cultural Expressions Act, 2016*, traditional knowledge is defined to include knowledge that is:

> "*originating from an individual, local or traditional community that is the result of intellectual activity and insight in a traditional context, including know-how, skills, innovations, practices and learning, embodied in the traditional lifestyle of a community*."

Such knowledge is mainly transferred orally from one generation to another.[18] Daniel Kawooya argues that the oral transmission of knowledge is one of the reasons why Africa has been treated as a peripheral participant in "global knowledge flows."[19]

On the other hand, this meaning is closely related to the definition of cultural expressions which includes knowledge and art transferred or shared verbally like stories and poetry; or music, traditional dances, folk art,[20] jewelry and traditional rituals, among others.[21] The definitions are broad since TK and TCE cannot be sufficiently defined within the four corners of the other intellectual property rights (IPRs) like copyright inasmuch IPRs may arise in both regimes, for instance, in the protection of folk songs.[22]

16 UG Schroeter, 'Ad Hoc or Institutional Arbitration-A Clear-Cut Distinction: A Closer Look at Borderline Cases,' [10] Contemp. Asia Arb. J. (2017) pp. 141.
17 E Al Tamimi, 'International Commercial Arbitration in the MENA: Institutional v. Ad Hoc: A Wealth of Choice,' [83.1] Arbitration: The International Journal of Arbitration, Mediation and Dispute Management (2017).
18 P Ikuenobe, 'Oral tradition, Epistemic dependence, and Knowledge in African Cultures,' [33.1] Synthesis Philosophica (2018) pp. 23-40.
19 He adopts the term indigenous and traditional knowledge (ITK) in reference to TK TCE.
20 Section 24, Copyright and Neighbouring Rights Act, (No. 7) 1999 (Tanzania).
21 G Dutfield, 'TRIPS-related aspects of traditional knowledge,' [33] Case W. Res. J. Int'l L (2001) pp. 233.
22 DJ Gervais, 'Spiritual But Not Intellectual-The Protection of Sacred Intangible Traditional Knowledge,' [11] Cardozo J. Int'l & Comp. L. (2003) pp. 467.

According to the World Intellectual Property Organization (WIPO), traditional knowledge and traditional cultural expressions may also be referred to as '*knowledge, know-how, skills and practices that are developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity*.'[23] In reiteration to the apparent lack of a coherent or universal definition of TK and TCE, WIPO also acknowledges that '*there is not yet an accepted definition of TK at the international level*.'[24] This conceptual gap may have two-pronged challenges: firstly, a positive broad protection of any TK and TCE. A broad regime can be used to protect any "soon-to-be discovered" TK and TCE[25] and not currently easily identifiable or recognizable within the public domain.

Secondly, a broad and ambiguous definition is risky since it makes it difficult to define the IPRs within the TK TCE regime, hence increasing the vulnerability of cultural heritage to misappropriation, where the TK TCE cannot be identified, defined and segregated from other IPRs. Scholars like Ajeet Mathur posit that '*such [traditional] knowledge is not limited to definable or articulable sets of knowable elements*.'[26] Therefore, the very nature of TK TCE may pose legal, moral and ethical challenges when designing an effective protection system. This may explain why the *sui generis* system is adopted so that various aspects of indigenous knowledge are protected. Such a *sui generis* system is comprehensive enough to protect any emerging TK and TCE unlike the mainstream IP regimes while also limited to provide a coherent socio-legal framework that conforms to the unique nature of TK and TCE.

Other theorists also define TK and TCE through the lens of other IPRs and the scope of protection provided to the main IPRs like Patent, Copyright and Trade Mark (TM). For instance, Ben Sihanya conceptualizes TK and TCE as part of the '*IP and related regimes [that] crucial to Kenya and Africa [but] are either not prominently captured in the TRIPS Agreement or not reflected at all*.'[27] Indeed, this explains part of the reason why there is no regionally accepted regime of protection on TK TCE.

The lack of conceptual coherence on TK and TCE is also apparent when some scholars refer to TK TCE as 'traditional science,'[28] 'indigenous knowledge or

23 DF Robinson, AL Ahmed & R Pedro, eds., *Protecting Traditional Knowledge: The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore* (Taylor & Francis, 2017).

24 RL Okediji, 'A tiered approach to rights in traditional knowledge,' [58] Washburn LJ (2019) pp. 271.

25 Ibid.

26 A Mathur, 'Who owns Traditional Knowledge?'Economic and Political Weekly (2003) pp. 4471-4481.

27 B Sihanya, 'Integrating Intellectual Property, Innovation, Transfer of Technology and Licensing in Kenya and Africa,' (WIPO-WTO Colloquium Papers: 2018 Africa Edition).

28 C Oguamanam, 'Towards a tiered or Differentiated Approach to protection of Traditional Knowledge (TK) and Traditional Cultural Expressions (TCEs) in relation to the Intellectual Property System,' [23] The African Journal of Information and Communication (2019) pp. 1-24.

education,'[29] 'culture' and 'intangible cultural heritage' according to UNESCO.[30] As indicated earlier, this conceptual diversity presents challenges that directly affect the formulation and design of regulatory frameworks that address the unique cross-border nature of African TK and TCE.

One of the challenges is that while the focus of TRIPS and WIPO-WTO have been positive, they have been heavily skewed towards addressing misappropriation and biopiracy without addressing how to effectively safeguard communities sharing indigenous knowledge across national boundaries in East Africa. According to WIPO (2008):

> *"emphasis on controlling biopiracy alone will be inadequate to protect TK and the international community and individual nations will need to also address the underlying threats to the integrity of TK systems."31*

Similarly, extensive research has been conducted on the need for equitable access and benefit sharing, but with limited focus on national boundaries. This approach, if undertaken in exclusion, is fundamentally flawed as it is detached from the African communal and communitarian conceptualization of natural and genetic resources as shareable resources.[32]

This is the reason why Article 5(1) of the EAC Treaty directs state parties to pursue mutual cooperation in cultural issues, technology transfer and research. Further, Kenya's National Policy on TK and TCE acknowledges the need to promote "*regional cooperation for purposes of identifying the common traditional cultural heritage and promoting exchange of genetic resources and associated information*."[33] Therefore, multi-disciplinarity and mutual regional collaboration in defining identifying and safeguarding cross-border TK and TCE is important. It will not only broaden the scope of TK and TCE protection and value addition under regional trade agreements, but also ensure that any emerging disputes are resolved amicably.

29 S Ochwo-Oburu, 'East Africa and Indigenous Knowledge: Its nature, contents, aims, contemporary structures, and vitality,' (The Palgrave Handbook of African Education and Indigenous Knowledge 2020) 303-318.

30 UNESCO, 'UNESCO publishes East African case studies on living heritage and climate change,' 7 December 2021, <https://www.unesco.org/en/articles/unesco-publishes-east-african-case-studies-living-heritage-and-climate-change> (accessed 27 October 2023).

31 B Tobin, 'The Role of Customary Law in Access and Benefit-sharing and Traditional Knowledge Governance: Perspectives from Andean and Pacific Island countries,' World Intellectual Properties Organization and the United Nations University (2008).

32 G Aguilar, 'Access to genetic resources and protection of traditional knowledge in the territories of indigenous peoples,' [4.4-5] Environmental Science & Policy (2001) 241-256.

33 Republic of Kenya, The National Policy on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions, 2009 <https://wipolex-res.wipo.int/edocs/lexdocs/laws/en/ke/ke022en.html#:~:text=Ensure%20that%20access%20to%20traditional,for%20their%20rights%20and%20appropriate> (accessed 8 January 2024).

III. WHY SHOULD EAC MEMBER STATES FOCUS ON TK TCE?

This section provides an understanding on the common values that EAC member states share across national boundaries. The paper asserts that boundaries can be abstract and constructed either within or without national territories. Boundaries that are *within* refer to the delimited boundaries between internally devolved governance units. On the other hand, boundaries *without* refer to the colonialistic boundaries between member states that were drawn as a consequence of the 1884 Berlin Conference where African land was partitioned.[34] Relatedly, part of the regional conflicts in Africa have been mainly attributed to this historical and political context.[35] Four (4) issues are outstanding:

First, to forge a common regional approach to TKCE requires an understanding of how individual member states treat TK and TCE and cultural heritage in the broader context. For instance, just like in Kenya, culture plays a fundamental aspect of its societal and constitutional order. Article 201 of the Rwandan *Law No. 31/2009 on the Protection of Intellectual Property* stipulates that "*expressions of folklore are part of the national culture and heritage*." Hence, at the foundational stage, TK and TCE define a state's internal, regional and international identity, and it also provides a mechanism for the state's continuity.

Second, there are trade and development aspects to TK and TCE which are protected under the UN Conference on Trade and Development (UNCTAD). WIPO and the UN Educational, Scientific and Cultural Organization (UNESCO) have also adapted strategies to safeguard cultural heritage and biodiversity under the Convention on Biodiversity (CBD).[36] Despite the prominence given to TK and TCE through these institutional frameworks and regulatory attempts at the global stage, much focus has been shifted to peripheral matters like inclusion of TK and TCE holders and owners,[37] while ignoring the more substantive questions like how to resolve disputes regarding shared transnational indigenous knowledge.[38]

Authors like Francis Kariuki proffer traditional justice systems (TJS) as an effective *sui generis* system of resolving TK and TCE disputes.[39] While this may be convenient especially for "protection" within national borders, there are still

34 J Herbst, 'The Creation and Maintenance of National Boundaries in Africa,' [43.4] International Organization (1989) pp. 673-692.

35 N Idejiora-Kalu, 'Understanding the effects of the resolutions of the 1884–85 Berlin Conference to Africa's Development and Euro-Africa relations,' [2] Prague Papers on the History of International Relations (2019) pp. 99-108.

36 UNESCO (2021) "UNESCO publishes East African case studies on living heritage and climate change," ibid.

37 B Sihanya, 'Traditional Knowledge and Traditional Cultural Expressions in Kenya' [12 No.2] LSK Journal (2016) pp. 1- 38.

38 A Saurombe, 'The teaching of indigenous knowledge as a tool for curriculum transformation and Africanisation,' [138] Journal of Education (2018) pp. 160.

39 F Kariuki, 'Protecting Traditional Knowledge in Kenya: Traditional Justice Systems as Appropriate *Sui Generis* Systems,' (2020).

conflicting debates on what "protection" actually means with regards to TK and TCE.[40]

To some authors, "protection" should only focus on moral and economic rights (including equitable compensation for exploitation of IPRs, A&BS etc) and promoting fair competition.[41] On the other hand, TK and TCE is a shared IPR that cannot be exclusively appropriated to individuals save for persons duly recognized within particular communities as the relevant custodians of TK and TCE. Even on such a basis, any economic and recognition benefits derived from the exploitation of TK and TCE must be attributed to the entire community. There is no TK and TCE that is specifically identifiable as being an "East African" IPR but member states have internal TK and TCE. They then share elements of their cultural heritage, and some were historically transferred as a means of social development and conservation of TK and TCE.[42] Thus, any protection system must be cognizant of these dynamics. Alternatively, it also means that "protection" ought to be on a case-by-case basis and context-specific.

Third and relatedly, whereas an internationally binding law would be advisable for consistency and homogeneity, regionally-specific laws and regulations should be encouraged since they are highly likely to reflect the unique circumstances of the Global North.[43] Perspectives are also divergent internationally on the nature of protection that is effective for "indigenous knowledge." This explains why some proponents advocate for country-specific interventions on TK TCE.

IPRs have also been situated as an international human right under the *UN Declaration on the Rights of Indigenous Peoples,* and are protected as a means of promoting social justice.[44] This has resulted in enhancing the recognition of IPRs in defining the negotiation of multilateral agreements, technology transfer and capacity building within the global cultural politics.[45] Regardless, it is also common knowledge that IPRs are given lesser recognition as compared to civil and political rights.

Fourth, East Africa lacks a homogenous protection of TK TCE. The lack of uniformity in national legislation poses multiple problems especially on cross-

40 MR Muller, 'Legal Protection of Widely Shared and Dispersed Traditional Knowledge' in Daniel F. Robinson et. al. eds., *Protecting Traditional Knowledge: The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore* (Routledge 2017) pp. 123-140.

41 F Kariuki, ibid.

42 WIPO, *Technical Study on Patent Disclosure Requirements Related to Genetic Resources and Traditional Knowledge* (2004)

43 B Sihanya, TK and TCE, ibid.

44 UN Declaration on the Rights of Indigenous Peoples, <https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf> (accessed 11 November 2023).

45 RJ Coombe, 'Intellectual Property, Human Rights & Sovereignty: New Dilemmas in International Law Posed by Recognition of Indigenous Knowledge and the Conservation of Biodiversity,' [6] Ind. J. Global Legal Stud. (1998) pp.59.

border governance of indigenous knowledge.[46] Some EAC member states protect "cultural expressions," "folklore"[47] and "copyright and related rights" within the traditional IPR regimes like copyright. Under the Kenyan 2016 Act, there is no guidance on how to address cross-border issues. Relatedly, the Act fails to provide guidelines or measures on how to identify holders and owners of TK TCE. This is a critical element when defining a conflict resolution mechanism since the main actors must be identified.

State	Law/Regulation on TK TCE	Provision(s) on Cross-border TK TCE?
Kenya	Copyright Act, 2001 (Chapter 130) (2009 Revised Edition) Protection of Traditional Knowledge and Cultural Expressions Act, 2016	No. The Act requires further review to promote cross-border shared TK TCE.
Uganda	Copyright and Neighboring Rights Act 2006- section 5	No.
Tanzania	Copyright and Neighbouring Rights Act, (No. 7) 1999 Traditional and Alternative Medicine Act, 2002 (Act No. 23 of 2002)	Only recognizes "foreign folklore" under section 3(2) (subject matter of protection) No.
Rwanda	Law No. 31/2009 on the Protection of Intellectual Property	No.
Burundi	Law No. 1/021 of December 30, 2005 on the Protection of Copyright and Related Rights in Burundi Law No. 1/13 of July 28th, 2009 on Industrial Property	No standalone law/regulation on TK TCE
DRC	Law No. 24/82 of July 7, 1982 on Copyright and Neighbouring Rights	No standalone law/regulation on TK TCE
South Sudan	To be verified	To be verified

Source: Eugene Owade (Ongoing Research on TK and TCE)

From the table above, it is clear that most East African states lack a standalone legislation on TK TCE. This demonstrates the continued reliance on broad-based international IP regimes and the subsequent domestication of the international lack of recognition or the minimalist focus on TK TCE matters in East Africa under such regimes. At the time of this research and writing, there was insufficient information and data on the protection of intellectual property rights in South Sudan, including on the WIPO database on TK and TCEs.[48]

46 F Susy, 'The Challenge of Cross-border Protection of Traditional Knowledge' in *Protecting Traditional Knowledge: The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore* (2017) pp. 325.

47 Remarkably, the Kenyan Act makes reference to Folklore under Section 2 without defining it.

48 WIPO, 'Traditional Knowledge, Traditional Cultural Expressions & Genetic Resources Laws,' <https://www.wipo.int/tk/en/databases/tklaws/> (accessed 20 October 2023).

While a *sui generis* system has been recommended, a few states have integrated it into their national laws. This means that without a defined protection system, conflicts cannot be resolved amicably due to the lack of an enabling framework. Resolving TK and TCE issues within the existing IPR regimes may lead to conflicting, distorted and ineffective outcomes due to the inherent features of TK and TCE that distinguishes it from copyright, trade mark and patent regimes.[49]

Furthermore, even where national legislation and policy frameworks exist like in Kenya, cross-border resolution of TK and TCE disputes is only mentioned in passing. This issue is also escalated in international treaties and agreements like TRIPS where dispute resolution is sometimes arguably conciliatory, but little attention is paid to the Afro-Kenyan nature of shared cultural heritage across borders. If that was the case, then a Model Law would have been negotiated entrenching arbitration and an Afro-centered approach to amicable dispute settlement.

As a positive step, the predecessor of the African Union (AU), the Organization of African Unity (OAU) had a *Model Law on the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources 2000.* The Model Law seeks to promote principles of sustainable development and inalienability of traditional knowledge.[50] It is important that all EAC members state ratify this Model Law in promoting the regulation of traditional knowledge in Africa.

IV. WHO ARE THE RIGHTS HOLDERS AND OWNERS IN TK AND TCE?

One of the main concerns in conflict management is which party takes responsibility or can sue or be sued on indigenous knowledge conflicts. Can a community assume corporate status where it can sue and be sued in its own name? Answering this in the affirmative may be a recipe for chaos in at least three (3) ways. First, the definition of community is broad and includes urban and rural groups. A community may in some circumstances be the prescriptive term to refer to a group of people sharing common ideals that may fall outside the scope of TK and TCE. Who would then grant the authority to act?

Secondly, based on the first premise, identifying the persons with actual and legitimate interests in communal litigation may be problematic with the absence of concrete criteria of identifying the individuals who actually belong

49 BM Sihanya (2016; 2020) *IP and Innovation Law in Kenya and Africa: Transferring Technology for Sustainable Development* (Sihanya Advocates & Sihanya Mentoring, 1st ed, *IPILKA* 1).

50 WIPO, 'OAU Model Law, Algeria, 2000 — Rights of Communities, Farmers, Breeders, and Access to Biological Resources,' <https://wipolex-res.wipo.int/edocs/lexdocs/laws/en/oau/oau001en.html> (accessed 5 November 2023).

to a specific, shared and identifiable cultural heritage. Thirdly, can the breach of obligations be visited upon an entire community vicariously where such breach is occasioned by specific individuals? This is conscious of the fact that cross-border TK and TCE disputes may emerge within private regimes (among individuals) but metamorphose into a public law and regional issue.[51]

Alternatively, can any punitive damages be realized upon the identified representatives? These are critical issues that must be addressed and any proposed administrative, policy or legal approaches must be sensitive to the underlying varying levels of socio-economic development, literacy, power imbalance and gender dimensions that obscure the equitable participation of every holder or owner of TK TCE.

Similarly, whereas the 2007 *Draft Declaration on the Rights of Indigenous Peoples (UNDDRIP)* advocates for domestic laws to be enacted, a common regional approach for traditional knowledge is also important in maintaining good regional relations and equitable negotiations for any commercialization of traditional knowledge. This Declaration and the OAU Model Law provide broadly that the key actors are the state and the local communities, which must work collaboratively. Article 11 of the UN Draft Declaration on Indigenous Peoples' Rights recognizes the community as the primary actor who "have the right to practise and revitalize their cultural traditions and customs" and the state is a secondary actor where it has the mandate to ensure "*redress through effective mechanisms.*"[52]

This paper argues that one of the effective mechanisms for regional dispute resolution is arbitration. At the EAC regional level, it would be critical that the state takes primary responsibility for the arbitral process, but prior informed consent (PIC) must be sought from the specific community affected by the dispute. Community representatives well versed in the traditional knowledge systems must also be appointed and actively involved in the dispute resolution process. However, what is the nature of cross-border disputes that can arise in regionally shared TK and TCE?

V. NATURE OF CROSS-BORDER DISPUTES IN EAST AFRICAN TK TCE REGIMES

This section provides a synopsis of the actual or potential disputes that may arise in regionally shared TK in East Africa.

51 BM Sihanya, Ibid.

52 Ibid. (Our emphasis).

A. TYPES OF CROSS-BORDER DISPUTES

Conflicts may arise broadly from non-compliance with set laws and shared obligations like common ownership of sacred grounds, and misappropriation, among others. There are five-pronged legal gaps on TK and TCE protection.

First, the Kenyan 2016 Act does not envisage that TK TCE has and continues to play a fundamental role in politics. Article 14(c) of the Act confines itself to TK protection and documentation focusing on its "*decorative, economic, and recreational*" aspects. This ignores the fact that the effectiveness of the EAC is partly influenced by its political economy and regional comity revolves around political cooperation and governance systems inter and intra the member states.[53]

Second, Article 31 as read with 32 of the East African Treaty provide for the jurisdiction of the EACJ in hearing and determining disputes submitted to it, including through arbitration. However, it is not *prima facie* clear whether the EAC member states or the EACJ can effectively resolve TK TCE matters. This paper argues that the EACJ judges require relevant expertise, skills and capacity building on TK matters or the institutional body to have an impact on cross-border TK disputes.

Relatedly, many academic and governance discourse often resort to pushing for training and standardization of indigenous knowledge and practices. Must indigenous knowledge be standardized, and whose "standard" is it that TK should conform to? Standardization in the strict sense would lead to the loss of TK and TCE's indigenous value after formalization. This is because most TK and TCE are crude, raw, in their natural form and ought to be unaltered.[54] However, without proper delineation and documentation, TK and TCE becomes vulnerable to misappropriation.

Third, the EAC lacks a treaty or common approach on traditional justice systems (TJS). The Kenyan TK and TCE Act under Art. 44 provides vaguely for the recognition and protection of TK and TCE from member states provided there is a *reciprocal arrangement.* Article 44 states that "*in accordance with reciprocal arrangements, this Act may provide the same protection to traditional knowledge and cultural expressions originating in other countries or territories as is provided to traditional knowledge and cultural expressions originating in Kenya*." This provides an opportunity for Kenya and the EAC member states to formulate a framework that upholds reciprocity in TK recognition and protection. At the moment, not all

53 Hamad, 'Neo-Functionalism': Relevancy for East African Community Political Integration?' [9.7] Africology: The Journal of Pan African Studies (2016).

54 SB Brush, 'Indigenous Knowledge of Biological Resources and Intellectual Property Rights: The Role of Anthropology,' [95.3] American Anthropologist (1993) pp. 653-671.

EAC member states have a reciprocal arrangement on TK TCE. The lack thereof can be remedied through regional cooperation and formulation of a common approach for shared TK.

Fourth, TK and TCE laws are boundary specific or mainly confined to territories or national borders. Relatedly, TJS is also community specific and even where communities live in more than one country, their TJS is not homogenous. TJS are also problematically deemed to be "*repugnant to justice or immoral,*" inconsistent or not standardized.[55] This is primarily why arbitration can be a more effective model since it is more developed and consistent in terms of the application of rules across borders.

Fifth, a close reading of Section 10 of the Kenyan TK TCE Act discloses at least two (2) ambiguities. First, the nature or form of authorization required for the exploitation of TK is not clear. Relatedly, how does this protect cross-border TK and TCE? Second, it is not clear to what extent Kenyan communities have actually implemented Section 10(3) of the Kenyan TK TCE Act through the formulation of rules on authorization under is in practice. Third, while it is positive that the maintenance of TK TCE was decentralized to the devolved units, it is not clear how the Inter-Governmental Dispute Resolution (IGDPR) can be effectively harnessed in resolving TK issues that cut across counties, especially where such cross-county TK require authorization.

The upside is that should such disputes arise, the IGDPR has sectoral groups and technical committees that should be sufficiently prepared to "*provide mechanisms for the resolution of intergovernmental disputes where they arise*."[56] Relatedly, the TK TCE pays little attention to TK that transcends the 47 county government borders.[57] It is also not clear what levies are applicable for any exploitation of TK TCE. Relatedly, there is insufficient data on how many communities have TK TCE rules lodged with their relevant county governments.

According to the Rwandan *Law No 31/2009*, exceptions for TK protection include "*adaptation for the creation of literary works influenced by folklore*." The fact that such literary works would be copyrighted and in effect generate revenue for the author, should mean that a commensurate framework is necessary to provide for equitable access and benefit sharing with the owners or holders of the folklore. This demonstrates one of the instances of the lack of uniformity in the laws of member states as discussed in Part III above.

55 B Bwire, 'Integration of African Customary Legal Concepts into Modern Law: Restorative Justice: A Kenyan example,' [9.1] *Societies* (2019) pp. 17.

56 Article 3(f), Intergovernmental Relations Act, 2012.

57 Article 188, Constitution of Kenya, 2010.

Hence, an ideal situation would be the formulation of an EAC-specific Model Law for adoption by member states that provides basic or minimum criteria and guidelines for the protection of TK TCE and fuses the unique circumstances of each member state. The Model Law should also leave room for adaptability of the law by relevant member states to emerging disputes that suit the local phenomena within their jurisdictions.

Also, mutual recognition of TK TCE at the regional level should be blended with national protection systems. The downside is that mutual recognition only applies effectively where the IPRs are registered. Thus, a minimum threshold for protection that defines cross-border TK TCE and border controls where applicable is necessary, but the same should be cognizant of the uniqueness of TK TCE.

The foregoing discussions point to the fact that there are various gaps in the internal legislation of EAC member states that require sufficient attention, before a common regional framework can be designed. Such a regional framework should address cultural misappropriation and cooperative mechanisms, for instance, between the Maasai in Kenya and in Tanzania. Documentation should also be inclusive and multidisciplinary since piecemeal or isolated documentation of TK may distort the identity of communities when some aspects are sufficiently included.

B. RESOLVING THE INHERENT NATURE OF TK TCE: A CHALLENGE OR OPPORTUNITY?

TK has inherent unique features that provide opportunities and challenges against its effective protection. First, TK is mainly transmitted orally. This can be affected especially where there are language barriers across borders, for instance, Kenyan DhoLuo and Ugandan Padhola are phonetically different despite sharing a common cultural heritage. Hence adaptation or translation may distort the intended meaning of TK.

Second, due to the inherent nature of TK TCE, maintaining control and agency over the oral transmission and preservation of indigenous knowledge is problematic. What may be passed orally as an original version of indigenous knowledge in Kenyan DhoLuo, may be deemed a fundamental alteration of the TK, especially when applying traditional medicine and relaying traditional songs, wise sayings, among others. That vitiates the intention and or practice by the recipient. The impact is that across 4-5 generations, necessary knowledge may be lost or distorted due to the inconsistent translation, modification or alteration to suit specific contexts.

According to the Kenyan National Policy on TK, while citing Nakashima:

> "*traditional knowledge is not merely learned by rote and handed down from one generation to the next. Inherently dynamic, it is subject to a continuous process of verification, adaptation and creation, altering its form and content in response to changing environmental and social circumstances.*"[58]

Thus, while cultural knowledge is transient, there is need to maintain consistency in the positive aspects of TK. The implication is that researchers need to document and create a transboundary database for posterity and preservation of TK.

The downside is that this requires significant resources, technical expertise and resilience since TK is not only a cultural issue but also a governance issue. A common regional research Fund that is specific TK TCE documentation would address this issue. Documentation can take various forms. A positive example is India's Traditional Knowledge Digital Library which catalogues the country's traditional medicinal knowledge.[59]

Third, Article 19(c) of the Kenyan Act 2016 refers to "incidental uses" as an exception. The phrase "incidental uses" is broad, vague and ambiguous. The USA Supreme Court in *Euro-Excellence Inc. v Kraft Canada Inc*. [2007] S.C.R. 20 (Can.) while addressing what "incidental" means in relation to copyright infringement, did not define the term but opined that "*what constitutes incidental content should be determined from the consumer's perspective*."[60] While TK and TCE use varies across different jurisdictions, there is need to provide "minimum" content of what "incidental" means to avoid cultural misappropriation of TK under the guise of incidental exception.

Finally, according to the Kenyan National Policy on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions, TK and TCE are constantly evolving, hence there is need to develop measures that secure sustainability while also ensuring that protection is not limited to documentation, but creates balance between present and past generations' conceptualization of TK and TCE. There is no one-size-fits all approach that can be adopted to address the challenges facing TK protection in East Africa, but innovative mechanisms like arbitration can be a step in the right direction.

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58 Ibid; L Kadirgamar, 'Interfaces between Intellectual Property, Traditional Knowledge, Genetic resources and Folklore: Problems and Solutions,' [29] JMCL (2002) pp. 97.

59 WIPO Magazine (2021) 'Protecting traditional knowledge: A Grassroots Perspective,' <https://www.wipo.int/wipo_magazine/en/2017/01/article_0004.html> (accessed 5 November 2023).

60 M LaFrance, 'Wag the dog: Using Incidental Intellectual Property Rights to block Parallel Imports,' [20] Mich. Telecomm. & Tech. L. Rev. (2013) pp.45.

VI. RESOLVING CROSS-BORDER DISPUTES IN EAST AFRICAN TK TCE REGIMES THROUGH ARBITRATION

Arbitration is defined in Part I and II of this paper as a private and binding dispute resolution process that involves a third-party. This section addresses the substantive and procedural aspects of arbitration and how it can be adopted as an effective dispute resolution mechanism for cross-border TK disputes.

A. SUBSTANTIVE ASPECTS OF ARBITRATION

There are two (2) types of arbitration: domestic and international. According to Article 1(3)(c) of the *UNCITRAL Model Law 1985*, a dispute can become the subject of international arbitration when the parties agree that the "*subject matter of the arbitration agreement relates to more than one country.*"[61] Regionally shared TK stretch beyond national or domestic borders. Thus, international arbitration is preferred due to its inherent ability to be adapted to complex commercial disputes.

IP when appropriated, utilized, exchanged for value or there is value addition, then becomes subject to rules and regulations of the market in the commercial sense. This is why the negotiations of most Free Trade Agreements (FTAs) involve an IP aspect.[62] On the other hand, according to Georges Delaume, the main demerit of domestic arbitration is that it is subject to the state's judicial supervision and the applicable rules may sometimes be inflexible.[63] For instance, Kenyan Courts can be involved in the arbitral process, however, only to a limited extent which is mainly in the recognition and enforcement of arbitral awards.[64]

1. INTERNATIONAL BASIS FOR ARBITRATION

Arbitration is one of the identified dispute resolution mechanisms in the Convention of the Hague on the Peaceful Settlement of International Disputes (1907). Various scholars have argued that TK TCE is a subject of biological diversity. Hence, Article 27 and Annex II of the UN Convention on Biological Diversity (CBD) also provides a procedure of arbitration. Kenya, Uganda, Tanzania, Rwanda, Congo and Burundi have ratified the CBD. Under Article 27(1) CBD, where parties conflict, their first recourse is negotiation before seeking

61 Article 1(3)(c), UNCITRAL Model Law (1985).

62 P Roffe, C Spennemann & JV Braun, 'Intellectual Property Rights in Free Trade Agreements: Moving beyond TRIPS minimum standards,' in *Research handbook on the protection of Intellectual Property under WTO rules* (2010) pp. 266-316.

63 GR Delaume, 'Arbitration with Governments: 'Domestic' v. 'International' Awards,' [17.4] The International Lawyer, (1983) pp. 687–98. http://www.jstor.org/stable/40705458 (accessed 5 November 2023).

64 Section 10, Arbitration Act, 2012.

mediation. Article 27(3) then gives member states the authority to declare their intention to pursue arbitration where mediation and negotiation fail.[65]

Such arbitration process is governed by the procedural rules under Annex II which involve a written notification to the CBD Secretariat clarifying the subject matter of the arbitration. The parties constitute the arbitral tribunal whereby they appoint two (2) neutral arbitrators who then mutually appoint a third neutral arbitrator. Under Article 5 of Annex II, the arbitral tribunal determines its own procedural rules.[66] Further, the unique features of arbitration under the CBD is that the arbitral decision is not appealable and binds the parties. The binding and non-appealable nature of arbitral awards is an opportunity since it would not be in the best of communities within the EAC to be involved in endless litigation, which may have an adverse impact on regional socioeconomic and political relations.

Furthermore, Article 2(3) UN Charter encourages parties to "*settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered*."[67] The dispute resolution mechanisms are then outlined under Article 33 which begins with the same language as the CBD wherein the first point of dispute resolution is mediation. Arbitration is one of the preferred dispute resolution mechanisms. It has been acknowledged as an effective means of resolving cross-border patent disputes. According to Gustavo Meira, arbitration is effective as it is more flexible and can help in avoiding the "Manichean dichotomy" which refers to two sides of a thing which are in opposition of each other.[68]

Article 5(2) *Berne Convention or the Protection of Literary and Artistic Work 1886 (1971 Paris Text)* refers to the "*laws of the country*" which has been interpreted to mean national or domestic laws on copyright and related rights. However, the same provision fails to provide a mechanism for shareable TK TCE as "related rights." This provision highlights the territoriality nature of IP protection hence this paper advocates for the adoption of procedural rules to govern cross-border disputes as compared to substantive rules which are more territorial-based.

65 UNEP, 'Handbook on the Convention on Biological Diversity' <https://wedocs.unep.org/bitstream/handle/20.500.11822/8175/-Handbook%20on%20the%20Implementation%20of%20Conventions%20Related%20to%20Biological%20Diversity%20-20001529.pdf?sequence=2&isAllowed=y> (January 2000) (accessed 8 January 2024).

66 Ibid.

67 UN Charter, <https://www.un.org/en/about-us/un-charter/full-text> (accessed 5 November 2023).

68 M Moser & L Gustavo, 'Resolving Cross-Border Patent Disputes through Mediation and Arbitration WIPO,' [53.4] Les Nouvelles-Journal of the Licensing Executives Society (2018).

B. REGIONAL BASIS FOR ARBITRATION OF TK TCE

So far, disputes at the regional level are either resolved domestically or through the EACJ. Member states have different national laws governing resolution of IP disputes. Kenya has the Arbitration Act Cap 49 which governs arbitration processes in Kenya. Remarkably, Section 2 of the Kenyan legislation provides for domestic and international arbitration without necessarily confining international arbitration to disputes with a "commercial" context only. The same language is adopted in the Ugandan Arbitration and Conciliation Act, 2008.

However, the Act does not explicitly provide for intellectual property disputes as part of the disputes that can be arbitrated. This is what is broadly referred to as the "arbitrability" of different disputes.[69] Few national jurisdictions have resolved the arbitrability question on IP disputes with inasmuch as England and France have acknowledged that patent and copyright disputes are arbitrable. South Africa abhors the arbitrability of IP disputes.[70] Despite noting that the High Court has the jurisdiction to determine whether a subject matter of any dispute is arbitrable under Kenyan laws and on public policy grounds, no Kenyan law expressly or implicitly limits the resolution of IP disputes through arbitration. This is also the same language adopted under section 34(2)(b) of the Ugandan Arbitration and Conciliation Act, 2008. However, an opportunity lies in the fact that intellectual property law disputes can be determined as civil suits through arbitration in Uganda.[71]

While IP is not explicitly mentioned within the scope of disputes that the EACJ can exercise its jurisdiction on under Article 27(1) of the EAC Treaty, the Court can exercise extended jurisdiction over any matters under Article 27(2) of the Treaty. The EACJ also has the mandate to conduct arbitration on matters within the scope of the Treaty as provided for under Article 32 as read with Rule 15 of the EACJ Arbitration Rules, that provide for the jurisdiction of arbitral tribunals. Regarding the extended jurisdiction, the EACJ requires an enabling protocol which has not yet been signed by all the EAC member states.

Some authors like Francis Kariuki posit that arbitration may be limited where there is no "prior contractual relationship" between parties."[72] However, parties can also mutually agree to settle their dispute(s) through arbitration especially where there is no prior contractual relationship. For instance, most communities within EAC lack legal or regulatory frameworks on shared TK TCE with

69 DW Kibia, *Arbitrability of Intellectual Property Disputes in Kenya* (Diss. University of Nairobi, 2019).

70 I Shapatava, *Arbitrability of Intellectual Property Disputes and Challenges during Judicial Review of Arbitral Award* (MS Thesis. 2021).

71 WIPO, 'The Arbitration and Conciliation Act (Chapter 4),' <https://www.wipo.int/wipolex/en/legislation/details/5245> (accessed 7 November 2023)

72 Ibid.

neighbouring states. This is despite the likelihood of cross-border disputes on TK being high and in effect critical to maintaining good neighborliness among EAC member states. Thus, this legal gap should constitute a ground of arbitration provided that the state parties submit the dispute to the EACJ under a special agreement.

Most of the EAC members have rules and regulations on arbitration, but the said rules do not bar the arbitrability of IP disputes. Several studies have also supported the arbitrability of IP disputes,[73] inasmuch as there is scant literature on the arbitrability of TK and TCE matters. The lack of an express bar against arbitration of intellectual property disputes therefore presents an opportunity for amicable resolution of regional disputes. Also, arbitration is a preferred dispute resolution process for TK and TCE since it is flexible given that parties can determine and fashion the rules and guidelines governing the arbitral process.[74]

However, according to Margaret Moses, the author notes that:

> "*because arbitration is a private dispute resolution process lacking some of the safeguards of a national legal system, the quality of the Tribunal has a significant impact on maintaining parties confidence in the arbitration as a system that works*."[75]

Nonetheless, given that arbitration is entirely consensual, parties can agree on the modification of the applicable rules in whichever manner that fits their dispute. This may also be a chance to integrate aspects of traditional justice systems (TJS) as minimum rules of the arbitral process.

Adjudication of IP disputes involve a complexity of matters which requires sector-specific skills, competencies, knowledge and experience. It is arguable that many individuals or communities lack technical expertise on IP matters which may hinder the effectiveness of the arbitral process. This explains why arbitration of IP disputes has not been sufficiently explored at the EACJ. Most judicial officers also lack technical understanding of the variables in TK.[76] This may partly be due to doctrinal factors or to some extent attributable to an institutional culture of literal, strict and black letter interpretation of the law.[77] This is further negated by the fact that arbitral parties have limited say in the

73 TD Halket eds. *Arbitration of international intellectual property disputes* (Juris Publishing, Inc., 2012).

74 K Muigua, 'Building Legal Bridges: Fostering Eastern Africa integration through commercial arbitration,' [3.1] Alternative Dispute Resolution (2015), 45.

75 ML Moses, (2017) *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press).

76 I Mgbeoji (2007) *Global Biopiracy: Patents, Plants, and Indigenous Knowledge* (UBC Press, 2007).

77 V Ramsey, 'National Courts and Arbitration: Collaboration or competition? The Courts as Competitors of Arbitration,' (CIArb Centenary Conference, London, 3 July 2015).

appointment of arbitrators with specific technical skills and experience on TK TCE matters under Rule 8 of the EACJ Arbitration Rules.

TK matters require a holistic interpretation just as recommended under the Constitution of Kenya which places culture and cultural heritage at the center of its societal structure. Therefore, expert evidence may be necessary but not mandatory. The EACJ Tribunal has powers to appoint experts and professionals with specific expertise, skills and experience in TK matters to assist the Tribunal in understanding the nature, scope and technical requirements of TK and TCE. Community representatives can also appoint technical experts to assist them during the arbitral process. Relatedly, the arbitral tribunal is composed of neutral arbitrators and the parties can opt out of the arbitration at any stage.[78]

Upon the finalization of the arbitral process at the EACJ, the arbitral award is binding and "final." While the EACJ Arbitration Rules provide that the enforcement of arbitral awards shall be governed by the rules of the country where the award is to be enforced, the New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York Convention) provides a universally coherent framework for the recognition and enforcement of arbitral awards.[79]

Relatedly, EAC member states like Kenya, Uganda, Burundi, DRC and Tanzania are all signatories to the New York Convention.[80] Thus, despite the lack of a common regional approach to determining what subject matter are arbitrable, the New York Convention provides a basis for a common recognition and enforcement of arbitral awards granted by the EACJ.[81] Also, formulating and implementing a common regional policy on the recognition and enforcement of foreign arbitral awards under the New York Convention will be a great step towards entrenching a uniform regional practice.

The foregoing discussions provide a basis for the arbitration of TK matters. However, the success of the arbitral process is mainly dependent on whether the distinguishing features of arbitration are complied with or not. For instance, parties must agree on the rules of procedure, the place of arbitration, appointment of arbitrators, language of the arbitral tribunal and related factors. Also, since there is no sovereign to compel parties to engage in arbitration or to comply

78 W Grantham, 'The Arbitrability of International Intellectual Property Disputes,' [14.1] Berkley Journal of International Law (1996) pp.197-200

79 P Sanders, 'New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards,' [6] Netherlands Int. L. Rev. (1959) pp. 43-55.

80 New York Convention, 'Contracting States,' <https://www.newyorkconvention.org/countries> (accessed 7 November 2023).

81 F Kariuki, Redefining Arbitrability: Assessment of Articles 159 & 189 (4) of the Constitution of Kenya,' [1.1] Alternative Dispute Resolution Journal (2013) pp.174-188.

with negotiated agreements like treaties or *ad hoc* frameworks that outline the obligations of member states, parties must be willing to be mutually bound by the arbitral process and award.[82]

C. PROCEDURAL ASPECTS OF ARBITRATION

The EACJ is a court with a hybrid mandate which means that it handles litigation and arbitration. Relatedly, while the Court has not determined many IP disputes through its arbitration mechanisms, it can adopt best practices from the emerging jurisprudence especially from the arbitration of cross-border environmental disputes. Such best practices can be within the EAC bloc through benchmarking and comparative practice.

For instance, Kenya is preferred as a seat of arbitration both locally, regionally and internationally. It also has existing institutional structures and training institutions like the Nairobi Centre for International Arbitration (NCIArb) which can provide training and capacity building to staff of EACJ. Therefore, it is an opportunity for practitioners of arbitration to play a central role in redefining the TK TCE regime through arbitration. This will also present an opportunity to be at the front-seat in terms of reforming its laws through actual practice where cross-border disputes arise.

Relatedly, Kenya is deemed as a "model democracy" due to its stable governance systems and its role as a diplomatic hub, hence Kenya and EAC can harness these capabilities in redefining its place in safeguarding and marketing TK TCE internationally. Further, global exposure is vital for technology transfer from the Global North, for instance, through capacity building and training on how to harness modern technology in recording TK TCEs in Kenya and East Africa, generally. Similarly, the EAC cannot effectively harness local knowledge systems under the continental African Continental Free Trade Agreement (AfCFTA) without comprehensive, uniform and consistent regional protection systems for TK TCE, and IPRs generally.

D. ARBITRATION VERSUS APPLICATION OF CUSTOMARY LAW TO TK TCE

According to Article 40 of the Kenyan TK TCE Act 2016, any disputes can be resolved through alternative dispute resolution (ADR) mechanisms like arbitration or customary laws. However, customary law is limited or subject to the "inconsistency" or "repugnancy" clauses in the Constitution of Kenya,

82 DS Carlo, 'Arbitration Agreements as Waivers to Sovereign Immunity,' [30.1] Arbitration International (2014) pp.59-90.

2010. While this qualifier is vague, customary law presents several merits to the resolution of TK TCE including the fact that it is informal, easily accessible and cheap.

However, customary law also has inherent weaknesses that render it unconducive for the resolution of technical matters like IPRs.* Relatedly, where a regulatory regime like Customary law would result in more uncertainty in governance and administration of intellectual property rights, then the regime is not an enabler but a hindrance to the enjoyment of such rights. The Kenyan legislative process may have opted to ignore the difficulty in resolving TK TCE issues through customary law.[83]

The fact that TJS was the primary dispute resolution mechanism for TK TCE under Article 30 where the ownership of TK TCE is contentious was a recipe for chaos especially for cross-border TK TCE conflicts. This is because questions like 'whose customary law would be applicable?' and 'which fora?' are not adequately addressed. Even if customary law was to be applied in resolving TK TCE disputes, criticisms would still arise regarding the qualifications, expertise and relevant technical experience of the key actors. To some extent, these are generally technicalities applied to admonish the application of customary law.[84]

Relatedly, Kenyan communities can therefore opt for arbitration instead of TJS since Section 30(1) of the Kenyan TK and TCE Act provides that in addition to customary law, the parties may resolve their disputes through "*such other means as agreed to by the parties.*" As demonstrated in the previous sections, arbitration would pose many benefits that outweigh customary law and litigation in the resolution of TK TCE cross-border disputes.

E. EVALUATING CHALLENGES RELATED TO ARBITRATION OF TK AND TCE IN EAST AFRICA

As indicated earlier, the main challenge with effective integration of arbitration into the resolution of IP disputes generally is the lack of technical expertise. This has also contributed to commercial exploitation of TK TCE without proper recognition or benefit sharing arrangements which continues to perpetuate inequalities and cultural appropriation in East Africa. Hence, many arbitral tribunals and national actors are faced with a challenge of ensuring a balance between the communal rights of indigenous communities vis-à-vis other IPRs.

83 Ibid.

84 B Bwire, 'Integration of African Customary Legal Concepts into Modern Law: Restorative Justice: A Kenyan example,' [9.1] Societies (2019) pp.17.

Various international legal frameworks like Article 15.1 of the Convention on Biological Diversity (CBD) also provide a limited view towards the protection of TK and genetic resources which are territorially centered. This presents a transition from African communalism or what Evanson Chege refers to as the "*common good"* in the enjoyment of indigenous knowledge. Similarly, the Kenyan 2016 Act did not envisage transnational TK TCE and neither does it provide insights on the criteria of determining an "owner" and "holder" of TK where the TK is shared across national borders. Conceptually, ownership in other IPRs is clear. Ownership is mainly correlated to property rights. No community, entity or individual can defend or claim what they do not own in the strict sense, for instance, in land ownership.

Furthermore, Article 6(d) of the Kenyan 2016 Act points to the fact that TK TCE protection falls back to the existence of either "formal or informal" customary laws and rules. This does not envisage that there is also incongruence among EAC member states' national policy on TK. Instead, arbitration provides a uniform set of rules for dispute resolution across borders. In addition to the *sui generis* systems of protection for TK TCE, WIPO and WTO have considered mediation as an alternative to resolving TK disputes.[85] However, their focus has been specific to national boundaries without effectively addressing the interconnected cultural knowledge and values that transcend the limits of national boundaries.

VII. CONCLUSION

This study focused on evaluating the opportunities and challenges of adopting arbitration in resolving cross-border disputes on intellectual property rights under the East Africa Court of Justice. The main focus of the paper was the shared cultural heritage, traditional knowledge (TK) and traditional cultural expressions (TCE) within the EAC regional bloc. Thus, the study made at least five (5) major findings. First, the EAC lacks a common, effective regional dispute resolution mechanisms for cross-border TK TCE disputes. The practice is not well established due to gaps in the existing legal, institutional and policy frameworks within EAC and national jurisdictions. Also, the inflexibility of national courts warrants the case for a regional approach. However, establishing an effective arbitration mechanism under EACJ requires relevant modifications.

Second, the success or effectiveness of arbitration in TK TCE is dependent on various correlated factors including the nature and scope of law, policy, technical capacity, resources and political goodwill. Thus, whereas judicial intervention is

85 VP Tuteja, 'Traditional Knowledge and Arbitration Dispute Resolution: Indigenous People and Local Communities,' in *Intellectual Property Rights and the Protection of Traditional Knowledge* (IGI Global, 2020) pp. 103-123.

preferable, effective TK TCE protection in EAC must integrate complementary systems like voluntary arrangements with the communities, the formulation of a mutual sharing agreement for cross-border TK; and administrative measures within relevant communities for the sustainable utilization of IPRs.

Third, there is need to mainstream awareness on indigenous knowledge (TK and TCE) within EAC and as a national policy. This is a fundamental step towards the realization of the objective of the EAC Treaty where member states commit to "*foster and to promote greater awareness of the shared interests of their people*" including cultural heritage. This includes promoting the visibility of the EACJ as an arbitration institution. Relatedly, there is need to adopt relevant measures to shield the EACJ from budgetary constraints as a result of funding challenges whenever member states have bilateral disputes.

Fourth, while the study focuses on how to strengthen the EACJ as an effective arbitral institution for intellectual property rights (IPRs) matters in EAC, this paper is also cognizant of the existence of broad sociocultural, political and economic factors of divergence within EAC. A harmonized arbitration framework cannot succeed where EAC member states are constantly engaged in conflict. Hence, the paper argues that should there be an alternative, new, distinct and standalone arbitral institutional framework, then the same should be developed and strengthened to promote regional focus on TK TCE, especially on biodiversity, genetic resources and traditional medicine.

Fifth, there is policy and institutional gap between protection of IPRs within East Africa and the regional commitment to securing access to justice. Therefore, member states should also prioritize science, technology and innovation within the EAC regional bloc for broad-based and sustainable regional development. This is because EAC member states cannot effectively harness the economic potential of IPRs under regional and global trade agreements without a comprehensive, uniform and coherent approach within the EAC on IP dispute resolution. With particular emphasis, arbitration does not provide a one-size-fits all approach for resolution of cross-border disputes, but it offers a window of opportunity for the incremental and progressive development of the legal, policy and institutional frameworks on EAC regional integration, especially on intellectual property matters.

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