

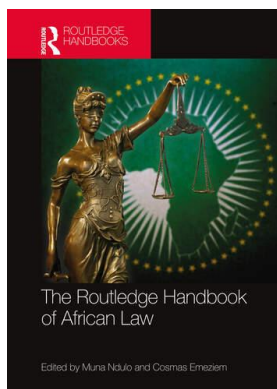
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SHOW ME THE MONEY

Evaluating the significance of traditional knowledge and cultural expressions in the context of foreign direct investment outflows

Anthony C. K. Kakooza

Introduction

In the *World Investment Report 2018: Investment and New Industrial Policies*, the United Nations Conference on Trade and Development (UNCTAD) listed the top 10 industries in value terms as: (1) chemical and chemical products; (2) business services; (3) food, beverages and tobacco; (4) finance; (5) electricity, gas and water; (6) machinery and equipment; (7) information and communication; (8) electrical and electronic equipment; (9) transportation and storage; and (10) mining, quarrying and petroleum (UNCTAD 2018, 8, Table I.2). The report goes on to list culture as an example of non-economic aspects of international law that interact with the investment policy regime (UNCTAD 2018, 111). However, it does not provide clear illustrations as to how the interaction of culture and the flow of investments comes about. The purpose of this chapter, therefore, is to highlight the close interaction between culture and the flow of investments. We start by exploring the meaning of the term “flows of foreign direct investment” (FDI). The Organisation for Economic Co-operation and Development (OECD) explains, “Foreign Direct Investment (FDI) flows record the value of cross-border transactions related to direct investment during a given period of time” (OECD 2020). (Repetition).

In this chapter, I attempt to show how elements of culture, particularly traditional knowledge (TK) and traditional cultural expressions (TCEs), interact with the flow of FDIs. I highlight the fact that the absence of empirical data on the role played by TK and TCEs in global economics dents and negatively biases their significance. Next, I point out key industries in which TK and TCEs play an influential economic role and present several case studies that portray the challenges, albeit with ultimately positive economic impacts, generated through utilization of TK and TCEs. Finally, I narrow down the argument by advising against the need to resort to a revenue generation system for income derived from the utilization of TK and TCEs, as a way of building up a record base of their economic impacts. The chapter argues that the current global trend toward regulating how TK and TCEs are utilized will ultimately create a more organized system for their use that safely addresses cultural value concerns, but which will in turn create avenues for generation of data on the direct significance that TK and TCEs play toward the flows of FDIs into an economy.

Understanding key terms

Although there is no globally acceptable definition of TK and TCEs, the World Intellectual Property Organization has defined these two terms as follows:

Traditional knowledge is considered as the content, substance, or idea of knowledge (such as traditional know-how about the medicinal use of a plant, or traditional ecological management practices), as distinct from the form, expression, or representation of traditional cultures (such as a traditional song, performance, oral narrative or graphic design), which are known as TCEs or expressions of folklore.

WIPO 2004, no. 7.71, 446

TK and TCEs are closely associated with Indigenous peoples. However, it would be erroneous to state that TK and TCEs are only reflective of the cultural heritage of Indigenous peoples. This is because TK and TCEs, as a reflection of culture, means that they are embodied in all persons that possess a culture. This is mainly reflective of developing economies and less developed countries in Africa and the Middle East, as well as in South America, where the inhabitants are mainly constituted of Indigenous peoples and ethnic communities. However, some developed economies also boast of Indigenous and ethnic communities. It is therefore essential to understand what the characteristics of such persons are. Article 1 of the 1989 International Labour Organization (ILO) Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, which entered into force September 5, 1991, defines Indigenous and tribal peoples as follows:

- (a) Tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
- (b) Peoples in independent countries who are regarded as Indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

ILO 1989, rt. 1, para 1

The key point to the understanding of Indigenous peoples is that they tend to retain most, if not all, their “social, economic, cultural and political institutions” (ILO 1989). This creates the assumption that such persons hardly have any interactions with the outside world or in instances where there are such interactions, they are quite minimal, to the extent that the day-to-day lives of Indigenous peoples are mainly influenced by their own customary situations. This is somewhat different from an understanding of ethnic communities that are essentially characterized by people of the same background and language but may differ in terms of how they carry on with their way of life. It can therefore be said that Indigenous peoples are a subset of ethnic communities and are keener at practicing and showcasing their TK and TCEs, as opposed to most members of ethnic communities that have migrated from their original homes or inter-married with persons from other backgrounds, thus, perhaps, lessening their hold on their cultural practices.

The role of traditional knowledge and expressions of culture in economic development

The most obvious illustration of the role that Indigenous peoples play toward economic enhancement is in the tourism industry. The UNCTAD *World Investment Report 2018*, for instance, highlights the performance of the tourism industry in the past year, with a projection of inflows of US\$440 million and proceeds to show how tourism-related construction projects were the drivers of FDI flows into the service-based economies of countries like Barbados, Saint Kitts, and Nevis (UNCTAD 2018, 54, 76). However, these projections need to be decontextualized. The larger focus for the tourist industry is about scenic attractions for most of these countries. The foreign tourists are mainly attracted to the large beaches, sunshine, and wild game. Aspects of cultural heritage, such as TCEs, lag far behind in the list of attractions. This is arguably the reason why there is no direct data on the contribution that TK and TCEs make toward the flow of FDIs.

Nonetheless, there is an attractive element about Indigenous peoples that also draws attention from foreign visitors, corporate entities, and other parties to such communities. It is partly the display of social and cultural skills, as elements of their TCEs, that attract outsiders to Indigenous peoples. TCEs such as dramatic performances are part of packages that tourists pay for, watching in many countries that they visit. In many places, where tourists are known to congregate, locals set up stalls in which they market various handicrafts depicting the cultural expressions of the ethnic communities. This activity consequently transforms into income-generating enterprises for the locals that produce the handicrafts, as well as those who market them. Some regions have thus been able to grow large and profitable markets from selling handicrafts and, through efforts to develop their brands, have gone on to register trademarks based on their TCEs.

In Kenya, for instance, Taita–Taveta County has been known for using an age-old traditional knowledge skill in the making of baskets out of sisal. Over the years, as the local and foreign markets for such baskets have increased, in order to protect the quality of their baskets from duplication, the local ethnic community formed the Taita Baskets Association and registered a collective trademark “TAITA BASKET” (WIPO 2017, 43). Taita Baskets, which are an example of both TK and TCEs from the local community, are therefore a contributory factor within the growth of the Kenyan economy.

Similarly, the Cowichan tribes of North America are known for having turned their traditional knitting skills using in making the Cowichan sweater an income-generating project (Stopp 2012).¹ Starting as an ancient skill in which the Indigenous peoples of the Cowichan Valley turned mountain goat wool, dog hair, and plant fibers into woven textiles of great value, in the late 1860s, with the introduction of multiple-needle knitting, they began to produce what became known as the Cowichan sweater. Gradually, over the years, their traditional skill and display of their folklore through the marketing of such sweaters became their only source of income. Unfortunately, the merchants and buyers were cutting out a better deal for themselves (Stopp 2012). Out of concern that the Cowichan Nation would lose control of their brand, and thus, the quality of their sweater, they registered a trademark “COWICHAN” to distinguish their products from other similar products in the market, though this did not prevent their cultural expressions from being misappropriated by outsiders (Shrumm 2017, 141).

Just as German carmaker Volkswagen names its Touareg SUV after the Berber-speaking ethnic group in North Africa, the Maasai in Eastern Africa have had their fair share of corporate entities partaking of their name and cultural expressions. The Maasai community, which cuts across both Kenya and Tanzania, is another example of cultural expressions at work, with great

potential for economic contributions toward the host nations. The word “Maasai” is used as a brand name by various corporate entities worldwide, while the Maasai name is the paramount cultural identity of the three million Masaai people living in Kenya and Tanzania. Sadly, like the Cowichan tribes and many other Indigenous peoples, although money is generated out of the use of Maasai TCEs, the members of the community have hardly benefited economically from this cultural appropriation. Isaac ole Tialolo of the Maasai Intellectual Property Initiative (MIPI), a private entity established in Kenya to advocate for the rights of the Maasai, reported, in 2013, that no one had ever bothered to seek their permission before using their name (Rizzo 2013). However, in 2018, the Maasai struck their first deal with Koy Clothing, a UK retail company, which agreed to pay a license of 5 percent toward local projects that benefit the local community in return for the use of Maasai-based designs in their clothing line. Koy Clothing has entered similar license deals with other East African ethnic communities, such as the Luo, the Gusii, and the Kamba (Ombogo 2019).

MIPI’s objective is the establishment of an authorizing agent that can oversee the use of the name by reviewing requests for branding of future products, as well as assessing those that are already on the market. Isaac ole Tialolo of MIPI states that the Masaai demand respect to be accorded toward their cultural heritage (Rizzo 2013). Therefore, it is not certain as to whether the Masaai community is more interested in protecting their cultural heritage or overseeing the use of their name by different entities, subject to license arrangements that are economically beneficial to the community. Another puzzling aspect, insofar as the Masaai are concerned, is that, as a cross-border community, it is not clear as to how the benefits of the license arrangements are to be equally shared by the members of the community in both Kenya and Tanzania. MIPI appears to advocate for only the Masaai in Kenya and not the community in Tanzania. The same concern applies for the Luo Community, which also entered into a license arrangement with the Koy Clothing Company for the use of their TCEs. The Luo are also a cross-border community found in Kenya and Uganda. As such, although income-generating schemes are evidently of economic benefit to these Indigenous peoples, the actual record of such impacts may be difficult to ascertain for a long time to come.

The ability to connect the dots between appropriation of TK and TCEs and the economic outcomes is also hampered by the very nature of these elements of culture. The very nature in which TK is appropriated within the intellectual property regime requires documentation. It is thus easier to trace appropriation of TK than to do so for intangible TCEs, such as songs and poems, which do not necessarily require documentation in tracing the origin of appropriated folklore into works that have copyright or trademark protection. It is therefore easier to trace an economic linkage between owners of patented works and the owners of TK, from which such works are drawn. Traditional medicinal knowledge, for instance, can be easily traced in the patent realm when a pharmaceutical company applies for a patent. The process leading to the grant of a patent requires full disclosure and entails the mentioning of any related or unrelated prior art—which is where traditional medicinal knowledge may be considered. In such instances, patents derived from TK have often involved execution of license arrangements in which the Indigenous people who are custodians of such TK also receive a share of the royalties. A few examples include the San community in Southern Africa, who negotiated a benefit-sharing arrangement with the South African Council for Scientific and Industrial Research (CSIR) that had licensed a patent to Phytopharm, a UK-based company. Based on this patent, the British company generated a diet drug, a glycoside, using the Hoodia plant located in the Southern African Kalahari Desert, where the San community is based. The San Indigenous peoples have been using the Hoodia plant as an energizer and hunger depressant, as part of their TK skills, for hundreds of years (WIPO 2003). In India, the herbal medicinal plant

Arogyapacha (meaning “the green that gives strength”) led to the development of a sports drug named Jeevani, which is also an anti-stress and antifungal agent (see Saudagar, Sambathkumar, and Bachhav [2013]). The medicinal plant is associated with the Kani Indigenous people of India, who were compensated for the patent, receiving a first royalty payment of US\$12,500, followed by annual payments (Medicine Hunter 2010).

Another interesting instance that exemplifies the difficulty in connecting TK from an Indigenous group of people to economic gain is that of a California-based company, Shaman Pharmaceuticals, Inc. (hereinafter, Shaman), which approached an Indigenous community in Peru out of interest in the local community’s use of traditional medicinal knowledge derived from a tropical plant called Sange de drago. Various agreements were executed involving Shaman, the Indigenous peoples, and the local government. The three-staged agreements covered short- and long-term benefits. The first stage covered provision of immediate needs of the Indigenous peoples, such as health care and forest conservation; the second stage covered mid-term benefits, such as educational material and related resources; and the last stage covered long-term benefits, such as a share of the profits from the commercial success of the patent (Ragavan 2001, 22–3, citing Bierer, Carlson, and King (2006). Shaman was able to provide payments for portable water, roads, and health care for the local community after filing for two patents, one for a child respiratory disease and another for herpes. Unfortunately, shortly thereafter, Shaman went bankrupt, and the Indigenous peoples were never able to fully benefit from the utilization of their TK (Reid 2009, 95, citing Eiland 2007).

In all three examples, there are clear economic benefits to the Indigenous peoples that are linked to the TK, although, yet again, as with the Cowichan peoples of Canada, there are no apparent records of the flow of FDIs drawn from appropriation of TK. It is harder still to draw out connections between TCEs and the flow of FDIs. Most TCEs, particularly intangible ones, such as music, narratives, dance, performances, and cultural festivities, are orally passed from one generation to the next, with inadvertent changes over the years. As such, anyone who appropriates such TCEs only needs to place the TCE into a material form, with or without added effort to claim copyright protection. This is, naturally, to the chagrin of the custodial communities, though in most instances, in the absence of a regulatory structures in place, hardly anything can be done. Inadequate or absent regulatory mechanisms thus make it even easier for such misappropriation and weaken further the possibility of establishing an economic value system from the utilization of TCEs that are transformed into intellectual property. Ironically, this is true regardless of whether the resultant intellectual property can be easily valued once it is traded in the market system.

Graham Dutfield (2005) gave an analysis of the relationship between TK and trade in “Harnessing Traditional Knowledge and Genetic Resources for Local Development and Trade.” He looked at the role TK had been playing generally in areas of research and development (R&D), arts and crafts, and agricultural and forest products, contributing to international trade and boosting economic value everywhere but in the communities from where such TK originates.

Dutfield asserted that in many traditional societies, cultural expressions such as handicrafts and artworks are not mass produced because of well-structured guidelines handed down over time from the ancestors. On the contrary, they are produced by individual artisans and artists with the relevant skills in the cultural expressions of the given society. He also added that trade in handicrafts produces substantial economic rewards, for instance, as highlighted in Burkina Faso (West Africa) where handicrafts constitute 70 percent of GDP, and generally, handicrafts represent an estimated value of US\$30 billion in the world market. Dutfield,

however, warned that trade can increase dependence on outsiders and vulnerability to exploitation (Dutfield 2005).

It follows that, although the nature of intangible TCEs makes it difficult to trace their economic value in terms of transactions, tangible TCEs, on the other hand, particularly in the field of handicrafts, come closest to showing a direct flow of income for the ethnic communities involved. In Namibia (Southern Africa), New Perimeter, a nonprofit organization established by global law firm DLA Piper as a pro bono initiative, started a project that has brought about socioeconomic development to the local ethnic communities through capitalizing on their TCEs. One of the objectives of New Perimeter is the advancement of economic development in developing and post-conflict countries. On that basis, it entered into a partnership with a local entity called the Omba Arts Trust, which was started by a Namibian community dealing in product development, training, mentoring, sales, and marketing support to rural arts and crafts producers in Namibia. Through this partnership, a marketing linkage was created with the members of the rural-based communities to assist them in the trade of their arts and crafts. The products are thus able to make it to national, regional, and international markets (New Perimeter 2020). However, the Namibian government has not been able to give any significant attention to taking stock of the income inflows for its local communities through trade in cultural products. The following statement from the United Nations Educational, Scientific and Cultural Organization (UNESCO) reveals that Namibia has only recently begun to appreciate and weigh the role that its culture is playing in the country's economic development, though there are still no direct linkages between TCEs and FDI:

Since independence in 1990, Namibian authorities have recognized culture's role in development in such key documents as the 2001 Policy on Arts and Culture and the National Development Plan 3 (2007–2012). However, the inability to empirically demonstrate this connection has resulted in gradually sidelining culture in recent years and in its omission from the structure of the National Development Plan 4 (2013–2017). The new wealth of data on culture and development, which resulted from implementing the CDIS, made it possible to convincingly advocate for culture and development and bring it back in the next UNPAF (United Nations Partnership Framework) for 2014–2018.

UNESCO 2015, 3

Another example of the use of tangible TCEs to generate income flows for Indigenous peoples is through the work that the Swedish retailer IKEA is doing, particularly, in the United States. In January 2014, the IKEA company introduced a limited edition of Scandinavian products, labeled as a "Trending Collection" and laced with Chinese Cultural Expressions (Yahoo! Finance 2014). The products were a merger of Scandi design aesthetic with materials and motifs of Chinese design. In commenting about the design line, IKEA's head of design, Marcus Engman, stated, "We weren't tourists shopping around for expressions from foreign cultures. It was a new way to work with design. We learned even more about working together, about sharing ideas and how everyone can contribute to one single product. The result is that the whole group takes credit for the ideas" (Yahoo! Finance 2014). Although this brand innovation was a way of targeting the US market and probably earned IKEA the profits it was targeting, it is not likely that there is any empirical data as to how this integration with Chinese TCEs generated income flow into China.

What stands out in all the different examples, highlighted in the chapter thus far, is that it is not possible to present accurate statistical data on cash flows generated for any Indigenous

group or country through cross-border transactions in TK or TCEs. In most of the African settings, the economic base for TCEs is considered as an informal income, and though the government regulatory agencies are aware of such dealings in the markets, especially with tourists, no efforts have been made to tax such activities. Yet, for the Cowichan Nation, in particular, an Indigenous group in Canada, a developed nation, the precise records of the income flow cannot be generated. Initially, Cowichan sweaters were bartered for food and, as such, no receipts were provided. Currently, income generated on Canadian reserves is tax exempt, and the Cowichan Natives do not keep records of the number of sweaters sold (Stopp 2012). In the next part of this chapter, I explore whether it is worthwhile to tax trade in products based on TK and TCEs.

Should there be a tax on traditional knowledge and traditional cultural expressions as income generators?

Taxation of the flow of income for any goods or service-based industry is one way of keeping records of income flows that, in turn, help to draw various economic-related statistics, such as the flow of FDIs. For many Indigenous peoples, as seen in the examples provided here, the income obtained from the transactions that they engage in, related to their TK and TCEs, hardly trickles to the state governments under which they live. This can be attributed to the absence of enabling legislative and policy structures in place, as well as the fact that, for most Indigenous peoples, such transactions are skewed toward favoring the interests of the foreign exploiters of the cultural knowledge. The local communities do not receive a fair share of the benefits, with hardly anything to pass to the government—that is, if such an obligation were to exist. Nonetheless, taxation is not a practical measure for states to employ in generating economic benefit from TK and TCEs. This is due to the following considerations:

1. *The issue of identifying TCEs:* As opposed to TK used in patents, intangible TCEs, such as music and dance performances, have evolved over a period of time, and it becomes difficult to dissect the point at which the TCE evolved into a work of copyright, through gaining a material form orchestrated by the appropriating agent. Drawing out this distinction is important to avoid creating a scenario for double taxation if the value in the resulting copyrighted material is also to be taxed.
2. *Users of TK and TCEs do not have a readily ascertainable value through transactions, and thus, an ad valorem tax is not practical:* This creates tax challenges for any government agency that may be given the mandate to oversee negotiation and payment of royalties, as well as taxation, prior to or after TK and TCE usage by foreign parties. In the same vein and from the perspective of an ad valorem tax system, it is inconceivable to rate TK and TCEs as personal or private property, based on the argument that these are cultural rights belonging to specific Indigenous people and not to the whole country.
3. *Challenges with cross-border TK and TCEs:* Several Indigenous communities are split across various national boundaries that were created by the former colonial masters of the countries in which they are located. Inevitably, some of them, such as the Maasai community in Kenya—as opposed to the one in Tanzania—have crafted ways in which they are generating income from their cultural knowledge. Creating a tax system for such income, without establishing balanced measures by all the governments that are stakeholders for such communities, would be a recipe for confusion, especially if the benefits cut across the national boundaries.
4. *The risk of stagnating culture:* Culture is not static but an evolutionary science that grows with every generation through its utilization by the people that identify with it. Transactions

evolving TK and TCEs, albeit creating anger among Indigenous peoples for various reasons, also feed into this evolution. As such, placing a tax on such transactions risks a response by stakeholders turning away to other profit ventures in which the government tax system would not be seen to deprive them of their income. If the utilization of the cultural heritage is shunned in such a way, it risks slowing down or stunting the growth of culture.

- a. This situation happened in Ghana where, in the 1990s, attempts were made to introduce a tax regulation on the use of TCEs by both foreigners and local musicians. The objective was to control foreign appropriation of Ghanaian folklore as well as generate revenue for the government. However, the ripple effect was that Ghanaian musicians became discouraged in drawing inspiration from traditional musical expressions in their modern creative efforts (Collins 2006). Although the tax regulation did not materialize at the time, §64 of the current legislation on copyright in Ghana stipulates that a fee should be paid for the use of folklore.² It is uncertain as to the effect this has on the independent flow and utilization of TCEs since there is no empirical data available. However, judging by the historical reactions toward inclusion of a tax on TCE usage, one can argue that there would be better utilization of such culture in Ghana, in a way that benefits the state without capping it under a government tax system.

In short, it is only in the past 20 years or so that Indigenous peoples have started appreciating the economic value in their TCEs and TK. Considering that this culture is part of their identity and rooted within their lifestyles, their perspectives in terms of the value of TK and TCEs is far different from the way the outside world perceives the cultural knowledge. Certainly, such perceptions have not been realized in financial terms until only recently, as more and more of such communities have opened to the outside world. As such, statistical data showing the connection between TK/TCEs and FDI flows are rare, if not impossible to obtain.

The scenario is not likely to last for the next 10 years or so, considering that agitation for the protection of TK and TCEs is on the rise among Indigenous peoples. Host governments are also paying attention and working on domestic legislation to effect such protections.³ Regional and international bodies are also following suit with the drafting of instruments to the same effect.⁴ Ideally, what this means is that a more organized system of utilizing TCEs and TK, as overseen through a legislative and policy structure, will break ground in the creation of data on the effect that proper use of TK and TCEs has on the economy of a nation.

Conclusion

In exploring the current linkages between TCEs, TK, and contribution to the flow of income into countries that host Indigenous communities, the absence of empirical evidence to this effect still begs the question as to the extent that cultural heritage—through TCEs and TK—contributes to development. This chapter is inclined to use definitions of key terms as guides toward reaching a conclusive response to this puzzle. *Black's Law Dictionary* looks at “development” as “[a]n activity, action, or alteration that changes undeveloped property into developed property” (Garner 1999, 462). The *Oxford Dictionary and Thesaurus*, on the other hand, has rather basic definitions for the terms “development,” “economic,” and “social.” It equates “development” to the words, “enlargement, evolution, expansion, extension, growth, increase; advance, improvement, progress” (Hawker and Cowley 1996, 129). The word “economic” is also defined as “enough to give a good return for money or effort outlaid” (Hawker and Cowley 1996, 152). Furthermore, the word “social” is defined as “of a society or its organization” (Hawker and Cowley 1996, 480). Drawing from these definitions, which are not

necessarily authoritative positions, it can be asserted that the term “social–economic development,” is *the improvement of a society’s conditions based on monetary or financial input*.

This definition is juxtaposed with the roles that TK and TCEs play through financial inclusion and income generation for various Indigenous peoples. Better lifestyles and employment opportunities are created for persons in local communities that deal in their cultural heritage, and above all, such TK and TCEs play a significant role in contributing a wealth of information to this knowledge–based economy through improvement in innovation and creativity. In the absence of clear figures on the FDI flows, one still cannot rule out how very important TK and TCEs are in the world economy.

Notes

- 1 These tribes include the Coast Salish First Nations found on Vancouver Island and the mainland of British Columbia in Canada. The main producers of the sweaters are knitters from the Cowichan Nation, located in what is now known as Duncan, British Columbia.
- 2 Ghana Copyright Act 690 of 2005. See <https://wipolex.wipo.int/en/text/148037>.
- 3 For instance, in 2016, Kenya enacted the Protection of Traditional Knowledge and Traditional Cultural Expressions Act, No. 33 of 2016, and Zambia enacted the Protection of Traditional Knowledge, Genetic Resources and Expressions of Folklore Act, No. 16 of 2016.
- 4 The Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore (2010) of the Africa Regional Intellectual Property Organization (ARIPO) came into force in January 2012, while WIPO is still involved in negotiating draft instruments on genetic resources, traditional knowledge and expressions of folklore.

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