

AFRICAN CONTINENTAL FREE TRADE AREA AGREEMENT: THE ENVISAGED PHASE II-INTELLECTUAL PROPERTY ASPECT

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ABSTRACT

Economic growth based on innovation and trade agreements facilitate transfer of technology between countries. The World Trade Organization (WTO) enables members to enter into regional trade agreement granting more favorable trade conditions to its fellow signatories than it does to other parties and provide the legal basis for preferential trade agreements between developing countries. To exploit these regional trade opportunities, the African Union (AU) undertook to establish the African Continental Free Trade Area Agreement (AfCFTA) and to bring coherence to the regional intellectual property (IP) cooperation. The inclusion of IP in trade agreements provide an opportunity to set common rules on IP protection and a common approach to the use of flexibilities offered through WTO's Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement. A strategic approach to IP policy at a continental level has the potential to provide a basis for pooling resources among African countries and regional economic communities (RECs), thus building substantial capacities required for IP. Furthermore, it has the ability to strengthen a common approach to negotiating IP trade and investment agreements with external partners.

Through this regional IP co-operation framework, the AU embraces IP as a tool for public policy to promote economic,

social and cultural progress by stimulating creative work and technological innovation. A well-functioning IP regime provides incentives for development and innovation leading to economic competitiveness, technological diffusion and economic growth as a spin off.

Key words: trade agreements, intellectual property, transfer of technology, WIPO, WTO, ARIPO, PAIPO

1. INTRODUCTION

The IP system is deemed a tool for public policy to promote economic, social and cultural progress by stimulating creative work and technological innovation.¹ The term intellectual property refers broadly to the creations of the human mind. Intellectual property rights (IPRs) safeguard the interest of creators by awarding property rights to them, mostly the freedom to operate for their creations. IPRs are largely protected by granting statutory expression to the moral and economic rights for creations to IP creators. IPRs aim to promote creativity through the reward, dissemination and application of creations.²

A well-functioning IP regime should facilitate direct and indirect transfer of technology (TT) through FDI trade and licensing.³ Furthermore, a well-functioning IP regime provides incentives for development and innovation leading to economic competitiveness and technological diffusion for an economic growth spin off. Developed countries recognize IP rights as a critical component of FDI and TT; they ensure that maximum IP benefits are derived from trade

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¹ Jayashree Watal and Antony Taubman (eds), *'The Making of TRIPS Agreement, Personal insights from Uruguay Round Negotiations'* (WTO 2015) 2.

² Karky R, 'Intellectual Property Rights and Foreign Direct Investment Agreements' in: Perry M. (eds) *Global Governance of Intellectual Property in the 21st Century* (Springer, Cham, 2016) 209-223.

³ Watal (n 1).

agreements; contrarily; developing countries and least developed countries (LDCs); are not yet in a position to fully utilize possible opportunities brought about by the IP regime as a result of a series of challenges.⁴ When negotiating trade agreements, developing countries only accept inclusion of IP rights as a bargain providing an opportunity for improved market access for its textiles and agricultural goods.⁵ Developing countries are thus struggling to generate value from IP due to their tangible asset economic focus being based on raw material and manufacturing capabilities.⁶

The African Union (AU) recognized the opportunities afforded through trade agreements for the African continent to enable the movement of goods and services, eradicate trade barriers, tariffs and quotas. In its effort to boost intra-African trade the AU proposed the African Continental Free Trade Area Agreement (AfCFTA) for its member states. However, some issues such as IPRs go beyond elimination of trade barriers and have implications on domestic policies. The implications influence technological development, national economy and the society.

The World Trade Organization (WTO) regimes, such as Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement, control trade-related IPRs.⁷ Through the TRIPS Agreement, the WTO enables members to enter into regional trade agreements (RTAs) granting more favorable trade conditions to its fellow signatories than it does to other

parties and to provide the legal basis for preferential trade agreements (PTAs) between developing countries and LDCs. Trade agreements facilitate innovation, economic growth and TT between countries.⁸ This paper focuses on the IP aspects envisaged in the AfCFTA.

2. THE ROLE OF WIPO & THE WTO

World Intellectual Property Organization (WIPO) promotes the protection of IP throughout the world through administering 15 IP treaties in 24 regimes. These regimes are categorized in three tiers – the first tier is comprised of 15 treaties⁹ that define internationally agreed basic standards of IP protection in each country. The second tier is comprised of five treaties¹⁰ that are termed global protection treaties. They ensure that one international registration or filing have effect in any of the signatory states. IP applications are simplified and costs reduced through the WIPO application system. The third tier is comprised of four ‘classification treaties’¹¹ that organize information on inventions, trademarks and industrial designs into indexed, manageable structures, to simplify retrieval.¹²

Whilst WIPO ensures administrative co-operation through treaties; WTO administers the TRIPS Agreement. The TRIPS Agreement set a global and uniform set of IPR regulation for recognizing IP as a trade issue.¹³ TRIPS was aimed at:

Reducing impediments to international trade. Focusing on the need to promote effective and adequate protection of

⁴ *ibid* 2.

⁵ Manfred Elsig and Jenny Surbeck, ‘Intellectual Property Rights and Preferential Trade Agreements: Data, Concepts and Research Avenues’ (European Consortium for Political Research General Conference, Prague, 07-10 September 2016).

⁶ Raymundo Valdés and Maegan McCann, ‘Intellectual Property Provisions in Regional Trade Agreements: Revision and Update (WTO Staff Working Paper, ERSD 2014-14).

⁷ Shik-Lee Yong, ‘The United States-Korea Free Trade Agreement’ in Lester S Mercurio B and Bartels L (eds), *Bilateral and Regional Trade Agreements: Case Studies* (Cambridge University Press 2016) 22-23.

⁸ Valdés (n 6).

⁹ Paris Convention for the Protection of Industrial Property (1883); Berne Convention for the Protection of Literary and Artistic Works (1886); Madrid Agreement for the Repression of False or Deceptive Indications of Sources of Goods (1891); Buenos Aires Convention (1910); Universal Copyrights Convention (1952); Rome Convention for the Protection of Performers, Producers of Phonographs, and Broadcasting Organizations (1961); United Nations Convention Establishing the WIPO (1967); Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms (1971); Brussels Convention (1974); Nairobi Treaty on the Protection of the Olympic Symbol (1981); Film Register Treaty

(1989); Treaty on Intellectual Property in respect of Integrated Circuit (1989); Trademark Law Treaty (1994); WIPO Copyright Treaty WIPO Performances and Phonograms Treaty (1996).

¹⁰ Hague Agreements (1934, 1964) Lisbon Agreement for the Protection of Appellations of Origin and their International Registration (1958); Patent Cooperation Treaty (1970); Budapest Treaty on the International Recognition of Deposit of Microorganisms for the Purposes of Patent Procedures (1977); Madrid Agreement concerning the International Registration of Marks (1891); and the Protocol relating to that Agreement (1989).

¹¹ Nice Agreement concerning the International Classification of Goods and Services for the purpose of the Registration of Marks (1957); Locarno Agreements and establishing an International Classification for Industrial Designs (1968); Vienna Agreements establishing an International Classification of the Figurative Elements Marks (1973); Strasbourg Agreement concerning the International Patent Classification (1979).

¹² Economic Commission for Africa, African Union and African Development Bank Group, ‘Assessing Regional Integration in Africa (ARIA) VII: Innovation, Competitiveness and Regional Integration’ (ECA 2016) 64.

¹³ Elsig (n 5).

intellectual property rights. Ensuring that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade, to develop a multilateral framework of rules and disciplines dealing with international trade in counterfeit goods.¹⁴

3. THE TRIPS AGREEMENT

The TRIPS Agreement sets the minimum benchmark for IP protection in the territories of WTO Members. TRIPS incorporates some of the main international WIPO agreements that already existed prior to WTO's establishment. The TRIPS Agreement complements the WIPO treaties and conventions, and covers additional areas of IP and introduces higher standards of protection than that which are provided for under the two WIPO treaties.^{15,16} Even though not all countries are party to all WIPO-administered treaties, by virtue of the TRIPS Agreement, WTO member states are bound by core WIPO treaties.¹⁷

African countries as a developing continent formed the AU; made up of 55 members, 33 of which are classified as Least Developed Countries (LDCs). LDCs are low income countries with structural limitations to sustainable development.¹⁸ 53 African countries are WIPO Member states. In terms of the WTO, 43 of the African countries are WTO member states; 29 of which are LDCs.¹⁹

TRIPS Agreement established minimum standards of IP protection and requirements to which member countries must subscribe, as well as rules for administration of enforcement of IPRs. The TRIPS Agreement also provides for the application of the WTO dispute settlement mechanism to resolve disputes between members concerning its compliance.²⁰ It is termed:

A far-reaching international treaty on IP to date covering a wide sweep of substantive subject matter as well as administration and enforcement of IP and settlement of disputes between trading partners over IP.²¹

WTO members, apart from LDCs, are obliged to implement TRIPS minimum standards. Members are left free to determine the appropriate method of implementing the provisions of the Agreement within their own legal system and practice²². This had fundamental implications for the policy space available to developing countries in designing their national IP rules and policies. It is indicated that the TRIPS Agreement's general standards of IP protection benefit certain industrial sectors where companies from developed countries are dominant.²³ The minimum standards of IP rights regulation that the TRIPS Agreement promoted brought about varying implementation strategies. In this context big businesses had a competitive edge over small businesses due to the advantage for the economies of scale and the ability to handle the overhead costs of litigation and compliance. Similarly, developed countries will have an advantage over developing and LDCs as well.²⁴ Developing countries have been unable to bear significant costs for adopting TRIPS provisions. The provisions come with the need to ensure judicial and institutional infrastructure to educate, implement, manage and enforce IPR provisions.²⁵

It is deemed that the current role of the WTO in developing the international IP trade system is minimal despite its major role in enhancing the global standards for IP protection. The WTO Council is seen to be paralysed by basic disagreements on the role of the socio-economic development aspect of TRIPS.²⁶ It is submitted that even though IPRs offer incentives

¹⁴ Watal (n 1) 6.

¹⁵ These include the Paris Convention and the Berne Convention for the Protection of Literary and Artistic Works.

¹⁶ Valdés (n 6).

¹⁷ Economic Commission for Africa (n 12) 66.

¹⁸ United Nations 'Economic Analysis and Policy Division: Least Developed Countries' What does the Adoption of the African Continental Free Trade Agreement signify? 29 March 2018 available at <<https://www.un.org/development/desa/dpad/least-developed-country-category.html>> accessed 26 May 2018.

¹⁹ Economic Commission for Africa (n 12) 67.

²⁰ Watal (n 1) 6.

²¹ *ibid* 16.

²² WTO Overview: The TRIPS Agreement <https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm> accessed 10 June 2020

²³ Economic Commission for Africa (n 12) 77.

²⁴ *ibid* 45, 50.

²⁵ Narayanan G Badri and Sangeeta Khorana, 'Meta-Regional Trade Agreements: Costly distraction for Developing Countries' (*Economic Structures*, 2017) 6: 29 <<https://o-doi-org.oasis.unisa.ac.za/10.1186/s40008-017-0090-y>> accessed 26 June 2018.

²⁶ Carlos Correa, 'The Role of the World Trade Organization in the Intellectual Property System' in Christopher Geiger and Xavier Seuba (eds), *Rethinking International Intellectual Property Law: What*

to innovate, the difficulty in their application is that they work in certain contexts. The requirements for IP rights and the enhancement of innovation is the existence of conditions such as skills, information, capital and market prospects.²⁷

A large market with sufficient capital, qualified personnel, and innovation-oriented entrepreneurs is necessary for an effective IP regime. African countries are struggling with these conditions. In some instances, even if these conditions are met, IP rights may not promote innovation. An example is that pharmaceutical patent protection that has been unable to increase research and development (R&D), FDI and domestic investment in developing countries as right holders import or export final products rather than invest in local production.²⁸

IP is one of the essential determinants of inward FDI, as stated the existence of a sound IP regime attracts FDI and encourages TT as an important consideration of foreign investors. TRIPS article 7 sets out:

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.²⁹

4. INTELLECTUAL PROPERTY AND TRADE AGREEMENTS

Trade agreements are formulated with the objective of economic development. The inclusion of IP in trade agreements promotes innovation and leads to economic growth. The TRIPS Agreement being an instrument to facilitate economic growth and development through the

administration of IPRs has been criticised for failing to take into account the different levels of capacity for innovation and the interests of developing and LDCs.³⁰ The different levels of innovation capacity has made it difficult for the developing and least developed countries to grow their economies under the indicated prescribed minimum TRIPS standards.³¹ WTO however, enables member states to enter into RTAs granting more favorable trade conditions to its fellow signatories than it does to other parties and it also provides the legal basis for preferential agreements between developing countries. WTO member states have actively engaged in the formation of RTAs as evident in international trade policy through the rapid increase in the number of RTAs.³² The economic impact of RTAs with IP provisions relates to the estimation of the costs and benefits of adopting common policies and regulations among countries at different stages of economic development.³³

Developing countries may be pressured into adopting common rules when entering into RTAs which are inappropriate for their level of development, or rules that are used to protect the vested interests of certain groups.³⁴ Despite the emergence of RTAs very few have been registered purely between developing countries. The following figures show number of trade agreements regulating IP and their distribution between developed and developing countries.³⁵

Institutional Environment for the Development and Enforcement of IP Law? (CEIPI ICTSD 2015) 41.

²⁷ Economic Commission for Africa (n 12) 61.

²⁸ *ibid* 68.

²⁹ Karky R, 'Intellectual Property Rights and Foreign Direct Investment Agreements' in Perry M (eds), *Global Governance of Intellectual Property in the 21st Century* (Springer Cham 2016) 209-223.

³⁰ Christopher Geiger, 'Multilateralism vs Pluralism in international IP Law: lessons to be Learned from the Failure of the Anti-Counterfeiting Trade Agreement' in Christopher Geiger and Xavier Seuba (eds), *Rethinking International Intellectual Property Law: What Institutional Environment for the Development and Enforcement of IP Law?* (CEIPI ICTSD 2015) 45.

³¹ Valdés (n 6).

³² Xavier Seuba, 'Substantive and Jurisdictional Challenges Arising from Bilateralism in Christopher Geiger and Xavier Seuba (eds), *Intellectual Property' in Rethinking International Intellectual Property Law: What Institutional Environment for the Development and Enforcement of IP Law?* (CEIPI-ICTSD, 2015) 57.

³³ Valdés (n 6).

³⁴ *ibid*.

³⁵ Seuba, Xavier, 'Intellectual Property in Preferential Trade Agreements: What Treaties, What Content?' (2015) *The Journal of World Intellectual Property* 240.

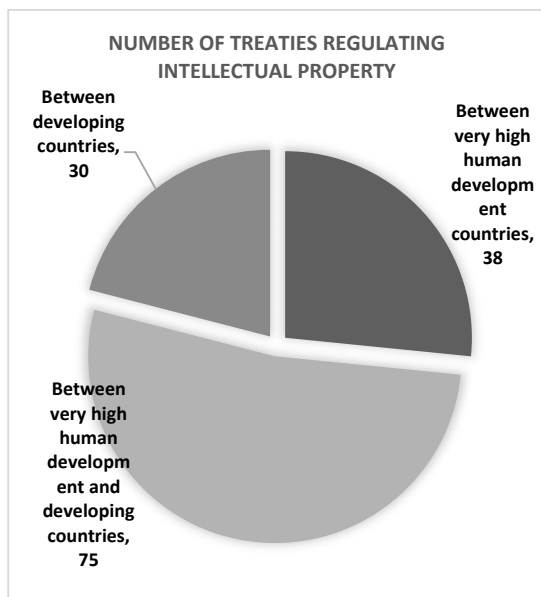


Figure 1: Number of Preferential Trade Agreements regulating IP registered at the WTO

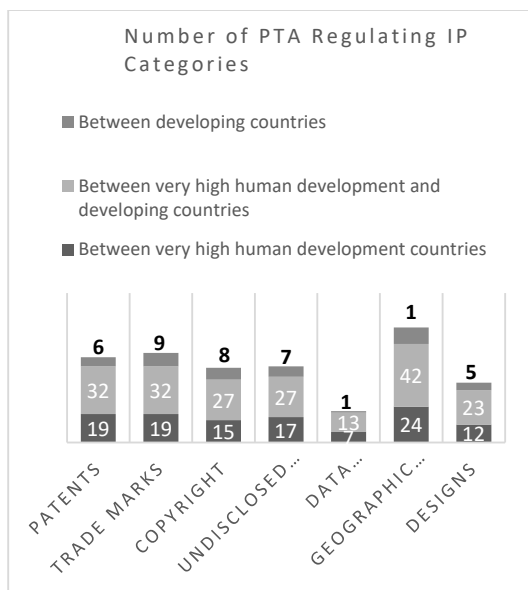


Figure 2: Number of Preferential Trade Agreements regulating IP categories

The number of trade agreements entered into between developed and developing countries is strikingly high, and there are very few agreements between developing countries.

To fully exploit the regional trade opportunity, the AU in its 2063 Agenda³⁶ undertook two initiatives that could help bring coherence to the regional IP cooperation. The initiatives are the Continental Free Trade Area Agreement and efforts to establish a Pan-African Intellectual Property Organization (PAIPO), with its headquarters in Tunisia. South Africa’s Trade and Industry Minister commented that ‘a Continental Free Trade Area agreement on IP would provide an opportunity to set common rules on IP protection and use of flexibilities in the global IP regimes, based on a common approach.³⁷ However, taking into the differentiated development levels, different levels of industrial developments and different IP policies, it would be advisable rather to have some level of harmonization of IP regimes across the continent.

It is submitted that IPRs confer an incentive to innovate, however in countries where dominance is based on incremental innovation as a result of scarcity of required conditions to enable innovation such as weak scientific and technological infrastructure as well as skills, information, capital, market³⁸ enforcement of common rules on IP protection is likely to perpetuate the currently existing inequalities as technology exporting countries are likely to benefit more than technology importing least developed countries.

5. AFRICAN CONTINENTAL FREE TRADE AREA AGREEMENT

The AU member states met in Kigali, Rwanda on 21 March 2018 to deliberate on the signing of the new African Continental Free Trade Area Agreement (AfCFTA). The AfCFTA is one of the key deliverables in the AU’s first 10-year implementation plan of Agenda 2063 (2014 to 2023). The

³⁶ ‘Assessing Regional Integration in Africa (ARIA) VIII: Bringing the Continental Free Trade Area About’ (Economic Commission for Africa, African Union and African Development Bank Group, 2017) xi.

³⁷ Department of Trade and Industry, ‘Minister Rob Davies on the Outcomes of the African Continental Free Trade Area’ (4-Traders, News: Companies, 27 March 2018) <<http://www.4-traders.com/news/Minister-Rob-Davies-On-Outcomes-of-the-African-Continent-Free-Trade-Area-26235110/>> accessed 07 April 2018.

³⁸ Carlos Correa, ‘Intellectual Property in LDCs: Strategies for Enhancing Technology Transfer and Dissemination’ (UNCTAD The Least Developed Countries Report 2007) 7

agreement is envisaged to enter into force once 22 member states have ratified it.³⁹

A. OBJECTIVES OF THE AFRICAN CONTINENTAL FREE TRADE AREA AGREEMENT

The key objective of the AfCFTA is to boost intra-African trade by forging a single continental legal regime for all relevant trade disciplines. This will include lower tariffs, simplified rules of origin and customs procedures and regulations for trade in services. In addition to that, AfCFTA's objective is to create a single continental market for goods and services, with free movement of business persons and investments, to pave the way for accelerating the establishment of the Customs Unions; to enhance competitiveness at the industry and enterprise level through exploiting opportunities for production, continental market access and better resource allocation.⁴⁰

The first phase of the AfCFTA includes a package of legal instruments such as a founding agreement, protocols on trade in goods and services, and annexures on trade-related rules and procedures, as well as a dispute settlement mechanism.⁴¹ The focus of the second phase of AfCFTA will be protocols on investment, competition and IP.⁴² The African Continental Free Trade Area (AfCFTA) seeks to ensure African integration and unity. It provides an opportunity to advance a continental approach to a balanced IP rights system that responds to the aspirations contained in Agenda 2063.⁴³ It promises a new trade order with an intention is to liberate Africa from the shackles of underdevelopment ...⁴⁴ AfCFTA, then, aims to support African-led development and industrialization.⁴⁵ Lessons should be drawn from the South-South co-operation that African countries turned to. Although theoretically focused on Brazil, Russia, India, China, and South Africa (BRICS), in practice, China dominated this

South-South partnership. The outcome of the co-operation resulted in infrastructure investment with China through its Belt and Roads Initiative raising major socio-ecological questions such as employment structures that prioritize Chinese and undervalue African labor. Furthermore, it is submitted that these infrastructure projects are usually bartered with African resources, generate crippling debt and related debt crises, involve the physical loss of land, and cause economic dislocations related to the increase in land values. The Chinese co-operation has also brought about the destruction of African textile manufacturing and locally produced goods and services as they are unable to compete with the imported Chinese goods in Africa.⁴⁶ The implementation of the first phase is likely to have challenges because as transaction costs decline, transnational corporations (TNCs) will gain larger markets and increased opportunities for land speculation. TNCs will become even more powerful as they purchase more African land and resources.⁴⁷ Furthermore it is submitted that AfCFTA has failed to take seriously the problem of inequality in Africa, which is even more pressing than barriers to productivity and trade. Instead of developing a framework to overcome this problem, the currently envisioned trade system will increase inequality and thereby cause social, economic, and environmental damage.⁴⁸

The IP aspect of the AfCFTA Agreement is expected to provide an opportunity to set common rules on IP protection and use of flexibilities in the global IP regimes, based on a common approach.⁴⁹ It would also provide a framework for sub regional cooperation, building on integration already achieved in the regional economic communities such as the Tripartite Free Trade Area (TFTA) between Common Market for Eastern Southern Africa (COMESA),⁵⁰ Eastern African

³⁹ What does the Adoption of the African Continental Free Trade Agreement signify? (tralac, 29 March 2018) <<https://www.tralac.org/discussions/article/12893-what-does-the-adoption-of-the-african-continental-free-trade-agreement-signify.html>> accessed 20 May 2018.

⁴⁰ Continental Free Trade Area <<https://au.int/en/ti/cfta/about>> accessed 20 June 2018.

⁴¹ Economic Commission for Africa (n 35) 56.

⁴² Department of Trade and Industry (n 36).

⁴³ 'Assessing Regional Integration in Africa (ARIA) IX: Assessing Regional Integration in Africa' (Economic Commission for Africa, African Union and African Development Bank Group, 2019) 154

⁴⁴ Franklin Obeng-Odoom, 'The African Continental Free Trade Area' (January, 2020) *American Journal of Economics and Sociology* Vol. 79 No. 1, 167.

⁴⁵ *ibid* 180.

⁴⁶ *ibid* 174.

⁴⁷ *ibid* 186.

⁴⁸ *ibid* 192.

⁴⁹ Economic Commission for Africa (n 35) 145.

⁵⁰ COMESA is a free trade area agreement formed in 1994 by 19 member states namely: Democratic Republic of Congo, Burundi, Union of the Comoros, Republic of Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan,

Community (EAC)⁵¹ and the Southern African Development Community (SADC).⁵² The AfCFTA builds on the notion that the three RECs are committed to cooperating on IP policy under the TFTA.⁵³

In promoting policy coherence and based on a common approach; IP rights protocol in the AfCFTA are expected to provide an opportunity to establish common rules on IP protection and the use of flexibilities in the global IP regimes. It would also provide a framework for sub-regional cooperation and promote further cooperation at the continental level. The objective of promoting policy coherence should help Africa address the relationship between IP rights and other socioeconomic objectives, including innovation, environmental protection and traditional knowledge.⁵⁴ However, the flexibilities provided by TRIPS Agreement have to be carefully considered as it does not exempt regional preferential trade agreements established after it had come into force (such as the AfCFTA) from providing better treatment to the nationals of the members of those agreements. In other words, agreements made by countries in the context of the AfCFTA, for example, must be extended to nationals of all WTO member States.⁵⁵ This has the ability to favour technology exporting countries and increase inequality.

B. IP DIMENSION OF THE AfCFTA

The competition policy and IP rights disciplines of the AfCFTA Agreement are expected to be launched after the conclusion of the negotiations on goods and services.⁵⁶ A strategic approach to IP policy at continental level has the potential to

provide a basis for pooling resources among African countries and RECs to build the heavy capacities required for ensuring IP protection. This could also strengthen a common approach to negotiating IP trade and investment agreements with external partners.⁵⁷

C. CHALLENGES AND OPPORTUNITIES

As detailed in the United Nations Economic Commission for Africa (UNECA) 2016 report 'Assessing Regional Integration in Africa (ARIA VII, 2016)' one of the key challenges facing the African continent is the fragmented IP regulatory framework.⁵⁸ There are currently two sub-regional IP organizations; the African Regional Intellectual Property Organization (ARIPO) and the Organisation Africaine de la Propriete Intellectuelle (OAPI). ARIPO focuses on 19 English speaking African countries⁵⁹ whilst OAPI's focus is on the 17 French speaking African⁶⁰ countries. There are however 19 AU member countries that neither belong to neither ARIPO nor OAPI, including regional powerhouses such as Egypt, Nigeria and South Africa. In addition to that, ARIPO member states have different IP frameworks, while OAPI member states subscribe to a unified IP legal system framework for negotiating bilateral trade and investment agreements.⁶¹ The two IP organizations are independent from RECs and disengaged from the regional integration agenda leading to: (i) Policy and Institutional incoherence; (ii) Focus on the grant of patent rights at the exclusion of giving significant guidance to exercise of rights; (iii) Harmonization effort sometimes reducing policy space available to member states (iv) Lack of IP co-operation.⁶²

Swaziland, Uganda, Zambia and Zimbabwe. <<http://www.comesa.int/comesa-members-states/>> accessed 07 April 2018.

⁵¹ EAC is a regional intergovernmental organisation of six partner states: Burundi, Kenya, Rwanda, South Sudan, Tanzania and Uganda <https://www.eac.int/overview_of_eac7> accessed 07 April 2018.

⁵² SADC is a regional intergovernmental organisation comprised of 15 partner states: Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe <<https://www.sadc.int/member-states/>>.

⁵³ Caroline Ncube, Tobias Schonwetter, Jeremy de Beer and Chidi Oguamanam, 'Intellectual Property Rights and Innovation: Assessing Regional Integration in Africa (ARIA VIII)' (2017) Open AIR Working Paper 5.

⁵⁴ Economic Commission for Africa IX (2019) 125.

⁵⁵ *ibid* 105.

⁵⁶ Economic Commission for Africa (n 35) 145.

⁵⁷ Department of Trade and Industry (n 35).

⁵⁷ Ncube, *et al* (n 53).

⁵⁸ Economic Commission for Africa (n 35) 72.

⁵⁹ African Regional Patent Office member states <www.aripo.org/resources/member-states> accessed 20 May 2018. Currently 19 states are members to the Lusaka Agreement and therefore members of ARIPO. These are Botswana, The Gambia, Ghana, Kenya, Lesotho, Malawi, Mozambique, Namibia, Sierra Leone, Liberia, Rwanda, São Tomé and Príncipe, Somalia, Sudan, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe.

⁶⁰ OAPI member states <www.oapi.int/> accessed 20 May 2018. Currently 17 member states that are members thereto: Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Congo, Côte d'Ivoire, Equatorial Guinea, Gabon, Guinea, Guinea Bissau, Mali, Mauritania, Niger, Senegal, Union of the Comoros and Togo.

⁶¹ Economic Commission for Africa (n 12)

⁶² *ibid* 72.

The AU proposed the establishment of PAIPO as a chance for a coherent approach to IP policy co-operation as well as to deal with deficiencies left by ARIPO and OAPI.⁶³

Another identified challenge is multiple IP related initiatives being led, or planned, by RECs brought about by the independent disengagement of ARIPO and OAPI from regional integration efforts.⁶⁴ These initiatives do not include existing or proposed regional IP organizations.⁶⁵ The promotion of regional integration is proposed. It is stated that regional exhaustion regimes for IP rights can help to promote regional trade and value chain integration and reduce discrimination between State Parties.⁶⁶

Developing countries and LDCs are IP consumers and importers of IP not producers and exporters.⁶⁷ It is submitted that whatever framework is considered should reflect the fact that innovation in the context of Africa is different from elsewhere in the world. Innovation occurs mainly in the informal sector and not heavily reliant on predictable means of knowledge authority and appropriation.⁶⁸

Trade agreements in developing countries should reflect the innovation context through the support of traditional knowledge-based innovations in two ways: first, for the benefit of local indigenous communities that hold and are dependent on such knowledge; second, for the promotion and capability building initiatives to utilize traditional knowledge (TK) as a source of modern innovation for growth in a way that empowers TK holders. In both perspectives, connections need to be made between development, public health, industrial, trade and IP related policies and institutions. Appropriate institutions for managing interactions among TK holders and the diversity of TK users should be implemented to deal with uncertainties that surround knowledge sharing.⁶⁹

D. KEY CONSIDERATIONS FOR IP IN AfCFTA

A functional IP governance framework includes institutional frameworks, policies, strategies, laws and regulations as well as IP administration and adjudication mechanisms to integrate and enforce rights agreed upon. It is costly for developing countries or LDCs to implement all these mechanisms. It is thus imperative for the AfCFTA IP agreement to highlight flexibility, the importance of a transition period, and the safeguarding of policy space to create limitations and exceptions that suit countries at various stages of economic development.⁷⁰

In addition to maximizing the utilisation of flexibilities where applicable⁷¹ other general IP provisions as key points for consideration:⁷²

- a. Adoption of a regional IP exhaustion regime in order to prevent fragmentation of the market.
- b. Enforced ratification of the Protocol amending the TRIPS Agreement, 2005 to benefit from the facilitation of production and exportation of pharmaceuticals for a regional trade agreement in which 50 per cent or more of its members are least developed countries. (The AfCFTA will also qualify under the Protocol).
- c. Adoption of a tripartite regional policy on IP rights and public health based on the East African Community Regional IP Policy on the Utilization of Public Health-Related WTO-TRIPS Flexibilities and the Approximation of National IP Legislation.
- d. Endorsement of the Nairobi Statement on Investment in Access to Medicines or adoption of a similar commitment.
- e. Adoption of an in-built agenda to develop a plant breeders' rights regime tailored to the interests of the region, based on the needs of the local seed industry and publicly funded agricultural research centres.
- f. Enforced ratification of the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or Otherwise Print Disabled.

⁶³ *ibid* (n 12) 149.

⁶⁴ *ibid* 149.

⁶⁵ *ibid* 149.

⁶⁶ Economic Commission for Africa IX (2019) 150.

⁶⁷ Badri (n 24).

⁶⁸ Kraemer-Mbula E and Wunsch-Vincent S (eds), *The Informal Economy in Developing Countries: Hidden Engine of Innovation* (Cambridge University Press, UK 2016) 150.

⁶⁹ Economic Commission for Africa (n 35) 16.

⁷⁰ *ibid* 16.

⁷¹ Watal (n 1) 23.

⁷² Economic Commission for Africa IX (2019) 108-109.

- g. Adoption of mandatory disclosure requirements in patent laws and in plant variety protection laws, except for partner States that are members of the 1991 UPOV Convention.
- h. Consideration of the adoption of a tripartite agreement which ascertains that measures in accordance with the WHO Framework Convention on Tobacco Control do not constitute an expropriation of IP assets or an infringement of IP rights.
- i. Adoption of measures for cooperation on patent examination, including for the sharing of patent examination results.

E. PROVISIONS RELATED TO SPECIFIC IP CATEGORIES⁷³

The eighth United Nations Economic Commission for Africa (UNECA) report on 'Assessing Regional Integration in Africa'⁷⁴ suggests that the specific IP categories are to be handled as follows in the AfCFTA:

Copyright – Balanced, sound and coherent domestic frameworks that are practically relevant, context appropriate and responsive to digital technologies encourage innovation and creativity. Inclusion of express provisions, to cater to disabled persons; temporary copies; parallel importation; orphan works and text; and data mining is imperative with regard to exceptions and limitations. In addition, maximum use of flexibilities under copyright to facilitate access to creative works is very critical.⁷⁵

Patents - A more robust approach to using existing flexibilities and more aggressively leveraging policy space is required. The continent needs better patents that are granted according to patent law that adequately address its socio-economic needs for example access to medicines. Despite Africa's requirement for improvement in IP ranking in relation to numbers of patents granted per resident; the agreement should not simply seek to secure the grant of patents for the sake of improving Africa's position in ranking systems. It should ensure the consideration of innovation in the context of Africa and support for traditional knowledge-based

innovations. Patent office capacity and processes are to be strengthened for credible and effective patent examination.⁷⁶

Trademarks – Communal trademarks strategies are underutilized in Africa and they are better suited for the development vision of African producers into marketable inventions. The AfCFTA negotiations afford a platform to promote IP policies tailored to achieving some form of sui generis framework for the protection of the less conventional trademarks at the national level.⁷⁷

Traditional knowledge – As a key strength for Africa, the AfCFTA needs to recognize the progress made for global recognition and protection of TK and its expression in major areas innovation and knowledge, including in medicine, agriculture, biotechnology and food.⁷⁸

The seventh United Nations Economic Commission for Africa (UNECA) report on "Assessing Regional Integration in Africa" outlines four areas that are imperative in relation to integrating IP issues into national development policies to improve the prospects of socio-economic development. These areas are – Agriculture, Manufacturing, Public Health and Access to Knowledge.

Agriculture – 'the agricultural sector is of huge importance to most African countries as a source of livelihood, income and employment. Around 53% of Africa's agricultural producers are comprised of smallholder farmers who requires integration into larger value chains, through promotion and access to market as well as export opportunities.⁷⁹

When designing an IP system, policy makers must consider the sector's characteristics, possible changes from growing liberalization of agricultural trade, the inputs in sustainable productions, and food security—including the structure of the seed supply system. A system that strikes a balance between plant breeders' rights and the ability for farmers to save and exchange seeds should be devised.⁸⁰

Manufacturing - National IP policy should reflect the country's industrial development stage. IP should enable and

⁷³ Economic Commission for Africa (n 35) 152.

⁷⁴ *ibid* 135.

⁷⁵ *ibid* 151.

⁷⁶ *ibid* 151.

⁷⁷ *ibid* 151.

⁷⁸ *ibid* 152.

⁷⁹ Economic Commission for Africa (n 35) 4.

⁸⁰ Economic Commission for Africa (n 12).

promote local innovation, there should be access for absorption and diffusion of acquired technologies. Available flexibilities should be used to promote technology diffusion and allow reverse engineering, a strict criterion to assess patentability should be explored.

Public Health – The IP system must not constrain access to affordable generic medicines and health technologies. Flexibilities such as compulsory licensing should enable the production and establishment of generic medicine industries. It is imperative for IP rights holder to invest in local R&D and locally produced generics for the local market. Administrators may wish to adopt a clear approach in which trade and IP policies are formulated in a manner that preserves developing countries' ability to provide long term, affordable and sustainable access to medicines.⁸¹

Access to Knowledge - Maximum use of flexibilities under copyright to facilitate access to creative works, scientific and factual data and to enable R&D projects. There is a crucial need for exceptions for education in copyright laws to balance IP protection, access to works and to promote access to knowledge.⁸²

Competition policy and law have the ability to complement IP and trade rules to increase access to and reduction in the IP rights cost in respect of protected knowledge and technology. It was also stated that the complex issue of the intersection between IP rights and human rights, which formed a challenge for some international trade agreements, should not be ignored in the AfCFTA negotiations.⁸³ TRIPS flexibilities should be used in the AfCFTA to safeguard and address developmental needs.

An IP rights protocol for the AfCFTA is necessary for the following reasons:⁸⁴

- a. To cover the trade aspects of IP rights that contribute to regional trade and value chain
- b. and certification marks.

c. Facilitating the use of flexibilities under international integration.

d. To avoid the differential treatment of the AfCFTA countries compared to countries outside Africa arising from participation in different multilateral and bilateral IP rights treaties.

e. To provide for harmonized approaches to key IP issues of interest for Africa that are not adequately covered under multilateral treaties, including plant variety protection and the protection of genetic resources, traditional knowledge and cultural expressions.⁸⁵

f. Enhancing the use of geographical indications, collective marks instruments for the protection of public health.

g. Strengthening IP administration through exchange of experience and capacity- building and the creation of a continental database on IP registration.⁸⁶

6. CONCLUSION

Africa boasts a huge untapped trade potential as it boasts majority of developing and least developed countries that are still rich in natural resources. The AfCFTA provides a great opportunity for intra continental trade and investment. It is acknowledged that there are hurdles and challenges to be overcome as a result of different levels of industrial developments, institutional arrangements and IP legislative and regulatory landscape within the continent.

For the AfCFTA to be effective the key considerations as suggested by the UNCTAD seventh, eighth and ninth reports must be taken into consideration, in addition to certain procedural principles that need to be adhered to. The focus of the AfCFTA negotiations should be how best to integrate human rights issues with IP law and policy, especially regarding questions of access to educational materials and health care in Africa as well as consideration for traditional based innovations and innovations taking place in the informal sectors. The AfCFTA IP Protocol negotiations should consider exploring the stipulations of maximum instead of minimum standards in the area of user-focused flexibilities,

⁸¹ Badri (n 24).

⁸² Economic Commission for Africa (n 12).

⁸³ Economic Commission for Africa (n 35) 152.

⁸⁴ Economic Commission for Africa IX (2019) 125.

⁸⁵ *ibid.*

⁸⁶ Economic Commission for Africa IX (2019) 129.

such as exceptions and limitations. AfCFTA could be a platform used to negotiate IP trade and investment agreements with external partners. To fast track IP skills and capacity development, resources should be pooled to build the extensive capacity required for ensuring IP protection. Intellectual property rules should encourage country relevant innovation and to improve prospects of socio-economic development and not to just protect and promote IPRs and promote IP related rankings.⁸⁷

The fundamental priority is to ensure democratic legitimacy. This can be achieved by using open, transparent and inclusive consultative processes that facilitate public debate and engagement. Reporting on such processes, by publishing session notes and or videos, is also a key aspect of widening engagement. It permits those who were not able to participate in person to gain insight into proceedings so that they can provide feedback.⁸⁸

The acceptance and the effect of a treaty depends on its content, which must reflect a balance between rights, obligations and responsibilities. Intellectual property rights enforcement cannot be considered strictly from an economic perspective but has to incorporate social aspects as well. A degree of flexibility also allows countries to adopt measures according to their specific needs and circumstances. This will encourage better coherence and greater acceptance of the entire system.⁸⁹

Africa already boasts a number of networks and regional instruments such as RECs, COMESA, EAC, SADC and ECOWAS that have already developed capacity and have had successful trade negotiation experiences. Building upon the success of these instruments will ensure that implementation of AfCFTA does not unnecessarily re-invent wheels.

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⁸⁷ Correa (n 25) 29.

⁸⁸ Economic Commission for Africa (n 35).

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