IP DIMENSION OF BILATERAL AND REGIONAL TRADE AGREEMENTS IN AFRICA: IMPLICATIONS FOR TRADE AND DEVELEOPMENT POLICY

Moses Nkomo[*]

ABSTRACT

Free Trade Agreements are gaining traction with the 'Africa Rising' mantra that has taken hold of the continent over the past couple of years. In March 2018, the African Union launched the Africa Continental Free Trade Area (AfCFTA)[1] in Kigali, Rwanda. Over a dozen Trade and Investment Framework Agreements have been signed between the United States of America and African countries and Regional Economic Communities.[2] So far, only Morocco has signed a Free Trade Agreement with the United States of America.[3] The negotiations for the Free Trade Agreement between the US and the Southern Africa Customs Union have stalled over intellectual property provisions.[4] The European Union has also entered into several Economic Partnership Agreements with countries and RECs in Africa within the framework of the Cotonou Agreement.[5] Intellectual property plays a central role in the trade and development policy of developed countries. So important is intellectual property to the US trade policy that the 2002 Trade Act boldly states that, '[T]he principal negotiating objectives of the USA regarding trade-related intellectual property are … (A) to further promote adequate and effective protection of intellectual property rights, including through … ensuring that the provisions of any multilateral or bilateral trade agreement governing intellectual property rights that is entered into by the USA reflect a standard of protection similar to that found in US law.'[6] The question that arises in the context of bilateral and regional trade agreements in Africa is the effect of such agreements on the intellectual property, trade and development policy. What is the impact of the Free Trade Agreements on TRIPS flexibilities? This paper focuses on the impact of the US and EU Trade policies and approaches to the flexibilities developing countries fought so hard to secure in the TRIPS Agreement.[7]

Key words: Bilateral trade agreements, regional trade agreements, trade policy, development policy**.**

1. INTRODUCTION

With the 'Africa Rising' mantra gaining momentum over the past couple of years, there has been substantial interest in concluding bilateral and regional trade agreements with various countries and regional trade blocks from the United States and the European Union. African Countries and regional groupings have escalated their pursuit of Free Trade Agreements (FTAs) with local and international trading partners. The recently concluded Continental Free Trade Area (CFTA) and various regional initiatives bear testimony to the increasing appetite for FTAs on the continent.

While the Continental Free Trade Area is trending at the time of compiling this paper, and there are a handful of regional FTAs on the continent, this paper focuses on the intellectual property ramifications of FTAs with the United States and the European Union. This focus is informed by the aggressive

---

[*] **Moses Nkomo** is Intellectual Property Law Lecturer, University of Zimbabwe, Harare, Zimbabwe. A passionate, highly motivated intellectual property law advocate and thought leader, a chronic possibility thinker and avid student of strategy, Moses Nkomo has over sixteen years' experience as a registered practising IP attorney in Zimbabwe, over six years' experience as a consultant, lecturer and researcher of intellectual property law and policy. He has been a lecturer of Intellectual Property law at the University of Zimbabwe since 2007, also lectured Enforcement of Intellectual Property Rights for the WIPO funded Master's Degree in Intellectual Property Law at Africa University from 2011 to 2013, and is a regular resource person for IP locally, regionally and internationally. Currently he is the Senior Partner of Donsa-Nkomo & Mutangi Legal Practice, a commercial law firm with a special interest in intellectual property law and strategy. He is the founder of IPIQ Business Solutions (Private) Limited, a consultancy company which advocates for mainstreaming of intellectual property for sustainable competitive advantage at enterprise and national levels. Moses is a holder of a Bachelor of Laws Honours Degree, a Master's Degree in Intellectual Property and an Executive Master's Degree in Business Administration and is working towards a Doctor of Laws degree in intellectual property.

[1] Agreement establishing the African Continental Free Trade Area (signed on 21 March 2018) [hereinafter AfCFTA]

[2] 'Coutries and Regions – Africa' (*United States Trade Representative* website) <https://ustr.gov/countries-regions/africa>.

[3] 'Morocco Free Trade Agreement' (*United States Trade Representative* website) <https://ustr.gov/trade-agreements/free-trade-agreements/morocco-fta>.

[4] Sunday Times (Johannesburg, 19 September 2004)

[5] Agreement between the European Union and African, Caribbean and Pacific (ACP) Countries 2000

[6] Trade Act of 2002 (United States) s 2102

[7] Agreement on Trade-Related Aspects of Intellectual Property Rights (15 April 1994) 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement] <https//www.wto.org>legal_e27-trips>

approach to enforcement of intellectual property rights by the US and the EU, especially regarding the flexibilities in the TRIPS Agreement as reflected in the 2018 Special 301 Report.[8]

This paper was conceived on the premise that the protection and enforcement of intellectual property rights must not impede legitimate socio-economic developmental goals for developing countries. It took a huge effort for developing countries to achieve the flexibilities currently enshrined in the TRIPS Agreement and these flexibilities must be jealously guarded from erosion through FTAs and Economic Partnership Agreements. It is this writer's conviction the trade and development policy of African countries must be informed by their domestic needs, dreams and aspirations and not be dictated by powerful developed countries. African countries must leverage the intellectual property system, and capitalize on the existing flexibilities in the intellectual property system to boost their industrial, technological and economic capacity. Lessons may be drawn from how Asian countries leveraged on technology transfer to build their industrial and technological capacities. There is therefore no room for TRIPS Plus intellectual property regimes which are invariably part of FTA baggage.

The noble objectives set out in the TRIPS Agreement to the effect that, '[T]he 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,'[9] have been progressively undermined by a rather aggressive approach to protection of intellectual property, especially by the USA.[10]

This paper covers an analysis of the USA and EU policy positions in Free Trade Agreements, reviews the intellectual property provisions of the USA – Morocco Free Trade Agreement, draws lessons from other jurisdictions, highlights the main challenges African countries face in dealing with IP in Free Trade Agreements, and recommends possible approaches to mitigate the erosion of flexibilities through FTAs.

2. USA POLICY ON IP IN FREE TRADE AGREEMENTS

The USA has followed a consistent and unremitting policy of elevating intellectual property right (IPR) standards. It has done so through unilateral, bilateral, regional and multilateral action. First of all, it has raised the levels of protection domestically[11] and has kept on monitoring enforcement of IPRs internationally, through the Special 301 Report, by listing countries that do not meet US expectations for protecting and enforcing IPRs.[12] The Special 301 report is part of the Trade Act which orders the US Trade Representative to produce an annual report that is the first step to imposing trade sanctions on countries which systematically damage the interests of IPR holders in the US.[13]

It is the declared policy of the United States to increase intellectual property protection, and through FTAs and trade and investment framework agreements (TIFAs) through which it is seeking 'higher levels of intellectual property protection in a number of areas covered by the TRIPS Agreement.'[14] For example, in December 2017, the United States concluded an Out-of-Cycle Review of Thailand and moved Thailand from the Priority Watch List to the Watch List.[15] Engagement on IP protection and enforcement as part of the bilateral U.S.-Thailand Trade and Investment Framework Agreement yielded results on resolving US IP concerns across a range of issues, including enforcement, patents and pharmaceuticals, trademarks, and copyright.[16] The US has at least 12 TIFAs in Africa, four of which are with Regional Economic Communities[17] with several member states each.[18]

[8] Special 301 Report (2018) USTR, 5
[9] TRIPS Agreement, art 7
[10] Special 301 Report (2018) USTR, 5
[11] Pedro Roffe, 'Bilateral Agreements and a TRIPS-plus World: The Chile-USA Free Trade Agreement TRIPS' (2004) Issues Papers (Quaker International Affairs Programme, Ottawa), 3 <http://geneva.quno.info/pdf/Chile(US)final.pdf>.
[12] Special 301 Report (2018) USTR, 5
[13] ibid.
[14] Special 301 Report (2004) USTR, 2 <http://www.ustr.gov>.
[15] Special 301 Report (2018) USTR, 10.
[16] ibid.
[17] <https://ustr.gov/countries-regions/africa>
[18] ibid.

Under the Special 301 provisions, compliance with TRIPS does not amount to adequate and effective intellectual property protection. For example, in the 2018 Special 301 report, 'USTR identifies India on the Priority Watch List for lack of sufficient measurable improvements to its IP framework on longstanding and new challenges that have negatively affected U.S. right holders over the past year.'[19] Seeking higher levels of protection beyond TRIPS and requiring developing countries to apply standards similar to the US suggests that the net effect of the FTAs is to curtail the use of legitimate flexibilities under the TRIPS Agreement, such as compulsory licensing.

The main areas of flexibility targeted by the United States FTA are patent protection and protection of undisclosed information.[20] On patent protection, there is an array of requirements including compensatory patent term extension, protection of plants and animals, curtailment of compulsory licensing, and others.[21] For example, even before the completion of the TRIPS Agreement the USA concluded its bilateral agreement with Canada,[22] in which IP is featured prominently. The USA had a particular concern about liberal Canadian policies in allowing compulsory licensing to support its pharmaceutical domestic generic industry.[23] Further, in the 2018 Special 301 Report, the USTR contends that, '[T]o maintain the integrity and predictability of IP systems, governments should use compulsory licenses only in extremely limited circumstances and after making every effort to obtain authorization from the patent owner on reasonable commercial terms and conditions.'[24] (emphasis added)

The requirement to restrict compulsory licenses to extremely limited circumstances is an affront to permissible flexibilities under TRIPS, particularly Article 30. It is also inconsistent with the interpretation of Article 30 rendered by the WTO DSB in the Canada Generics case.[25]

On May 18, 2017, President Donald Trump notified Congress of the Administration's intent to renegotiate North American Free Trade Agreement (NAFTA) in order to modernize and rebalance the Agreement.[26] On 17 July 2017 USTR publicly released a detailed summary of the objectives the Administration seeks to achieve through this renegotiation.[27] Through the renegotiation, the Administration has two principal objectives: first, to update the agreement with modern provisions representing the best text available. **This will bring NAFTA into the 21st century by adding improved provisions to protect intellectual property** and facilitate efficient cross-border trade, among other updates.[28]

This reflects the level of seriousness with which the United States views intellectual property in the context of FTAs, and whenever it has opportunity, it pushes back any flexibilities which may be at the disposal of its trading partner. According to the USTR, Intellectual property (IP) infringement, including patent infringement, trademark counterfeiting, copyright piracy, and trade secret theft, causes significant financial losses for right holders and legitimate businesses around the world. IP infringement undermines US competitive advantages in innovation and creativity to the detriment of American businesses and workers.[29]

The official negotiating objectives of the US with respect to IPRs are clearly enunciated in the Trade Act of 2002 as follows:

Section 2102

[19] Special 301 Report (2018) USTR, 5.
[20] Jayashree Watal, *Intellectual Property Rights in the WTO and Developing Countries* (Kluwer Law International, 2001).
[21] Frederick M. Abbott, *IP Provisions of Bilateral and Regional Trade Agreements in Light of U.S. Federal Law* (2006).
[22] The Canada – US Free Trade Agreement (entered into force on 1 January 1989) 27 I.L.M. 281 (1988) <http://wehner.tamu.edu/mgmt.www/nafta/fta/>.
[23] Jerome H. Reichman, 'Managing the Challenge of a Globalized Intellectual Property Regime,' (2003) Paper prepared for the ICTSD–UNCTAD Dialogue.
[24] Special 301 Report (2018) USTR, 14.
[25] WTO, *Canada – Patent Protection of Pharmaceutical Products – Report of the Panel* (17 March 2000) WT/DS114/R.
[26] North American Free Trade Agreement, 32 I.L.M. 289 and 605 (1993) [hereinafter NAFTA] <https://ustr.gov/trade-agreements/free-trade-agreements/north-american-free-trade-agreement-nafta>.
[27] ibid.
[28] Annual Report II (2018) USTR, 2.
[29] Special 301 Report (2018) USTR, 11.

(4) Intellectual property. …The principal negotiating objectives of the USA regarding trade-related intellectual property are…

(A) to further promote adequate and effective protection of intellectual property rights, including through—

(i) (I) ensuring accelerated and full implementation

of the Agreement on Trade-Related Aspects of Intellectual Property Rights referred to in section 101(d)(15) of the Uruguay Round Agreements Act (19 U.S.C. 3511(d)(15)), particularly with respect to meeting enforcement obligations under that agreement; and

(II) **ensuring that the provisions of any multilateral or bilateral trade agreement governing intellectual property rights that is entered into by the USA reflect a standard of protection similar to that found in US law**;

(ii) providing strong protection for new and emerging technologies and new methods of transmitting and distributing products embodying intellectual property;

(iii) preventing or eliminating discrimination with respect to matters affecting the availability, acquisition, scope, maintenance, use, and enforcement of intellectual property rights;

(iv) ensuring that standards of protection and enforcement keep pace with technological developments, and in particular ensuring that rightholders have the legal and technological means to control the use of their works through the Internet and other global communication media, and to prevent the unauthorized use of their works; and

(v) providing strong enforcement of intellectual property rights, including through accessible, expeditious, and effective civil, administrative, and criminal enforcement mechanisms;

(B) to secure fair, equitable, and non-discriminatory market access opportunities for US persons that rely upon intellectual property protection; and

(C) to respect the Declaration on the TRIPS Agreement and Public Health, adopted by the World Trade Organization at the Fourth Ministerial Conference at Doha, Qatar on November 14, 2001.[30]

Through the mechanism of the Special 301 Report, the USTR pursues an aggressive policy to protect US creators, inventors and innovators. This has become more brazen with President Trump's America First mantra. In the 2018 Special 301 Report, the USTR states that:

The identification of the countries and IP-related market access barriers in this Report and of steps necessary to address those barriers are a critical component of the Administration's aggressive efforts to defend Americans from harmful IP-related trade barriers.[31]

3. EU POLICY ON IP IN ECONOMIC PARTNERSHIP AGREEMENTS

While not as blunt as that of the United States, the European Union policy on intellectual property is also fairly aggressive. The European Union is negotiating Economic Partnership Agreements with various African countries in terms of the Cotonou Agreement, which provides, among other things, the need 'to ensure an adequate and effective level of protection of intellectual, industrial and commercial property rights … **in line with international standards**.'[32]

New international standards are continuously being established with respect to areas covered by the TRIPS, including through FTAs and the international standards of IP protection which are the basis of the EPAs.[33]

The attitude of the EU on TRIPS Flexibilities was exposed in the case of EC v Canada,[34] commonly known as the Canada Generics case. The dispute between the parties arose from the enactment in the Canadian Patent Amendment Act in

[30] Trade Act of 2002 (United States) s 2102 <http://www.tpa.gov/pl107_210.pdf>
[31] Special 301 Report (2018) USTR, Executive Summary 5.
[32] Cotonou Agreement, art 46.
[33] Lorand Bartels, 'The Trade and Development Policy of the European Union,' (2007) The European Journal of International Law Vol. 18 no. 4.
[34] WTO, *Canada – Patent Protection of Pharmaceutical Products – Report of the Panel* (17 March 2000) WT/DS114/R.

1993. The Amendment Act introduced two new exceptions to the rights of patent holders, namely the Regulatory Review exception and the stockpiling exception. The Act provided that 'it is not an infringement of a patent for any person to make, construct, use or sell a patented invention solely for uses reasonably related to the development and submission of information required under the law of Canada, a province or a country other than Canada that regulates the manufacture, construction, use or sale of any product.'

In the Canada Generics case, the EC managed to successfully argue for a very narrow interpretation of exceptions to patents rights set out in Articles 30 and 31 of the TRIPS Agreement. This was a push back on the flexibility given by the unambiguous language of Article 31 in particular.

4. THE GENERAL APPROACH OF DEVELOPED COUNTRIES TO IP IN FREE TRADE AGREEMENTS WITH DEVELOPING COUNTRIES

Pedro Roffe notes that, '[W]hile TRIPS introduces minimum standards of protection, albeit with some flexibility, recent trends suggest a more complex picture characterized as a TRIPS-plus phenomenon.'[35]

The common TRIPS-plus features in bilateral and regional trade deals the United States has entered with developing countries include:

- Provisions establishing special 5-10 year monopoly protections for pharmaceutical test data required to demonstrate drug safety and efficacy and to authorize a drug for use ('data exclusivity'). Data exclusivity may effectively bar compulsory licensing or generic competition for drugs that are not patent protected.
- Measures prohibiting drug regulatory agencies from granting marketing approval to a generic version of a medicine if the product is covered by a patent ('linkage'). As even the Bush administration has acknowledged, such requirements have been subjected to repeated abuse in the United States, unjustifiably delaying the introduction of generic competition.
- Patent extensions beyond the 20 years of monopoly protection mandated by the WTO.
- Restrictions on the ability of countries to undertake re-importation (also known as parallel importation).
- Obligations to extend patent protection to minor improvements in, or new uses of, older products.

It is clear that Free Trade Agreements pose a real risk to the flexibilities guaranteed by the TRIPS Agreement, but this research will seek to demonstrate that developing countries have room to cement, rather than surrender, their flexibilities when entering into Free Trade Agreements.

5. ANALYSIS OF USA-MORROCO FREE TRADE AGREEMENT

The FTA[36] is composed of 24 chapters dealing with broad aspects of trade, including general provisions establishing a free trade zone between the two countries, definitions, administrative aspects, settlement of disputes and specific chapters dealing with standards in areas such as market access, services, investment, telecommunications and intellectual property (IP). Chapter 15 deals with IP. It begins with general provisions, followed by 12 sections dealing, respectively, with general provisions, trademarks, domain names on the internet, geographical indications, copyright, related rights, obligations common to copyright and related rights, protection of encrypted program-carrying satellite signals, patents, measures related to certain regulated products, enforcement of IPRs and final provisions.

The FTA builds on the international architecture of IPRs. It establishes as a major principle that nothing in the Agreement derogates from the obligations and rights of the Parties by virtue of TRIPS or other multilateral IP agreements administered by the World Intellectual Property Organization (WIPO) (hereinafter referred to as the 'non-derogation principle'). It enshrines the national treatment principle of non-discrimination between nationals of the two countries

[35] Pedro Roffe, 'Bilateral Agreements and a TRIPS-plus World: The Chile-USA Free Trade Agreement TRIPS' (2004) Issues Papers (Quaker International Affairs Programme, Ottawa), 3 <http://geneva.quno.info/pdf/Chile(US)final.pdf>.

[36] US - Morocco Free Trade Agreement (Signed 15 June 2004, entered into force on 1 January 2006) [hereinafter US - Morocco FTA] <https://ustr.gov/trade-agreements/free-trade-agreements>.

and, as a consequence of the most-favoured nation clause in TRIPS, the advantages, benefits, and privileges granted by the FTA are automatically accorded to the nationals of all other Members of the World Trade Organization (WTO).

In terms of Article 15.10 of the United States-Morocco Agreement, Morocco is required to grant data exclusivity way beyond the requirement in Article 39 TRIPS. While Article 39.3 of TRIPS envisages protection of test data submitted to governments to meet regulatory approval, Article 15.10 goes far beyond this requirement and introduces layers and layers of protection. Particularly important is the fact that the FTA requires data exclusivity applicable to all new medicines irrespective of whether they are patentable. The FTA introduces a mandatory five year period of exclusivity for test data. Article 39.3 only requires the application of unfair competition rules as opposed to exclusivity. This is calculated to prevent generic drug manufacturers from relying on test data submitted by originator companies.

The FTA does not provide for an exception to the data exclusivity where it is necessary for the protection of public health.

Article 15.10(3) of the FTA introduces the principle of patent term restoration to compensate for unreasonable curtailment of the effective patent term due to delays in the marketing approval process, as well as additional provisions requiring patent term extensions based on delay in granting of the patent. In addition to all the cumbersome requirements related to the protection of test data in its own right, the FTA goes even further to link the test data protection to the patent term with the effect that for new products which are also patented, no generic can be registered except with the consent of the patent owner during the term of the patent, including when the patent term is extended based on the delays in either granting the patent or marketing approval.

The FTA also seeks to define patentability criteria such as utility to conform to the United States standard. The FTA also requires Morocco to provide mandatory patents for plants and animals, as well as to grant patents for new uses of known pharmaceutical products.[37] This makes the ever greening of patents relatively easy and delays the entry of generic medicines in the market with potentially catastrophic consequences.

The FTA also prohibits, or at the very least restricts, parallel importation. Article 15.9(4) provides that:

Each party shall provide that the exclusive right of the patent owner to prevent importation of a patented product, or a product that results from a patented process, without the consent of the patent owner shall not be limited by the sale or distribution of that product outside its territory.[38]

Such provisions essentially allow the patent holders, through contract laws, to segment markets and maintain price discrimination.

6. LESSONS FROM THE USA–CHILE FTA NEGOTIATIONS

In the early 1990s, Chile and the United States America (USA) started discussions on the possibility of launching negotiations of a free trade agreement. For the USA, the negotiations with Chile represented an important opportunity to consolidate changes in the area of IP for which some industrial domestic groups were driving for reforms, namely in the area of new copyright disciplines in the digital environment and improved protection for pharmaceutical and agricultural chemical products. The US copyright industry, including entertainment and software, together with the pharmaceutical sectors from both countries, played a key role during the negotiations. The Chilean domestic pharmaceutical sector was also an important player. It met 90% of the public health sector needs, was the only one with installed capacity, and generated more than 6,000 jobs plus 50,000 related to sub-contracting and out-sourcing. Foreign pharmaceutical companies, on the other hand, were mere importers and distributors of products produced abroad. Understandably, the Chilean domestic pharmaceutical industry was particularly alert during the FTA negotiations and expressed concerns from the outset about the introduction in the negotiations of issues such as:

[37] US - Morocco FTA, art 15.9(2).

[38] US - Morocco FTA, art 15.9(4).

- Increase of patent protection term;
- Reinstatement of pipeline protection for pharmaceutical products;
- Prohibition of parallel importation and exhaustion of patent rights;
- Restrictions on procedural issues (e.g., elimination of the opposition process);
- Enhancement of the protection of undisclosed information;
- Increasing fines in case of infringement;
- Linkage between sanitary permits and the granting of patents;
- Limitations for granting compulsory licenses; and,
- Scope of the reversal of the burden of proof in case of process patents.

The FTA IP Negotiating Group met for the first time in January 2001. Reportedly, Chile tried to avoid the inclusion of TRIPS-plus provisions from the very beginning particularly because it felt, as illustrated above, that it had intensively advanced in the implementation of TRIPS and in the signature of important international conventions in this field. However, for the USA, a trade agreement without higher standards of protection was not an option. From the outset, the USA indicated the areas considered to be of major concern in reaching an agreement on IP matters and these included:

- Better coordination between the health authorities and the Industrial Property Department to avoid granting marketing approval to pharmaceutical products similar to pharmaceuticals still under patents;
- A ban on the use of undisclosed information required to grant marketing approval of competing or similar pharmaceutical and agricultural chemical products;
- Implementation of an adequate system to protect undisclosed information under Article 39.3 of the TRIPS Agreement;
- Establishment of pipeline protection for pharmaceuticals products;
- The patenting of transgenic plants and animals;
- Limitations in the granting on compulsory licenses;
- Limitations to the denial of patent applications based upon certain grounds such as morality, prejudice to the environment, and diagnostic, therapeutic and surgical methods for human and animal treatments;
- Limitations on the use of parallel importation;
- Establishment of an effective mechanism to guarantee that all public agencies use only authorized computer programs;
- Clarification of the right of reproduction with respect to temporary reproductions;
- The non-recordal of trademark licenses for their validity;
- The increase in the level of enforcement for infringement of digital related products;
- Participation of governments in Internet Corporation for Assigned Names and Numbers (ICANN) and adoption of the Uniform Domain-Name Dispute-Resolution Policy (UDRP);
- The possibility of the right holder to recover profits perceived by the infringer of copyrighted products;
- The seizure of infringing goods and of material and implements by means of which such goods are produced; and,
- Establishment of criminal remedies to provide a deterrent to future infringements.

The final and decisive round of negotiations took place in December 2002, where over 90 Chilean and 140 US negotiators from different agencies worked for nine straight days to conclude the Agreement. On that occasion, most of the outstanding questions were overcome, including those in the Chapter on IP.

The foregoing example illustrates the need to have stakeholder buy-in and involvement in FTA negotiations. It also illustrates the need to have sufficient human resource capacity and expertise and the necessity of putting national developmental objectives at the centre of any trade and development policy. The example also shows that with sufficient will and expertise, it is possible to resist erosion of TRIPS Flexibilities through Free Trade Agreements. The sheer numbers of the negotiators involved is indicative of the level of seriousness of the parties involved. African countries are usually represented by a few individuals at the negotiations and this disadvantages them.

7. THE AFRICAN CONUNDRUM

Who determines the IP and Trade & Development policies for Africa? Whose agenda is served by the IP and Trade & Development policies adopted in African countries? Do African countries sell their birthright for a bowl of stew? Is the Trade and Development policy of African Countries home grown or it is dictated by the West? Whose interests are served by the FTAs and EPAs African countries are stampeding to enter into? How sustainable are the Trade and Development policies pursued by African countries? Is IP an enabler or a disabler of trade and development in the context of FTAs and EPAs?

With the advent of the AfCFTA, the question of intellectual property and trade & development policy has become very topical. The Agreement Establishing AfCFTA provides for cooperation by State parties on investment, IPR and competition policy.[39] The Agreement further provides that, '[T]his Agreement shall cover trade in goods, trade in services, investment, intellectual property rights and competition policy.'[40] Article 7 provides that phase 2 of the negotiations shall cover IPRs, investment and competition policy. The agreement also provides that, '[T]he Protocols on Trade in Goods, Trade in Services, Investment, Intellectual Property Rights, Competition Policy, Rules and Procedures on the Settlement of Disputes and their associated Annexes and Appendices shall, upon adoption, form an integral part of this Agreement. The Protocols on Trade in Goods, Trade in Services, Investment, Intellectual Property Rights, Competition Policy, Rules and Procedures on the Settlement of Disputes and their associated Annexes and Appendices shall form part of the single undertaking, subject to entry into force.'[41] This demonstrates that intellectual property is getting increasing prominence on the continent. However, given the general lack of technical capacity in Africa, there is a high possibility the intellectual property protocol will rely heavily on US or EU technical assistance and will thus be inspired by US and EU standards of IP protection.

According to the USTR Special 301 Report for 2018, 'A top trade priority for the Administration is to use all possible sources of leverage to encourage other countries to open their markets to U.S. exports of goods and services, and provide adequate and effective protection and enforcement of U.S. intellectual property (IP) rights. **Toward this end, a key objective of the Administration's trade policy is ensuring that U.S. owners of IP have a full and fair opportunity to use and profit from their IP around the globe**.'[42]

Intellectual property protection and enforcement are central to the American trade policy, as stated in the 2018 Special 301 Report: 'Fostering innovation and creativity is essential to U.S. economic growth, competitiveness, and an estimated 45 million American jobs that directly or indirectly rely on IP-intensive industries. USTR continues to work to protect American innovation and creativity in foreign markets with all the tools of U.S. trade policy, including through the annual Special 301 Report.'[43]

This essentially means that in so far as African countries wish to tap into the sizeable American and European market, the IP and Trade & Development Policy is dictated by the bigger, more powerful trading partners. This explains why, despite investing so much to secure reasonable flexibilities in the TRIPS Agreement, there is a real risk that all these gains will be wiped away through Bilateral Free Trade Agreements. This is a classical illustration of the old adage that 'he who pays the piper calls the tune.' The lack of a deep understanding of the strategic importance of intellectual property for socio-economic development results in governments diving into FTAs without counting the cost.

8. THE PROBLEMS OF AFRICA

A. Lack of a coordinated and harmonised approach to intellectual property and trade & development policy is a major handicap on the continent. In most countries, IP is administered by the Ministry of Justice; Trade is administered by the Ministry of Industry and Commerce; Development is administered by the Ministry of Finance and Economic

[39] AfCFTA, art 4.
[40] AfCFTA, art 6.
[41] AfCFTA, art 8.
[42] Special 301 Report (2018) USTR, 5 (Executive Summary).
[43] Special 301 Report (2018) USTR, 12.

Development, and these ministries have little or no convergence. This results in a chaotic system wherein there are contradictions and conflict of priorities. There is a need for a multi-stakeholder, robust, harmonized, well-coordinated approach to the interface between Intellectual Property, on the one hand, and Trade and development policy on the other.

B. Lack of capacity to effectively negotiate favourable terms in FTAs and EPAs. In most African countries, trade negotiations are exclusively conducted by government officials, many of which have no advanced knowledge or training on the various aspects of the trade negotiations. For example, intellectual property is not a very familiar subject in most government offices in Africa and, consequently, it is not given the same attention and importance it is given by the US Administration, for example. Further, industry players are rarely involved in the policy formulation processes and therefore the policies are usually ivory-tower policies not related to the needs on the ground.

C. Sheer ignorance of the ramifications of the FTAs and EPAs is also another serious problem in Africa. There is very little strategic thinking and strategic planning at the governmental level. Governments are often engrossed in trying to get quick fix solutions to the myriad of socio-economic challenges bedeviling our countries to the extent they never stop to think of the long term ramifications of the agreements they sign. Whereas President Trump's America First approach may be considered too radical, there may be a need to adopt a strategic approach to the crafting and implementation of IP, trade and development policies in Africa.

D. Overreliance of technical support from development partners is another serious challenge for Africa. Most of the IP, trade & development policies are cut and paste templates provided by development partners which do not speak to the peculiar circumstances of African countries. Take for instance an African country that blindly depends on the US for technical assistance, and they request assistance in drawing up a trade and development policy which will govern their trade relations with the US. There is no price for guessing that the policy will be biased towards achieving the trade objectives of the US.

9. CONCLUSION

The foregoing discourse clearly shows that FTAs seek to entrench the protection and enforcement of intellectual property rights of developed countries and to undermine the use of TRIPS flexibilities by developing countries in that they elevate the object and purpose of intellectual property protection beyond the scope of TRIPS. Instead of contributing to the promotion of technological innovation and transfer of technology and ensuring the mutual advantage of producers and users of technological knowledge in a manner conducive to social and economic welfare, they maintain the advantage of developed countries over developing countries.

FTAs constitute the worst risk to the utilization and enjoyment of TRIPS Flexibilities by developing countries and take away the opportunity of developing countries to leverage the IP system to further their own developmental objectives. Those developing countries who have already entered into FTAs with the US have been subjected to immense pressure through the Special 301 system.

Those countries that are negotiating FTAs must be vigilant and diligent so that they do not lose the flexibilities provided by the TRIPS Agreement. For African countries, while the menace of Free Trade Agreements has been minimal so far, with only Morocco having already entered into a Free Trade Agreement with the United States, it is important to highlight the net effect of the FTA was to erode all the flexibilities guaranteed by the TRIPS Agreement. The Southern African Customs Union (SACU) has done well to insist on FTA negotiations without IP provisions while the United States negotiators argued that this was outside their negotiating mandate hence the stalemate on the US - SACU FTA.

African countries are now aware of the adverse impacts of FTAs on TRIPS flexibilities and are in a position to safeguard them. They need to consolidate and defend the policy flexibilities enshrined in TRIPS through law reforms informed by national or regional developmental objectives. There is also a need for regional integration, harmonisation and coordination of approaches to IP, trade & development. Capacity building is also imperative if Africa is to effectively negotiate for better terms in FTAs and EPAs.

BIBLIOGRAPHY

Abbott FM, IP Provisions of Bilateral and Regional Trade Agreements in Light of U.S. Federal Law (ICTSD and UNCTAD, 2006)

Agreement Establishing the African Continental Free Trade Area (signed on 21 March 2018) <https://au.int/en/treaties/agreement-establishing-african-continental-free-trade-area>

Agreement on Trade-Related Aspects of Intellectual Property Rights (15 April 1994) 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) <https//www.wto.org>legal_e27-trips>

Bartels L 'The Trade and DevelopmentPolicy of the European Union,' (2007) The European Journal of International Law, Vol. 18 no. 4

Reichman JH 'Managing the Challenge of a Globalized Intellectual Property Regime,' (2003) Paper prepared for the ICTSD–UNCTAD Dialogue

Roffe P 'Bilateral Agreements and a TRIPS-plus world: The Chile – USA Free-Trade Agreement,' Issues Papers 4, QIAP, Ottawa

The Cotonou Agreement (signed on 23 June 2000) <https://www.europarl.europa.eu/intcoop/acp/03_01/pdf/mn3012634_en.pdf>

US – Morocco Free Trade Agreement <https://ustr.gov/trade-agreements/free-trade-agreements>

US – Chile Free Trade Agreement <https://ustr.gov/trade-agreements/free-trade-agreements>

Special 301 Report (2017) USTR <https://ustr.gov/sites/default/files/files/Press/Reports/20>

Special 301 Report (2018) USTR <https://ustr.gov/sites/default/files/files/Press/Reports/20>

Watal J, Intellectual Property Rights in the WTO and Developing Countries (Kluwer Law International, 2001