

THE IP DIMENSION OF BILATERAL AND REGIONAL TRADE AGREEMENTS IN AFRICA: IMPLICATIONS FOR TRADE AND DEVELOPMENT

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ABSTRACT

Regional integration on the African continent has been the focus of renewed interest with initiatives such as the African Continental Free Trade Area and the Tripartite Free Trade Area currently being negotiated. These initiatives aim to go beyond the traditional trade liberalization of goods and services to include harmonization of intellectual property and competition laws. This provides a valuable opportunity for African countries to review their laws and determine the manner in which they can shape intellectual property law to serve their interests and circumstances. However, their options are to some extent circumscribed by the international arena within which they operate as well as by some of their existing regional and international obligations. The discussion in this paper highlights some of the issues that will need to be addressed in the quest to negotiate a protocol on intellectual property covering patents, trademarks, copyright, utility models and industrial designs in the context of the Tripartite Free Trade Area. Most of these issues will also need to be addressed when negotiating at the wider Continental level. The paper concludes that given the heterogeneity of the negotiating parties and the flexibilities they already enjoy, it may not be possible to arrive at new substantive obligations and the focus may need to be on facilitating the procedural aspects of the law.

Key Words: Regional Integration, Tripartite Free Trade Area, Intellectual Property, Harmonization, Patents, Trademarks, Copyright.

1. INTRODUCTION

Regional integration on the African continent is not a new phenomenon. For the most part, however, integration has primarily been concerned with facilitating the free movement of goods and services between the various African states, with intellectual property (IP) being the preserve of specialised institutions such as the African Regional Intellectual Property Organization (ARIPO) and the African Intellectual Property Organization (OAPI).

Lately, however, the desire to deepen integration between different sub-sets of African countries has led to an increased interest in the harmonization of IP laws within the different regional trade blocs. This has been reflected in the negotiations for the establishment of larger blocs such as the Tripartite Free Trade Area (TFTA) and the proposed African Continental Free Trade Area (AfCFTA). The first phase of

integration within these larger blocs has not included IP but in the second phase of negotiations, IP is expected to take a more central role. There is, therefore, an urgent need to conduct research into the implications and modalities of such harmonization for social and economic development, if it does indeed occur. Such research would look into possible areas of harmonization and the mechanisms to be employed if such harmonization is to bestow tangible benefits to the affected communities.

This paper looks at some of the options available to the States that make up the TFTA as they prepare to engage in negotiations on IP. The next section gives a brief overview of the international environment within which trade and IP matters exist. Section three looks at some of the trademark related issues before turning to patent matters in section four. Section five looks at copyright law before in section six, some of the other IP areas are examined. Lastly, section seven provides some concluding thoughts and recommendations.

2. INTERNATIONAL ENVIRONMENT

The Tripartite Free Trade Area (TFTA) brings together 26 Member States of the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC) and the Southern African Development Community (SADC). Under the TFTA treaty, in the first phase of negotiations the parties agree to create a unified free trade area covering goods and services. In the second phase of negotiations, members agreed to negotiate in the areas of IP. This is provided for in Article 45(1) of the Agreement which states:

Recognising the need to conclude Phase II negotiations, and to provide flexibility in the implementation of the Agreement, the Tripartite Member/Partner States agree to negotiate and endeavour to conclude the following protocols within 24 months upon entry into force of this Agreement:

- a) a Protocol on Trade in Services; and
- b) Protocols on trade-related matters including, Competition Policy, Cross-Border Investment, Trade and Development, and Intellectual Property Rights.¹

It should be noted that of the 26 Members making up the Tripartite FTA, 21 are members of the WTO. As such, the TRIPS Agreement sets out certain minimum standards members must comply with. However, Article 66(1) of TRIPS recognises the special position of LDCs and provides a period

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¹ Agreement Establishing a Tripartite Free Trade Area Among the Common Market for Eastern and Southern Africa, the East African Community and the Southern African Development Community, Article 45(1).

of time within which to comply with those obligations. This period has since been extended until 1 July 2021.²

Negotiations aimed at establishing a Continental Free Trade Area were launched in Johannesburg in June 2015. After several rounds of negotiations, The Agreement Establishing the Continental Free Trade Area was signed in Kigali, Rwanda in March 2018 by 44 Members of the African Union. Article 24(1) of the Agreement provides that it shall enter into force 30 days after the deposit of the 22nd instrument of ratification.³ On the 29th April 2019, the 21st and 22nd instruments of ratification were deposited by Sierra Leone and the Saharawi Republic, meaning that the Treaty officially entered into force on 30 May 2019.⁴

Table 1: Membership of International Treaties

Country	Lusaka Agreement	Banjul Agreement	Harare Protocol	TRIPS	Paris Convention	Berne Convention
Angola				?	?	
Botswana	?	?	?	?	?	?
Burundi				?	?	?
Comoros					?	?
DRC				?	?	?
Djibouti				?	?	?
Egypt				?	?	?
Eritrea						
Ethiopia						
Kenya	?		?	?	?	?
Lesotho	?	?	?	?	?	?
Libya					?	?
Madagascar				?	?	?

Malawi	?	?	?	?	?	?
Mauritius				?	?	?
Mozambique	?		?	?	?	?
Namibia	?	?	?	?	?	?
Rwanda	?		?	?	?	?
Seychelles				?	?	
South Africa				?	?	?
Sudan	?		?		?	?
Swaziland	?	?	?	?	?	?
Tanzania	?	?	?	?	?	?
Uganda	?	?	?	?	?	?
Zambia	?		?	?	?	?
Zimbabwe	?	?	?	?	?	?
Total	13	8	13	21	24	21

It should be noted that despite the Continental Free Trade Area Treaty having entered into force, not all parts of the Treaty have been concluded. For instance, the Rules of Origin to be applied by Member States in determining the goods eligible for preferential treatment and the Tariff Offers between Members are yet to be agreed on. This means that in practice, the free trade area is yet to be operationalised.

Regarding intellectual property, two African institutions are significant. The first of these is the African Regional Intellectual Property Organization (ARIPO), an international organization bringing together 19 primarily English speaking African countries. The objectives of the parties to the Lusaka Agreement that established the organization include the promotion of the harmonisation and development of IP laws appropriate to the needs of its members, fostering the establishment of a close relationship between its members in

² The first extension occurred in 2005 when the TRIPS Council extended the transition period to 1 July 2013. This was subsequently extended on 11 June 2013 to 2021. See <https://www.wto.org/english/tratop_e/trips_e/ldc_e.htm>

³ The Agreement Establishing the Continental Free Trade Area, Article 24(1).

⁴ <<https://au.int/en/pressreleases/20190429/afcta-agreement-secures-minimum-threshold-22-ratification-sierra-leone-and>> accessed 19 October 2019.

matters relating to IP and establishing such common services or organs as may be necessary or desirable for the co-ordination, harmonisation and development of IP activities among members. It is therefore clear that ARIPO has to play a central role in the harmonisation effort so far as its members are concerned. For that reason, the instruments ARIPO members have concluded amongst themselves on IP matters will be central to any negotiations.

The other significant IP organization in Africa is the African Intellectual Property Organisation (OAPI). OAPI was created by the Bangui Agreement of 2 March 1977. Its membership of 17 countries is drawn primarily from French-speaking African countries. Unlike ARIPO, the Bangui Agreement serves as the national intellectual property law for all the OAPI Member States. However, because none of its members are a part of the TFTA, discussion of its mandate and services offered is outside the scope of this paper.

1. Trademarks

This section gives an overview of a few key trademark related issues that need addressing in a TFTA Protocol on IP. The first point to note is that there are already several international legal regimes governing trademark law. The TRIPS Agreement obliges members of the WTO to comply with the provisions regarding to trademarks found in Articles 15 to 21. These provisions cover protectable subject matter, rights conferred, exceptions, term of protection, requirement of use, other requirements and licensing and assignment, respectively. WTO Members are also required to comply with the provisions regarding geographical indications found in Articles 22 – 24 of TRIPS.

For ARIPO members who signed and ratified the Banjul Protocol, that instrument will occupy a central position in determining what they can and cannot agree to do in any IP negotiations. The Banjul Protocol provides a mechanism for parties to centrally process trademark applications. One of the main challenges facing the Banjul Protocol has been the low number of signatories. Currently, it has just 10 parties and 8 are part of the TFTA negotiations.⁵

Definition of a mark

A threshold issue that should be considered by the parties regards arriving at a common understanding of what a mark is. A mark is defined by the TRIPS Agreement as

Any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark. Such signs, in particular words including personal names, letters, numerals, figurative elements and combinations of colours as well as any combination of such signs, shall be eligible for registration as trademarks. Where

signs are not inherently capable of distinguishing the relevant goods or services, Members may make registrability depend on distinctiveness acquired through use. Members may require as a condition of registration, that signs be visually perceptible.⁶

Domestically, a review of different national laws reveals there are several distinct approaches that states have taken to define trademarks. Most TFTA countries still require a mark to be visible to be registrable.

However, a number of countries including Mozambique⁷ and Uganda⁸ allow for the registration of audible and olfactory signs.

Types of marks

Other than the regular trademark, many countries also provide for the registration of certification and collective marks. Article 7bis of the Paris Convention obliges parties to accept for filing and to protect collective marks belonging to associations, the existence of which is not contrary to the law of the country of origin. However, it does not say anything about certification marks. As a result, the legal frameworks differ from country to country. A review of some TFTA countries' laws reveals that countries like Kenya,⁹ Mozambique,¹⁰ Namibia¹¹ and Rwanda¹² provide for the registration of both collective and certification marks while others like Sudan, Swaziland and Tanzania provide for the registration of neither. This presents another opportunity for countries to harmonise their laws.

Grounds for Refusal

An application for trademark registration is no guarantee the mark will be registered. The relevant trademark offices are required to examine the proposed mark proposed and decide as to its registrability. One of the issues that can arise, therefore, pertains to grounds for refusal of grant. These generally include non-distinctiveness, similarity to another mark, similarity to well-known marks and marks that are contrary to public order or morality. However, the interpretation of these terms is left to states.

Opposition

Once a mark has been accepted for registration, it is generally advertised in an official medium for members of the public to have an opportunity to oppose. This opposition period differs from one country to another and provides another opportunity for harmonization of laws.

Duration of protection

The TRIPS Agreement provides that "Initial registration, and each renewal of registration, of a trademark shall be for a term of no less than seven years. The registration of a

⁵ The two exceptions are Liberia and Sao Tome and Principe.

⁶ TRIPS, Article 15(1)

⁷ Industrial Property Code, 2006, Article 1(i).

⁸ Trade Marks Act, 2010, section 1.

⁹ Trade Marks Act, sections 40 and 41.

¹⁰ Industrial Property Code, 2006, Article 123.

¹¹ Industrial Property Act, 2012, section 187.

¹² Intellectual Property Law, Articles 156 and 161.

trademark shall be renewable indefinitely.”¹³ The Banjul Protocol, on the other hand, provides for a longer period of initial protection of 10 years, also renewable indefinitely subject to the payment of renewal fees. A review of the legal frameworks of some of the TFTA countries reveals they provide for slightly different durations of protection, with most opting for the 10-year period.

However, in terms of when protection begins, there are different approaches. For example, Botswana, Kenya, Lesotho, Namibia and Rwanda provide for protection beginning from the date of application, while others provide that protection only begins at registration.

Taking all the above into consideration, the question arises whether TFTA members would be better off seeking a protocol that will expedite the application process, while leaving substantive laws to the national legal regime, or if they should seek to harmonise substantive laws.

2. Patents

This section looks at patent law and some of the key issues that need addressing in harmonising patent law among the members of the TFTA. As is the case with trademark law, there are already a number of international agreements aiming to harmonise patent law. Under WIPO's auspices, the main instruments dealing with patents are the Paris Convention (some of whose provisions are incorporated into TRIPS by reference), the Patent Cooperation Treaty (PCT) and the Patent Law Treaty (PLT). For WTO Members, the TRIPS Agreement contains a number of provisions in Articles 27 – 34. All these address different aspects of patent law.

At a regional level, the provisions of the Harare Protocol will play a central role in the position that ARIPO members will take in the forthcoming negotiations. The Harare Protocol empowers ARIPO 'to grant patents and to register utility models and industrial designs and to administer such patents, utility models and industrial designs on behalf of Contracting States'.¹⁴

The following are some of the patent issues where TFTA members may consider harmonising their laws:

Patentable subject matter

This is a critical issue in defining the scope of patent law. An analysis of the relevant laws shows that some TFTA countries provide a comprehensive definition of an invention incorporating the three elements of novelty, non-obviousness and utility¹⁵ while others simply define an invention as “an idea which permits in practice the solution to a specific problem in the field of technology”.¹⁶

Defining what an invention is closely relates to that of determining those products or processes to be considered non-inventions. This issue arises in the context of where to draw the line between matters eligible for patent protection and those that are not by virtue of being a part of the public domain.

Section 3(10)(h) of the Harare Protocol provides some guidance here by providing that

The following in particular shall not be regarded as inventions within the meaning of paragraph 10(a):

- (i) Discoveries, scientific theories and mathematical methods;
- (ii) Aesthetic creations;
- (iii) Schemes, rules and methods for performing mental acts, playing games or doing business, and programs for computers;
- (iv) Presentation of information.¹⁷

Regarding the issue of computer programmes, it is worth noting that even though, as seen above, the Harare Protocol specifically excludes them from protection, not all TFTA Members have incorporated this provision into their legislation. With the growing importance of computer programs in the ICT sector, it will be important to have a common understanding regarding the best means of protecting them.

Exclusions

Not all subject matter that falls within the definition of an invention as described above is eligible for patent protection. In certain instances, countries will put in place legal mechanisms to distinguish between patentable and non-patentable inventions. This is often done as a matter of public policy and has proved to be fairly controversial, especially regarding pharmaceutical products.

Article 27 of TRIPS provides that

- (2) members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect ordre public or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law.¹⁸

Article 27(3) of TRIPS also permits members to exclude from patentability:

- a) Diagnostic, therapeutic and surgical methods for the treatment of humans or animals;

¹³ TRIPS Article 18

¹⁴ Harare Protocol, Section 1.

¹⁵ For example, Kenya (Industrial Property Act, section 2), Malawi (Patents Act, section 2), and Uganda (Industrial Property Act, 2014, section 2).

¹⁶ For example, Botswana (Industrial Property Act, 2010, section 2), Lesotho (Industrial Property Order, 1989, section 2),

Mozambique (Industrial Property Code, 2015, Article 1(e)), Namibia (Industrial Property Act, 2012, section 12) and Rwanda (Intellectual Property Law, 2009, Article 5).

¹⁷ Harare Protocol, Section 3(10)(h).

¹⁸ TRIPS Agreement, article 27(2).

b) Plants and animals other than micro-organisms, and essentially biological processes for the production of plants and animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof.¹⁹

These provisions are mirrored in sections 3(10)(j)(i) and (ii) of the Harare Protocol.

An analysis of the laws of a number of TFTA countries reveals the distinction between non-inventions and exclusions is not always clearly reflected in their laws. In these countries, such as Lesotho,²⁰ Rwanda²¹ and Sierra Leone,²² categories are grouped together as not being eligible for, or excluded from, patent protection. This distinction is important because Article 27(1) of TRIPS specifies patents must be available for certain inventions subject to the allowed exceptions under paragraphs 2 and 3.²³

Pharmaceutical product exclusions

As noted above, the issue of exclusions from patentability assumes importance pertaining to the debate regarding the availability of affordable medicines in developing and least-developed countries. At least two LDCs in the TFTA region, Uganda and Rwanda, have specific legislation that excludes pharmaceutical products from patent protection. Going forward, and in the context of the TFTA, members will need to negotiate whether an exclusion for pharmaceutical products should be a part of an IP Protocol. This is likely, as it is highly improbable that a concession obtained at the WTO will be surrendered in TFTA negotiations. With the anticipated free movement of goods within the TFTA, this has the potential to provide a conducive legal environment for these countries to establish domestic pharmaceutical industries.

New Uses

This is another area of patent law that has recently attracted controversy, with much of the debate concerning the new uses of already existing substances potentially patented. The practice of 'evergreening' has been criticised for unfairly extending the lifespan of a patent, thus preventing the public from enjoying it in the public domain. An analysis of some members' legislation shows that a few such as Namibia,²⁴ Rwanda²⁵ and Zambia²⁶ have updated their laws to include specific exclusions for new uses.

Ownership

Issues regarding ownership of patents and the legal position of the inventor, where the inventor is not the applicant, are

fairly uncontroversial and would not be priority areas for harmonisation as most countries have adopted similar legislation on these issues.

Processing

Patent law is territorial in nature and patent applications can only be granted nationally. However, both the PCT and the Harare Protocol provide avenues through which parties can use WIPO and ARIPO respectively as a central focal point through which patent applications designating individual members can be processed. The PCT provides the protection of inventions in any of the Contracting States to be filed as international applications under the Treaty.²⁷ Be that as it may, the issue of patent application processing at the national level is one where negotiations can aim for a limited extent of harmonisation. From a procedural perspective, there are a number of issues that need considering.

First, there are those states which allow for a pre-grant opposition procedure while others do not. Example of each?

The second procedural issue would be whether countries should be encouraged to adopt a substantive examination position or restrict themselves to a patent registration system. South Africa has been a prominent member of those countries operating a registration system without undergoing substantive examination. However, this position is changing and South Africa is preparing to transition to a substantive examination system.

From the regional perspective, the Harare Protocol provides for substantive examination of applications to be carried out by ARIPO. Applications can be submitted either directly to ARIPO or indirectly through the national offices. Once the application has been examined by ARIPO, it is transmitted to the individual Member States for final determination on whether the application can be granted under their national laws.

This is therefore an area where TFTA countries can be encouraged to join an expanded ARIPO and pool their resources for purposes of facilitating the patent application process.

Disclosure

The appropriate level of disclosure needed by applicants, especially regarding the use of genetic resources (GRs) and traditional knowledge (TK) in patent applications is another issue causing some controversy.²⁸ A few countries such as Uganda²⁹ have included an obligation to disclose in their national laws. However, this is not a provision that has been widely adopted. The TFTA Protocol on IP provides an

¹⁹ TRIPS Agreement, article 27(3).

²⁰ Industrial Property Order, 1989, section 4.

²¹ Intellectual Property Law, Article 18.

²² Patents and Industrial Designs Act, section 16.

²³ TRIPS Agreement, article 27(1).

²⁴ Industrial Property Act, 2012, section 17(1)(j).

²⁵ Intellectual Property Law, Article 18(5).

²⁶ The Patents Act, 2016, section 17(e).

²⁷ PCT Article 3

²⁸ See WIPO, *Technical Study on Patent Disclosure Requirements Related to Genetic Resources and Traditional Knowledge* (2004).

²⁹ Industrial Property Act, 2014, section 21(8) provides that "The description shall contain a clear identification of the origin of genetic or biological resources collected in the territory of

opportunity for member states to address this issue and adopt a common position.

Duration

The duration of patent protection, though generally uncontroversial, is another area where there is potential for harmonisation. The TRIPS Agreement provides that the term of protection shall not end before the expiration of twenty years from the date of filing.³⁰ The way this has been interpreted in practice by WTO members varies. While most countries provide for the term of twenty years subject to payment of fees, a few provide for an initial term of 15 years plus a renewal of 5 years.

Compulsory Licensing

Though a patent grants the owner rights to prevent others from using the invention, this right is not absolute. In certain instances, governments can make use of the invention in question. These instances include cases of national emergency, non-working and dependent patents. Article 31 of the TRIPS Agreement sets out some of the conditions that must be respected in such instances. These conditions include ensuring that the use is non-exclusive, non-assignable and predominantly for the use of the domestic market. In addition, the right holder must be paid adequate remuneration. This is also another issue proven to be controversial and should be considered in the context of availability of pharmaceuticals.

3. Copyright and Related Rights

This section gives an overview of the areas of copyright and related rights with potential for harmonisation. As is the case with trademarks and patents, there are several international legal regimes governing copyright and related rights law, including the Berne Convention, WIPO Copyright Treaty (WCT), the WIPO Performances and Phonograms Treaty (WPPT) and the Beijing Treaty on Audiovisual Performances. For members of the WTO, the TRIPS Agreement obliges them to comply with the provisions regarding copyright found in Articles 9 – 14. On the issue of computer programs, TRIPS obliges members to protect them as literary works under the Berne Convention.³¹

Unlike trademarks and patents, there is no regional treaty, whether under ARIPO or otherwise, specifically dedicated to copyright matters. Of the 26 States that make up the Tripartite area, 21 are members of the Berne Convention.

The appropriate duration of copyright protection is one area that could prove controversial in negotiations regarding copyright. The general term of protection under the Berne Convention is the life of the author plus fifty years.³²

Uganda and that were directly or indirectly used in the making of the claimed invention as well as of any element of traditional knowledge associated or not with those resources and that was directly or indirectly used in the making of the claimed invention without the prior informed consent of its individual or collective creators.”

However, this is a minimum and there are a number of countries around the world that provide for a longer term of protection (such as the life of the author plus seventy years.)

To move forward, members will need to consider establishing a minimum level of protections or whether they will aspire to raise protections to the highest possible level. On one hand, going for a minimum will ensure that members only take upon themselves the obligations they are able to implement. However, such an approach has the disadvantage of not advancing copyright laws and in the end means that each state continues to do pretty much what it wants with regards to copyright law.

4. Other IP areas

This penultimate section of the paper gives a brief overview of a few other areas of intellectual property that need consideration in harmonising intellectual property law within the TFTA. These areas are utility models, industrial designs and geographical indications.

Utility models

It is worth noting a few things with regards to the role of utility models in the IP legal framework. The Paris Convention contains a few provisions that refer to utility model protection without defining what a utility model is. At a regional level, the Harare Protocol also allows for the protection of utility models. The Protocol defines a utility model as meaning

Any form, configuration or disposition of elements of some appliance, working tools and implements as articles of everyday use, electrical and electronic circuitry, instrument, handicraft, mechanism or other object or any part thereof in so far as they are capable of contributing some benefit or new effect or saving in time, energy and labour or allowing a better or different functioning, use, processing or manufacture of the subject matter or that gives utility advantages, environmental benefit, and includes micro-organism or other self-replicable material, products of genetic resources, herbal as well as nutritional formulations which give new effects.³³

It provides further that utility models are to be protected if they are new and industrially applicable.³⁴ A review of the laws of some TFTA members shows that even though many do provide for utility model registration, some such as Malawi, Sudan and Zimbabwe are silent on the protection of utility models

Industrial Designs

The issue of industrial designs is fairly uncontroversial as Article 5quinquies of the Paris Convention obliges all

³⁰ TRIPS Agreement, article 33.

³¹ TRIPS Agreement, article 10(1).

³² Berne Convention, article 7(1).

³³ Harare Protocol, Section 3ter(1).

³⁴ Harare Protocol, Section 3ter(2).

countries of the Union to protect industrial designs. Article 25 of the TRIPS Agreement also contains an obligation on the part of WTO Members to protect industrial designs. The Harare Protocol also contains provisions setting out the procedure to be used for the protection of industrial designs.³⁵ It does not however, define industrial design.

There is therefore an opportunity to harmonise the definition of an industrial design, as there are some differences in the ways the national laws define the term.

Geographical Indications

In section 3 above, it was noted that the TRIPS Agreement obliges WTO Members to comply with the requirements of Articles 22 – 24 on the protection of geographical indications. This can be either by sui generis legislation or through trademark law.

Within the TFTA, a number of countries, such as Uganda and Zimbabwe, have already enacted specific stand-alone legislation containing detailed provisions on GIs, while others have detailed provisions within broader intellectual property statutes. Other countries have opted to protect GIs through their trademark laws. There is considerable scope for harmonisation of laws in this area that will facilitate trade in goods bearing GIs and allow value addition, especially agricultural products.

5. RECOMMENDATIONS AND CONCLUSION

Given the heterogeneity of African countries in terms of technical capacity, geographical as well as economic size and population, it is not going to be easy to achieve a harmonisation of IP laws. The fact that many are also LDCs who, under the TRIPS Agreement, have been given until 2021 to put laws in place that are TRIPS-compliant means that, for those countries, there is even less incentive to update their laws to comply with TRIPS.

For the reasons discussed above, this paper recommends the following:

1. With regard to trademarks laws, an IP Protocol should restrict itself to identifying areas where parties can harmonise both substantive and procedural aspects of their laws without necessarily aiming to establish a unitary trademark registration body. As seen above, even within ARIPO, it has proven challenging to persuade parties to sign and ratify the Banjul Protocol.
2. With regard to patent laws, there is a large scope for harmonisation of laws in any proposed IP Protocol. This is especially so in those areas where LDCs are given longer grace periods within which to enact the necessary patent laws.
3. With regard to copyright and related rights laws, the fact that copyright does not require any formalities for protection means the focus would be more on substantive rights than procedural questions in an IP Protocol. It will therefore be

necessary for parties to decide whether they wish to set out any minimum level of rights.

4. With regard to industrial design and utility models, the relatively low profile that these two branches of IP law occupy means there is likely few controversial issues which need negotiation.

5. With regards to geographical indications, an IP protocol provides an opportunity for countries that have not developed a sui generis law on GIs to consider doing so as a way of harnessing the potential of this area of law.

In conclusion, the task of negotiating and concluding an IP Protocol is going to be difficult, especially if the Protocol is going to contain substantive obligations for signatories. The more likely outcome will be an instrument containing best endeavours obligations and which aims at benchmarking obligations against already existing international instruments such as TRIPS and the various treaties administered by WIPO. The flexibilities currently enjoyed by LDCs are unlikely to be interfered with or in any way limited.

That being said, there is merit in including IP as an issue to be concluded as a part of a wider treaty dealing with the free movement of goods and services because history teaches us that left unchecked, IP can be used as a non-tariff barrier to the movement of goods and services.

³⁵ Harare Protocol, Section 4.

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