Intellectual Property Rights and Innovation: Assessing Regional Integration in Africa (ARIA VIII)

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Problem statement

Recent discussions of regional integration, innovation and competitiveness have drawn increasing attention to the vexing issue of intellectual property (IP). Chapter four of the 2016 report, *Assessing Regional Integration in Africa (ARIA VII): Innovation, Competitiveness and Regional Integration*, deals specifically with IP. Of relevance to this paper is the Report's view that:[1]

> The Continental Free Trade Area agreement on intellectual property would provide an opportunity to set common rules on intellectual property protection and use of flexibilities in the global intellectual property regimes, based on a common approach. It would also provide a framework for sub regional cooperation, given that COMESA, EAC and SADC are committed to cooperating on intellectual property policy under the Tripartite Free Trade Area.

The ARIA VII Report also highlighted the potential of the Pan-African IP Organisation (PAIPO) to provide an institutional basis to manage the complex issues of protecting existing policy spaces from erosion by trade agreements, supporting national efforts to craft appropriate legislative and policy frameworks for IP, and manage regional co-operation.[2] Separately, preparations to establish PAIPO are already underway, with the location of its headquarters having been confirmed as Tunisia.[3]

Negotiations toward a Continental Free Trade Agreement (CFTA) were launched in June 2015.[4] They were set to follow an agreed roadmap and framework,[5] and to culminate in the launch of the CFTA in 2017. One of the significant preliminary steps towards the

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[1] UNECA *Innovation, Competitiveness and Regional Integration: Assessing Regional Integration in Africa VII* (2016) 75, available at *http://www.uneca.org/sites/default/files/PublicationFiles/aria7_eng_rev_30march.pdf.*

[2] Ibid, 76.

[3] African Union Assembly Decision No.: Assembly/AU/Dec. 522(XXIII) available at *https://carolinebncube.files.wordpress.com/2013/03/au-assembly-decisions-2014.pdf.* See also, Caroline B Ncube 'The PAIPO Watch' available at *https://carolinebncube.wordpress.com/the-paipo-watch/*; African Union Commission and New Zealand Crown *African Union Handbook: A Guide for those Working With and Within the African Union* (2014) 152 available at *http://www.un.org/en/africa/osaa/pdf/au/au-handbook-2014.pdf.*

[4] Decision on the Launch of Continental Free Trade Area Negotiations Doc. Assembly/AU/11(XXV) (June, 2015 Johannesburg).

[5] African Union 'Draft Framework, Road Map and Architecture for Fasttracking the Continental Free Trade Area (CFTA)' available at *https://www.tralac.org/images/Resources/Continental_FTA/Draft_framework_for_the_CFTA.pdf.*

creation of the CFTA was the June 2015 signing of the Tripartite Free Trade Area Agreement (TFTA) between the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC) and the Southern African Development Community (SADC).[6] The TFTA is expected to merge with an FTA that will be formed by the other eight Regional Economic Communities (RECs) recognised as building blocks for the CFTA. The second-stage TFTA negotiations also include negotiations about IP, although agreement has not yet been reached.

While the 2017 deadline looks unrealistic, it has been recommended that in the meantime a framework agreement be concluded in order to, among other things, "facilitate policy convergence through common regimes in such areas as intellectual property rights, competition policy, and government procurement." [7] Such an agreement will make it possible to partially meet the 2017 deadline set by the CFTA Roadmap.

To assist trade policymakers in the development of a framework, this paper explores IP issues, perspectives, and priorities related to both the CFTA and PAIPO. It suggests that process and substance issues are each important to create fair and balanced IP systems on the continent that stimulate innovation, growth, and competition. To this end, the paper's suggested framework draws significantly on the *Max Planck Principles for Intellectual Property Provisions in Bilateral and Regional Agreements*, [8] (the Principles for IP Provisions, or just Principles) adapted for a distinctly African context.

[6] 'Communique of the Third COMESA-EAC-SADC Tripartite Summit' 10 June 2015 available at *https://www.sadc.int/files/5914/3401/0196/Communiqu_of_the_3rd_COMESA_EAC_SADC_Tripartite_Summit.pdf*.

[7] David Luke and Simon Mevel 'The Option of a Framework Agreement in the Continental Free Trade Area (CFTA) Negotiations: A Non-Paper' (May 2015) available at *http://www.uneca.org/sites/default/files/PublicationFiles/cfta_framework_agreement_non-paper-rev1_en.pdf.*

[8] Henning Grosse Ruse-Khan, et al 'Principles for Intellectual Property Provisions in Bilateral and Regional Agreements' (2013) 44(18) *IIC - International Review of Intellectual Property and Competition Law* 878–883 available at *http://www.ip.mpg.de/fileadmin/ipmpg/content/forschung_aktuell/06_principles_for_intellectua/principles_for_ip_provisions_in_bilateral_and_regional_agreements_final1.pdf*.

Background & Context

1. Global Disintegration

Movement toward greater integration within the continent of Africa is happening while economic partnerships elsewhere have failed or are under significant strain. The unlikelihood of progress with multilateralism on a global scale has been apparent since the failure of the World Trade Organisation (WTO)'s Doha Round of negotiations.[9] But very recent events like Brexit from the European Union and the United States' withdrawal from the Trans-Pacific Partnership (TPP) have radically changed the global economic landscape.[10] Multilateralism is not just stalled but unravelling.

We submit that the procedural and substantive failures around IP issues in various contexts have contributed significantly to the backlash against trade agreements generally. Concerns have been simmering since the negotiation of the WTO's Agreement on Trade-related Aspects of Intellectual Property (TRIPS), which heavily favoured the interests of the most developed countries in exchange for false hopes provided to the world's least developed countries.[11]

Even in developed countries, academic experts and business leaders testified the TPP would have created major impediments to innovation and major losses on IP and digital and cultural policies.[12] Non-governmental organisations were also highly critical of the

[9] For a brief history of the Doha round negotiations and an analysis of its deadlock, see Sungjoo Cho 'The Demise of Development in the Doha Round Negotiations' (2010) 45 *Texas International Law Journal* 573-601. See also Fredrik Erixon 'After the Bali Agreement: Lessons of The Doha Round for The WTO's Post-Bali Agenda' (2014) European Center for International Political Economy Policy Briefs No. 2/2014 available at *http://www.ecipe.org/app/uploads/2014/12/PB02.pdf*.

[10] See IMF 'World Economic Outlook' (July 2016) available at *https://www.imf.org/external/pubs/ft/weo/2016/update/02/pdf/0716.pdf*; Yuan Q Mui 'Withdrawal from Trans-Pacific Partnership Shifts U.S. Role in World Economy' 23 January 2017 The Washington Post available at *https://www.washingtonpost.com/business/economy/withdrawal-from-trans-pacific-partnership-shifts-us-role-in-world-economy/2017/01/23/05720df6-e1a6-11e6-a453-19ec4b3d09ba_story.html?utm_term=.3320d7661378*.

[11] Peter Drahos and John Braithwaite *Information Feudalism: Who Owns the Knowledge Economy?* (2002) Earthscan Publications Ltd.

[12] Jim Balsilie 'Evidence to the Standing Committee on International Trade' (5 May 2016) 42nd Parliament of Canada, 1st Session, Number 15 available at *http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=e&Mode=1&Parl=42&Ses=1&DocId=8245091;* Michael Geist 'Evidence to the Standing Committee on International Trade' (5 May 2016) 42nd Parliament of Canada, 1st Session, Number 15 available at *http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=e&Mode=1&Parl=42&Ses=1&DocId=8245091*.

agreement's impact on electronic commerce and Internet policy.[13] The impact of patents on access to medicines was another major problem with TPP. Indeed, the *Washington Post* editorial board noted: "No issue caused more conflict in the latest round of talks — or in the general political debate over the TPP — than the question of intellectual property and other protections for the U.S. pharmaceutical industry."[14] In developing countries, such concerns were even more acute.

While wrong-headed IP policy played a role in the ultimate failure of TPP, agreements focused solely on IP and not other issues have had an equally poor outcome. The most notable misstep happened when a group of countries tried to ram ill-advised IP policies through an undemocratic process of negotiating the Anti-Counterfeiting and Trade Agreement (ACTA). While Morocco was the only African country amongst the strange bedfellows involved in ACTA,[15] its experience might serve as a warning for the rest of the continent. The procedural and substantive problems with ACTA have been well documented in dozens of working papers,[16] a special journal issue,[17] and even a book.[18] It has been called a "lesson in how not to negotiate an agreement on international cooperation in law enforcement."[19]

In each of these contexts, we have witnessed protectionist sentiments emerge to preserve national sovereignty over knowledge governance, to put limits on the commodification of information, and to safeguard the public domain. There is a common theme: Since the negotiation of TRIPS in the 1990s, countries at all stages of development, aided by a more engaged civil society, have wised up. They have refused to stand idly by as lopsided IP provisions are packed into the Trojan horse of international trade agreements. Yet, a

[13] Electronic Frontier Foundation 'Trans-Pacific Partnership Agreement' available at *https://www.eff.org/issues/tpp*.
[14] Washington Post 'A Debate Over U.S. Pharmaceuticals Is Snagging the Trans-Pacific Partnership Deal' (10 August, 2015) available at *https://www.washingtonpost.com/opinions/a-hiccup-in-trans-pacific-partnership-negotiations/2015/08/10/1c0a9584-3d37-11e5-9c2d-ed991d848c48_story.html?utm_term=.5b6a29473181*.
[15] The parties to ACTA were Australia, the United States of America, Japan, the 27 nations of the European Union, Switzerland, Canada, Singapore, South Korea, New Zealand, Morocco and Mexico.
[16] Available at *http://digitalcommons.wcl.american.edu/research/*.
[17] Focus Issue: Intellectual Property Law Enforcement and the Anti-Counterfeiting Trade Agreement (ACTA) (2011) 26(13) *American University International Law Review* available at *http://digitalcommons.wcl.american.edu/auilr/vol26/iss3/*.
[18] Pedro Roffe and Xavier Seuba, eds., *The ACTA and the Plurilateral Enforcement Agenda: Genesis and Aftermath* (2015) Cambridge University Press.
[19] Kimberlee Weatherall 'Politics, Compromise, Text and the Failures of the Anti-Counterfeiting Trade Agreement' (2011) 33 *Sydney University Law Review* 229-263.

problem remains. It is clear to negotiators (or at least independent experts) what will *not* work, but there is little clear vision of the kinds of policies to put in place of the previous century's outdated IP templates.

Closer to home on the African continent, the East African Community (EAC)'s experience with anti-counterfeiting policy and regulation serves as a cautionary tale. The EAC prepared a draft policy on Anti- Counterfeiting, Anti- Piracy and other Intellectual Property Rights Violations and the EAC Anti- Counterfeit Bill, neither of which have been adopted.[20] The main critique against them was that they espoused TRIPS-plus provisions, which were totally inappropriate for EAC's Least Developed Country (LDC) member states.[21] This critique was vindicated by the Kenyan High Court's striking down of equivalent provisions in the *Kenyan Anti- Counterfeit Act*.[22] The EAC's mistake was to underestimate the complexity of IP issues, which led to inappropriate reliance on the rhetoric of lobbyists and inadequate consultation with local experts and civil society.

The disruption of trade negotiations globally, and the re-emergence of regionalism outside of the United States and European Union, could be a blessing in disguise for the nations of Africa. While we should not underestimate the importance of issues surrounding agricultural subsidies and other matters of pressing concern for least-developed countries, the fact is that Africans now live in a knowledge economy. For the issues that matter most in a knowledge economy, especially IP rights, the substance of now-failed agreements would have formed disastrous precedents.

Despite the demise of the TPP, ACTA, and similarly flawed agreements, regional trade integration involving IP remains possible. Canada and the European Union overcame slim odds to salvage the Comprehensive Economic and Trade Agreement (CETA).[23] Negotiations toward a Regional Comprehensive Economic Partnership (RCEP) between Australia, China,

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[20] Caroline B Ncube *Intellectual Property Policy, Law and Administration in Africa: Exploring Continental and Sub-regional Co-operation* (2016) Routledge 81.
[21] Ibid.
[22] Act No. 13 of 2008, in *Patricia Asero Ochieng, Maurine Atieno and Joseph Munyi v The Attorney General*, HCCC Petition No. 409 of 2009.
[23] CETA was signed on 30 October 2016. See EU 'EU-Canada Comprehensive Trade and Economic Agreement (CETA)' available at *http://ec.europa.eu/trade/policy/in-focus/ceta/*. For some major controversies around the negotiation of CETA see generally, Jeremy de Beer 'Applying best practice principles to international intellectual property lawmaking' (2013) 44 *IIC-International Review of Intellectual Property and Competition Law* 884-901; Daniel Drache and Stuart Trew 'The Pitfalls and Promises of the Canada-European Union Comprehensive Economic and Trade Agreement' (2010) available at *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1645429*; Jim Miles 'The EU-Canada Comprehensive Economic and Trade Agreement (CETA), backroom ministrations and secret negotiations' 3 November 2016 Global Research available at *http://www.globalresearch.ca/the-eu-canada-comprehensive-economic-and-trade-agreement-ceta-backroom-ministrations-and-secret-negotiations/5554419*.

India, Japan, New Zealand, South Korea and ten ASEAN countries are ongoing.[24] Furthermore, prospects for pan-African economic integration are good, even if going slower than hoped.

2. Africa's Opportunities and Challenges

An opportunity now exists for Africa to burst forward on a new path for knowledge governance.[25]

Knowledge governance includes, but is not limited to, IP; it encompasses the range of formal or informal legal, economic, social, cultural, political, and technological structures that determine who can appropriate or access knowledge, and how.[26] In the process, Africa can redefine the agenda for negotiation of IP issues in trade agreements impacting the global north and south. To do so, however, African countries must first sort out their own fundamental priorities for IP, given the collaborative dynamics of innovation on the continent.[27]

Currently, Africa's IP regulatory framework is fragmented. An agreement regarding IP in the CFTA must seek to overcome challenges on three levels: (a) multiple sub-regional IP organisations, (b) the proliferation of IP matters in RECs, and (c) misalignment with the continent's overall development agenda.

(a) Sub-regional IP Organizations

First, two sub-regional IP organisations exist: the African Regional IP Organisation (ARIPO) and the Organisation Africaine de la Propriété Intellectuelle (OAPI). There are also several AU members who do not belong to either of these two sub-regional IP organisations, including regional powerhouses such as Egypt, Nigeria and South Africa.

Language is one issue dividing ARIPO and OAPI, with the former operating mostly in respect of English-speaking countries and the latter in respect of French-speaking countries.

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[24] Negotiations for the RCEP were launched in Cambodia on 20 November 2012. See Australian Government Department of Foreign Affairs and Trade 'Regional Comprehensive Economic Partnership' available at http://dfat.gov.au/trade/agreements/rcep/Pages/regional-comprehensive-economic-partnership.aspx.

[25] For a conceptualisation of 'knowledge governance' see Chris Armstrong and Tobias Schonwetter 'Conceptualising Knowledge Governance for Development' (2016) 19 *The African Journal of Information and Communication* 1-17, *https://doi.org/10.23962/10539/21749*

[26] Open African Innovation Research network (Open AIR) *Annual Report 2016: From Project to Partnerships* (2016) 49.

[27] Jeremy de Beer et al (eds), *Innovation and Intellectual Property: Collaborative Dynamics in Africa* (2014) UCT Press.

Structural differences also exist. ARIPO member states have different IP frameworks, while OAPI member states subscribe to a unified IP legal system. ARIA VII identified this prevailing model of two regional IP organisations that are independent from RECs, and disengaged from the regional integration agenda, as a challenge.[28]

The following difficulties then follow from this:[29]

- policy and institutional incoherence;
- focus on the grant of patent rights to the exclusion of giving significant guidance on the exercise of those rights;[30]
- harmonization efforts sometimes reduce the policy space available to member-states; and
- provision of "an IP co-operation framework for negotiating bilateral trade and investment agreements" leading to the further degradation of policy space when their member states sign such agreements.

Negotiations surrounding PAIPO, conducted under the auspices of the AU, may help address some of these difficulties, but a guiding framework would be necessary for any new organisations to operate effectively.

(b) Sub-regional Economic Communities

The second challenge is that there are multiple IP-related initiatives being led, or planned by the RECs, that do not include existing or proposed regional IP organisations. At least eight RECs have, to some extent, sought to address IP matters.[31] The proliferation of RECs is graphically represented in Figure 1, below.

REC initiatives are necessary because of the independent disengagement of ARIPO and OAPI from regional integration efforts. An example of such REC initiatives is the IP Agenda of the TFTA.[32]

[28] Note 1, 72.
[29] Ibid, 73.
[30] It is important to note that in relation to copyright, ARIPO has given guidance through issuing a guide on the Marrakesh Treaty that is broad enough in its scope to encompass the exercise of user rights. See ARIPO 'ARIPO Guidelines for the Domestication of the Marrakesh Treaty' (February 2016) available at *http://www.aripo.org/publications/copyright-publications/item/150-aripo-guidelines-for-the-domestication-of-the-marrakesh-treaty*.
[31] Ncube (n20) 51.
[32] Ncube ibid, 86-90.

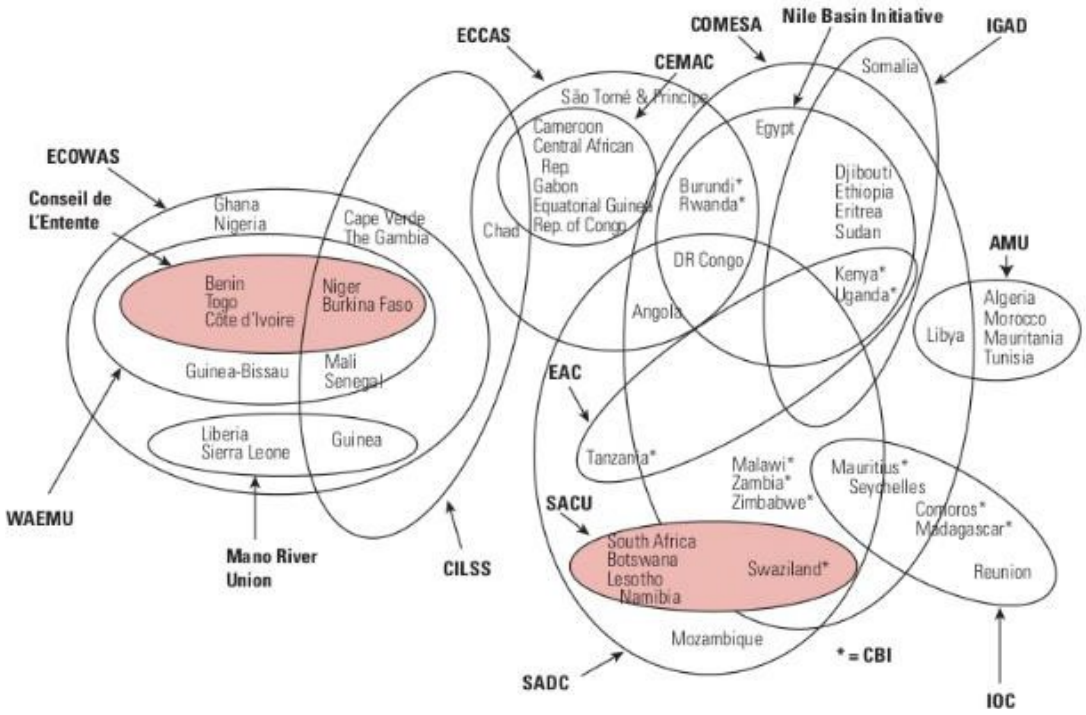

Figure 1: Spaghetti Bowl of Regional Integration. Source: Harry G. Broadman, "Africa's Silk Road: China and India's New Economic Frontier" (2007) The World Bank 18.

(c) Pan-African Socio-Economic Aspirations

A third challenge to address is alignment between the CFTA, PAIPO and Agenda 2063. The AU's adoption of Agenda 2063 includes the following aspirations:

- A prosperous Africa based on inclusive growth and sustainable development;
- An integrated continent, politically united, based on the ideals of Pan Africanism and the vision of Africa's Renaissance;
- An Africa of good governance, respect for human rights, justice and the rule of law;
- A peaceful and secure Africa;
- An Africa with a strong cultural identity, common heritage, values and ethics
- An Africa whose development is people-driven, relying on the potential of African people, especially its women and youth, and caring for children; and
- Africa as a strong, united, resilient and influential global player and partner.

The Agenda 2063: First Ten-Year Implementation Plan 2014-2023[33] sets out clear implementation goals for the CFTA and PAIPO under the second aspiration above. The

[33] African Union Commission *Agenda 2063: First Ten-Year Implementation Plan 2014-2023* available at *http://www.nepad.org/resource/agenda-2063-first-ten-year-implementation-plan-2014-2023*.

creation of the African Economic Community and PAIPO are prioritised under the framework and Institutions for a United Africa.[34]

This three-level alignment would seek to ensure that the ultimate goals of protecting existing policy spaces from erosion by trade agreements, supporting national efforts to craft appropriate IP legislative and policy frameworks and managing regional co-operation are met.

[34] Ibid, 65 - 66.

A Framework for Solving IP Issues

1. Established Parameters

The nations of Africa have an opportunity to experiment while developing a 21st-century agreement reflecting the continent's own IP priorities, but negotiations are not starting from scratch. This subsection of the paper describes existing constraints and best practice models that might shape discussions going forward.

The CFTA IP agreement would primarily be an *internal* regional initiative in that it would serve as a binding statement of the signatory countries' position on IP matters on the continent. It would also serve as an important *external* guide for these countries when they negotiate FTAs with countries beyond the continent. In other words, these internal issues would influence or guide signatory member states in their trade agreement negotiations with other countries or regional groupings.

General principles on the negotiation of the CFTA have already been agreed, as set out in the AU Statement of the Objectives and Guiding Principles for Negotiating the Continental Free Trade Area.[35] These principles would of course also apply to CFTA framework agreements.

In addition to the general CFTA negotiating principles, we suggest that the *Principles for IP Provisions* can help to underpin the CFTA IP Agreement. These *Principles* were developed by a working group of international IP experts from nearly every region of the world, facilitated by the Max Planck Institute for Innovation and Competition.[36] They reflect "core concerns regarding the use of IP provisions as a bargaining chip in international trade negotiations, ... and the lack of transparency and inclusiveness in the negotiating process; and recommend international rules and procedures that can achieve a better, mutually advantageous and balanced regulation of international IP."[37]

Recommendations based upon the *Principles* deal with issues of process and substance. For example, transparency, consultation and public participation in the development of negotiating mandates and the negotiation process are vital. Substantively, the *Principles*

[35] Gerhard Erasmus 'The New Principles for Negotiating the CFTA' (2015) TRALAC Trade Brief No. S15TB05/2015; Prudence Sebahizi 'Scope of the CFTA Negotiations, Principles, Objectives and Institutional Frameworks' (2016) available at *http://unctad.org/meetings/en/Presentation/ditc-ted-09032016-accra-ppt-UNCTAD.pdf*.

[36] See further the special issue of (2013) 44 (8) *IIC - International Review of Intellectual Property and Competition Law*.

[37] Henning Grosse Ruse-Khan, et al 'Principles for Intellectual Property Provisions in Bilateral and Regional Agreements' (2013) 44(18) *IIC - International Review of Intellectual Property and Competition Law* 878–883.

emphasise flexibilities, the importance of transition periods, and the preservation of policy space to create limitations and exceptions that suit countries at various stages of economic development.

While the *Principles* were developed with large-scale multilateral trade negotiations in mind, they may also be applied to guide negotiations about IP in the contexts of both broader socio-economic development discussions (such as the Development Agenda, the UN Sustainable Development Goals, and/or Agenda 2063) and narrower agreements on specific issues and institutions (such as PAIPO, access to medicines, and/or access to copyright-protected works by visually impaired persons).[38] Their flexibility and general applicability makes them well suited to guide development of a framework agreement on IP for CFTA.

2. Afro-centric Approach to IP Policy

AU member-states ought to approach the IP framework agreement in a unique manner that takes the continent's context and aspirations into account. The negotiating parties come to the discussions from the same perspective, unlike other trade agreements where IP matters are used as a bargaining chip to reach consensus between global North net IP exporting states and global South net IP importing states. The playing field is more even in this context because AU member states are all net IP importing states with largely the same developmental context and aspirations.

This should facilitate a uniquely made-in-Africa approach to the agreement because the negotiating parties have common Afro-centric values and priorities and are confronted by the same IP-related issues as discussed below. A fundamental concern underlying these issues is how to craft an agreement that breaks with the colonial legacies that still plague African IP frameworks.[39]

3. Procedural Principles

Going forward, in terms of procedure, it is crucial not to repeat the mistakes made by law and policy makers around the world that jeopardised or, in some cases, ultimately frustrated the conclusion of IP-related instruments; whether it be national legislation (such

[38] de Beer (n23).
[39] Caroline B Ncube 'Decolonising Intellectual Property Law in Pursuit of Africa's Development' (2016) 8(1) *WIPO Journal* 34 -40; Caroline B Ncube 'Three Centuries and Counting: The Emergence and Development of Intellectual Property Law in Africa' in Rochelle C Dreyfuss & Justine Pila (eds), *The Oxford Handbook of Intellectual Property Law* (Oxford University Press Forthcoming); T Kongolo, 'Historical Evolution of Copyright Legislation in Africa' (2014) 5(2) The *WIPO Journal* 163, 168–70; T Kongolo, 'Historical Developments of Industrial Property Laws in Africa' (2013) 5(1) The *WIPO Journal* 105, 115–16.

as Stop Online Piracy Act [SOPA] and Protect IP Act [PIPA] in the United States)[40] or bilateral, plurilateral or multilateral trade agreements and treaties (such as ACTA, TPP or TTIP).

In essence, criticism against the process by which these failed instruments were negotiated (the "how") centered on concerns regarding democratic legitimacy. The root causes of illegitimacy included:

- secrecy in which the negotiations were conducted and the associated lack of transparency of these negotiations;
- lack of inclusive consultations of all relevant stakeholders; instead negotiating parties appeared to follow a selective consultation process that typically excluded civil society;
- negotiations taking place outside of existing international bodies and fora such as WIPO and the WTO with established rules for public engagement and sharing of information;
- ignoring, concealing or actively downplaying the implications for personal freedoms, such as freedom of expression and privacy; and
- rushed processes (e.g., in the case of SOPA) that appear to propose simplistic solutions to complex problems and challenges.

In 2012, similar procedural concerns were raised in Africa with regards to the draft PAIPO statute. African IP experts then argued that "[t]he draft PAIPO statute is the result of a non-transparent process without open consultations with relevant stakeholders including civil society. No drafts of the statute have previously been issued let alone publicly discussed."[41] The negotiation of PAIPO was demonstrably inconsistent with the *Principles for IP Provisions*, and heavily criticized on that basis.[42]

It must be noted, however, that historically trade negotiations were typically conducted in rather secretive fashion, usually adhering to a diplomatic process of government representatives negotiating behind closed doors. In light of the above criticism, it appears that this traditional approach needs to be replaced by a more open, holistic, transparent process that sufficiently includes all relevant stakeholders.

Thus, in response to changed dynamics and heightened public expectations in the area of international law and policy making – and to minimise the risk of public push-back and, ultimately, failure – CFTA negotiations must be geared towards ensuring good, fair,

[40] See Peter K Yu 'The Alphabet Soup of Transborder Intellectual Property Enforcement' (2012) 60 *Drake Law Review* 16-33.
[41] See 'A New Course for the Pan African Intellectual Property Organization Is Urgently Needed' (18 October 2012) Letter to African Union-AMCOST V available at *https://www.change.org/p/a-new-course-for-the-pan-african-intellectual-property-organization-is-urgently-needed*.
[42] de Beer (n23) 895-7.

balanced and widely-supported policy through democratic, open, transparent, inclusive and diligent processes. This includes wide public consultations and debates. The processes and methods followed by international organisations such as WIPO and national lawmakers, involving public access to draft documents as well as public hearings, could serve as examples.

4. Substantive Principles

While it is premature and inappropriate to dictate to negotiators what substantive positions and policies should be included in an agreement on IP, we suggest the substantive content of an IP framework leading toward the CFTA can be guided by several overarching observations.

One is that innovation in Africa is distinct from innovation elsewhere in the world. Empirical research led by experts from networks like the Open African Innovation Research network, Open AIR, clearly shows that in Africa "innovation and creativity are not endeavours that inevitably take place in the context of market economic surveillance."[43] Innovation that does occur through market mechanisms cannot be isolated from the informality that permeates so much economic activity on the continent. Global trade and IP policymakers are just recently becoming aware of the on-the-ground evidence and expert insights into the vibrant innovation of Africa's informal sectors.[44]

Even if formal IP protections were appropriate in such contexts, which they are not, research shows that such formal protections "cannot exist in the absence of strong institutions, including not just IP offices that register, disclose and educate, but also a culture of respect and enforcement of IP rights."[45] Such respect is impossible to build as long as the substantive provisions of IP law are far removed from the realities of everyday life in Africa.

For example, in an eight-country comparative study of copyright's impact on access to education in Africa, researchers concluded the challenge with copyright is not lack of legal protection, neither is it that existing copyright laws in the countries studied do not comply with international standards. The challenge is "lack of awareness, enforcement and exploitation of copyright". The study further concluded that even where there is awareness

[43] de Beer, et al (n27) 374.
[44] Erika Kraemer-Mbula and Sacha Wunsch-Vincent (eds) *The Informal Economy in Developing Nations: Hidden Engine of Innovation?* (2016) Cambridge University Press; Jeremy de Beer, et al 'The informal economy, innovation and intellectual property – Concepts, metrics and policy considerations' (2013) WIPO Economic Research Working Paper No. 10 available at *http://www.wipo.int/edocs/pubdocs/en/wipo_pub_econstat_wp_10.pdf*; Jeremy de Beer, et al 'Frameworks for Analysing African Innovation, Entrepreneurship, the Informal Economy and Intellectual Property' in de Beer, et al (eds) (n27) ch. 2.
[45] de Beer, et al (n27) 390.

of copyright principles, people are unable to comply with such principles that do not reflect their socio-economic reality.[46]

Any effort to include IP provisions in the CFTA or a preparatory agreement must, to be successful, recognise the importance of enacting policies that reflect the values and experiences of Africans whom such policies serve.

The Nigerian movie industry, also known as Nollywood, offers an excellent example of phenomenal growth not because of IP protection, but *despite* IP protection.[47] Notwithstanding mixed impressions on the role of IP in Nollywood, not many deny that the lax IP regime in the industry has given rise to creative patterns of engagement between the industry and actors in the informal movie distribution networks in Nigeria. A stronger and unbalanced approach to IP alienates and isolates members of such informal networks, criminalizing them as pirates. The industry continues to develop creative ways of leveraging the partnership and contractual potentials of these isolated actors who are now critical stakeholders in the Nollywood value chain. Some members of the industry recognize that while IP may be desirable, unbalanced implementation of IP policies often privileges few in the industry and comes at the expense of the cultural contexts that favours collaborative creativity and the enduring desires of individual artists and creators for optimum exposure. Sentiments from the industry suggest a realization that such exposure holds greater opportunities for creators' independence through a universe of options for equitable economic benefits to all stakeholders in the industry.

Gradually, Nollywood continues to evolve, calling attention to the need for pragmatism and sensitivity to context in the making of IP policy, in rejection of the one-size-fits-all pattern. There is evidence of similar patterns with musicians in Egypt.[48] Africa's vibrant cultural industries provide an opportunity to explore how best to tailor IP in a responsive manner in the context of authentic African innovation and creativity. The key is to increase respect for African cultural exports to the rest of the world, not to kowtow to lobbyists or buy into the fiction that piracy in Lagos or Nairobi is any more rampant than in London or New York. Piracy in emerging economies, including in Africa, is more a market failure than an IP problem.[49]

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[46] Chris Armstrong, et al *Access to Knowledge in Africa: The Role of Copyright* (2010) International Development Research Centre 318-319.
[47] Chidi Oguamanam 'Beyond 'Nollywood' and Piracy: In Search of an Intellectual Property Policy for Nigeria' (2011) *NIALS Journal of Intellectual Property* 3-37 available at *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2291267*.
[48] Nagla Rizk 'From De Facto Commons to Digital Commons? The Case of Egypt's Independent Music Industry' in de Beer et al (n27) 171-202.
[49] Joe Karaganis (ed) *Media Piracy in Emerging Economies* (2011) Social Science Research Council available at *http://ssrc-cdn1.s3.amazonaws.com/crmuploads/new_publication_3/%7BC4A69B1C-8051-E011-9A1B-001CC477EC84%7D.pdf#page=15.*

These observations are just a hint of the vast body of evidence that is emerging to inform IP policy-making worldwide.[50] The following concrete suggestions build upon this body of evidence, and if implemented would put Africa ahead of the rest of the world when it comes to progressive IP policies suited for the 21st century global knowledge economy.

(a) Copyright

As far as copyright is concerned, the CFTA's overarching objective must be to ensure that the member states' domestic copyright frameworks are balanced, sound, coherent, practically-relevant, context-appropriate and responsive to digital technologies, with the aim of facilitating maximum levels of creativity in these countries.

It is important to acknowledge, first, that nowadays a significant amount of copyrighted works are created by individuals outside of typical commercial enterprises. Current copyright laws in Africa and globally do not seem to take this sufficiently into account. It is also important to recognise that even though some protection is good for creativity, more protection is not necessarily better. Over-protecting IP is not only obsolete but also potentially harmful, especially in the developing country context. In the same vein, it is now clear that global, or even regional, one-size-fits-all approaches to issues concerning copyright law are often ill-suited and that instead, tailored approaches to copyright protection are needed to best respond to local conditions.

In essence, domestic laws must fairly balance the legitimate interests of existing copyright owners with those of users/future creators.[51] Adequate protection is required as an incentive and/or economic and moral reward for those who invest time, effort, and money in their creative endeavours. However, overzealous protection can severely hamper future creative efforts by creating insurmountable access barriers that impede general access to and dissemination of knowledge, including cultural and educational materials, and stifle new and collaborative modes of creativity, such as Open Access/Open Education, Open Science and Open Data, that hold great promise for Africa's development and growth.[52]

When tackling the issue of copyright protection in the CFTA, these are some of the key considerations:

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[50] Jeremy de Beer 'Evidence-based Intellectual Property Policymaking: An Integrated Review of Methods and Conclusions' (2016) 19(5-6) *Journal of World Intellectual Property* 150–177 available at *http://onlinelibrary.wiley.com/doi/10.1111/jwip.12069/full*.

[51] The goal of creating balanced copyright systems is emphasised, for instance, in Articles 7 and 8 of the Agreement Trade Related Aspects on Intellectual Property Rights, 1995 (TRIPS Agreement).

[52] Jeremy de Beer 'Open Innovation in Development: Integrating Theory and Practice across Open Science, Open Education, and Open Data' (2017) Open AIR Working Paper No. 3.

i. Scope of protection: Increased piracy does not justify expanding the scope of copyright protection; this is better addressed through strengthening enforcement mechanisms. Expanding the scope of copyright protection, e.g. to introduce so-called broadcasting rights, inevitably results in a further shrinking of the public domain – an important pool for follow-up creativity – and should therefore only be considered after a careful cost/benefit analysis has taken place. Such analyses may currently be undertaken at other fora, such as WIPO in the case of broadcasting rights, and the CFTA should not forestall the outcome of these efforts.

ii. Term of copyright protection: Longer copyright terms would not result in more creativity, mainly because authors are not motivated by a few extra years of protection very far into the future.[53] Instead, any extension would come at the high social cost of a shrinking public domain, with adverse effects for creativity levels. It is therefore suggested that the CFTA should prescribe the minimum terms of copyright protection as stipulated in the Berne Convention and TRIPS ("ceiling"). Indeed, serious consideration should be given to including in CFTA *maximum* terms of copyright protection. Harmonized maximum terms of protection would significantly help coordinate access to knowledge across African borders, facilitating collaboration in the areas ranging from research and education to digital cultural initiatives.

iii. Copyright exceptions and limitations: Copyright exceptions and limitations are arguably the single most important balancing tools available to copyright law and policy makers. A modern interpretation of "the three-step test" as contained in various international copyright treaties provides sufficient leeway for law and policy makers to flexibly legislate in this field.[54] In light of the importance of copyright exceptions and limitations, the CFTA's provisions concerning them should be crafted in a way that generally facilitates the introduction of far-reaching exceptions and limitations in domestic copyright legislation, e.g. fair use and compulsory licences. In addition, the CFTA should make express mention of several particularly important copyright exceptions and limitations, including exceptions and limitations:

- benefitting visually impaired persons and persons with print disabilities, based on the Marrakesh Treaty[55]
- allowing temporary reproductions
- permitting parallel importation ("regional exhaustion of copyright")
- dealing with orphan works
- addressing text and data mining

[53] See, for example, the brief of seventeen famous and/or Nobel-prize winning economists as *amicus curiae* in the United States Supreme Court case of *Eldred v Ashcroft* available at *https://cyber.harvard.edu/openlaw/eldredvashcroft/supct/amici/economists.pdf*.
[54] Christophe Geiger, et al 'The Three-Step-Test Revisited: How to Use the Test's Flexibility in National Copyright Law' (2014) 29(3) *American University International Law Review* 581-626.
[55] To this end see, ARIPO's Guidelines on the Domestication of the Marrakesh Treaty (2016).

iv. ISP liability/notice & takedown procedures: Internet Service Providers (ISPs) depend on reliable safe harbour provisions to shield them from secondary liability, especially in cases of mere conduit, caching or hosting. The CFTA should adopt a safe harbour system that effectively protects ISPs from liability, coupled with a notice and takedown system with a robust counter-notice procedure to avoid over-blocking and censorship (possibly combined with penalties for abuse of the notice and takedown system).

v. DRM/TPM and anti-circumvention provisions: Copyright owners employ digital rights management technologies and technological protection measures to enable market segmentation and geo-fencing, and to prevent illegal copying of their materials. It is already uncertain why legislative intervention is required to provide an additional layer of (legal) protection against anti-circumvention activities targeting DRM and TPM tools. However, if such protection is indeed granted after careful consideration of the pros and cons, it should be made clear that the scope of copyright exceptions and limitations is extended to shield against claims resulting from these anti-circumvention provisions.

vi. Penalties: Excessive and disproportionate penalties should be avoided.

(b) Patents

Patent law and policy reforms in Africa should focus on institutional capacity-building. Extensive research, including a survey of patent offices in 44 African countries, reveals that African states are "dumping grounds" for patents, with little or no examination of applications or public access to invention disclosures or other documents.[56] Efforts to improve processes and capacity are underway at ARIPO and in some states, supported by foreign governments from outside of Africa and international organisations such as WIPO. CFTA-related coordination processes should complement such initiatives.

However, in accepting external assistance and integrating programs to strengthen patent capacity into the CFTA agenda, African countries must be sure to resist any pressure to simply churn out more patent grants. This is a real danger, given the desire to improve Africa's ranking in the world tables of innovation performance. Numerous global innovation indices rank countries on statistics including (but not limited to) patenting and other IP filings and licensing activities.[57] For instance, 25 of the 27 African countries ranked on the 2016 *Global Innovation Index* were below the median score of countries surveyed worldwide, partly because African countries have not acquired the advanced scientific and

[56] Ikechi Mgbeoji 'African Patent Offices Not Fit for Purpose' in de Beer et al (n28) 234-247, 381.
[57] Global Innovation Index reports are available at *https://www.globalinnovationindex.org/about-gii#reports*.

technical capabilities associated with R&D and patents.[58] This has led to headlines like, "South Africa: Region Failing to Innovation, Says Study," citing a UNESCO report that concluded: "Countries in southern Africa are producing so few scientific publications and patents that the region's social and economic progress is threatened."[59]

Granting more patents will not solve this problem; and may exacerbate it. This lesson has already been learned in other regions of the world, where the proliferation of "junk" patents risks clogging up innovation systems and stifling entrepreneurship.[60] Africa has a real chance now to avoid the mistakes others have made, and to strike the right balance in respect of patent protection that serves *Africa's* interests. In the context of publicly funded research, some African countries are setting up bureaucracies to chase IP rights.[61] Instead, they would do well tapping into the tremendous power of open science, open data, and open innovation.[62]

Africans innovation experts know very well that "patent protection per se is too narrow to account for most of the innovative activity going on in the region."[63] NEPAD has recognized this fact in an important series of studies, "African Innovation Outlook," published in 2010 and 2014.[64] A new agenda is being formulated to measure innovation in the informal economy,[65] where patents are irrelevant and unnecessary because innovators use better suited methods of appropriating the social and economic benefits of innovation.[66]

The nations of Africa should resist any temptation to use the opportunity of CFTA for patent reform to expand the subject-matter, scope, or duration of patent protection. "Strengthening" patent protection on the continent of Africa requires *better* patents, not

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[58] Soumitra Dutta, et al *The Global Innovation Index 2016: Winning with Global Innovation*. (2016) Cornell University, INSEAD, & WIPO 20-21.
[59] C. Campbell 'Southern Africa: Region Failing to Innovate, Says Study' (13 August 2010) available at *http://www.scidev.net/global/policy/news/southern-africa-failing-to-innovate-says-study-1.html.*
[60] James Bessen and Michael J Meurer *Patent Failure: How Judges, Bureaucrats and Lawyers Put Innovators at Risk* (2008) Princeton University Press; Dan L Burk and Mark A Lemley *The Patent Crisis and How the Courts Can Solve It* (2009) University of Chicago Press.
[61] Caroline Ncube, et al 'Effects of the South African IP Regime on Generating Value from Publicly Funded Research: An Exploratory Study of Two Universities' in de Beer et al (n28) 282-315.
[62] Note 52.
[63] Calestous Juma & Jackton B Ojwang (eds) *Innovation and Sovereignty: The Patent Debate in African Development* (1989) African Centre for Technology Studies (ACTS) 2.
[64] African Union-New Partnership for Africa's Development (AU-NEPAD) *African Innovation Outlook 2010* (2010) African Union 28 available at *http://www.nepad.org/system/files/June2011_NEPAD_AIO_2010_English.pdf*; African Union-New Partnership for Africa's Development (AU-NEPAD) *African Innovation Outlook II* (2014) African Union 146-148 available at *www.un.org/africarenewal/sites/www.un.org.africarenewal/files/AIO_2_Final%20Product[2].pdf*.
[65] Jacques Charmes, et al 'Formulating and Agenda for the Measurement of Innovation in the Informal Economy' in Erika Kraemer-Mbula and Sacha Wunsch-Vincent (eds.) (n44) 336-366.
[66] Jeremy de Beer and Sacha Wunsch-Vincent 'Appropriation and Intellectual Property in the Informal Economy' in Erika Kraemer-Mbula and Sacha Wunsch-Vincent (eds.), ibid pp 232-268.

more patents. Africa's focus should be on quality, not quantity. This means stricter scrutiny by highly qualified patent examiners, carefully assessing every application to ensure it meets the highest standards of novelty, inventiveness, and industrial applicability. Particular emphasis must be placed upon the dissemination of patent-related information, so that the technologies which are disclosed by African and non-African applicants can be used effectively following expiration of the limited monopoly period patent law provides. Patent policymaking discussions ought also to focus on sectors and issues of particular importance to Africa, and define particular priorities in respect of those sectors and issues. For example, on the topic of pharmaceuticals, Africa's clear priority must be on access to medicines. Facilitating access to medicines requires changes to IP law, including consideration of mechanisms for pooling essential medicines patents and compulsory licensing in appropriate circumstances.[67] Flexibilities in the global IP regime exist that permit such measures, if the nations of Africa are bold enough to stand together and use them.

It was African countries that led the movement to change global IP law and enable access to anti-retroviral drugs to fight HIV/AIDS, culminating in the *Doha Declaration on the TRIPS Agreement and Public Health*.[68] Even greater coordination on the continent at this moment can lead to massive savings of resources and, far more importantly, lives. Some of the RECS have already taken leadership on this aspect. For instance, EAC adopted a Health Protocol and a Regional IP Policy on the Utilisation of Public Health-Related WTO-TRIPS Flexibilities and the Approximation of National IP Legislation in 2013.[69] ECOWAS adopted a Policy[70] and Guidelines for Implementation of TRIPS Flexibilities in National Legislation to Improve Access to Medicines in the West African Region in 2012.

Writing about the explosive growth of Kenya's information technology industry, experts have observed: "Despite the benefits of WTO membership and of safeguarding one's intellectual property, the fact is that on balance, the western patent model is not yet helpful to most Kenyan – or African – entrepreneurs."[71] New evidence and frameworks for assessing Africa's technology clusters, innovation hubs and makerspaces suggest that

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[67] See Ellen t'Hoen *Private Patents and Public Health: Changing Intellectual Property Rules for Access to Medicines* (2016) Health Action International available at *http://accesstomedicines.org/resources/*.
[68] WT/MIN(01)/DEC/2 (20 November 2001) available at *https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm.*
[69] EAC *Regional Intellectual Property Policy on the Utilization of Public Health-Related WTO-TRIPS Flexibilities and the Approximation of National Intellectual Property Legislation* (2013) and *Health Protocol on Public Health Related WTO-TRIPS Flexibilities* (2013) available at *http://www.cehurd.org/wp-content/uploads/downloads/2013/05/EAC-TRIPS-Policy.pdf*.
[70] Development of a Harmonized TRIPS Policy for Adoption by ECOWAS Member States that Employ TRIPS Flexibilities to Improve Access to Medicines in the Region (2012) available at *https://www.healthresearchweb.org/?action=download&file=ECOWASTRIPSPOLICY_English.pdf*.
[71] Isaac Rutenberg 'Faking It: Time to Rethink Intellectual Property in Developing Countries?' 29 October 2013 *The Guardian* available at *https://www.theguardian.com/global-development-professionals-network/2013/oct/29/intellectual-property-rights-google*.

serious caution and careful planning is warranted before importing foreign IP policies into an already thriving environment.[72]

The patent model advanced by the CFTA, therefore, needs to take African contexts into consideration and be closer aligned to lived experiences and entrepreneurial needs.[73] In practice, this may mean the creation and promotion of other types of protection for incremental innovation that is more common than the romanticised sole inventor breakthrough innovation.

(c) Trademarks

Trademark protection, generally, seeks to distinguish goods and services offered by one provider from those goods and services of another provider; and trademarks originating in developing countries are often seen as conduits for development in these countries. If effectively utilised, trademarks can significantly increase competitiveness by creating access to local, regional and the global market, chiefly because of the positive reputation of the goods and services to which they are affixed.

However, local, regional and international market access remains a key challenge for African producers, especially small-scale producers, and research evidence suggests that less conventional trademark-based strategies such as communal trademark protection might often be better suited to translate development visions of African producers into marketable innovations. The term *communal trademark* is used here as an umbrella-term for certification marks, collective marks and Geographical Indications (GIs). Unlike conventional trademark protection, these hitherto underutilised forms of IP protection combine elements of external protection with elements of internal openness, inclusion and collaboration, appropriate to local conditions.[74] For instance, recent research has found that groups of agricultural (Ethiopian coffee and Ghanaian cocoa) and industrial (Nigerian leather and textile products) producers and retailers successfully utilised communal trademark strategies. Yet, it was found that domestic legal reform is required to take full advantage of strategies built on communal trademark systems, and the CFTA could play a key role in promoting legal reform in this area. A key question would be, however, whether GIs should be protected as collective marks, or whether a *sui generis* form of protection should be introduced for GIs. It appears that the better approach is to provide for some

[72] Olugbenga Adesida, et al (eds.) *Innovation Africa: Emerging Hubs of Excellence*, (2016) Emerald; Jeremy de Beer, et al 'A Framework for Assessing Technology Hubs in Africa' (2017) Open AIR Working Paper No. 2; Jeremy de Beer et al 'A Framework for Assessing Technology Hubs in Africa' (2017) 6(2) *NYU Journal of Intellectual Property and Entertainment Law* 237-277 available at *http://jipel.law.nyu.edu/wp-content/uploads/2017/04/NYU_JIPEL_Vol-6-No_2_2_deBeer_TechnologyHubs.pdf*.
[73] Isaac M. Rutenberg and Jacquelene Mwangi 'Do Patents and Utility Model Certificates Encourage Innovation in Kenya?' (2017) 12 (3) *Journal of Intellectual Property Law & Practice* 206-215 available at *https://doi.org/10.1093/jiplp/jpx010.*
[74] Jeremy de Beer et al (n27) 386.

type of *sui generis* protection,[75] and while costs have been raised as a concern against adopting such a system, there are various strategies that can help mitigate the cost.[76] However, the call for a *sui generis* system underscores, once again, that conventional forms of IP are increasingly unsuited for more organic forms of innovation and knowledge generation.

(d) Traditional Knowledge of Indigenous and Local Communities

Traditional Knowledge (TK) remains one of the key entry points for the continent as a net exporter of knowledge with ramifications for IP, trade and policy. The uniqueness of TK for the continent is reflected on the overlap of TK with various sites of innovation and knowledge production including in medicines, agriculture, food, biotechnology, genetic resources, arts, designs and crafts, etc.[77] As a consequence, in order to situate TK within the CFTA agenda, not only would it be necessary to identify existing African position(s) in past and ongoing treaty negotiations relevant to TK at global and regional levels, there is a need to appraise regional initiatives relevant to harmonization of TK relevant instruments and policies. For example, ARIPO's Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore[78] provides a context for building and scaling up a region-wide TK framework suitable for the CFTA. The same is true of the 2000 African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources.[79]

Despite the discordant or largely negative reception of global IP instruments that intersect with TK, there has been some progress in specific contexts of such intersection that could inspire regional initiative such as CFTA. Specifically, the progress made since 2000 pursuant to the implementation of the Convention on Biodiversity, with specific reference to the 2010 Nagoya Protocol on Access to Genetic Resources and Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity[80] provides robust principles relevant to the CFTA for integration of customary laws and practices of indigenous and local communities and their involvement in matters of access and benefit sharing regarding genetic resources and TK. The AU has already developed an African Regional Guideline for Coordinated Implementation of the Nagoya Protocol,[81] which is a

[75] See Chidi Oguamanam and Teshager Dagne 'Geographical Indication (GI) Options for Ethiopian Coffee and Ghanaian Cocoa' in de Beer, et al (n28) 77-108.
[76] Jeremy de Beer et al (n27) 99.
[77] See Chidi Oguamanam *International Law and Indigenous Knowledge: Intellectual Property, Plant Biodiversity and Traditional Medicine* (2010) University of Toronto Press.
[78] Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore, 2010 available at *http://www.wipo.int/edocs/trtdocs/en/ap010/trt_ap010.pdf*.
[79] Available at *http://www.wipo.int/edocs/lexdocs/laws/en/oau/oau001en.pdf*.
[80] Available at *https://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf*.
[81] Available at *https://www.bioversityinternational.org/fileadmin/user_upload/campaigns/Treaty_and_Nagoya_Workshop_2015/AU_Practical_Guidelines_on_ABS-English.pdf*.

rigorous expert-driven document that can assist with charting the pathway for TK in the context of CFTA. The Nagoya Protocol is a pivotal instrument and a critical step forward against biopiracy. That initiative overlaps with the work of WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC)[82] where the African negotiating group has demonstrated strong resolve on stronger protection of TK. These include by way of strong disclosure requirement regarding the source or origin of genetic resources and associated TK used in IP claims, negotiated and collaborative involvement of states and indigenous communities with opportunity for implementing other complementary measures such as TK databases and other forms of documentation of TK in ways that are not counterproductive to its protection.[83]

Another relevant international instrument with positive ramification for TK and IP for Africa is the FAO International Treaty on Plant Genetic Resources for Food and Agriculture.[84] The treaty is the first formal attempt to implement access and benefit sharing as inspired under the CBD. That instrument provides for the protection of farmers' rights with specific of regard to traditional practices of exchange and use of farm-saved seeds, traditional agricultural knowledge and involvement of farmers in the making the policies that affect them.[85]

We note that a number of African countries at national and regional levels (AOPI and ARIPO) have abandoned the spirit of the AU Model Legislation mentioned above, and have aligned or are in the process of aligning their laws with the TRIP-plus standard of plant variety protection pursuant to the UPOV.[86] That trend has uncovered a significant gap regarding the misalignment of African realities and priorities with IP policies, a situation that goes against the core of Max Planck principles. In the transition to UPOV, there has been little or no consultation with farmers who produce over 80% of food on the continent, neither were other critical stakeholders such as NGOs allowed to participant in the process.[87] Farmers, women's organizations, local communities and diverse stakeholders have decried the priority that African states have now accorded to proprietary actors in agriculture biotechnology and formal plant breeding over small scale

[82] Available at *http://www.wipo.int/tk/en/igc/.http://www.wipo.int/tk/en/igc/*. See Daniel F Robinson, et al (eds) *Protecting Traditional Knowledge. The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore* (2017) Routledge.
[83] See WIPO-IGC 'The Protection of Traditional Knowledge, Draft Articles Rev 2' WIPO/GRTKF/IC/32/4 (32nd Session Nov 28-Dec 2) available at *http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_32/wipo_grtkf_ic_32_4.pdf*. There are also WIPO-IGC draft articles on genetic resources and traditional cultural expressions.
[84] International Treaty on Plant Genetic Resources for Food and Agriculture, 2009 available at *http://www.fao.org/plant-treaty/en/*.
[85] Ibid. Article 9.
[86] For a critical and comprehensive account and context for this development, see Chidi Oguamanam 'Breeding Apples for Oranges: Africa's Misplaced Priority over Plant Breeders' Rights' (2015) 18 *Journal of World Intellectual Property* 165-195 available at *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2553363*.
[87] Ibid.

and informal TK-driven farmers are the bedrock of the continent's food security.[88] There is a lesson for CFTA from these negative experiences.

In a related matter, many African countries are now in the process of implementing the CBD Protocol on Biosafety as the segue to full scale introduction of GMOs.[89] Expectedly, this has sparked a lot of controversies arising from little or no consideration for environmental and socio-economic impact assessment, especially given the disruptive and displacing effect of GMOs on traditional agricultural practices and farmers in the indigenous and local communities.[90] It is our view that a transparent and robust process of public consultation and stakeholder engagement is necessary to identify appropriate policy frameworks that can supervise a constructive interface of GMOs and agricultural biotechnology with farmers-driven traditional agricultural practices on the African continent.[91]

Africa's niche as an organic producer of agriculture products, albeit by default, represents a significant opportunity for the continent's economic and trade potential as the organic genre continues to be in high demand on a global scale.[92] In the context of the CFTA, such opportunities can be better optimized through regional and sub-regional framework for certifications, trademarking and various marketing options including geographical indications.[93] In addition, the agro-ecological, agro-biodiverse and open model of knowledge production in traditional agricultural knowledge continues to assume increasing importance because of its sustainability and resilience in the era of climate change and in ways that require proactive support for that knowledge system.[94]

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[88] Ibid.

[89] Chidi Oguamanam 'Organic Farming in Nigeria in the Era of Agro-biotech and Biosafety' (2015) 3(6) *Journal of Advances in Agricultural Science & Technology* 77-80 available at *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2694743*.

[90] Ibid. See also Israel DK Agorsor, et al 'Towards Genetically Engineered Crops in Ghanaian Agriculture: Confined Field Trials and the 'Next-door Neighbor Effect' Theory' (2016)19(1) *Journal of Agrobiotechnology Management & Economics* 66 available at *http://www.agbioforum.org/v19n1/v19n1a07-agorsor.htm*. One of the key disruptive effects of GMOs is manifested in the phenomenon large scale acquisition of agricultural land on the continent that continues to displace small scale indigenous and local farming communities. See Chidi Oguamanam 'Sustainable Development in the Era of Bioenergy and Agricultural Land Grab' in S Alam, et al (eds) *International Environmental Law and the Global South* (2015) Cambridge University Press 237-255 available at *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2558195*.

[91] See Chidi Oguamanam 'Toward a Constructive Engagement: Agricultural Biotechnology as a Public Health Incentive for Less Developed Countries' (2011) 7(2) *Journal of Food Law and Policy* 257-296 available at *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2307739*.

[92] See Oguamanam 'Organic Farming in Nigeria' (n89).

[93] See Chidi Oguamanam and Teshager Dagne 'Geographical Indications: Options for Ethiopian Coffee and Ghanaian Cocoa' in de Beer, et al (n27) 77-108.

[94] See Shirin Elahi, et al *Knowledge and Innovation in Africa: Scenarios for the Future* (2013) Open AIR; Chidi Oguamanam 'Plant Genetic Resources Interdependence: Reintegrating Farmers Back in Global Food System' in Amanda Kennedy and Jonathan Liljeblad (eds.) *Food Systems Governance* (2016) Routledge Chapter 8

Despite the misalignment of recent and ongoing policies on the promotion of breeders' rights and introduction of GMOs and proprietary biotechnology with Africa's food security interests in relation to TK and farmers' rights,[95] there are still ample opportunities through the Nagoya Protocol, the African Guidelines on its Coordinated Implementation of the Nagoya Protocol, the FAO International Treaty and ongoing work at the WIPO-IGC to anchor CFTA orientation on TK and the balancing of the rights of farmers and breeders. A revisit of the AU Model Legislation and a synthesis of jurisprudence over disclosure of origin and sources of genetic resources used in IP claims and other complementary measures regarding access and benefit sharing provide pathways to continent-wide free trade agreement that is TK-friendly. Besides, a complementary aspect of such a framework should include the promotion traditional knowledge-based entrepreneurship and trade. Too much emphasis on benefit sharing undermines the continent's potential as knowledge producer as opposed to a mere resource supplier.

As a last point on this matter, with regard to TK, CFTA has to deliberately address the ambiguity with the African continent has dealt with the issue of indigeneity. The issue remains a source of discordance among African countries and often threatens their pre-existing consensus on specific issues at international fora. The question of indigeneity has ramification for the role of the state in regard to TK. Where there is an acknowledgement of a distinct population that has the status of "Indigenous People(s)", the role and claim of the state claimed on TK does not approximate to the more proactive role of the state where there is no claim to distinct indigeneity and everyone else is regarded a member of a local community. It is about time African states addressed how the ongoing dichotomy between Indigenous Peoples and Local Communities are engaged on the continent because of its implication on the role of the states on protection, ownership and administration of TK, which are now contentious matters at the WIPO-IGC.[96]

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available at *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2656423*; Chidi Oguamanam 'Agro-Biodiversity and Food Security: Biotechnology and Traditional Agricultural Practices at the Periphery of International Intellectual Property Regime Complex' (2007) *Michigan State Law Review* 215-255 available at *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2283471*; Chidi Oguamanam 'Open Innovation in Plant Genetic Resources for Food and Agriculture' (2013) 13(1) *Chicago-Kent Intellectual Property Journal* 11-50 available at *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2310635*.

[95] See Chidi Oguamanam 'Africa's Food Security in a Broken Global Food System: What Role for Plant Breeders' Rights?' (2015) 5(4) *Queen Mary Journal of Intellectual Property* 409-429 available at *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2685401*; see also Chidi Oguamanam 'Intellectual Property and the Right to Adequate Food: A Critical African Perspective' (2015) 23(3) *African Journal of International & Comparative Law* 503-525 available at *https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2683438*.

[96] See WIPO-IGC (n82).

(e) Intersection of IP with competition law and human rights law

i. IP and competition law: Economic systems based on the principle of a free market require free competition, and there appears to be tension between IP laws that effectively create time-limited monopolies and competition laws that seek to strengthen competition by, among other things, curbing monopolies. Interestingly, however, both regimes exist to promote creativity and innovation and to enhance consumer welfare.

While it is generally accepted that holding IPRs does not necessarily confer market power *per se*[97], competition law may be used to increase access to and reduce excessive prices of IPR-protected knowledge and technologies in cases of market failures and abusive conduct of IPR owners. This, currently, is an underutilised strategy, especially in developing countries.

The United Nations Development Programme has recently launched a publication on the use of competition law to promote access to health technologies.[98] According to the guidebook, competition law is complementary to some of the flexibilities built into international IP and trade rules and, therefore, warrants further attention. Competition law can be used to address wrongful conduct in the health technologies sector,

> "…whether or not they are associated with the abuse of patents or other IP rights. For instance, anticompetitive activities undertaken in the context of government procurement processes, such as bid-rigging and price-fixing, are not necessarily associated with IP. [...] Many developing countries are at an early stage in the field of competition law enforcement and some countries may not have appreciated how important competition law can be used in regulating the pharmaceutical sector, promoting access and reducing prices."

Notably, the TRIPS Agreement already contains a number of provisions directly addressing the nexus between IPR protection and anti-competitive behaviour, including Articles 8, 31(k) and 40. These should be considered when drafting the IP strategy for the CFTA.

ii. IP and human rights: The intersection of IP and human rights law is complex and, certainly in Africa, under-explored. However, the human rights implications of IP laws and policies should no longer be ignored by international law and policy makers, especially

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[97] Carlos Correa 'Intellectual Property and Competition Law' (2007) ICTSD Intellectual Property and Sustainable Development Series Issue Paper No. 21 at ix available at *https://www.iprsonline.org/resources/docs/corea_Oct07.pdf*.

[98] Fredrick Abbott, et al *Using Competition Law to Promote Access to Health Technology: A Guidebook for Low- and Middle-Income Countries* (2014) UNDP available at *http://www.undp.org/content/undp/en/home/librarypage/hiv-aids/using-competition-law-to-promote-access-to-medicine.html*.

because human rights claims have played a central role in criticising instruments such as ACTA.

The key international human rights instruments such as the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) contain numerous human rights that, in one way or another, interact with IP. Strong IP protection conflicts with some important human rights obligations such as Art 19 ("Freedom of Opinion and Expression") and Art 27 ("Freedom of Participation in the Cultural Life of the Community, Enjoyment of the Arts and Sharing of Scientific Advancement and its Benefits") of the UDHR; at the same time, instruments like the UDHR also protect the "moral and material interests" of creators in their scientific, literary or artistic productions.

The important question is how best to resolve conflicts between human rights obligations and IP protection in international instruments such as the CFTA, particularly on issues relevant to Africa, including access to educational materials and healthcare. While there are no clear-cut answers at this point,[99] it appears indispensable to at least better integrate human rights thinking into future IP law and policymaking, thereby de-linking IP from issues such as trade.

One possible consequence of such an approach could be to contemplate introducing maximum standards of IP protection instead of or in addition to the previously followed approach of prescribing only minimum standards for IP protection that member states may exceed as they wish. It could also result in requiring member states to introduce a set of mandatory user-focused flexibilities, such as exceptions and limitations. Ultimately, the aim must be to fairly balance the conflicting interest, and to better promote human rights in the context of international IPR frameworks and instruments.

[99] Some answers may soon be provided by one current project investigating the interface between human rights and current and future intellectual property law and policy reform processes in four African countries with the aim of improving access to medicines and access to knowledge in the ASK Justice project, available at *www.askjustice.org*.

Conclusion and Recommendations

Studies of African innovation have taught us that it occurs mostly in the informal sector and is not heavily reliant on conventional means of knowledge governance and appropriation, such as IP. Studies of IP regulatory frameworks have emphasised the need for laws and policies that are aligned to socio-economic realities that are supported by appropriately resourced institutions. An Afro-centric, developmental and human rights sensitive perspective has to infuse any discussion of the content and form of the CFTA IP agreement. This paper has considered several types of IP and identified the following clear priorities for inclusion in the CFTA's IP agreement:

- **Copyright**: The creation of domestic frameworks that are balanced, sound, coherent, practically-relevant, context-appropriate and responsive to digital technologies, with the aim of facilitating maximum levels of creativity. This requires appropriate provisions pertaining to the scope of protection, including exceptions and limitations, and caps on the length of protection. With regard to exceptions and limitations, the inclusion of express provisions to cater for visually impaired persons and persons with print and other disabilities; temporary copies, parallel importation; orphan works and text and data mining, is imperative.

- **Patents**: the agreement should not simply seek to secure the grant of more patents for the sake of improving Africa's ranking in ranking systems. The continent needs better patents that are granted in terms of patent law that adequately addresses both economic and humanitarian needs. This will require a more robust approach to using existing flexibilities and more aggressively leveraging policy space. As noted above, some of the RECs have provided leadership in this regard. The CFTA agreement ought to consolidate these efforts (by incorporating them) and not seek to re-invent appropriate policy and/or guidelines. National patent laws should require substantive examination and patent office capacity and processes need to be strengthened so that such examination is credible and effective.

- **Trademarks**: Less conventional trademark-based strategies such as *communal trademarks* are better suited to translate the development vision of African producers into marketable inventions because they combine elements of external protection with those of internal openness, inclusion and collaboration appropriate to local conditions. However, such strategies are currently underutilised in Africa. Domestic frameworks to aid their utilisation and protection are lacking. Available legal frameworks are tailored for the protection of conventional trademarks. The CFTA negotiations afford a platform to promote IP policies that are tailored towards achieving some form of *sui generis* framework for the protection of the less conventional trademarks at the national level.

- **Traditional Knowledge**: In terms of IP and trade policy, TK remains a key strength for the African continent. TK finds expression in major areas innovation and knowledge production including medicine, agriculture, biotechnology and food. Not only has the continent been forceful at the global stage galvanising position for global protection of TK, there are also initiatives aimed at regional harmonisation in TK as evidenced in the regional and sub-regional protocols and guidelines identified in the discussion above. The call is for negotiators to take cognisance of the positions and policy statements in these protocols and guidelines when crafting an IP policy within the context of the CFTA.

- **Competition**: The Background Paper recognises the complementary role competition law can play in relation to IP and trade rules in achieving increased access to and reduction in the price of IPR protected knowledge and technology if properly utilised. To be effective, IP rules and competition principles must be balanced. For this purpose, provisions in the TRIPS Agreement should be considered to build upon in the CFTA negotiations. The complex issue of the intersection between IP and human rights, which formed a challenge for some international trade agreements, should not be ignored in the CFTA negotiations. Key international human rights treaties contain provisions with links to IP. The focus of the CFTA negotiations should be how best to integrate human rights issues with IP law and policy in relation to questions of access to educational materials and healthcare within the African context. In this regard, the CFTA negotiations should consider exploring the stipulations of maximum standards instead of minimum standards in the area of user-focused flexibilities such as exceptions and limitations.

In addition to the substantive focus areas summarised above, certain procedural principles need to be adhered to. The fundamental priority is to ensure democratic legitimacy. This can be achieved by using open, transparent, 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.

The selection of state representatives in the negotiation process is also critically important. Many government departments are implicated in innovation, trade, education, health, and IP matters, necessitating some national inter-ministerial co-operation to ensure that the national representative(s) reflects the position of all these departments. Whilst AU member states would ultimately be the parties to the agreement, in the interests of openness and comprehensive consultation, it would be prudent to include some representation from the sub-regional IP organisations and the RECs in both consultation and negotiation processes.

The consideration of a CFTA IP agreement presents a significant opportunity to align the sub-regional IP organisations to RECs and regional integration initiatives in a manner that achieves a holistic and appropriate continental approach to IP matters. Consolidation of completed and on-going initiatives such as EAC and ECOWAS TRIPS Flexibilities Policies and ARIPO's Guidelines on the Domestication of the Marrakesh Treaty will significantly progress negotiation and conclusion of the agreement.

A global context that is marked by failure of integration and IP-related trade agreements affords Africa the perfect moment at which to craft a unique approach that meets her context and needs. This is an achievable aim as the African states have common interests and the negotiating field is more even than when the parties have polarised, contesting interests, which often play out as global north extractor parties negotiating with global south source parties. We argue that paying attention to the above substantive and procedural considerations would enhance African states' efforts to successfully negotiate and conclude an IP agreement that will be aligned to the continent's overall development agenda.

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