

# *Mapping Africa's Complex Regimes: Towards an African Centred AfCFTA Intellectual Property Protocol*

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*This article breaks new ground by advancing the first comprehensive mapping and analysis of the fragmented intellectual property (IP) architecture in Africa in light of the pending African Continental Free Trade Area (AfCFTA) IP Protocol. I argue that the AfCFTA IP Protocol presents a timely, albeit arduous, opportunity for Africa to reconstruct its broken IP architecture by aligning the conflicting sub-regional IP regimes with the development-oriented aspirations that animate the African Union's IP agenda. This will drive the design and delivery of IP systems suited to the contexts, conditions and collective interests of Africa. In appreciating Africa's agricultural resources, traditional knowledge and cultural legacies, I argue that the AfCFTA IP Protocol negotiators ought to prioritise geographical indications, plant variety protection, traditional knowledge and traditional cultural expressions, which embody Africa's innovative and creative strengths. While the African Union (AU) has policy frameworks on these subjects, there are variations in the sub-regional organisations' uptake patterns. Sub-regional organisations are increasingly embracing the Continental Strategy for Geographical Indications in Africa 2018 - 2023. Conversely, no sub-regional organisation has introduced a plant variety protection system styled on the African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources 2000. Moreover, the sub-regional regimes adopt distinct governance structures. The Organisation Africaine de la Propriété Intellectuelle (OAPI) operates a uniform system, whereas the African Regional Intellectual Property Organisation (ARIPO) operates a flexible system. The AU's ambitious attempt to resolve the policy incoherence and inconsistency through the Pan African Intellectual Property Organisation (PAIPO)- a single Pan-African IP organisation to harmonise IP and stimulate social and economic development in Africa - is inchoate. I conclude by submitting suggestions that challenge the AfCFTA IP Protocol negotiators to supply homegrown African centred IP systems that radically reimagine the normative configurations of IP.*

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# Table of Contents

<b>Mapping Africa's Complex Regimes: Towards an African Centred AfCFTA</b>	
<b>Intellectual Property Protocol . . . . .</b>	<b>233</b>
<b>Introduction . . . . .</b>	<b>234</b>
<b>I. The African Union and Intellectual Property . . . . .</b>	<b>237</b>
A. Plant Variety Protection and Geographical Indications . . . . .	237
B. Intellectual Property Commitments, Declarations and a Pan-African Organisation.	249
<b>II. African Sub-Regional Intergovernmental Organisations and Intellectual Property . .</b>	<b>255</b>
<b>A. Sub-Regional Intellectual Property Organisations . . . . .</b>	<b>255</b>
<b>B. Sub-Regional Economic Communities of the African Union . . . . .</b>	<b>265</b>
i. The Economic Community of West African States . . . . .	266
ii. The East African Community. . . . .	269
iii. The Southern African Development Community . . . . .	270
iv. The Common Market for Eastern and Southern Africa . . . . .	273
<b>III. The AfCFTA and a Development Oriented Intellectual Property Protocol . . . . .</b>	<b>275</b>
A. How Should the AfCFTA IP Protocol Connect with the Regime Complex for IP in Africa? . . . . .	276
B. What should the Scope of the AfCFTA IP Protocol be? . . . . .	281
i. Patents. . . . .	283
ii. Geographical Indications . . . . .	285
iii. Plant Variety Protection . . . . .	285
iv. Traditional Knowledge . . . . .	286
<b>IV. Conclusion. . . . .</b>	<b>289</b>

## *Introduction*

Africa is at a seminal intellectual property (IP) moment as it prepares for Phase II negotiations of the African Continental Free Trade Area (AfCFTA) Agreement covering investment, competition and IP. Inspired by the Pan-African vision of ‘an integrated, prosperous and peaceful Africa’ embodied in the African Union’s (AU) Agenda 2063 and attracted by the promise to promote sustainable socio-economic development, 44 African countries signed the *Agreement Establishing the AfCFTA* on 21 March 2018 at the 10th Extraordinary Session of the Assembly of the AU in Kigali, Rwanda.<sup>1</sup> Effective from 30 May 2019, the AfCFTA is the world’s largest continental free trade area, creating a single market for goods and services that apply to 1.2 billion people, projected to expand to 2.5 billion by 2050. Article 8 of the *Agreement Establishing the AfCFTA* provides that the Protocols on Trade in Goods, Trade in Services, Investment, *IP Rights*, Competition Policy, Rules and Procedures on the Settlement of Disputes and their associated Annexes and Appendices will form an integral part of the AfCFTA as a single undertaking.<sup>2</sup> Thus, similar to the World Trade Organisation (WTO), AfCFTA Member States cannot pick and choose which Protocols, Annexes and Appendices to adopt and which to abandon.<sup>3</sup> Member States are bound to fulfil obligations set out under all the Protocols.

Accordingly, to avoid the pitfalls of Phase I AfCFTA negotiations especially the uncritical adoption of the Dispute Settlement template of the WTO, I argue that the negotiators need to carefully contour the IP Protocol to fit the African context for which it is introduced. This requires designing homegrown IP systems that underscore the unique forms of innovation and creativity in Africa to deliver an effective development-oriented IP Protocol. One of the core conundrums for the IP Protocol negotiators to confront is the fragmented IP architecture on the continent, comprising an array of partially overlapping and sometimes conflicting agreements, laws, policies and sub-regional organisations that I refer to as the regime complex for IP in Africa.

1 54 countries have now signed the AfCFTA, only Eritrea is yet to sign. African Union, *Agreement Establishing the African Continental Free Trade Area* (Mar. 21, 2018).

2 Emphasis added. Article 8, African Union, *Agreement Establishing the African Continental Free Trade Area* (May 16, 2018).

3 On the history of the WTO Single Undertaking, see Robert Wolfe, *The WTO Single Undertaking as Negotiating Technique and Constitutive Metaphor*, 12 J. INT’L ECON. L. 835–58 (2009).

<sup>4</sup>Africa's fragmented IP architecture alongside the sharp disconnect between regional aspirations and sub-regional realities is shaped by external influences such as bilateral/regional/multilateral trade agreements and colonial/coercive pressures. This combination of factors materially contributes to the policy incoherence and inconsistency of IP regimes on the continent. I contend that the AfCFTA IP Protocol has a novel opportunity to address this fragmentation.

The prevalent forms of innovation and creativity in Africa are grounded in indigenous low-cost technologies in informal sectors such as agriculture, the mainstay of most African economies and entertainment, a nascent contributor to African economies. This does not disregard Africa's emerging digital ecosystem sparked by the ubiquity of mobile phones and the influx of high-speed internet across the continent from the early 2000s. The vibrant class of innovators and digital entrepreneurs, clustered in technology hubs modelled after Silicon Valley, such as 'Silicon Savannah' in Nairobi, Kenya and 'Yabacon Valley' in Lagos, Nigeria are developing cutting-edge technologies applicable to both the informal and formal sectors. Contextually appropriate IP systems in Africa, therefore, would consider and respond to the unique innovation and creativity scene on the continent, to ensure that IP is employed as a tool to stimulate social and economic development. In doing so, it would be imperative to design the different categories of IP, namely copyright and related rights; industrial property (including patents, trademarks, industrial designs and geographical indications-GIs); and *sui generis* rights (including plant variety protection, traditional knowledge and traditional cultural expressions), in line with the exigencies, realities and priorities on the continent. In particular, Africa's rich agricultural resources, traditional knowledge and cultural repositories afford it comparative advantages with GIs, plant variety protection, traditional knowledge and traditional cultural expressions.

The paper proceeds as follows. In Part II, I examine the AU's IP instruments. These instruments embody the AU's positions on plant variety protection, GIs, copyright and IP policies. The instruments also inform the African Group's submissions at the international level, in fora like the WTO and the World Intellectual Property Organization (WIPO). In Part III, I explore the conflicting IP frameworks at the sub-regional level under the interrelated IP organisations and sub-regional economic communities of the AU (RECs). The asymmetrical IP sub-regional organisations are

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<sup>4</sup> On regime complexity, see Kal Raustiala & David G. Victor, *The Regime Complex for Plant Genetic Resources*, 58 INT'L ORGS. 277 (2004); Karen Alter & Kal Raustiala, *The Rise of the International Regime Complexity*, 14 ANN. REV. L. & SOC. SCI. 329 (2018).

the Organisation Africaine de la Propriété Intellectuelle (OAPI), comprised chiefly of Francophone African countries and the African Regional Intellectual Property Organisation, (ARIPO), comprised chiefly of Anglophone African countries.

The assorted RECs are the Arab Maghreb Union (AMU), the Economic Community of West African States (ECOWAS), the East African Community (EAC), the Intergovernmental Authority on Development (IGAD), the Southern African Development Community (SADC), the Common Market for Eastern and Southern Africa (COMESA), the Economic Community of Central African States (ECCAS), and the Community of Sahel-Saharan States (CENSAD).<sup>5</sup> These sub-regional organisations are assigned focal roles in the implementation of the AfCFTA IP Protocol. Yet, their legal frameworks are often disconnected from both the AU positions and policies and one another. The challenge for the AfCFTA IP Protocol negotiators as I discuss in Part IV would be to meticulously assess the state of affairs and imaginatively produce a representative but radical IP Protocol that centres, celebrates and champions Africa's unique forms of innovation and creativity.

My central claim is that negotiators can confidently conceive original conceptualisations of IP that produce ingenious legal norms, principles and paradigms while working within the boundaries of the international IP order. By prioritising and promoting the areas of strength for African innovation and creativity, the AfCFTA IP Protocol, like previous pioneering examples from Africa— the AU's *African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources 2000* (African Model Law) and ARIPO's *Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore 2010* (Swakopmund Protocol)—ought to be integral in defining the boundaries of African IP law. At a time when the Governing Body of the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) and the WIPO Intergovernmental Committee (WIPO IGC) are grappling with the protection of farmers rights, traditional knowledge and traditional cultural expressions, the envisioned exemplary AfCFTA IP Protocol could serve as references for these organisations and Global South constituencies.

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5 Part III of this Article focuses on the Economic Community of West African States (ECOWAS) in western Africa, the East African Community (EAC) in Eastern Africa, the Southern African Development Community (SADC) in southern Africa, and the Common Market for Eastern and Southern Africa (COMESA) in eastern and southern Africa.

## I. THE AFRICAN UNION AND INTELLECTUAL PROPERTY

The Organisation of African Unity (OAU, the predecessor to the AU) was established by the OAU Charter of 25 May 1963 to *inter alia* promote the unity and solidarity amongst the newly independent African States and to fight all forms of neo-colonialism.<sup>6</sup> Following the OAU Heads of State and Government Declaration of 9 September 1999 (Sirte Declaration) for the establishment of an African Union, the AU was launched on 9 July 2002 to *inter alia* accelerate the political and socio-economic integration of the continent and defend African common positions on issues of interest to the continent.<sup>7</sup> The AU's IP policy frameworks, therefore, provide insights into its activities and African common positions on IP.

While the OAU Charter and the Constitutive Act of the AU do not mention IP, the following five principal instruments of the AU adopted from the early 2000s onward, set out African common positions on plant variety protection, GIs, IP policies and institutional roadmaps.<sup>8</sup> These are the African Model Law, the Continental Strategy for Geographical Indications in Africa 2018–2023, (Continental Strategy for GIs), the African Union Strategic Guidelines for the Coordinated Implementation of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation in Africa', (ABS Strategic Guidelines), the Science, Technology and Innovation Strategy for Africa (STISA-2024) and the Pan African Intellectual Property Organisation (PAIPO) Statute. Other related instruments on the AU's IP commitments and declarations are considered.

This part is divided into two sections. The first section focuses on the African Model Law, Continental Strategy for GIs, ABS Strategic Guidelines and related instruments. The second section focuses on the STISA-2024, PAIPO Statute and related instruments. Both sections share concrete examples of provisions and critical reflections on the AU IP policy frameworks under study.

### A. Plant Variety Protection and Geographical Indications

The African Model Law is the AU's most significant input into the international IP

6 Preamble and Article II, 1(a), OAU Charter (May 25, 1963). The Heads of State and Government of the OAU, through a Sirte Declaration on September 9, 1999 called for the establishment of an African Union, to accelerate the process of integration in the continent. In July 2002, the AU was officially launched in Durban South Africa.

7 Article 3, Constitutive Act of the African Union (July 11, 2000).

8 I acknowledge that some of these instruments such as the Continental Strategy for Geographical Indications in Africa 2018–2023 reflects the (external) interests of funders.

order. The African Model Law was designed to assist AU Members craft national laws that reflect their ‘political orientation, national objectives and level of socio-economic development’ and to fulfil interconnected obligations under the World Trade Organisation’s (WTO) *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS) and the *Convention on Biological Diversity* (CBD).<sup>9</sup> Article 27.3(b) of TRIPS obliges all members of the WTO to *inter alia* protect plant varieties through patents, an effective *sui generis* system or any combination thereof.<sup>10</sup> Articles 3, 8 and 15 of the CBD recognise the sovereign rights of States to exploit their natural resources, preserve the knowledge of indigenous communities and determine access to their genetic resources. In formulating the African Model Law, Johnson Ekpere, its principal author and then Executive Secretary OAU Science Technical Research Commission (STRC), sought to balance enforcement-backed private rights as required under TRIPS with the conservation, sustainable use, and fair and equitable benefit-sharing from the use of biological diversity and genetic resources endorsed under the CBD.<sup>11</sup>

Accordingly, the African Model Law is anchored on the principle of balanced regional, sub-regional and national laws in Africa that cater to stakeholders’ divergent needs. In other words, these laws should protect the innovations, technologies and practices of local communities, including farming communities and indigenous peoples who conserve and enhance biological diversity for the benefit of present and future generations alongside commercial plant breeders who develop new plant varieties based on farmers’ varieties.<sup>12</sup> In practical terms, the African Model Law rejects the unconditional adoption of the *International Convention for the Protection of New Varieties of Plants* (UPOV) 1991 and patents for plant varieties.<sup>13</sup> It embraces the *sui generis* option under TRIPS, which it creatively construes through the following provisions. Access to biological resources and benefit-sharing principles on the conditions of

9 J. A. Ekpere, *The OAU’s Model Law: The Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources*, 1 (Organisation of African Unity, Scientific, Technical and Research Commission, Lagos Nigeria, 2000) [African Model Law].

10 Agreement on Trade-Related Aspects of Intellectual Property Rights, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1C, 1869, U.N.T.S. 299, 33 I.L.M. 1197 (1994). Convention on Biological Diversity, U.N.T.S. 79, 143, 31 I.L.M. 818 (June 5, 1992).

11 Ekpere, *supra* note 9, at 1–4; J. A. Ekpere, *African Model Law on the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources*, in AFRICAN PERSPECTIVES ON GENETIC RESOURCES: A HANDBOOK ON LAWS, POLICIES, AND INSTITUTIONS, 275–86 (Kent Nnadozie et al, Robert Lettington, Carl Bruch, Susan Bass & Sarah King eds., Environmental Law Institute 2003). The acronym ‘UPOV’ is used interchangeably with its organisation: International Union for the Protection of New Varieties of Plants (UPOV).

12 Ekpere, *supra* note 9, at 3.

13 Ekpere, *supra* note 9, at 8.



prior informed consent (Articles 3 to 15), local and indigenous community rights over biological resources (Articles 16 to 23), farmers rights (Articles 24 to 27), plant breeders' rights (Articles 28 to 56) and institutional arrangements (Articles 57 to 66).

In constructing the *sui generis* system of the African Model Law, Ekpere, an agronomist and Professor of Agriculture, foregrounded Africa's small-scale farming history. Although hardly recorded in writing, small-scale African farmers have perennially engaged in experimenting with, domesticating and developing plant varieties that contribute to the conservation of biological diversity. Fusing corporate farmer-originated technologies and traditional knowledge with indigenous agro ecological farming practices, these farmers select, save, use, exchange and sell farm-saved plant varieties and propagating materials to feed their families and communities. However, with the extension of IP to plant varieties in the United States (US) through its *Plant Patent Act in 1930* and the adoption of UPOV in 1961, which inspired the introduction of plant variety protection in TRIPS, African countries are faced with IP obligations that are not as directly relevant to their context as the established practices of saving, using and exchanging and propagating plant materials to feed their families and communities. Before TRIPS, only Kenya, South Africa and Zimbabwe had plant variety protection systems.<sup>14</sup> Notably, the plant variety protection options in Article 27.3(b) of TRIPS reflects the debates both within the Global North (US, European Union (EU), Japan and Canada: intra-Quad dissonance) and between the Global North and Global South.<sup>15</sup> While the US pushed for the inclusion of patents for plant varieties, the EU opposed this. Conversely, while the Global North supported a plant breeder rights' focused system, the Global South led by the African Group, India and Thailand, amongst others, favoured a creative *sui generis* system that includes provisions such as access and benefit-sharing and farmers' rights to protect small-scale farmers.

As I have argued elsewhere, although proposals from the African Group, Thailand and India negotiators to harmonise TRIPS with the CBD and the *International Undertaking on Plant Genetic Resources for Food and Agriculture* failed during the TRIPS negotiations, these actors boldly demonstrated capacity to convert their proposals into living laws at national and regional levels, thereby reframing plant variety protection

14 Titilayo Adebola, *Access and Benefit Sharing, Farmers' Rights and Plant Breeders Rights: Reflections on the African Model Law*, 9 QUEEN MARY J. INTELL. PROP. 105, 119 (2019).

15 UNCTAD-ICTSD, *Resources Book on TRIPS and Development*, 395–99 (Cambridge University Press, 2005). Dwijen Rangnekar, *Geneva Rhetoric, National Reality: The Political Economy of Introducing Plant Breeders' Rights in Kenya*, 19 NEW POLI. ECON. 359, 360 (2014).



from the bottom.<sup>16</sup> One of the remarkable achievements of the African Model Law (like *Thailand's Plant Variety Protection Act (PVPA), 1999* and *India's Protection of Plant Varieties and Farmers' Rights Act (PPVFR), 2001*) is the ability to weave contradictory and multifaceted legal norms, principles and systems into a coherent legal framework. Nonetheless, the African Model received international opposition. In Ekpere's words, 'there was substantial international resistance to the content of the Model Law. While some felt it will deprive Africa the benefit for international trade, others felt the continent will lose out from the benefit of modern science, technology and innovation. In fact, it was not expected that this type of document would emanate from an African organisation.'<sup>17</sup> Equally, the Genetic Resources Action International Network (GRAIN) reports that WIPO and UPOV sought to 'subvert the whole OAU process' by recommending the rewriting of the African Model Law to conform with their IP regimes. For example, WIPO rejected the principle of inalienability of community rights, which is one of the pillars of the Model Law.<sup>18</sup> At the same time, UPOV recommended that farmers rights should be subject or subordinate to plant breeders' rights.<sup>19</sup>

The current text of the African Model Law confirms that the AU did not implement these recommendations. As Tewolde Berhan Egziaber, then head of Ethiopia's Environmental Protection Authority averred, WIPO and UPOV were invited to 'contribute to the furtherance of the OAU process, not to change the essence of the Model Law.'<sup>20</sup> Importantly, the African Model Law, along with the PVPA and the PPVFR, stand as examples of creative *sui generis* plant variety protection options under Article 27.3(b) of TRIPS. The African Model Law also establishes the African common

16 Titilayo Adebola, *Examining Plant Variety Protection in Nigeria: Realities, Obligations and Prospects*, 22 J. WORLD INTELL. PROP. 36, 49(2018). TRIPS negotiations (Uruguay Round of Multilateral Trade Negotiations 1986 to 1993 (Uruguay Round) that birthed TRIPS).

17 Adebola, *supra* note 14, at 115.

18 Genetic Resources Action International Network (GRAIN), *IPRs Agents Try to Derail OAU Process: UPOV and WIPO Attack Africa's Model Law on Community Rights to Biodiversity* (June 18, 2001), <https://www.grain.org/article/entries/1966>. Noah Zerbe, *Biodiversity, Ownership, and Indigenous Knowledge: Exploring Legal Frameworks for Community, Farmers, and Intellectual Property Rights in Africa*, 53 ECOLOGICAL ECON. 493 (2005).

19 Genetic Resources Action International Network (GRAIN), *IPRs Agents Try to Derail OAU Process supra* note 18, Zerbe *supra* note 18, *UPOV and WIPO Attack Africa's Model Law on Community Rights to Biodiversity* (June 18, 2001), <https://www.grain.org/article/entries/1966>. Noah Zerbe, *Biodiversity, Ownership, and Indigenous Knowledge: Exploring Legal Frameworks for Community, Farmers, and Intellectual Property Rights in Africa*, 53 ECOLOGICAL ECON. 493 (2005).

20 Genetic Resources Action International Network (GRAIN), *IPRs Agents Try to Derail OAU Process: supra* note 18, *UPOV and WIPO Attack Africa's Model Law on Community Rights to Biodiversity* (June 18, 2001), <https://www.grain.org/article/entries/1966>.

(negotiating) position on plant variety protection and biological diversity, debated and maintained at various international fora.<sup>21</sup> Indeed, the African Group heavily relied on the African Model Law during the negotiations for the Nagoya Protocol with the final text of the Protocol mirroring the aspirations and provisions of the African Model Law.<sup>22</sup>

Despite the existence of the exemplary African Model Law and its rejection of the unconditional adoption of the UPOV 1991 Convention, it is paradoxical to see a proliferation of UPOV membership in Africa. I argue that twin shortcomings of the African Model Law contribute to its non-existent uptake in Africa. First, it fails to offer clear templates to facilitate the implementation of novel provisions like community rights in Part IV and farmers' rights in Part V. Although the Model Law is not intended to be prescriptive, many African sub-regional organisations (and countries), which have limited expertise on the esoteric plant variety protection discourse, are unable to carve out IP/TRIPS complaint laws from it. To contrast this with the UPOV system, the UPOV 1991 Convention provides a ready-made template for members to adopt. Second, the AU does not offer support with the design and introduction of plant variety protection laws at the sub-regional and national levels. To further contrast this with the UPOV system, the UPOV office offers its members seemingly unlimited support throughout the design and introduction of UPOV-styled plant breeders' rights systems at sub-regional (and national) levels.

Even though Ekperere emphasises that the African Model is 'work in progress', the AU has done little to address its conceptual limitations, promote its implementation or probe the proliferation of UPOV in Africa.<sup>23</sup> One of the AU's limited interventions in relation to the African Model Law is the *Gap Analysis Report on the African Model Law on the Protection of the Rights of Local Communities, Farmers and Breeders and for the Regulation of Access to Biological Resources* (Gap Analysis Report) published in February 2012.<sup>24</sup> The Gap Analysis Report stems from the 2011 AU Assembly Decision

21 See, e.g., World Trade Organisation, *Taking Forward the Review of Article 27.3(b) of the TRIPS Agreement: Joint Communication from the African Group* (WTO Council for Trade-Related Aspects of Intellectual Property Rights IP/C/W/404, June 23, 2003); World Trade Organisation, *Draft Decision to Enhance Mutual Supportiveness Between TRIPS Agreement and the Convention on Biological Diversity: Communication from Brazil, China, Colombia, Ecuador, India, Indonesia, Peru, Thailand, the ACP Group, and the African Group* (WTO Trade Negotiations Committee TN/C.W/59, Apr. 19, 2011).

22 TSHIMANGA KONGOLO, *AFRICAN CONTRIBUTIONS IN SHAPING THE WORLDWIDE INTELLECTUAL PROPERTY SYSTEM*, 119 (Routledge 2013).

23 Adebola, *supra* note 14, at 118.

24 Peter Munyi, Marcelin Tonye Mahop, Pierre du Plessis, Johnson Ekperere & Kabir Bavikatte, *A Gap Analysis Report on the African Model Law on the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources* (Commissioned by

on Africa's participation in the 10th Conference of Parties to the CBD [Assembly/AU/Dec.352(XVI)].<sup>25</sup> The AU Assembly agreed to prioritise biological diversity in the AU and to encourage AU Members to become parties to the CBD and its *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity* (Nagoya Protocol).<sup>26</sup> The AU Assembly's Decision and the African Group's active participation in the negotiations for the Nagoya Protocol inspired the call to revisit the African Model Law, especially in light of other related developments in international law such as the adoption of the *International Treaty on Plant Genetic Resources for Food and Agriculture* in 2001.

The Gap Analysis Report reveals areas for revisions in the African Model Law, such as its scope and provisions on IP, access and benefit-sharing and traditional knowledge related to genetic resources.<sup>27</sup> The Report proposes two potential action points, with the second as the preferred option. These two action points are first, to undertake a thorough review and revision of the African model Law, and second to craft a complementary guideline document for Member States to consult alongside the African Model Law. However, the Gap Analysis Report, like the African Model Law it builds on, omits to include (practical) templates to assist AU Member States to translate its provisions into substantive sub-regional or national laws. Although this aligns with its ethos as a 'Model Law' or 'non-prescriptive guideline', as I argue above, it doubles as one of the main flaws of the African Model Law.

The AU has neither reviewed and revised the African Model Law nor crafted the complementary guideline as recommended. Nevertheless, following the AU's commitment to prioritise biological diversity and the implementation of biological diversity related international instruments in Africa, including the CBD and Nagoya Protocol, it adopted the ABS Strategic Guideline at the 25th Ordinary Session of the AU Assembly, held in South Africa, in June 2015.<sup>28</sup> The ABS Strategic Guidelines

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the Department of Human Resources, Science and Technology of the African Union Commission, Feb. 2012) [hereinafter Gap Analysis Report]. The Gap Analysis Report was supported by the GIZ on behalf of the Federal Ministry for Economic Cooperation and Development, the Norwegian Ministry of Foreign Affairs, Danish Ministry of Environment, Institute de l'énergie et de l'environnement de la Francophonie (IEPF) and the European Union.

25 Assembly/AU/Dec.352 (XVI), Paragraph 3, Decision on the Report on Africa's Participation in the Nagoya Conference on Biodiversity Doc. Assembly/AU.15 (XVI) Add.3.

26 *Id.*

27 Gap Analysis Report, *supra* note 24.

28 The African Union also adopted the *African Union Practical Guidelines for the Coordinated Implementation of the Nagoya Protocol in Africa* [hereinafter ABS Practical Guidelines] at the 25th Ordinary Session of the African Union Assembly, held in South Africa in June 2015. The ABS Practical Guidelines provides step by step guidance on the implementation of the ABS

recognise the links between the CBD, Nagoya Protocol, ITPGRFA, *United Nations Declaration on the Rights of Indigenous Peoples* and principles established in the African Model Law.

The ABS Strategic Guidelines encourage African countries to accede to the Nagoya Protocol and to establish common African access and benefit-sharing standards to prevent (or punish) the misappropriation of African genetic resources and traditional knowledge.<sup>29</sup> It calls on the AU Commission, in collaboration with the RECs, to facilitate a coordinated implementation of the Nagoya Protocol in Africa. The ABS Strategic Guidelines further urge AU Member States to allocate adequate financial (and relevant resources) to support the fulfilment of their obligations under the Nagoya Protocol and other international agreements related to access and benefit-sharing. It sets out detailed instructions to assist AU Member States develop and implement access and benefit-sharing systems at the national and sub-regional levels. These include access to genetic resources for utilisation (Articles 8 to 17), benefit-sharing (Articles 18 to 24), monitoring and compliance (Articles 25 to 29), protection and promotion of traditional knowledge associated with genetic resources, community and farmers' rights, and economic development (Articles 30 to 32), and capacity building, capacity development and technology transfer (Articles 33 to 36).

Like the African Model Law and Gap Analysis Report, the ABS Strategic Guidelines sets out concrete provisions on genetic resources and associated traditional knowledge to assist African countries in drafting comprehensive access and benefit-sharing regulations to prevent the misappropriation and misuse of these resources. Although the African Model Law and Gap Analysis recommend the inclusion of access and benefit-sharing provisions as crucial elements of *sui generis* plant variety protection systems, African countries can introduce these provisions in separate or standalone access and benefit-sharing laws or regulations at sub-regional and national levels, which many have chosen. The Access and Benefit-Sharing Clearing-House, a global

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Strategic Guidelines and it is an appendix to that document. The explanatory notes for the ABS Practical Guidelines states that the Strategic Guidelines for the Nagoya Protocol should be read and interpreted alongside the CBD, Bonn Guidelines, Nagoya Protocol and ITPGRFA. The ABS Strategic Guidelines also complement materials on the subject, such as the IUCN's Explanatory Guide to the Nagoya Protocol on Access and Benefit Sharing, the Swiss-funded Management Tool and Best Practice Standard and its accompanying Handbook for Implementing Genetic Resource Access and Benefit Sharing Activities and the SAN Bio Traditional Knowledge and Plant Genetic Resources Guidelines. *See also* The African Union Common Position for Negotiations of the International Regime on Access and Benefit Sharing (Adopted by the Pan-African Conference of Ministers in charge of ABS, March 2020, Windhoek, Namibia).

29 ABS Practical Guidelines, *supra* note 28, at Preamble.

repository of access and benefit-sharing information administered by the CBD Secretariat, reveals that 21 African countries have legislative, administrative or policy measures for access and benefit-sharing.<sup>30</sup> However, most of the countries do not include these measures in plant variety protection systems - they include them national environmental law systems.<sup>31</sup> To be sure, African countries can fulfil their obligations under the CBD and Nagoya Protocol with the introduction of these stand-alone access and benefit-sharing provisions. However, this is antithetical to the *raison d'être* of the African Model Law, which seeks to reconcile the conflicting principles of sovereignty and community rights under the CBD with private property rights under TRIPS.<sup>32</sup> The gap in coordination and communication amongst the multiple government institutions exacerbates misappropriation of genetic resources, which a holistic *sui generis* plant variety protection system could avert.

One of the AU's most recent instruments on IP is its Continental Strategy for GIs.<sup>33</sup> The AU's Department of Rural Economy and Agriculture (DREA) designed the Continental Strategy for GIs in collaboration with the AU Member States, regional economic communities, and technical and development partners such as WIPO and the Food and Agriculture Organisation of the United Nations (FAO).<sup>34</sup> The Strategy seeks to align with international and AU initiatives such as the United Nations Sustainable Development Goals (UNSDGs), Comprehensive Africa Agriculture Development Programme (CAADP), Malabo Declaration on Accelerated Agricultural Growth and Transformation for Shared Prosperity and Improved Livelihoods (Malabo Declaration) and AU Agenda 2063. The Continental Strategy for GIs provides a

30 Convention on Biological Diversity, *The Access and Benefit-Sharing Clearing-House*, <https://absch.cbd.int> (accessed Aug. 25, 2020). This number may also reflect those countries that have submitted updates to the Access and Benefit-Sharing Clearing House.

31 Algeria, Benin, Burkina Faso, Burundi, Cameroon, Congo, Cote d'Ivoire, Democratic Republic of the Congo, Ethiopia, Kenya, Madagascar, Malawi, Mauritania, Morocco, Niger, Senegal, South Africa, Sudan, Togo, Uganda, United Republic of Tanzania and Zimbabwe. South Africa has a requirement for patent applicants to 'furnish information relating to any role played by an indigenous biological resource, a genetic resource or traditional knowledge or use in an invention; and to provide for matters connected therewith' No. 20 of 2005: Patents Amendment Act, 2005.

32 Ekpere, *supra* note 11, at 277.

33 African Union, *Continental Strategy for Geographical Indications in Africa 2018–2023* (Oct. 2017).

34 International organisations such as the International Cooperation Centre of Agricultural Research for Development (CIRAD), the Research and Technology Exchange Group (GRET) and African Regional Economic Communities such as the Economic Community of West African States (ECOWAS) and the Common Market for Eastern and Southern Africa (COMESA), as well as Agriculture and Intellectual Property Ministers, Universities, Researchers, Non-Governmental Organisations, Producers' Representatives and practitioners were involved in the e-consultation process.

voluntary guide to drive the AU Commission's mandate on the subject. The Strategy also offers an opportunity for stakeholders interested in the subject, such as OAPI, ARIPO, RECs, AU Member States and international partners, to collaborate on the protection of GIs in Africa.

The Continental Strategy on GIs makes the case that GIs can be used as a tool to promote sustainable social and economic development in Africa, because of the continent's rich natural resources, biological/cultural diversity and traditional knowledge.<sup>35</sup> Africa is home to genetically diverse cultivated plants, wild relatives, farmed/domesticated animals and small-scale farmers with rich portfolios of traditional knowledge, who produce up to 80 per cent of some food crops consumed on the continent.<sup>36</sup> Employing the flexibility codified in TRIPS, the Strategy encompasses legal protection for GIs through *sui generis* systems and trademark systems. It notes the importance of effective sub-regional and national legal and institutional frameworks as well as public-private partnerships to ensure the successful development and protection of GIs.<sup>37</sup> It presents four advantages that Africa can leverage to maximise the potentials of GIs for the continent.<sup>38</sup> First, Africa has an enormous assortment of traditional (food and non-food) products with significant economic, environmental and social contributions. Second, Africa is a budding market for quality origin-linked traditional (food and non-food products). Third, African GI products, especially key commercial products like cocoa, coffee and tea, are in high demand in export markets. Fourth, Public and Private (national, regional and international) stakeholders have indicated interest and commitment to invest in developing African GIs products.

However, the Continental Strategy for GIs highlights pertinent challenges, both generic (those related to development projects in the food and agricultural sectors) and GIs specific challenges.<sup>39</sup> Generic challenges include organising small holder

35 African Union, *Continental Strategy for Geographical Indications in Africa 2018–2023*, at 1 (Oct. 2017). See also EXTENDING THE PROTECTION OF GEOGRAPHICAL INDICATIONS: CASE STUDIES OF AGRICULTURAL PRODUCTS IN AFRICA (Michael Blakeney et al. Thierry Coulet, Getachew Mengistie & Marcelin Tonye Mahop eds., Earth scan from Routledge, 2012); Chidi Oguamanam & Teshager Dagne, *Geographical Indication (GI) Options for Ethiopian Coffee and Ghanaian Cocoa*, in INNOVATION AND INTELLECTUAL PROPERTY COLLABORATIVE DYNAMICS IN AFRICA, 77 (Jeremy De Beer et al. Chris Armstrong, Chidi Oguamanam & Tobias Schonwetter eds., UCT Press and GIZ 2014). Michael Blakeney & Getachew Mengistie Alemu, *Geographical Indications in Africa: Opportunities, Experiences and Challenges*, 38 EUR. INTEL. PROP. REV. 290 (2016).

36 African Small holder Farmers Group, *Supporting Small holder Farmers in Africa*, (July 2013), <http://www.ruralfinanceandinvestment.org/sites/default/files/ASFG-Framework-Report.pdf>.

37 African Union, *Continental Strategy for Geographical Indications in Africa 2018–2023*, at 9–10 (Oct. 2017).

38 *Id.* at 10–15.

39 *Id.* at 15–18.



producers with limited resources and investment capacity. Specific GI challenges stem from its complex ecosystem. This encompasses questions around multidisciplinary interactions, (agronomy, economics, geography, science, technology, law), multi-stakeholder partnerships, (public and private, government authorities value chain actors and consumers) and multi layered mapping (identification of potential products, qualities of products, definition of rules, certification and control).<sup>40</sup> The Continental Strategy for GIs further confirms the AU's commitment to draft a comprehensive Continental Model Law for GIs to support AU Member States with the development of sub-regional or national GIs laws.<sup>41</sup> This Model Law, to be designed in line with relevant international treaties such as TRIPS, CBD, ITPGRFA, *Lisbon Agreement for the Protection of Appellations of Origin and their International Registration 1958* and *Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods 1970*, will address issues such as the clarification of similar and sometimes confusing terms: GIs and appellations of origin, the connections between traditional knowledge and GIs, qualification to register and own GIs, as well as concerns over generic city and transborder GIs. To avoid some of the limitations of the African Model Law discussed above, this Continental Model Law for GIs should set out fully developed and easily adaptable substantive provisions, which could constitute the GIs section in the AfCFTA IP Protocol.

In addition, the Continental Strategy for GIs submits that it is a starting point for the establishment of an 'Action Plan Geographical Indications in Africa' and concludes with six strategic outcomes.<sup>42</sup> First, shared African vision on GIs as a tool to contribute to sustainable rural development. Second, legal and institutional frameworks at national and regional levels to protect GIs. Third, development and registration of GI products as pilots and drivers for development. Fourth, innovative market development for GI products through trade within Africa and in export markets outside Africa, particularly the European Union. Fifth, research, training programs and extension to generate informed and African tailored practices. Sixth, the creation of awareness about GIs amongst all stakeholders. Notably, Africa already has several GI products including Penja Pepper and Oku White honey from Cameroon, Ziama-Macenta coffee from Guinea, Rooibos Tea from South Africa, Tete goat meat from Mozambique, Argan

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40 *Id.* at 15–18.

41 *Id.* at 47.

42 *Id.* at 51–53.



Oil from Morocco and Taita basket from Kenya.<sup>43</sup> There are also on-going projects to develop other GI products around the continent. For example, WIPO is undertaking a project with the FAO to protect a wild species of fruit 'Madd de Casamance' from Senegal.<sup>44</sup> Nonetheless, these GI products do not even begin to capture the breadth of potential products in Africa.

Interestingly, unlike plant variety protection discussed above where the polarisations at the international level on the protection of plant breeders' rights or farmers' rights are couched as Global North versus Global South, with GIs, the debates are Old World versus New World.<sup>45</sup> Old World refers to countries with long histories, bountiful traditional knowledge and a smörgåsbord of placed-based products like countries in Africa, Asia and Europe. New World refers to countries with more recent histories, usually with migrant populations and fewer placed-based products like Australia, the US, and New Zealand. The Old World (or *Demandeurs*) advocates for stronger GI protection through *sui generis* systems while the New World promote trademarks as sufficient GI protection.<sup>46</sup> Drawing examples from the TRIPS Council and WIPO, Getachew Mengistie and Michael Blakeney point out European countries attempts to enlist support from their African counterparts to promote stronger *sui generis* systems.<sup>47</sup> One of the ways *sui generis* systems provide stronger protection is by allowing owners to prevent direct or indirect commercial use of registered names. This includes the prevention of the use of expressions like 'kind', 'style' and 'type' or the use of evocative emblems or symbols that may provide false or misleading information about the origin of the products. Like the EU where GIs are given priority in free

43 See THE PAN-AFRICAN GEOGRAPHICAL INDICATIONS INFORMATION HUB, <https://africa-gi.com/en/pan-african-gi/search> (accessed Aug. 28, 2020).

44 *Id.*

45 See debates on geographical indications during the Uruguay Round of Multilateral Trade Negotiations (1986 to 1993), DANIEL GERVAIS, *THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS* (Sweet & Maxwell, 1998); JAYASHREE WATAL, *INTELLECTUAL PROPERTY RIGHTS IN THE WTO AND DEVELOPING COUNTRIES* (Kluwer Law International, The Hague, 2001); UNCTAD-ICTSD, *Resources Book on TRIPS and Development*, 267–321 (Cambridge University Press, 2005).

46 Dwijen Rangnekar, *Demanding Stronger Protection for Geographical Indications: The Relationship Between Local Knowledge, Information and Reputation* (United Nations Institute for New Technologies Discussion Paper Series, Apr. 2004). Irene Calboli, *Expanding the Protection of Geographical Indications of Origin under TRIPS: "Old" Debate or "New" Opportunity?*, 10 MARQUETTE INTEL. PROP. L. REV. 182–203 (2006).

47 Getachew Mengistie & Michael Blakeney, *Geographical Indications and the Scramble for Africa*, 25 AFR. J. INT'L & COMP. L. 199–220 (2017). See, e.g., World Trade Organisation Council for Trade-Related Aspects of Intellectual Property Rights, *Communication from Bangladesh, Bulgaria, Cuba, the Czech Republic, Georgia, Hungary, Iceland, India, Jamaica, Kenya, The Kyrgyz Republic, Liechtenstein, Moldova, Nigeria, Pakistan, Slovenia, Sri Lanka, Switzerland and Turkey* (IP/C/W/308. Rev. 1, Oct. 2, 2001).

trade negotiations, Africa's potential collection of GI products can offer bargaining advantages in future bilateral/regional/multilateral trade negotiations.

GI can also be employed as a tool to localise economic control and engender effective endogenous development in Africa, which is consistent with the development-oriented aspirations of the AfCFTA. However, it is important to ensure inclusive social and economic development that directly benefits all actors in the GI product value chains, including small-scale producers. As Rosemary Coombe points out, GI advocates often preach a 'social imaginary' of harmonious communities and traditions derived from singular cultures with peaceful political relationships obscuring the social, economic and political complexities 'or perils' embedded in the development and sustenance of some GI products.<sup>48</sup>

## **B. Intellectual Property Commitments, Declarations and a Pan-African Organisation**

Beyond the African Model Law and Continental Strategy for GIs, the AU has maintained its interest in promoting IP around Africa through both specialist IP and non-specialist IP instruments. For example, the *Charter for African Cultural Renaissance* adopted by the Heads of State and Government of the African Union meeting in the Sixth Ordinary Session, (23 to 24 January 2006), recognises the role of copyright in conserving culture as one of the avenues to chart Africa's course towards technological development and respond to the challenges of globalisation.<sup>49</sup> Article 23 of the Charter provides that African States 'should prepare an inter-African convention on copyright in order to guarantee the protection of African works. They should also intensify their efforts to modify existing international conventions to meet African interests.' In the same vein, Article 24 of the Charter provides that African

48 Rosemary Coombe & S. Ali Malik, *Transforming the Work of Geographical Indications to Decolonise Racialised Labour and Support Agroecology*, 8 UC IRVINE L. REV. 363 (2018); Rosemary Coombe & S. Ali Malik, *Rethinking the Work of Geographical Indications in Asia: Addressing Hidden Geographies of Gendered Labour*, in GEOGRAPHICAL INDICATIONS AT THE CROSSROADS OF TRADE AND DEVELOPMENT IN ASIA, 87–121 (Irene Calboli & Ng-Loy Wee Loon eds., Cambridge University Press, 2017); Rosemary J Coombe, Sarah Ives & Daniel Huizenga, *Geographical Indications: The Promise, Perils and Politics of Place-Based Products*, in SAGE HANDBOOK ON INTELLECTUAL PROPERTY, 207–223 (Matthew David & Deborah Halbert eds.: Sage Publications, 2014); Rosemary Coombe, Sarah Ives & Daniel Huizenga, *The Social Imaginary of GIs in Contested Environments: Politicized Heritage and the Racialized Landscapes of South African Rooibos Tea*, in SAGE HANDBOOK ON INTELLECTUAL PROPERTY, 224–37 (Matthew David & Deborah Halbert eds., Thousand Oaks: Sage Publications 2014).

49 African Union, *Charter for African Cultural Renaissance* (Department for Social Affairs, African Union Commission, Jan. 24, 2006). 34 countries have signed the Charter and 14 countries have ratified it. It will enter into force upon receipt by the Commission of the African Union of the Instruments of ratification and adhesion from two-thirds of the total membership of the African Union.

States 'should enact national and inter-African laws and regulations guaranteeing the protection of copyright and set up national authors associations and copyright offices and encourage the establishment of authors' associations responsible for protecting the material and moral interests of those who produce cultural goods and services.'

Similar to plant variety protection and GIs examined in the preceding section, African countries have abundant creative works that could qualify for protection under copyright systems. The early forms of entertainment and expressions, (otherwise known as folklore), including paintings, riddles, storytelling, songs and traditional dances have evolved over generations, with contemporary iterations adjusted to accommodate global audiences.<sup>50</sup> As such, Africa has untapped potential to develop globally competitive creative works. In designing systems that accord African authors and creators recognition and compensation for the use of their creative works, it is crucial to ensure that copyright laws include culturally appropriate limitations and exceptions to ensure access to educational materials and knowledge. Ruth Okediji argues that limitations and exceptions 'consistent with local institutional conditions, and which map onto domestic values, are more likely to strengthen domestic capacity for the production of knowledge goods, while also providing essential support for development planning.'<sup>51</sup>

For its part, the *Science, Technology and Innovation Strategy for Africa* (STISA-2024), which is the first phase of a ten-year strategy (2014-2024) that positions science, technology and innovation at the core of the Agenda 2063, maintains the AU's commitment to promoting IP in Africa. One of the strategic objectives of STISA-2024 is to 'protect knowledge production (including inventions and indigenous knowledge) by strengthening intellectual property rights and regulatory regimes at all levels.'<sup>52</sup> In their report on STISA 2024, Calestous Juma and Ismail Serageldin, co-chairs of the panel that reviewed the Consolidated Plan of Action and the development of the STISA-2024 noted that to improve science, technology and innovation development in Africa, its governments and regional economic communities must provide an enabling environment, which includes strengthening legal and regulatory systems to protect

50 On indigenous creative works in Global South countries, see Ruth Gana, *Has Creativity Died in the Third World? Some Implications of the internationalisation of Intellectual Property*, 24 DENVER J. INT'L L. & POL. 109 (1995); MICHAEL F. BROWN, *WHO OWNS NATIVE CULTURE?* (Harvard University Press, 2004).

51 Ruth Okediji, *The Limits of International Copyright Exceptions for Developing Countries*, 21 VANDERBILT J. ENT. & TECH. L. 689, 718 (2019).

52 African Union, *On the Wings of Innovation: Science, Technology and Innovation Strategy for Africa 2024*, 25 (African Union Commission, Addis Ababa, 2014).

IP.<sup>53</sup> The STISA-2024 outlines the Pan African Intellectual Property Organisation (PAIPO), which will be discussed below, as one of the central institutions to implement the initiatives of the strategy.<sup>54</sup> STISA-2024 states that PAIPO ‘is in the process of being established to implement AU policy in the field of intellectual property. It will ensure dissemination of patent information, provide technical and financial support to invention and innovation and promote the protection and exploitation of research results.’<sup>55</sup>

Even though the STISA 2024 expresses a laudable objective to protect the different knowledge systems on the continent including indigenous knowledge and new technologies, practical follow up questions include ‘what types of IP systems would be required and how would these systems be construed?’ Here, it would be important to clarify how the AU decides to address debates associated with the different types of IP rights. For example, would copyright or patent protection best protect software, computer programmes or computer-related inventions developed in the technology hubs around Africa such as Silicon Savannah and Yabacon Valley? How would copyright laws address the liability of intermediaries for online copyright infringement? How would IP protect contested and emerging matters like protection of works generated by artificial intelligence, plant, animal or human genome sequencing, nanotechnology or inventions made/used in outer space?

The AU has not adopted any other IP frameworks to showcase its broad commitments to strengthening IP in Africa. However, the AU Ministers have affirmed their positions in subsequent instruments and engaged in the circulation of knowledge about IP amongst stakeholders in the innovation and creativity landscape in Africa. During the *African Ministerial Conference 2015: Intellectual Property (IP) for Emerging Africa* (African Ministerial Conference 2015) organised by WIPO, in cooperation with the AU Commission, the Government of the Republic of Senegal and the Japan Patent Office, the AU Ministers reaffirmed their IP commitments in the earlier mentioned Charter for African Cultural Renaissance and STISA-2024. In the *Dakar Declaration on Intellectual Property for Africa* adopted after African Ministerial Conference 2015, the AU Ministers pledged to provide ‘a conducive environment with dynamic IP systems

53 CALESTOUS JUMA & ISMAIL SERAGELDIN, *REBOOTING AFRICAN DEVELOPMENT: SCIENCE, TECHNOLOGY, AND INNOVATION STRATEGY FOR AFRICA*, 11 (Belfer Center for Science and International Affairs, Harvard Kennedy School Cambridge, 2016).

54 African Union, *On the Wings of Innovation: Science, Technology and Innovation Strategy for Africa 2024*, STISA, 36 (African Union Commission, Addis Ababa, 2014).

55 *Id.*

that propel creativity, innovation and inventiveness and effectively guide the promotion, acquisition and commercialization of intellectual property for sustainable growth and development and for the wellbeing of African populations.<sup>56</sup> The AU ministers also committed *inter alia*, to 'foster the development and utilisation of copyright and related rights to support the development of new business models', 'document, protect and promote the use and management of traditional/indigenous knowledge systems for development in Africa', 'promote IP education in schools and higher education institutions' and 'take advantage of opportunities available within WIPO technical assistance and capacity building programs.'<sup>57</sup>

Indeed, WIPO is actively involved in technical assistance and capacity building on IP and strategy formulation in Africa.<sup>58</sup> In addition to opening two external offices in Africa, the first in Algiers, Algeria in February 2019 and the second in Abuja, Nigeria in January 2020, WIPO has hosted a series of events on the continent.<sup>59</sup> One of its recent events, *Respect for IP – Growing from the Tip of Africa* that took place in Sandton, South Africa, from 23 to 25 October 2018, was co-organised by the Companies and Intellectual Property Commission South Africa, Department of Trade and Industry, South Africa (CIPC), WIPO, International Criminal Police Organisation (Interpol), World Customs Organisation (WCO) and WTO.<sup>60</sup> The main objectives of the event were to devise strategies to address the incomplete public understanding of IP in Africa, develop cooperation - both at the national and international level- to ensure that the benefits of IP as a tool for development are fully realised in Africa and discuss ways to counter IP infringements in an effective and balanced way. Ultimately, the event served as a platform for knowledge circulation and capacity building in Africa, albeit skewed

56 This Ministerial Conference was organised in line with the Japan Funds in Trust arrangement for Africa and the least developed countries. It held in Dakar, Senegal, from November 3–5, 2015. The Ministers also recognised the 'African Conference on the Strategic Importance of Intellectual Property Policies to Foster Innovation, Value Creation and Competitiveness,' held on March 12–13, 2013, in Dar es Salaam, United Republic of Tanzania, the Young African Innovators, Creators and Entrepreneurs: Intellectual Property, Innovation and Creativity for Entrepreneurship and Job Creation and The WIPO Report on the African Fashion Design Industry: Capturing Value through Intellectual Property.

57 *Id.*

58 World Intellectual Property Organisation, Regional Bureau for Africa.

59 Other WIPO External Offices are in Rio de Janeiro, Brazil (opened in 2009), Beijing, China (opened in 2014), Moscow, Russian Federation (opened in 2014), Tokyo, Japan (opened in 2006) and Singapore, Singapore (2005).

60 The event brought together over 400 stakeholders from around 70 countries, including businesses, consumer groups, legal practitioners, policymakers, enforcement officials, government ministers, international governmental and non-governmental organisations involved in intellectual property in Africa.

towards the Western-centric corpus of IP systems that the sponsors' favour. The AU policymakers appear eager to endorse 'effective' IP systems for Africa. Nonetheless, excluding PAIPO, which seems to have stalled and the forthcoming AfCFTA IP Protocol, the actions required to operationalise their intents -as communicated in the overlapping commitments and declarations above- are yet to materialise.

A final AU initiative that could play a significant role in the harmonisation of IP and regional integration in Africa is PAIPO. The AU first considered the proposal to establish an IP organisation for Africa in the early 2000s.<sup>61</sup>In Joelle Dountio's tracing of the critical events leading to the establishment of PAIPO, she notes that in May 2006, the AU Department of Human Resources, Science and Technology and the AU General Office convened a WIPO-supported meeting to 'deliberate on a range of intellectual property issues. It is during this meeting that the idea of creating [PAIPO] was first mooted.'<sup>62</sup>The AU published a PAIPO Concept Paper during the Extraordinary Conference of the African Ministers of Council on Science and Technology (AMCOST) that held from 20 to 24 November 2006 in Cairo, Egypt.<sup>63</sup> The Concept Paper confirmed that the 'rationale for creating an Africa-wide institution stems from the realisation that Africa needs a mechanism to facilitate far-reaching changes in the arena of intellectual property. However, such revolutionary reforms cannot be effected through existing regional arrangements that are currently underpinned by geographical limitations and lack of continental inclusiveness. It would thus be necessary to establish a new decision-making machinery that would engage the participation of all Member States.'<sup>64</sup> The Concept Paper clarifies that PAIPO will serve as a cost-effective institution to streamline IP management in Africa and sharpen the visibility of IP as a tool for economic development. It adds that PAIPO 'will add impetus to the leaders' political will and commitment to inventiveness and innovation.'<sup>65</sup> As I will discuss in Parts III and IV, introducing one organisation to streamline IP in Africa induces intractable procedural and substantive quandaries

61 Tshimanga Kongolo, *The African IP Organizations- the Necessity of Adopting One Uniform System for All Africa*, 3 J. WORLD INTELL. PROP. 265 (2000).

62 Joelle Dountio, *Some Key Events in the Early Development of the Proposal for a Pan African Intellectual Property Organization* Knowledge Ecology International, KNOWLEDGE ECOLOGY INTERNATIONAL (Feb. 10, 2013), <https://www.keionline.org/paipo>.

63 African Union, *Establishing a Pan-African Intellectual Property Organisation (PAIPO) A Concept Paper* Extraordinary Conference of the African Ministers of Council on Science and Technology (AMCOST), Cairo Egypt. EXT/AU/EXP/ST/8 (II) (Nov. 20–24, 2006).

64 *Id.* at 1.

65 *Id.*



based on the diverging sub-regional IP orthodoxies and regimes in Africa, which the AfCFTA IP Protocol negotiators would also have to address.

The AU Assembly adopted a Decision to establish PAIPO in January 2007.<sup>66</sup> The Decision requested the AU Commission in collaboration with the RECs, WIPO and in coordination with OAPI and ARIPO to submit texts relevant to the establishment of PAIPO. The *AU Progress Report on Research Policy Framework, Capacity Building for the African Policymakers and the Formation of PAIPO* of November 2007, reveals that the AU's Department of Human Resources, Science and Technology appointed the AU-STRC as the focal point for PAIPO.<sup>67</sup> It emphasises that PAIPO will only cover policy concerns and not the day-to-day administration of the existing regional intergovernmental institutions.<sup>68</sup> In particular, PAIPO's existence will not dissolve the existing regional IP organisations. On the contrary, the establishment of PAIPO will enrich their influence and scope. Between 2008 and 2016, there were further revisions of the Draft PAIPO Statute and consultations around Africa on the subject.<sup>69</sup> Caroline Ncube explains that the first Draft PAIPO statute raised concerns because it failed to address the public interest and WIPO Development Agenda, which meant that the Africa Group's victories at the international level, such as at the WTO Doha Development Round, was discounted.<sup>70</sup> Even though the revised and adopted PAIPO Statute refers to the WIPO Development Agenda, Ncube asserts that it still fails to 'refer to TRIPS flexibilities or the Doha Declaration.'<sup>71</sup>

The AU adopted the final PAIPO Statute on 31 January 2016 at the 26th Ordinary

66 African Union, Assembly of the African Union, Eighth Ordinary Session, Addis Ababa Ethiopia (Jan. 29–30, 2007).

67 African Union, *Progress Report on Research Policy Framework, Capacity Building for the African Policymakers and the Formation of Pan African Intellectual Property Organisation (PAIPO)*. African Ministerial Conference on Science and Technology (AMCOST III), Third Ordinary Session, Mombasa, Republic of Kenya, AU/EXP/ST/11(III), at 1 (Nov. 12–16, 2007). Notably, it was during Johnson Ekpere's term as Executive Secretary of the STRC that he devised the African Model Law.

68 *Id.* at 1–2.

69 See Caroline B. Ncube, *The PAIPO Watch' for a detailed outline of the PAIPO developments*, <https://carolineb.ncube.com/the-paipo-watch> (accessed Aug. 16, 2020). See also Y. Mupanga Vanhu, *African Union Rising to the Need for Continental IP Protection? The Establishment of the Pan-African Intellectual Property Organization*, J. AFR. L. 1 (2015); Caroline B. Ncube & Eliamani Laltaika, *A New Intellectual Property Organization for Africa?*, 8 J. INTELL. PROP. L & PRAC. 114–117 (2013).

70 Caroline Ncube, *Three Centuries and Counting: The Emergence and Development of Intellectual Property Law in Africa*, in THE OXFORD HANDBOOK OF INTELLECTUAL PROPERTY LAW (Rochelle Dreyfuss & Justine Pila eds., Oxford University Press, 2018, 428).

71 On failure to provide for membership requirements, see also *id.* and CAROLINE NCUBE, INTELLECTUAL PROPERTY POLICY, LAW AND ADMINISTRATION IN AFRICA: EXPLORING CONTINENTAL AND SUB-REGIONAL CO-OPERATION 133 (Routledge, 2016).



Summit of the AU Assembly, that held in Addis Ababa, Ethiopia.<sup>72</sup> Three countries have signed the Statute; Sierra Leone in July 2016, Ghana in July 2017 and Comoros on January 2018. It will enter into force 30 days after the deposit of the 15th instrument of ratification.<sup>73</sup> The PAIPO Statute states that it primarily promotes a development-oriented IP system.<sup>74</sup> Therefore, it recognises the role that an efficient continental IP organisation can play in promoting the cultural and socio-economic development of Africa.

The PAIPO Statute states important functions of PAIPO, including to harmonise IP within Africa and to establish African common positions for bilateral, regional, sub-regional or multilateral relations. For example, it provides in Article 4 (a) that PAIPO will harmonise IP systems to reflect the needs of the AU, its Member States, RECs, OAPI and ARIPO. In highlighting the importance of indigenous innovation systems, Article 4 (i) states that PAIPO will 'support the establishment of continental databases on genetic resources, traditional knowledge and traditional cultural expressions and folklore.' Relatedly, Article 4 (n) notes that PAIPO will offer a forum to discuss and formulate policies that address political issues and develop African common positions on IP, particularly on genetic resources, traditional knowledge, GIs, expressions of folklore, CBD related topics and emerging IP topics. On bilateral and multilateral relations, Article 4 (h) stipulates that PAIPO will take deliberate measures to support the conclusion of bilateral and multilateral agreements in Member States. Meanwhile, Article 4 (q) provides that PAIPO will lead the African negotiation in international IP issues to ensure the attainment of African common positions.

The complex but obvious question here is, how would PAIPO fulfil these herculean tasks? Take the harmonisation proposed in Article 4 (a) of the PAIPO Statute as an example. Africa has overlapping sub-regional IP organisations and RECs, which have conflicting IP agreements and protocols. These sub-regional organisations' IP agreements and protocols do not always align with the AU instruments. The Africa Model Law and plant variety protection discussed above is an excellent case study of this disconnection. Yet, Article 4 (n) of the PAIPO Statute provides for the formulation of African common positions on genetic resources, traditional knowledge as well as access and benefit-sharing. In considering Africa's IP relations with non-Africans, many African countries already have bilateral, regional or multilateral (trade or

72 African Union, Assembly of the Union, Twenty-Sixth Ordinary Session, Assembly/AU/589 (XXVI) (Addis Ababa Ethiopia) (Jan. 30–31, 2016).

73 Article 24, Statute of the Pan-African Intellectual Property Organisation.

74 Preamble and Articles 1, 3 and 22, Statute of the Pan-African Intellectual Property Organisation.

investment related) agreements, which include IP standards that diverge from AU instruments or the African Group's position at the various international fora.<sup>75</sup> How would PAIPO harmonise the fragmented and disconnected IP architecture in Africa? Would fulfilling the PAIPO objectives require the re-drafting and re-adoption of sub-regional IP agreements and protocols? Would fulfilling the PAIPO objectives require the renegotiation of some bilateral, regional and multilateral agreements?

I will return to the discussions on PAIPO in the context of the AfCFTA in Part IV. In the meantime, I explore the sub-regional IP regimes in Africa next.

## II. AFRICAN SUB-REGIONAL INTERGOVERNMENTAL ORGANISATIONS AND INTELLECTUAL PROPERTY

Africa's sub-regional IP organisations and RECs are crucial to both the harmonisation of IP through PAIPO and continental integration through the AfCFTA. While African countries formally encountered Western concepts of private rights over intellectual assets (or IP rights) and international IP systems during the colonial era, their odyssey to national IP law-making commenced post-political independence.<sup>76</sup> These newly independent states with limited experience and expertise in IP law-making backed by interest-driven support from former colonial authorities and international organisations, established sub-regional intergovernmental organisations to develop domestic systems. In this part, I focus on the two sub-regional IP organisations in Africa, OAPI and ARIPO, alongside the IP regimes in four RECs, ECOWAS, EAC, SADC and COMESA.

### A. Sub-Regional Intellectual Property Organisations

The first regional IP organisation in Africa, Office Africa in et Malgache de la Propriété Industrielle (OAMPI), the predecessor to OAPI, was formed in September 1962, after twelve Francophone African countries signed the *Agreement Relating to the Creation of an African and Malagasy Office on Industrial Property* (the Libreville

75 Chidi Oguamanam, *Breeding Apples for Oranges: Africa's Misplaced Priority over Plant Breeders' Rights*, 18 J. WORLD INTELL. PROP. 165–195 (2015); Adebola, *supra* note 14, at 108; United Nations Economic Commission for Africa, African Union, African Development Bank and United Nations Conference on Trade and Development, *Assessing Regional Integration in Africa IX: Next Steps for the African Continental Free Trade Area*, 111–12 (UNECA, AU, AfDB, UNCTAD, Addis Ababa, Ethiopia 2019).

76 Ruth L. Okediji, *The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System*, 7 SINGAPORE J. INT'L & COMP. L. 325–334 (2003). CAROLYN DEERE, *THE IMPLEMENTATION GAME: THE TRIPS AGREEMENT AND THE GLOBAL POLITICS OF INTELLECTUAL PROPERTY REFORM IN DEVELOPING COUNTRIES*, 36–37 (Oxford University Press, 2009) [hereinafter *The Imitation Game*].

Agreement).<sup>77</sup> Building on France's colonial relationship with Francophone Africa, the French Intellectual Property Office (INPI) was actively involved in drafting the Libreville Agreement. Without doubt, the colonial IP governance structure laid the foundation for the post-colonial reliance on France for domestic IP law-making in Francophone Africa. During the colonial era, French laws were extended to the French African Colonies by Ordinance or Orders.<sup>78</sup> The French administrators prioritised the protection of the intellectual assets of their nationals within the colonies, leaving the indigenous peoples no access to the IP system.<sup>79</sup> Accordingly, the physical exit of France from its colonies left limited local IP expertise. These former colonies memberships of international organisations, spurred by France, presented a growing need for national or regional IP laws. Tshimanga Kongolo explains that "there were two options on the table: to allow each country to design its... industrial property laws or to set up a uniform system of protection, given that all of them [the French African colonies] had applied the same French Law during the colonial period."<sup>80</sup> The countries chose the latter.

The Libreville Agreement, designed with technical assistance from INPI and the United International Bureaux for the Protection of Intellectual Property (BIRPI, the predecessor to WIPO), was a replica of the extant French laws. The Agreement protected patents, trademarks and industrial designs. It also introduced these threefold standards for cooperation, which are still in force in the OAPI region to date: uniform laws, common authority/IP office for Member States and common/centralised procedures, including the issuance of a single title of registration for all Member States.<sup>81</sup> OAMPI was renamed OAPI in March 1977, after the adoption of the *Bangui Agreement of 2 March 1977 on the Creation of an African Intellectual Property Organisation* (Bangui Agreement) and withdrawal of the Malagasy Republic.<sup>82</sup> Article 2 (a) of the Bangui

77 The twelve countries were Cameroon, Central African Republic, Chad, Congo, Côte d'Ivoire, Dahomey (now Benin), Upper Volta (now Burkina Faso), Gabon, Mauritania, Senegal, Niger and Malgasy Republic. The Agreement entered into force on January 1, 1964.

78 Apart from Algeria, Morocco and Tunisia that had separate systems, the following French laws (as amended), governed the French African Colonies: Patent Law (July 5, 1844), Trademark Law (June 28, 1857) and Industrial Design Law (July 14, 1909).

79 DEERE, *supra* note 76, at 249.

80 Tshimanga Kongolo, *Historical Developments of Industrial Property Laws in Africa*, 5 WIPO J. 109 (2013).

81 DEERE, *supra* note 76, at 250.

82 Agreement Revising the Bangui Agreement of March 2, 1977, on the Creation of an African Intellectual Property Organisation (Bangui [Central African Republic], Feb. 24, 1999). The Bangui Agreement entered into force on February 8, 1982. It was revised in 1999 (Feb. 24, 1999); the revision entered into force on February 28, 2002. OAPI currently has 17 members: Benin, Burkina Faso, Cameroon, the Central African Republic, Chad, the Comoros, the Congo,

Agreement reinforces the threefold standards established in the Libreville Agreement. It states that OAPI is responsible for 'implementing and applying the common administrative procedures deriving from a uniform system for the protection of industrial property, as well as the provisions of international agreements in this field to which the member States of the Organisation have acceded.'

OAPI provides for the protection of ten categories of IP. *Patents* (Annex I), *Utility Models* (Annex II), *Trademarks and Service Marks* (Annex III), *Industrial Designs* (Annex IV), *Trade Names* (Annex V), *Geographical Indications* (Annex VI), *Literary and Artistic Property* (Annex VII), *Protection Against Unfair Competition* (Annex VIII), *Layout-Designs (Topographies) of Integrated Circuits* (Annex IX) and *Plant Variety Protection* (Annex X).<sup>83</sup>OAPI's international obligations (in particular, TRIPS) external capacity building/ technical advice (including from WTO, WIPO, INPI and UPOV) and weak domestic policymaking capacity shape these IP systems.<sup>84</sup>On the first point about international obligations, and TRIPS, in particular, it is noteworthy to acknowledge that 12 of the 17 OAPI members are least developed countries according to United Nations classifications.<sup>85</sup>Consequently, pursuant to the special and differential treatment provision in Article 66.1 of TRIPS, these countries have an extension until 1 July 2021 to implement their TRIPS obligations. It bears mentioning that the mainly agrarian-based and net technology importing OAPI countries mostly develop low-cost indigenous innovations and rely on traditional knowledge and practices for everyday activities. Therefore, the Bangui Agreement ought to have maximised the flexibilities

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Cote d'Ivoire, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Mali, Mauritania, the Niger, Senegal, and Togo.

- 83 Annex X (Plant Variety Protection) entered into force on January 1, 2006. For a detailed examination of the different IP systems, see Ncube, *supra* note 71; Kongolo, *supra* note 22.
- 84 The international treaties that OAPI is signatory to are: The Paris Convention for the Protection of Industrial Property (Paris Convention), Berne Convention for the Protection of literary and Artistic Works (Berne Convention), Hague Agreement Concerning the International Deposit of Industrial Designs (Hague Agreement), Lisbon Agreement for the Protection of Appellations of Origin and their International Registration (Lisbon Agreement), Convention Establishing the World Intellectual Property Organisation, Patent Cooperation Treaty, the Nairobi Treaty on the Protection of the Olympic Symbol, Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure, UPOV, Marrakesh Agreement Establishing the WTO, Trademark Registration Treaty, and Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations.
- 85 United Nations Office of the High Representatives for Least Developed Countries, *Landlocked Developing Countries and Small Island Developing States (UN-OHRLLS)*, 'Least Developed Countries', <http://unohrrls.org/about-ldcs/criteria-for-ldcs/> (accessed Aug. 28, 2020). United Nations Conference on Trade and Development, *UN List of Least Developed Countries*, <https://unctad.org/en/pages/aldc/Least%20Developed%20Countries/UN-list-of-Least-Developed-Countries.aspx> (accessed Aug. 28, 2020).

allowed in TRIPS, for instance, by introducing IP systems that protect and promote farmers' rights, access to medicines and access to knowledge.

On the contrary, it introduced some strong IP systems like its Plant Variety Protection system in Annex X that conforms with the commercial plant breeder focused UPOV 1991 Act, which it joined on 10 July 2014 as its first intergovernmental member.<sup>86</sup> A 2019 Association for Plant Breeding for the Benefit of Society (APBREBES) Working Paper reveals that ten years after the entry into force of Annex X of the Bangui Agreement in OAPI, only 7 of OAPI's 17 members have used the Plant Variety Protection system and 'at great cost and at the expense of public funds.'<sup>87</sup> It adds that the system has neither produced a substantial increase in plant breeding activities in the OAPI Member States nor result in the growth of the seed industry in the sub-region. On the reverse, it has raised alarms about the misappropriation of farmers' varieties.<sup>88</sup>

For its procedural ambit, Article 4 (2) of the Bangui Agreement provides that it applies in its entirety to every Member State of OAPI. Article 6 (1) further provides that applications for registration of the different categories of IP should be filed directly with OAPI. However, members may file their applications for registration with national authorities where they are domiciled.<sup>89</sup> OAPI, therefore, conducts both formal and substantive examination for the registration of the different IP rights it grants. On international applications, Article 7 provides for an international patent application, international trademark registration and international deposit of industrial designs through filing in at least one Member State of OAPI. The Administrative Council of OAPI, comprising representatives of OAPI Member States, is the highest authority of the organisation.<sup>90</sup> It is responsible for determining its general policy and regulating and controlling its activities.

86 OAPI is a party to the UPOV 1991 Act. International Convention for the Protection of New Varieties of Plants, *Members of the International Union for the Protection of New Varieties of Plants* (Status on February 3, 2020). James Gathii notes that least developed countries have not generally taken advantage of the flexibilities in TRIPS. James Thuo Gathii, *Strength in Intellectual Property Protection and Foreign Direct Investment Flows in Least Developed Countries*, 44 GEORGIA J. INT'L & COMP. L. 499 (2015).

87 Mohamed Coulibaly, Robert Ali Brac de la Perriere & Sangeeta Shashikant, *A Dysfunctional Plant Variety Protection System: Ten Years of UPOV Implementation in Francophone Africa*, at 30 (APBREBES Working Paper, 2019).

88 *Id.*

89 Article 6 (2), Bangui Agreement.

90 Article 28 (1) provides for one representative per Member State for the Administrative Council. However, Article 28 (2) provides that a member may entrust its representation on the Council to the representative of another Member State. But no member of the Council may represent more than two States.

Over a decade after the twelve newly independent Francophone countries signed the Libreville Agreement, their Anglophone equivalents established the Industrial Property Association for English-speaking Africa (ESARIPO), with the assistance of the United Nations Economic Commission for Africa (UNECA) and WIPO. Unlike the former French African colonies that withdrew from the French IP laws in 1962, many British African colonies did not introduce national IP laws immediately after independence. For example, even though Nigeria gained its political independence from Great Britain on 1 October 1960, it only introduced national IP laws from 1965, starting with the Trademarks Act of 1965, the Patents and Design Act of 1970 and the Copyright Act of 1988. In line with its mandate 'to promote the protection of intellectual property throughout the world, through cooperation among States', WIPO was actively involved in capacity building in newly independent African countries.<sup>91</sup> It organised a Regional Seminar on patents and copyright for nine Anglophone African countries in Nairobi in October 1972, which recommended the establishment of a regional industrial property organisation.<sup>92</sup>

WIPO and UNECA responded to the Anglophone African countries' request for assistance in this regard in 1973 by collaborating to establish the regional organisation. The draft Agreement on the Creation of the Industrial Property Organisation for English-speaking Africa was prepared after a series of meetings at the UNECA headquarters in Addis Ababa and WIPO in Geneva.<sup>93</sup> A Diplomatic Conference, convened by UNECA and WIPO, which held in Lusaka, Zambia adopted this Agreement, now referred to as the Lusaka Agreement, on 9 December 1976.<sup>94</sup> The

91 Article 3, Convention Establishing the World Intellectual Property Organisation, July 14, 1967 (as amended Sept. 28, 1979).

92 The nine countries were Ghana, Kenya, Lesotho, Liberia, Malawi, Nigeria, Tanzania, Uganda and Zambia. The Regional Seminar adopted a resolution that endorsed the proposal made by UNECA to organise (with WIPO) a conference of the Heads of Industrial Property Offices from English-speaking African countries, to discuss the possible harmonisation of their industrial property laws and the creation of a central office.

93 For example, 19 English-speaking African countries participated in a conference on the legislation for English-speaking African countries in the field of industrial property, which took place in Addis Ababa, Ethiopia, from June 4–10, 1974. The 19 countries were Botswana, Egypt, Ethiopia, Gambia, Ghana, Kenya, Lesotho, Liberia, Libya, Malawi, Mauritius, Nigeria, Sierra Leone, Somalia, Sudan, Swaziland, Tanzania, Uganda and Zambia. The conference approved a draft agreement to establish an industrial property organisation for English-speaking African countries to promote cooperation amongst these countries. It agreed to convene a Diplomatic Conference to adopt the draft agreement. The conference also adopted a resolution for WIPO and UNECA to provide the interim Secretariat of the Organisation until it was established and a resolution to establish two committees. The first on patents, and the second on trademarks and industrial designs.

94 The Lusaka Agreement entered into force on February 15, 1978. The ESARIPO headquarters was initially in Nairobi, Kenya. The Council transferred the headquarters to Harare, Zimbabwe after



Lusaka Agreement established a regional system for the protection of industrial property, which sought to harmonise national laws of Member States and promote co-operation. On 12 December 1986, the ESARIPO Council renamed the organisation, African Regional Industrial Property Organisation, to expand the eligibility for membership beyond English-speaking Africa to all members of UNECA and the OAU (now AU). Almost two decades after, the organisation was renamed the African Regional Intellectual Property Organisation on 13 August 2004, to expand its mandate from industrial property to other categories of IP.<sup>95</sup>

Article III of the Lusaka Agreement provides that the objectives of ARIPO include, 'to promote the harmonisation and development of intellectual property laws and related matters, appropriate to the needs of its members and the region as a whole, to foster the establishment of a close relationship between its members in matters relating to intellectual property and to establish common services or organs necessary for the co-ordination, harmonisation and development of intellectual property activities affecting its members.' Unlike OAPI that is premised on a uniform IP structure delineated in the ten annexes to the Bangui agreement, ARIPO advances a flexible IP structure. Beyond the Lusaka Agreement, which confers ARIPO membership, Member States are not automatically bound to any of its Protocols. Simply put, ARIPO Member States can choose which Protocols to sign. ARIPO has four Protocols: *Harare Protocol on Patents and Industrial Designs* (Harare Protocol), *Banjul Protocol on Marks* (Banjul Protocol), *Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore* (Swakopmund Protocol) and *Arusha Protocol for the Protection of New Varieties of Plants* (Arusha Protocol).<sup>96</sup> ARIPO also has a 'Draft Policy and

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the fifth session of the Council in September 1981. UNECA and WIPO served as the ESARIPO Secretariat until June 1, 1981.

95 This amendment to the Lusaka Agreement was adopted by its Council of Ministers on August 13, 2004. ARIPO has 19 Member States, Botswana, Eswatini, Gambia, Ghana, Kenya, Lesotho, Liberia, Malawi, Mozambique, Namibia, Rwanda, Sao Tome and Principe, Sierra Leone, Somalia, Sudan, Tanzania, Uganda, Zambia and Zimbabwe. These 12 non-Member States have observer status, Angola, Algeria, Burundi, Egypt, Eritrea, Ethiopia, Libya, Mauritius, Nigeria, Seychelles, South Africa and Tunisia.

96 The Harare Protocol on Patents was adopted on 10 December 1982, and amended on 11 December 1987, 27 April 1994, 28 November 1997, 26 May 1998, 26 November 1996, 30 November 2001, 21 November 2003, 24 November 2006, 25 November 2013, 17 November 2015, 5 December 2016, 22 November 2017, 23 November 2018 and 20 November 2019. Banjul Protocol on Marks was adopted by the Administrative Council at Banjul, The Gambia, on 19 November 1993 and amended on 28 November 1997, 26 May 1998, 26 November 1999, 21 November 2003, 25 November 2013, 17 November 2015, 22 November 2017, 23 November 2018 and 20 November 2019. The Swakopmund Protocol was adopted by a Diplomatic Conference of ARIPO at Swakopmund (Namibia) on 9 August 2010 and amended on 6 December 2016. The Arusha Protocol was adopted by a Diplomatic Conference of ARIPO at Arusha (Tanzania) on 6 July



Legal Framework for the Protection of Geographical Indications' and a 'Model Law on Copyright and Related Rights.'<sup>97</sup> All ARIPO Member States, except Eswatini, are Contracting Parties to the PCT. ARIPO can also be designated under the PCT. In addition, ARIPO is a member of the Paris Convention, and like OAPI, its Arusha Protocol is modelled after the UPOV 1991 Convention.<sup>98</sup>

The ARIPO Secretariat conducts a mix of substantive and formal examination for IP applications. It administers applications for patents, utility models and industrial designs on behalf of parties to the Harare Protocol. Although it conducts a substantive examination of patent applications and utility models, it only conducts a formality examination for industrial designs. Nonetheless, national offices of parties can consider the application and inform ARIPO whether it will grant national protection. ARIPO processes trademark applications for parties to the Banjul Protocol. A trademark application can also be filed indirectly with the national industrial property office of any Contracting State that acts as a receiving office. ARIPO conducts formal examination for the trademarks applications it receives and directs them to a designated national office for substantive examination. ARIPO does not register traditional knowledge and expressions of folklore because Section 5 of the Swakopmund Protocol expunges any formality for traditional knowledge. To be clear, Section 5(2) provides that 'Contracting States and ARIPO Office may maintain registers or other records of the knowledge, where appropriate and subject to relevant policies, laws and procedures.' With respect to plant variety protection, ARIPO is earmarked to conduct a formal and substantial examination of applications for plant breeders' rights under the Arusha Protocol.

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2015. The Arusha Protocol is not yet in force. It will enter into force twelve months after four States have deposited their instruments of ratification or accession.

97 The Draft Policy and Legal Framework for the Protection of Geographical Indications was informed by the Decision of the Thirteenth Session of the Council of Ministers, held in Accra Ghana in 2011. See GI roadmap in African Regional Intellectual Property Organisation, *Who We Are and What We Do* (ARIPO Zimbabwe, 2016), [https://www.aripo.org/wp-content/uploads/2018/12/ARIPO\\_Who\\_We\\_Are\\_What\\_We\\_Do\\_1-1.pdf](https://www.aripo.org/wp-content/uploads/2018/12/ARIPO_Who_We_Are_What_We_Do_1-1.pdf). ARIPO published its Model Law on Copyright and Related Rights in October 2019.

98 All ARIPO Member States are parties to the WIPO Convention, all apart from Somalia and Sudan are parties to WTO TRIPS. Members are party to a mix of the following Berne Convention, Brussels Convention on Programme-carrying Signals, Budapest Treaty, Hague Agreement on Designs, Locarno Agreement on Classifications of Designs, Madrid Agreement on Marks, Madrid Protocol on Marks, Nairobi Treaty on Olympic Symbols, Nice Agreement on Classification of Marks, Paris Convention, Patent Cooperation Treaty, Phonograms Convention, Rome Convention, Strasbourg Agreement on Patent Classification, WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty.

The Council of Ministers, consisting of Ministers of Governments of Member States, is the supreme body for ARIPO.<sup>99</sup> In this capacity, the Council of Ministers is responsible for the policy orientation of the organisation and deciding on all necessary measures to develop and review the organisation's activities. It may delegate any of its powers or functions to the Administrative Council. The Administrative Council, consisting of heads of offices, is responsible for supervising the execution of the policies of the organisation as determined by the Council of Ministers. ARIPO appears to present contradictory policy positions, attributable to its external influences and support. For example, although it adopted the applaudable Swakopmund Protocol, which recognises the significant traditional practices of its Member States, it also adopted the UPOV 1991 styled Arusha Protocol, which undermines their traditional farming practices.<sup>100</sup>

One would have expected an organisation that protects and prioritises traditional knowledge and expressions of folklore to also accord traditional farming practices the same status. The participation of plant breeder centric organisations such as the United States Patent and Trademark Office, the EU Community Plant Variety Protection Office, the French National Seed and Seedling Association and UPOV in the workshops on the draft Plant Variety Protocol can contribute to explaining why ARIPO opted for the UPOV 1991 Convention.<sup>101</sup> According to the African Centre for Biodiversity, the Arusha Protocol will threaten farmers rights and sustainable agricultural development in the ARIPO region, while increasing multinational agrochemical/seed companies' corporate monopolisation of the African seed industry.<sup>102</sup>

*Table 1: Representation of the Regime Complex for IP in Africa*

*AU Member States	OAPI	ARIPO	ECOWAS	EAC	SADC	COMESA
People's Democratic Republic Of Algeria						

99 Article VI, Lusaka Agreement.

100 This is an example of the 'Africanisation' of an instrument that is not wholly suited to the African context.

101 African Intellectual Property Organisation, Council of Ministers Fourteenth Session, *Consideration of the Revised ARIPO Legal Framework for Plant Variety Protection*, ARIPO/CM/XIV/8 (2013). Also, 13 of its 19 Member States are least developed countries.

102 African Centre for Biodiversity, *The Arusha Protocol and Regulation: Institutionalising UPOV 1991 in African Seed Systems and Laws* (ACB Discussion Document, Sept. 2018).

AU MEMBER STATES	OAPI	ARIPO	ECOWAS	EAC	SADC	COMESA
Republic Of Angola						
Republic Of Benin						
Republic Of Botswana						
Burkina Faso						
Republic Of Burundi						
Republic Of Cameroon						
Republic Of Cabo Verde						
**Central African Republic						
The Republic Of Chad						
Union Of The Comoros						
Republic Of The Congo						
Republic Of Cote D'ivoire						
Democratic Republic Of The Congo						
Republic Of Djibouti						
Arab Republic Of Egypt						
Republic Of Equatorial Guinea						
State Of Eritrea						
***Kingdom Of Swaziland						
Federal Democratic Republic Of Ethiopia						
Gabonese Republic						

AU MEMBER STATES	OAPI	ARIPO	ECOWAS	EAC	SADC	COMESA
Republic of the Gambia						
Republic of Ghana						
Republic of Guinea						
Republic of Guinea-Bissau						
Republic of Kenya						
Kingdom of Lesotho						
Republic of Liberia						
Libya						
Republic of Madagascar						
Republic of Malawi						
Republic of Mali						
Republic of Mauritania						
Republic of Mauritius						
Kingdom of Morocco						
Republic of Mozambique						
Republic of Namibia						
Republic of Niger						
Federal Republic of Nigeria						
Republic of Rwanda						
Saharawi Arab Democratic Republic						

AU MEMBER STATES	OAPI	ARIPO	ECOWAS	EAC	SADC	COMESA
Democratic Republic of Sao Tome and Principe						
Republic of Senegal						
Republic of Seychelles						
Republic of Sierra Leone						
Somali Republic						
Republic of South Africa						
Republic of South Sudan						
Republic of The Sudan						
United Republic of Tanzania						
Togolese Republic						
Tunisian Republic						
Republic of Uganda						
Republic of Zambia						
Republic of Zimbabwe						

Source: The Author

\*55 Member States of the African Union in alphabetical order.

\*\*Member State under political sanction.

\*\*\* Name changed to Kingdom of eSwatini on 18 April 2018.

**B. Sub-Regional Economic Communities of the African Union**

The AU's RECs comprise the following eight sub-regional intergovernmental institutions that represent the pillars of the African Economic Community and provide the framework for economic integration as established under the *Treaty Establishing*

*the African Economic Community, Abuja Nigeria of 3 June 1991.*<sup>103</sup> ECOWAS, EAC, SADC, COMESA, AMU, IGAD, ECCAS and CENSAD. Considering the close connection between IP and trade, and indeed, between IP and all sectors of the economy, it is unsurprising that most of the constitutive agreements or protocols of the RECs include IP agendas. This part focuses on ECOWAS in the Western part of Africa, EAC in the Eastern part of Africa and SADC in the Southern part of Africa. It also highlights some activities in COMESA. Consistent twin themes in the four RECs covered is their commitment to harmonisation and cooperation. This part, therefore, points out instances where IP harmonisation and cooperation have been achieved or at least, attempted.

***i. The Economic Community of West African States***

ECOWAS, established on 28 May 1975 by the *Treaty Establishing the Economic Community of West African States, Signed in Lagos*, creates a single trading bloc that promotes effective economic cooperation and integration in all fields of activities of its fifteen Member States.<sup>104</sup> Article 3 of the Revised (ECOWAS) Treaty states that the community will harmonise and coordinate national policies, while promoting integrated programmes and activities, especially in food, agriculture and natural resources, industry, transport and communications, energy, trade, money and finance, taxation, economic reform policies, legal matters, human resources, education, information, culture, services, health, tourism, science, and technology.<sup>105</sup> In discussing science and technology,

Article 27.1 (a) provides that Member States will strengthen national scientific and technological capabilities to foster socio-economic transformation necessary to enhance the quality of life of its population.

Article 27.1 (c) goes on to stipulate that Member States will reduce their dependence on foreign technology and promote their individual and collective technological self-reliance. Article 27. 2 (c) maintains that Member States will harmonise national technological development plans by placing special

<sup>103</sup> Organisation of African Union, *Treaty Establishing the African Economic Community* (June 3, 1991).

<sup>104</sup> Benin, Burkina Faso, Cape Verde, Cote d' Ivoire, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Sierra Leone, Senegal and Togo.

<sup>105</sup> ECOWAS members signed a Revised Treaty in Cotonou, Benin Republic on July 24, 1993. *Economic Community of West African States (ECOWAS), Revised Treaty (Economic Commission, Abuja Nigeria 1993)*.



emphasis on indigenous and adapted technologies as well as their regulations on *industrial property* and transfer of technology.<sup>106</sup> Although Article 27. 2 (c) specifies industrial property, to the exclusion of copyright and related rights or *sui generis* rights, it requires ECOWAS Member States to craft inclusive IP laws that cater to the indigenous innovative systems.

ECOWAS does not have specialised IP instruments. However, following membership of different international or sub-regional IP organisations, ECOWAS members have varying IP national IP instruments. All ECOWAS Member States are party to TRIPS and all the Member States, except Cape Verde and Nigeria, are party to either OAPI or ARIPO (See Table 1). Notably, the West African Health Organisation (WAHO), the health agency of ECOWAS, published a report in December 2012, to underscore the importance of IP to different sectors of the economy including pharmaceutical, food, agriculture, technology and trade.<sup>107</sup> It recommends that ECOWAS establish an IP Unit and that its Member States fully apply TRIPS flexibilities.<sup>108</sup> In this regard, the United States Department of Commerce's Commercial Law Development Program Office has offered assistance to both ECOWAS and its Member States like Ghana, Liberia and Nigeria, to develop IP protection and enforcement in the sub-region.<sup>109</sup> Peter Drahos, John Braithwaite and Susan Sell have documented in detail how the United States, backed by private multinationals, have entrenched high-protectionist IP standards across the globe.<sup>110</sup> Therefore, as Nirmalya Syam and Viviana Munoz Tellez correctly caution, it is imperative for ECOWAS and its Member States to 'ensure that the development of national IP policies are not so designed that IPRs strengthen the technological dominance of firms from developed countries and exacerbate technological dependence of local industries from the region, contrary to the objectives of the ECOWAS Treaty.'<sup>111</sup>

106 Emphasis added.

107 West African Health Organisation (WAHO), *Development of a Harmonised TRIPS Policy: For Adoption by ECOWAS Member States that Employ TRIPS Flexibilities to Improve Access to Medicines in the Region* (WAHO/Technical Document, Oct. 31, 2012).

108 *Id.* at 42–43.

109 CLDP, *Commercial Law Development Program Office of General Counsel, United States Department of Commerce, 'CLDP Results in Sub-Saharan Africa'*, <https://cldp.doc.gov/about-cldp/results/cldp-results-sub-saharan-africa> (accessed Aug. 15, 2020).

110 PETER DRAHOS & JOHN BRAITHWAITE, *INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY?* (Earthscan, 2002); SUSAN K. SELL, *PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS* (Cambridge University Press, 2003, 2).

111 Nirmalya Syam & Viviana Munoz Tellez, *Innovation and Global Intellectual Property Regulatory Regimes: The Tension Between Protection and Access in Africa*, 45 (South Centre, Research Paper 67, June 2016) [hereinafter *Innovation and Global Intellectual Property Regulatory Regimes*].

## *ii. The East African Community*

The EAC, established on 30 November 1999 by the *Treaty for the Establishment of the East African Community*, seeks to develop policies and programmes to widen and deepen cooperation among its six Member States (referred to as ‘Partner States’) in political, economic, social, cultural fields, research, technology, defence, security, legal and judicial affairs.<sup>112</sup> Like the Revised ECOWAS Treaty, Article 103 of the EAC Treaty provides for the creation of both a conducive environment to promote science and technology within the community as well as the use and development of indigenous science and technologies. In particular, Article 103 (i) affirms the harmonisation of policies on the commercialisation of technologies along with the promotion and protection of IP rights.

The *Protocol on the Establishment of the East African Community Common Market 2009*, another key EAC Document, provides in Article 5.3 (k), that Partner States agree to cooperate on the promotion and protection of IP. Article 42 of the Protocol affirms that to promote research and technological development, the Council will develop technology policies and strategies that pay attention to the importance of technology management and protection of IP. Article 43 explains Partner States commitment to cooperate in copyright and related rights, patents, layout designs of integrated circuits, industrial designs, new plant varieties, geographical indications, trade and service marks, trade secrets, utility models, traditional knowledge, genetic resources, traditional cultural expressions and folklore, and any other categories of IP rights chosen by the Partner States. The Protocol requires Partner States to introduce IP policies that promote creativity, innovation and development of intellectual capital. At the same time, Article 43.4 (a) and (b) emphasises that Partner States will establish mechanisms to ensure the legal protection of traditional cultural expressions, traditional knowledge, genetic resources and national heritage as well as the promotion of cultural industries. Article 43 (6) assures that Partner States will honour their commitments in international IP agreements.

Further to the Protocol and in line with the AU Pharmaceutical Manufacturing Plan for Africa (PMPA) Business Plan 2012, the EAC Secretariat, in collaboration with the Partner States, introduced the *EAC Regional Intellectual Property Policy on the*

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112 The Treaty for the Establishment of the East African Community (Signed 30 November 1999, entered into force on 7 July 1999, Amended 14 December 2006 and 20 August 2007). Members of the Community, referred to as Partner States are Republic of Burundi, Republic of Kenya, Republic of Rwanda, Republic of South Sudan, United Republic of Tanzania and Republic of Uganda. See Objectives of the Community in Article 5.

*Utilisation of Public Health-Related WTO-TRIPS Flexibilities and the Approximation of National Intellectual Property Legislation in February 2013.*<sup>113</sup> It sets out policy statements on *inter alia* patentability criteria, marketing approval-‘Bolar’ exception, test data protection, parallel importation and compulsory licensing to guide EAC Partner States on how to revise national intellectual property laws to utilise the Public-Health related WTO-TRIPS Flexibilities fully. The EAC also has a Regional Pharmaceutical Manufacturing Plan of Action (2012-2016), which reveals the road map for an efficient and effective pharmaceutical manufacturing in Partner States, that will supply the national, regional and international markets with medicines.<sup>114</sup> However, these policies may be undermined by a conflicting EAC Policy on ‘Anti-Counterfeiting, Anti-Piracy and other IP Violations’, proposed EAC Anti-Counterfeiting and Competition Legislation or IP instruments designed pursuant to the Economic Partnership Agreement between the EAC and EU signed on 18 October 2014.<sup>115</sup>

Beyond the policy commitments outlined above, the only core IP instrument that the EAC has drafted in line with its harmonisation and cooperation agenda is its Seed and Plant Varieties Bill 2018 (SPVB). The SPVB is wholly modelled on the commercial/corporate plant breeder focused UPOV 1991 Convention, which like OAPI and ARIPO’s plant variety protection agreements, or like SADC’s discussed below, contravenes the AU’s African Model Law.<sup>116</sup> Nonetheless, EAC Partner States, like ECOWAS Member States, have varying IP instruments, following their membership

113 East African Community, *EAC Regional Intellectual Property Policy on the Utilisation of Public Health-Related WTO-TRIPS Flexibilities and the Approximation of National Intellectual Property Legislation* (EAC Tanzania, Feb. 2013). This Policy builds on the EAC Secretariat and Partner States initiative to harmonise policies, legislation and regulations on Intellectual Property, with the aim to maximise the benefits of Public Health-related WTO-TRIPS Flexibilities, which was launched in 2005.

114 EAC, *East African Community Regional Pharmaceutical Manufacturing Plan of Action: 2012–2016*, [https://www.unido.org/sites/default/files/2016-01/EAC\\_Regional\\_Pharmaceutical\\_Manufacturing\\_Plan\\_of\\_Action\\_0.pdf](https://www.unido.org/sites/default/files/2016-01/EAC_Regional_Pharmaceutical_Manufacturing_Plan_of_Action_0.pdf). However, these policies may be undermined by EAC Policies on Anti-Counterfeiting, Anti-Piracy and Other Intellectual Property Rights Violations as well as proposed EAC Anti-Counterfeiting and Competition Law.

115 See generally UNCTAD-GIZ-EAC Secretariat, *Regional Workshop on Policy Coherence for Local Production of Pharmaceutical Products and Other Means to Improve Access to Medicines and Medicinal Products in the East African Community* (Speke Resort Munyonyo, Kampala, Uganda, Sept. 21–23, 2015) [https://unctad.org/meetings/en/SessionalDocuments/tot\\_ip\\_0027\\_en.pdf](https://unctad.org/meetings/en/SessionalDocuments/tot_ip_0027_en.pdf). In Article 3 of the Economic Partnership Agreement Between the East African Community Partner States, of the One Part, and the European Union and its Member States of the Other Part, the Parties undertake to conclude negotiations on intellectual property rights 5 years upon entry into force of the Agreement. The Economic Partnership Agreement will enter into force after the parties’ sign and ratify it.

116 For a civil society reaction to the EAC Seed and Plant Varieties Bill, see African Centre for Biodiversity, *Concerns with the Draft EAC Seed and Plant Varieties Bill*, September 2018 Version (African Centre for Biodiversity South Africa, Apr. 2018), <https://www.acbio.org.za/sites/default/>

of TRIPS or ARIPO (See Table 1). All EAC Partner States except South Sudan are members of TRIPS, while all EAC members except Burundi and South Sudan are members of ARIPO (See Table 1). Notably, Rwanda is a party to the ARIPO's Swakopmund Protocol, which could ameliorate some of the adverse effects of the SPVB at the national level. A question that arises here, which applies to the other sections of this part, is how does a Member State of a REC resolve contradictory sub-regional IP obligations?

### *iii. The Southern African Development Community*

SADC, unveiled on 17 August 1992 as a replacement to the Southern African Development Coordinating Conference, seeks to 'achieve development and economic growth, alleviate poverty, enhance the standard and quality of life of the people of South Africa and support the socially disadvantaged through regional integration.'<sup>117</sup> Its *Protocol on Trade in the Southern African Development Community* covers one of its notable provisions on IP.<sup>118</sup> Article 24 of the Protocol asks Member States to adopt policies and implement measures within the Community to protect IP in line with TRIPS. Other SADC instruments relevant to IP include the *Regional Indicative Strategic Development Plan* (RISDP, 2005 – 2015) and the Revised RISDP (2015 – 2020) adopted in 2015.<sup>119</sup> Consistent with the SADC Treaty, the RISDP seeks to harmonise IP laws in its Member States, as a way to promote technology development, transfer and diffusion, including indigenous knowledge.<sup>120</sup> The RISDP mentions the importance of agricultural research and training on emerging issues like IP in flora and fauna, and the needs to ensure that technology developed is affordable to resource-poor farmers. To support this technology development, SADC adopted

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files/documents/Concerns%20with%20the%20draft%20EAC%20Seed%20and%20Plant%20Varieties%20Bill%2C%20September%202018%20version%20FULL%20REPORT.pdf.

117 SADC was formed on April 1, 1980 when the Heads of States and Governments of the Front-line States and representatives of the governments of Lesotho, Malawi, and Swaziland signed the *Lusaka Declaration 'Towards Economic Liberation'* in Lusaka Zambia. SADC was formed principally to support the cause on national political liberation in Southern Africa, and to reduce dependence particularly on the apartheid era South Africa. SADC has 16 Member States: Angola, Botswana, Comoros, the Democratic Republic of Congo, Lesotho Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. While the Southern African Customs Union is not discussed in this article, it is noteworthy as the only sub-region to have resisted a US FTA because of IP issues relating to HIV AIDS and access to medicines. See James Thuo Gathii, *The Neo-Liberal Turn in Regional Trade Agreements*, 86 WASHINGTON L. REV. 421, 469–70 (2011).

118 Southern Africa Development Community Protocol on Trade 1996 (amended in 2010).

119 The Regional Indicative Strategic Development Plan (2005–2015) was adopted in 2003 and the Revised Regional Indicative Strategic Development Plan (2015–2020) was adopted in 2015.

120 Strategy 4.5.4.

its *Protocol on Science, Technology and Innovation* 2008, which seeks to enhance and strengthen the protection of IP.<sup>121</sup>

In relation to access to medicines, the SADC adopted a *Protocol on Health* in 1999.<sup>122</sup> Article 29 of the Protocol on Health specifies that States will co-operate in the development of both modern and traditional (or complementary) medicines. It provides in part for the 'harmonisation of procedures of pharmaceuticals, quality assurance and registration', 'production, procurement and distribution of affordable essential drugs', 'research and documentation on traditional medicines and its utilisation' and 'the establishment of a regional databank of traditional medicine, medicinal plants and procedures in order to ensure their protection.' However, it highlights that the protection for traditional medicine, medicinal plants and procedures should be in accordance with related IP regimes governing genetic resources, plant varieties and biotechnology. In 2006, SADC Health Ministers also adopted the SADC *Pharmaceutical Business Plan* (PBP) 2007 to 2013 (renewed: 2014 to 2019), which seeks to enhance the availability of and access to affordable, quality, safe, efficacious essential medicines, including African Traditional Medicines. The PBP aligns with the Protocol on Health to achieve its goals.<sup>123</sup> Given the high rate of communicable diseases such as HIV/AIDS, tuberculosis and malaria and disparity in access to medicines in its Member States, it is commendable that SADC prioritises TRIPS flexibilities, including least developed countries' scope to manufacture generic versions of patented medicines, as an opportunity to build local manufacturing capacities.

Similar to the EAC, SADC adopted the commercial/corporate plant breeder focused Protocol for the *Protection of New Varieties of Plants (Plant Breeders' Rights) in the Southern African Development Community Region* in August 2017, styled after the UPOV 1991 Convention.<sup>124</sup> Nonetheless, SADC's Plant Genetic Resources Centre (SPGRC) and Technical Agreement address some of the questions about the exclusion of farmers' varieties from the formal seed system. It provides for the registration of

121 Article 2 (m), Protocol on Science, Technology and Innovation (Aug. 17, 2008).

122 The SADC Protocol on Health was signed on August 18, 1999.

123 SADC has an overall 'SADC Pharmaceutical Programme' created in June 2004 and located in the Social and Human Development and Special Programmes Directorate. See <https://www.sadc.int/themes/health/pharmaceuticals/> (accessed Aug. 28, 2020). For a detailed discussion on access to essential medicines in SADC, see Chikosa Banda, *Intellectual Property and Access to Essential Pharmaceuticals: Recent Law and Policy Reforms in Southern Africa Development Community Region*, 31 MARYLAND J. INT'L L. 44 (2016).

124 Botswana is the latest SADC Member State to sign the Protocol on 29 June 2020. Eight other SADC Member States have signed it: Angola, Democratic Republic of Congo, Eswatini, Lesotho, Mozambique. See SABRINA MASJINILA & MARIAM MAYET, *THE SADC PVP PROTOCOL: BLUEPRINT FOR UPTAKE OF UPOV 1991 IN AFRICA* (African Centre for Biodiversity, Sept. 2018).

farmers varieties in the SADC Variety Database subject to the description of the variety, including its name, description, performance, farmer experiences during cultivation and merits of the variety. The SPGRC is working alongside national plant genetic resources centres to design registration systems for farmers varieties, which would offer the opportunity for commercialisation of farmers' varieties. Accordingly, SADC showed support for smallholder farmers in a regional dialogue hosted by the African Centre for Biodiversity and Participatory Ecological Land Use Management (PELUM) Zimbabwe, which took place from the 3-4 December 2019. Bruce Chulu from the SCII Zambia requested the organisers to 'come up with procedures on the characteristics required for farmers varieties and present it to SADC through its Member States. He noted that 'the region will not refuse.'<sup>125</sup>

Like ECOWAS and EAC discussed above, SADC members also have varying national laws stemming from their membership of TRIPS, OAPI and ARIPO (See Table 1). All SADC members are party to TRIPS, while 9 of the 15 SADC Member States are party to OAPI or ARIPO (Angola, Madagascar, Mauritius, Seychelles, South Africa and Swaziland are non-members of either organisation) (See Table 1). Notably, SADC has the first fully operational (sub) regional EPA with the EU in Africa, signed on 10 June 2016 and operational from 10 October 2016.<sup>126</sup> The SADC-EU EPA covers Botswana, Lesotho, Mozambique, Namibia, South Africa and Swaziland, with Angola having an option to join in the future.<sup>127</sup> In Article 16 of the EPA, parties commit to cooperate on the protection of IP and reaffirm their commitment to TRIPS obligations and flexibilities. A question here is how will the parties achieve cooperation on TRIPS flexibilities? As discussed in Part II, the African Group and EU submissions at the TRIPS Council show that the African countries (including the SADC EPA States) interpretations of TRIPS flexibilities differs significantly from the EU's in certain instances such as plant variety protection.

One subject that the EPA parties share similar positions on at the TRIPS Council is GIs. The parties recognise the importance of GIs (and traditional knowledge) and

125 African Centre for Biodiversity, *Registration of Farmers' Varieties in SADC: A Report from Dialogue held at Victoria Falls, Zimbabwe, December 3-4, 2019*, at 11 (African Centre for Biodiversity, March 2020).

126 Other SADC members, the Democratic Republic of the Congo, Madagascar, Malawi, Mauritius, Zambia and Zimbabwe, are negotiating Economic Partnership Agreements with the EU through the sub-regional organisations.

127 Economic Partnership Agreement between the European Union and its Member States, of the one part, and the SADC EPA States, of the other part (16.9.2016, I. 250/28, Official Journal of the European Union).



commit to considering ways to cooperate on both subjects. To drive its GIs alliance, the EPA comprises a bilateral protocol between the EU and South Africa to protect GIs alongside trade in wines and spirits.<sup>128</sup> Under the Bilateral protocol, the EU commits to protecting 105 products (agricultural products, foodstuffs and wines) from South Africa, including Rooibos, Karoo meat, Napier, Paarl, Stellenbosch and Tygerberg. For its part, South Africa commits to protecting 251 products (agricultural products, foodstuffs, beers, wines and spirits) including Parmigiano Reggiano, Prosciutto di Parma, Champagne, Cognac, Irish Cream and Scotch Whisky. As mentioned above, GIs are less controversial in Africa, especially because external actors' -such as the EU's- push for stronger GIs systems align with African positions on the subject.

#### *iv. The Common Market for Eastern and Southern Africa*

While ECOWAS, EAC and SADC are case studies here, I will briefly highlight COMESA's *Policy on Intellectual Property Rights* and tripartite agreement with EAC and SADC before unpacking the intersections of the sub-regional IP organisations and RECs in Part IV.<sup>129</sup> Established by the *Treaty Establishing COMESA* signed on 5 November 1993 and ratified on 8 December 1994, COMESA provides for its Member States to exchange information on patents, trademarks and designs laws and to cooperate in science and technology development to develop and implement suitable patent and industrial property laws.<sup>130</sup> Although these provisions exclude copyrights and related rights, COMESA's Policy on IP covers both industrial property and copyrights. It submits that the generation, creation, innovation and management of IP plays an important role in wealth creation and national development, especially with the global shifts from resource-based economies to knowledge-based and innovation-driven economies.<sup>131</sup> Accordingly, it provides for Member States to promote the utilisation and protection of IP.

The Policy is divided into two parts. Part A, 'COMESA Policy on Intellectual Property Rights' covers the connection between IP and economic development, trade, cultural industries, traditional knowledge, expressions of folklore, information

128 Protocol 3: Geographical Indications and Trade in Wines and Spirits, Economic Partnership Agreement between the European Union and its Member States, of the one part, and the SADC EPA States, of the other part (16.9.2016, I. 250/28, Official Journal of the European Union).

129 COMESA, Official Gazette of the Common Market for Eastern and Southern Africa (COMESA), Council of Ministers Decision 90, at 26 (Volume 16, October 15, 2011).

130 COMESA has 21 Member States: Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Eswatini, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Somalia, Sudan, Tunisia, Uganda, Zambia and Zimbabwe. Articles 104 (1) (d) & 128 (e), Treaty Establishing the Common Market for Eastern and Southern Africa.

131 Paragraphs 3 & 11, COMESA Policy on Intellectual Property Rights.



communication technology, audit and valuation. Part B, 'The COMESA Policy on Copyright and Copyright Related Industries' is dedicated to copyright and related rights. Both parts foreground the contributions of IP to cultural, social and economic development and the need for member states to adopt effective legal and policy frameworks that fully exploit TRIPS flexibilities. However, the policy omits to cover concrete issues required for balanced systems that address conflicts and competing interests in IP required to fully exploit TRIPS flexibilities. Syam and Tellez assert that 'COMESA IP Policy only makes superficial references to the need for Member States to use the flexibilities under TRIPS without providing any guidance on how the flexibilities can be utilised in respect of each sector of the economies of the Member States of COMESA.'<sup>132</sup> Beyond its Policy, COMESA has not adopted any IP instruments.

COMESA, EAC and SADC launched a Tripartite Free Trade Area (T-FTA) on 10 June 2015.<sup>133</sup> The core objective of the tripartite agreement is to contribute to promoting social and economic development of the region and enhancing regional and continental integration processes. One of the commitments in the yet to be finalised Phase II negotiations is an IP chapter that will be Annex 9 of the T-FTA.<sup>134</sup> Annex 9, divided into eight Articles, sets out more detailed IP provisions than those of ECOWAS, EAC or SADC discussed above. In addition to the overarching provisions on Member States undertaking to design effective IP systems that incentivise innovation and creativity and contribute to social and economic welfare, other noteworthy provisions include Articles 3 and 6 on copyright, Article 4 on traditional knowledge, genetic resource and folklore, Article 5 on Information and Communications Technology and Article 7 on industrial property. While these are crucial provisions, similar to the concerns raised about the COMESA IP Protocol in the preceding paragraph, Annex 9 fails to engage in a nuanced coverage of other vital IP subjects relevant to its developing and least-developed country members, such as those on pharmaceutical patents and access

<sup>132</sup> Syam & Tellez, *supra* note 111, at 43.

<sup>133</sup> The Agreement, launched in Sharm El Sheikh, Egypt, covers the 29 members of COMESA, EAC and SADC. 22 Member States have signed the Agreement Establishing the Tripartite Free Trade Area among the COMESA, EAC and SADC: Angola, Botswana, Burundi, Comoros, Democratic Republic of Congo (DRC), Djibouti, Egypt, Kenya, State of Libya, Madagascar, Malawi, Mauritius, Namibia, Rwanda, Seychelles, South Africa, Sudan, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe. 8 countries have ratified the Agreement: Botswana, Burundi, Egypt, Kenya, Namibia, Rwanda, South Africa and Uganda.

<sup>134</sup> Article 45, 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 (June 10, 2015).

to medicines, copyright and access to knowledge, geographical indications and the appropriate type of protection system or plant variety protection and farmers' rights.

The UNECA, UN, AfDB and UNCTAD *Assessing Regional Integration in Africa IX* report recommends that T-FTA negotiators consider *inter alia* these essential themes during the T-FTA Phase II IP negotiations.<sup>135</sup> First, the adoption of a regional IP exhaustion regime, measures for cooperation on patent examination and policy on IP rights/public health/investment in access to medicines. Second, the enforced ratification of the Protocol amending TRIPS 2005 to qualify for production and exportation of pharmaceutical products. Third, the adoption of an agenda on plant breeders' rights regime contoured to suit the needs of the local seed ecosystems and publicly funded agricultural research centres. Fourth, the enforced ratification of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired or Otherwise Print Disabled. As the T-FTA is expected to contribute to AfCFTA, these recommendations would also apply to the AfCTFA IP Protocol negotiations.

Neither the AU nor the AfCFTA Secretariat has released a draft text of the AfCFTA IP Protocol. Million Habte, the AU Commission coordinator for the AfCFTA IP Protocol negotiations confirms that negotiations for the Protocol have not commenced.<sup>136</sup> Drawing from Parts II and III, I will discuss pertinent points to drive a development-oriented AfCFTA IP Protocol next.

### III. THE AFCFTA AND A DEVELOPMENT ORIENTED INTELLECTUAL PROPERTY PROTOCOL

The analysis advanced above indicates that one of the early exercises for the AfCFTA IP Protocol negotiators would be to assess and ascertain how the Protocol fits within the fragmented IP architecture on the continent. Consequently, I pose two preliminary questions. First, how should the AfCFTA IP Protocol connect with the regime complex for IP in Africa? By this I mean what role should the existing patchwork of regional and sub-regional institutions, instruments and policy frameworks play in the AfCFTA IP Protocol. Second, what should the scope of the AfCFTA IP Protocol be? By this

<sup>135</sup> For the 9 key points in full, see United Nations Economic Commission for Africa, African Union, African Development bank and United Nations Conference on Trade and Development, *Assessing Regional Integration in Africa IX: Next Steps for the African Continental Free Trade Area*, 110 (UNECA, AU, AfDB, UNCTAD, 2019).

<sup>136</sup> Habte explains that the AU Commission may start the process by providing trainings. Personal communication with Million Habte (Aug. 26, 2020).

I mean which IP categories would it cover and how would it conceptualise them? I share reflections on these questions in this part.

### **A. How Should the AfCFTA IP Protocol Connect with the Regime Complex for IP in Africa?**

To start with, the AfCFTA is one of the flagship projects of the AU's Agenda 2063. Therefore, I argue in favour of applying the AU's IP instruments, commitments and declarations to the AfCFTA IP Protocol. This would generate questions about which of the AU's aspirations make it into the IP Protocol and by extension, which gets extinguished. Uncontroversial subjects such as GIs would be easier to finalise because the African position aligns with external actors such as the EU and WIPO - who subtly or overtly influence IP law and policymaking at the sub-regional and national levels in Africa. However, controversial subjects such as plant variety protection, access to medicines and access to knowledge would incite scrutiny, generate knotty questions and demand detailed deliberations.

In Part III, I discussed OAPI, ARIPO, EAC and SADC's UPOV 1991 Convention styled plant breeders laws or draft laws, which limits the policy space for these sub-regional organisations and their Member States to introduce provisions like the protection of farmers' varieties, farming communities' varieties, farmers rights to save seeds or access and benefit-sharing principles recommended by the African Model Law. Some of these sub-regional institutions or their Member States, such as South Africa from SADC and Tanzania from EAC, are also parties to bilateral or regional trade agreements that mandate them to accede to the UPOV 1991 Convention.<sup>137</sup> The pivotal question, therefore, is whether the AfCFTA IP Protocol should require countries that have adopted onerous UPOV 1991 Convention obligations to re-negotiate those commitments to the extent that they depart from the development-oriented vision of the AfCFTA IP Protocol? I argue in the affirmative and in favour of making the African Model Law an important baseline on plant variety protection for the AfCFTA IP Protocol, which means an explicit rejection of sole reliance on the inflexible plant breeders' rights system of the UPOV 1991 Convention as 'a model' plant variety protection system.

For its part, PAIPO raises structural and procedural challenges. The PAIPO Statute provides that PAIPO seeks to harmonise IP in Africa. The tough question to

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<sup>137</sup> "Harmonize", OXFORD ENGLISH DICTIONARY ONLINE (Oxford University Press, June 2020).

tackle here is 'what does harmonise mean?' The Oxford English Dictionary defines harmonise as 'to be in *harmony* (with); to accord, agree (in sense, sentiment, feeling, artistic effect, etc.), or 'to bring in agreement (two or more things, or one thing with another); to reconcile.'<sup>138</sup> It defines harmony as a 'combination or adaptation of parts, elements, or related things, so as to form a consistent and orderly whole; agreement, accord, congruity.'<sup>139</sup> Its Latin etymology indicates its early link to music – joining or concord of sounds for a pleasing effect. Music engages simultaneous integration of notes, tones or pitches to produce new and nuanced sounds. Drawing from these definitions, PAIPO's task to harmonise IP in Africa, would be to ensure the sub-regional organisations agree with one another and can combine or adapt different elements of their frameworks to form a consistent and orderly whole while maintaining their independence. I argue that this combination *or harmonisation* ought to be grounded on the AU's IP agenda.

To be clear, *harmonise* differs from *unite*. The latter, which means 'to combine or join (something) *with* (also *to*) another; to bring or put together to form a single entity; to cause to be one' or 'to come together to form a single body or entity; to join or combine *with* (also *to*) another' is not PAIPO's stated goal.<sup>140</sup> Without question, unity would be problematic to achieve. In music terms, 'harmony requires diversity and eschews uniformity.'<sup>141</sup> Outside Africa, other regions have adopted different standards for IP harmonisation.<sup>142</sup> For example, the EU emphasises that harmonisation (or approximation) of IP plays a paramount role in the free circulation of goods within the European Single Market.<sup>143</sup> To achieve this, although the Member States have national IP laws (and the principle of territoriality applies), it introduces a mix of EU Directives and Regulations that cover certain substantive categories of IP. For example,

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138 *Id*

139 *Id*

140 "Unite", OXFORD ENGLISH DICTIONARY ONLINE (Oxford University Press, June 2020).

141 Martin Boodman, *The Myth of Harmonization of Laws*, 39 AM. J. COMP. L. 699, 701 (1991). On harmonisation of laws, see also Jose Angelo Estrella Faria, *The Future directions of legal harmonisation and law reform: Stormy seas or prosperous voyage*, 14 UNIFORM L. REV. 5 (2009).

142 To draw lessons for the AfCFTA IP Protocol, I unpack regional harmonisation of IP laws employing case studies from different regions in a forthcoming article.

143 Article 118, Treaty on the Functioning of the European Union (TFEU) ("In the context of the establishment and functioning of the internal market the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements."). See also Articles 34, 35, 36, 207 and 262 of the TFEU; Hanns Ullrich, *Harmony and Unity of European Intellectual Property Protection*, in INTELLECTUAL PROPERTY IN THE NEW MILLENNIUM, 20–46 (David Vaver & Lionel Bentley eds., Cambridge University Press, 2004).

it has uniform protection for Trade Marks and Designs in EU Member States through Directive (EU) 2015/2436 and Council Directive 98/71/EC, respectively.<sup>144</sup> The EU also has a variety of harmonising Directives for particular copyright subject matters such as Database (Directive 96/9/EC), Software (Directive 2009/24/EC), Information Society/Digital Environment (Directive 2001/29/EC) and Term/Duration of copyrights (Directive 2011/11/EU). In addition, the EU has uniform IP enforcement measures through its Enforcement Directive 2004/48/EC.<sup>145</sup> Importantly, the Court of Justice of the European Union (CJEU) smoothens residual unevenness through the interpretation of IP laws in the region.<sup>146</sup> In this regard, one of the significant contributions of the CJEU to harmonising copyright law is *Infopaq International A/S v Danske Dagblades Forening*, which *inter alia* sets out the definition of originality in copyright as including ‘author’s intellectual creation.’<sup>147</sup> In short, Member States retain national IP laws, while the EU adopts variegated approaches to harmonisation for the different categories of IP with the enforcement framework and CJEU augmenting the process. A stark dissimilarity between the EU and AU is that the former does not have sub-regional IP organisations or RECs, which is an added layer of complexity in the African context.

Furthermore, in recognising the diversity in Africa displayed through the mix of developing and least developed countries embedded within divergent social, economic and political contexts, I submit that PAIPO should embrace the principle of variable geometry, which offers flexibility and differentiated speeds of integration by allowing countries make liberalised commitments based on their economic ability. James Gathii expounds that variable geometry covers rules, principles, and policies included in trade integration treaties that afford members, especially the poorest members ‘(i) policy flexibility and autonomy to pursue at slower paces time-tabled trade commitments and harmonisation objectives; (ii) mechanisms to minimise distributional losses by creating opportunities such as compensation for losses arising from implementation of region-wide liberalisation commitments and policies aimed at the equitable distribution the institutions and organisations of regional integration to avoid concentration in any

144 See also Regulation (EU) 2007/1001 on the European Union Trade Mark and Council Regulation (EC) No 6/2002 on Community Designs.

145 See European Commission, *The EU Copyright Legislation*, <https://ec.europa.eu/digital-single-market/en/eu-copyright-legislation> (accessed Aug. 28, 2020).

146 European Commission, *Intellectual Property*, <https://ec.europa.eu/growth/industry/policy/intellectual-property> (accessed Aug. 28, 2020). Jonathan Griffith, *Constitutionalising or Harmonising? The Court of Justice, the Right to Property and European Copyright Law*, 38 EUR. L. REV. 65 (2013).

147 *Infopaq International A/S v Danske Dagblades Forening* (C-5/08) I.P.Q 57 (2009) 1-6569 [2009] E.C.D.R. 16.

one member; and (iii) preferences in industrial allocation among members in an RTA [regional trade agreement]...<sup>148</sup> Thus, embracing variable geometry would ensure the implementation of the PAIPO is tailored to corporately suit all Member States.

PAIPO will not start from scratch as there are already a series of agreements to cooperation and harmonisation agreements at the sub-regional level for it to build on. For example, OAPI and ARIPO have consistently confirmed commitment to cooperation and harmonisation. On 26 July 2019, the Director Generals of both organisations signed a revised Work Plan for 2019-2020, adopted during the 5th OAPI-ARIPO Joint Commission at the ARIPO headquarters in Harare, Zimbabwe.<sup>149</sup> Five salient features of the Work Plan and Joint Commission commitments are as follows. First, it emphasises the significance of reciprocal participation in activities of both organisations such as their ordinary sessions of Administrative Council, OAPI's African Invention and Technical Innovation Fair (SAIT) and ARIPO's IP Conference. Second, it undertakes to enhance the exchange of publications on the systems and procedures of both parties and to have OAPI research articles published in the African Journal of Intellectual Property and the ARIPO Magazine. Third, it encourages delegations from both Member States to lobby for African common positions on technical and strategic IP matters at the international level. Fourth, it agrees to conduct a study on the harmonisation of the OAPI and ARIPO systems. To facilitate this, both organisations agreed to coordinate reciprocal study visits and office exchanges as avenues for their experts to learn more about the legal systems, grant/registration procedures, information communication technology tools and best practices adopted in each organisation. Fifth, it highlights the importance of both organisation's capacity building activities as critical to creating a strong IP human resources capital in Africa. In this regard, both organisations committed to providing

148 James Thuo Gathii, *African Regional Trade Agreements as Flexible Legal Regimes*, 35 NORTH CAROLINA J. INT'L L & COMM. REG. 572, 609 (2010).

149 African Regional Intellectual Property Organisation, *ARIPO – OAPI Fifth Joint Commission Adopts a Revised Work Plan for 2019 – 2020* (Aug. 2, 2019), <https://www.aripo.org/aripo-oapi-fifth-joint-commission-adopts-a-revised-work-plan-for-2019-2020/>. Organisation Africaine de la Propriété Intellectuelle, 'Joint Commission OAPI-ARIPO: Strengthening Cooperation Links (Ties)', <http://oapi.int/index.php/en/brevet/item/450-joint-commission-oapi-aripo-strengthening-cooperation-links-ties> (accessed Aug. 20, 2020). Also, a webinar titled 'Towards Intellectual Property Rights Harmonization in Africa' organised by Africa International Trade Commerce Research on July 2, 2020, the Director Generals of OAPI and ARIPO expressed their dedication to the harmonisation of intellectual property in Africa. See <http://africainternationaltrade.com/wp-content/uploads/2020/07/Report-Of-The-Webinar-On-Toward-Intellectual-Property-Rights-Harmonization-In-Africa-V7.pdf>. See also WIPO-OAPI-ARIPO Tripartite Agreement signed on October 1, 2018. According to the cooperation framework, the organisations undertake to provide joint technical assistance programs to Member States of ARIPO and OAPI.



training and capacity building to develop common IP programmes. OAPI and ARIPO also signed a four-year cooperation agreement on 07 February 2017 at the ARIPO headquarters in Harare, Zimbabwe. The agreement, which supersedes the earlier agreements signed by both organisations in 1996 and 2005 respectively, sets out similar commitments as the Work Plans and Joint Commissions with the firm dedication to promoting harmonisation, cooperation and African Common Positions at the core.<sup>150</sup>

Similarly, RECs like COMESA, EAC and SADC are also working on activities to promote cooperation as I outlined with the example of the T-FTA in Part III above. In establishing the relationship between the RECs and the AfCFTA IP Protocol, the preamble, Articles 3 (h) and 19 of the AfCFTA Agreement affirm that it is cooperative. Indeed, the RECs are considered fundamental to the success of the AfCFTA. For example, while the preamble of the AfCFTA confirms that RECs are part of its building blocks, Article 19 (2) affirms: ‘that are member of other regional economic communities, regional trading arrangements and customs unions, which have attained among themselves higher levels of regional integration than under this Agreement, shall maintain such higher levels among themselves.’

Another way to develop the cooperation and harmonisation of IP in Africa is for the AU to create a platform to coordinate, collate and consider all the African Group’s and African countries’ contributions in international fora like the WTO, WIPO and World Health Organisation (WHO). Different, often unconnected, representatives take the lead on processes and relations in these organisations. For example, representatives from the trade ministries are usually the primary interlocutors at the WTO, representatives from the IP offices are the main participants in WIPO while representatives from the health ministries are the key invitees to the WHO. African academics from the diaspora are also actively involved in multilateral negotiations (such as, in the WIPO-IGC). The proposed AU driven African-centric platform would promote the preservation and presentation of African Common Positions. I also suggest that the AU introduces monitoring and evaluation mechanisms to periodically review its harmonisation strategies and IP common positions in line with appropriate indicators and baselines.

In sum, the AfCFTA IP Protocol should introduce harmonising standards to address the increasingly fragmented IP architecture on the continent. The provisions of the IP Protocol would, therefore, have a constitutional hierarchy over the existing

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150 African Regional Intellectual Property Organisation, *OAPI and ARIPO Sign New Cooperation Agreement* (Feb. 9, 2017), <https://www.aripo.org/oapi-and-aripo-sign-new-cooperation-agreement/>.



sub-regional IP instruments. The test for the negotiators here would be to move from rhetoric and intention into action. I turn to some action points in relation to the scope of the AfCFTA IP Protocol.

### **B. What should the Scope of the AfCFTA IP Protocol be?**

IP is a broad term that encompasses wide-ranging proprietary rights. National, regional and international institutions select varying scopes of coverage for the subject. As I mentioned in Part III, OAPI provides for these ten categories of IP: Patents, Utility Models, Trademarks and Service Marks, Industrial Designs, Trade Names, Geographical Indications, Literary and Artistic Property, Protection Against Unfair Competition, Layout-Designs (Topographies) of Integrated Circuits and Plant Variety Protection. ARIPO provides for Patents, Industrial Designs, Marks, Traditional Knowledge and Expressions of Folklore and Plant Variety Protection. As a starting point, the negotiators would need to identify the categories of IP to protect. A combination of the categories covered in both organisations would suffice (while OAPI covers most of the relevant categories of IP, the inclusion of traditional knowledge and expressions of folklore from ARIPO completes the outline).

To advance toward development-oriented systems, the IP categories have to be carefully constructed. As Ruth Okediji puts it, 'intellectual property rights are not scientifically derived, but instead, culturally constructed and negotiated between the state and private interests.'<sup>151</sup> IP is connected to quotidian experiences as it applies to arts, agriculture, (bio)technology, crafts, culture, designs, education, entertainment, environment, fashion, food, health, science and sports, amongst others. Indeed, the promise of national 'development' spurred newly independent Global South countries to craft domestic IP laws, become a party to international IP organisations and participate in capacity-building or training programs.<sup>152</sup> The recurrent rhetoric was and still is that IP furnishes a pathway to industrialisation that will enhance the material welfare of the Global South.<sup>153</sup> For example, Article 7 of TRIPS provides: 'the protection and enforcement of intellectual property rights should contribute to the promotion of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare.' Article 8 adds in part: 'Members may, in formulating or amending their laws and

151 Okediji, *supra* note 76, at 317.

152 Ruth Okediji, *The Limits of International Copyright Exception for Developing Countries*, 21 VANDERBILT J. ENT. & TECH. L. 689, 691 (2019).

153 *Id.*

regulations, adopt measures necessary to ... promote the public interests in sectors of vital importance to their socio-economic and technological development.’

Although there is limited empirical evidence to support the claim that IP effectuates enduring economic development, I underscore the development centric discourse of the AU and African regional institutions here because of its potential, if constructed correctly, to offer some economic growth outcomes in African societies. I take an example from GIs. The Scotch Whisky Economic Impact Report 2018, building on the work of the Centre for Economics and Business Research, reveals that Scotch Whisky contributed GBP5.5 billion to the United Kingdom’s economy in 2018.<sup>154</sup> The report adds that Scotch Whisky supports more than 42, 000 jobs across the United Kingdom; including 10,500 jobs in Scotland and 7,000 jobs in rural communities.<sup>155</sup> To be sure, IP policies and laws cannot effect these outcomes in isolation. Appropriate cultural, economic social, technological and political contexts would be required. A crucial factor to consider (which is not discussed in the article) is how enforcement standards contribute to IP and development in Africa (and its investment relationships with external actors).

In my view, a development-oriented AfCFTA IP Protocol will unreservedly define IP in terms that are fit for the different social and economic contexts around Africa and celebrate the continent’s areas of strength, especially in its agricultural, creative, cultural sectors. Accordingly, this development-oriented AfCFTA IP Protocol will demand robust qualitative and quantitative research, based on contextually appropriate methodologies and methods, to excavate the exigencies, realities and priorities across the continent. For example, the Open African Innovation Research and Training Project finds that most of the research on IP, innovation and creativity focus on the formal sectors of the economies, thereby, marginalising the informal forms of innovation and creativity, ubiquitous in Africa (and the Global South).<sup>156</sup> Similarly, Chidi Oguamanam and Funmi Arewaun cover how Nigeria’s film industry (otherwise referred to as Nollywood) thrives outside a strong copyright (enforcement) system.<sup>157</sup> The interrelated activities of artists, entrepreneurs and infringers inform

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154 Scotch Whisky Association, *Scotch Whisky Economic Impact Report 2018* (Apr., 2019), <https://www.scotch-whisky.org.uk/media/1591/final-2018-economic-impact-report.pdf>.

155 *Id.*

156 See, e.g., Jeremy de Beer et al. *INNOVATION & INTELLECTUAL PROPERTY: COLLABORATIVE DYNAMICS IN AFRICA*, 7 (UCT Press, 2014).

157 Chidi Oguamanam, *Beyond “Nollywood” and Piracy: In Search of an Intellectual Policy for Nigeria*, 3 *NIALS J. INTELL. PROP.* 3 (2011); Olufunmilayo Arewa, ‘Nollywood: Pirates and Nigerian Cinema’, in *CREATIVITY WITHOUT LAW: CHALLENGING THE ASSUMPTIONS OF INTELLECTUAL PROPERTY*

the industry's progress. It is essential to emphasise that there will be variations in IP requirements for different sectors and sub-regions or countries. Put differently no one-size IP composition would suit the heterogeneous continent; hence, the need for (qualitative and quantitative) research and variable geometry as highlighted above. For example, while Nollywood thrives with a weak copyright system, the agricultural sector in Nigeria may thrive with strong farmers' rights and traditional knowledge systems. Therefore, the research and data derived would equip African negotiators (and law and policymakers) draft effective laws and make informed decisions when considering external offers on capacity building and technical support.

Furthermore, depending on how the negotiators decide to resolve the harmonisation question posed above, including whether a new substantive IP instrument is required or whether the existing regional instruments would be reviewed, I advance additional questions to foster their remedial efforts. First, how are the different IP categories delineated? Second, what are the terms of protection? Third, what are the limitations and exceptions to the exclusive rights granted? As examples, I share succinct suggestions on patents, GIs, plant variety protection and traditional knowledge drawing from OAPI, ARIPO and the TRIPS minimum standards.

### *i. Patents*

The AfCFTA negotiations have the flexibility to shape the scope of patents on the continent by adopting inclusive definitions of inventions and exceptions to patentability that suit the innovation styles and ideological positions of its peoples. OAPI's Annex 1 (Bangui Agreement) and ARIPO's Harare Protocol provide for patents in line with Article 27 (1) of TRIPS, which stipulates that WTO Members are to make patents available for inventions, whether products or processes, in all fields of technology, based on three conditions, namely novelty, inventive step and industrial applicability.<sup>158</sup> However, WTO Members may exclude from patentability, inventions that are contrary to *ordre public* or morality, including to protect human, animal, plant life, health or to avoid serious prejudice to the environment.<sup>159</sup> TRIPS neither defines 'inventions' nor the *ordre public* or morality exceptions allowed. However, Article 27 (3) provides that Members *may* exclude 'diagnostics, therapeutic and surgical methods for the treatment of humans or animals' or 'plants and animals other than micro-

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(Kate Darling & Aaron Perzanowski eds., NYU Press, 2017); Chidi Oguamanam, *Nollywood Phenomenon: "The Nollywood Phenomenon: Innovation, Openness, and Technological Opportunism in the Modelling of Successful African Entrepreneurship"*, 23 J. World Intell. Prop. (2020).

158 Article 27 (1), TRIPS.

159 Article 27 (2), TRIPS.

organisms, and other essentially biological processes for the production of plants or animals other than non-biological and microbiological processes.<sup>160</sup>

One of the cardinal elements the African Model Law is its opposition to patents for life forms.<sup>161</sup> Article 9 of the African Model Law clearly states that patents for life forms and biological processes are not recognised. OAPI's Annex 1 and the Harare Protocol provide similar exceptions to patentability, including 'inventions that are contrary to public policy or morality', 'discoveries, scientific theories and mathematical methods', 'plant varieties and animal species', 'methods for the treatment of the human or animal body by surgery or therapy, including diagnostic methods' and 'computer programs.'<sup>162</sup> These provisions should inform the crafting of the exceptions to patentability in the IP Protocol.

OAPI and ARIPO's 20-year patent duration from the date of filing can set a precedent for the AfCFTA IP Protocol negotiators.<sup>163</sup> For pharmaceutical patents and access to medicines which have come to the fore because of the Corona virus disease (COVID-19), the negotiators should address patent terms and additional protection for minor improvements (otherwise referred to as patent evergreening). Olasupo Owoeye, Olugbenga Olatunji and Bukola Faturoti, aptly argue that patent evergreening affect access to medicines in the Global South.<sup>164</sup> Furthermore, in line with sub-regional interventions such as the *EAC Regional Intellectual Property Policy on the Utilisation of Public Health-Related WTO-TRIPS Flexibilities and the Approximation of National Intellectual Property Legislation* and flexibility allowed in Articles 30, 31 and 31bis of TRIPS, the negotiators should provide robust compulsory licensing provisions and related data exclusivity waivers to safeguard public health in Africa.<sup>165</sup> Amaka Vanni rightly reminds us that the way Global South actors conceptualise, establish and interpret pharmaceutical patent laws impacts on access to medicines, public health and development.<sup>166</sup>

160 Article 27 (3), TRIPS.

161 Ekpere, *supra* note 9, at 21–22.

162 Article 6 of Annex 1, Bangui Agreement, Section 3, Harare Protocol.

163 Article 33, TRIPS; Article 9 of Annex 1, Bangui Agreement.

164 Olasupo Owoeye, Olugbenga Olatunji & Bukola Faturoti, *Patents and Trans-Pacific Partnership: How TPP-Style Intellectual Property Standards may Exacerbate the Access to Medicines Problems in the East African Community*, 33 INT'L TRADE J. 197 (2019).

165 African countries can also explore opportunities for South-South technology transfer and cooperation. See Obijiofor Aginam, *Global Health Governance, Intellectual Property and Access to Essential Medicines: Opportunities and Impediments for South-South Cooperation*, 4 GLOBAL HEALTH GOVERNANCE 15(2010).

166 AMAKA VANNI, *PATENT GAMES IN THE GLOBAL SOUTH: PHARMACEUTICAL PATENT LAW-MAKING IN BRAZIL, INDIA AND NIGERIA* (Hart, 2019).

### ***ii. Geographical Indications***

I recommend that the AfCFTA IP Protocol negotiators should design *sui generis* systems for GIs - as opposed to trademark systems –as the *sui generis* system benefits both the developing and least developed countries on the continent because they are endowed with potential products that could qualify as GIs. OAPI provides a *sui generis* GI system in Annex VI of the Bangui Agreement. In contrast, ARIPO protects GIs through collective or certification marks under its Banjul Protocol. Both systems reflect the latitude offered in Article 22 (2) of TRIPS, which provides for WTO Member States to provide any legal means to protect GIs. Article 22 of TRIPS defines GIs as goods that originate in the territory of a Member, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin. Accordingly, Member States can protect these GIs through a variety of legal frameworks, including *sui generis* systems, trademarks and unfair competition laws.<sup>167</sup>

In unpacking debates on the conceptualisation of GIs, Chidi Oguamanam and Teshager Dagne propose that ‘given the territorial nature of most agricultural practice in Africa, a geographical link as a condition for GI protection adds significant value to GIs as tools to contextualise policy objectives in the protection of biodiversity, the preservation of cultural identity and protection of biodiversity.’<sup>168</sup> Besides the fact that GIs are only registerable in other jurisdictions if they have strong protection in their countries of origin, *sui generis* systems provide a broader scope of protection that conserve local traditional knowledge systems, methods of production, processes of transfer and methods of utilisation, which preserve the authenticity of protected products both at national and international levels. The *sui generis* system will provide GI owners with the exclusive rights to exclude others from any forms of unauthorised reproduction, imitation or falsification of the protected products. In addition, *sui generis* GI systems are not time-limited and often remain valid unless the registration is cancelled, as opposed to (certification and collective) trademarks that are usually granted for renewable ten-year periods.

### ***iii. Plant Variety Protection***

Like GIs, Africa’s agricultural heritage gifts it with unique plant varieties and associated

<sup>167</sup> Article 22, TRIPS.

<sup>168</sup> Chidi Oguamanam & Teshager Dagne, *Geographical Indication (GI) Options for Ethiopian Coffee and Ghanaian Cocoa*, in INNOVATION & INTELLECTUAL PROPERTY: COLLABORATIVE DYNAMICS IN AFRICA, AT 100 (Jeremy De Beer, et al. Chris Armstrong, Chidi Oguamanam & Tobias Schonwetter eds., UCT Press, 2014).

farmers' traditional knowledge to conserve and develop new varieties, which make it an excellent site to promote *sui generis* plant variety protection systems. Both OAPI and ARIPO's Annex X Bangui Agreement and Arusha Protocol respectively provide UPOV 1991 Convention Styled systems in line with the choice offered in Article 27.3(b) of TRIPS, which allows WTO Member States to protect plant varieties through patents, effective *sui generis* systems or any combination of systems. As TRIPS neither defines *sui generis* nor recommends the UPOV system, I maintain that the IP Protocol negotiators can creatively conceptualise a *sui generis* plant variety protection system for the continent despite the policy contradictions the debates on the subject.

Bram de Jonge and Peter Munyi propose that one way to address the debates about the suitability of the UPOV 1991 Convention for Africa is to adopt a differentiated system, with 'varied levels of protection, both for different crops and with respect to different categories of farmers.'<sup>169</sup> However, I argue that adopting the comprehensive system akin to the African Model Law fittingly legitimises the small-scale farmers indigenous innovation systems prevalent in Africa. The components of the *sui generis* plant variety protection systems should include community rights, farmers rights and plant breeders' rights. Important exceptions to plant breeders' rights here should consist of farmers' rights to save, use, exchange and sell seeds/propagating materials.

#### *iv. Traditional Knowledge*

I suggest that ARIPO's Swakopmund Protocol should serve as a starting consultation point for the AfCFTA IP Protocol negotiations on traditional knowledge. Accordingly, Section 2 of the Protocol defines traditional knowledge as 'any knowledge originating from a local or traditional community that is the result of intellectual activity and insight in a traditional context, including know-how, skills, innovations, practices and learning, where the knowledge is embodied in the traditional lifestyle of a community or contained in the codified knowledge systems passed on from one generation to another.' Like patents, the Protocol clarifies that traditional knowledge is not limited to any technical field, and notes that it may include agricultural, environmental, medical knowledge or knowledge related to genetic resources.<sup>170</sup>

Factors for the negotiators to clarify include a definition of traditional knowledge, conditions for protection, beneficiaries of protection, rights conferred, assignment

169 BRAM DE JONGE, NIELS P LOUWAARS & JULIAN KINDERLERER, A SOLUTION TO THE CONTROVERSY ON PLANT VARIETY PROTECTION IN AFRICA' NATURE BIOTECHNOLOGY (May 2015); Peter Munyi, Bram De Jonge & B Visser, *Opportunities and Threats to Harmonisation of Plant Breeders' Rights in Africa: ARIPO and SADC*, 24 AFR. J. INT'L & COMP. LAW 86, 104 (2016).

170 Section 2 of the Swakopmund Protocol.



and licensing, access and benefit-sharing, exceptions and limitations, compulsory licensing, duration of protection and dispute resolution.<sup>171</sup> Where relevant, the African Model Law can also offer guidance on the subject. For example, in Article 16, it provides for the rights of communities over their innovations, practices, knowledge and technologies acquired through generations.<sup>172</sup> In Article 26. 1 (a) it further provides that farmers rights include the right to protect their traditional knowledge relevant to plant and animal genetic resources.<sup>173</sup> However, the negotiations should avoid the limitations of the Swakopmund Protocol and the African Model Law like in the instances where substantive IP provisions are not clarified in a way that African countries can easily adopt or adapt.

There are no international definitions or standards for traditional knowledge as TRIPS fails to include it as one of its categories of IP. Graham Dutfield notes that 'traditional knowledge was a non-issue at the GATT Uruguay Round of trade negotiations.'<sup>174</sup> Nonetheless, following repeated calls from the African Group and other Global South actors, WIPO IGC has an on-going mandate to negotiate text-based instrument(s) for the protection genetic resources, *traditional knowledge* and traditional cultural expression.<sup>175</sup> Debates around adopting a tiered or differentiated approach to traditional knowledge and traditional cultural expressions are gradually evolving in the WIPO-IGC negotiations.<sup>176</sup> According to Chidi Oguamanam, a tiered or differentiated approach 'is a pragmatic and malleable strategy that seeks to negotiate the extent of exclusive rights or non-exclusive rights that attach to the beneficiaries or claimants of TK/TCEs [traditional knowledge/traditional cultural expressions], as a factor of how much of those, or aspects thereof, may already be in the public domain.'<sup>177</sup>

171 Sections 2 to 15 of the Swakopmund Protocol.

172 Article 16 of the African Model Law.

173 Article 26.1 (a) of the African Model Law.

174 Graham Dutfield, *TRIPS-Related Aspects of Traditional Knowledge*, 33 CASE WESTERN RESERVE J. INT'L L. 233, 236 (2001). On the complexities around traditional knowledge at the international level, see Graham Dutfield, *TK Unlimited: The Emerging but Incoherent International Law of Traditional Knowledge*, 20 J. WORLD INTELL. PROP. 144 (2017).

175 See World Intellectual Property Organisation, *WIPO Intergovernmental Committee (IGC)*, <https://www.wipo.int/tk/en/igc/> (accessed Aug. 28, 2020). PROTECTING TRADITIONAL KNOWLEDGE: THE WIPO INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE, AND FOLKLORE (Daniel F. Robinson, Ahmed Abdel-Latif & Pedro Roffe eds., Routledge, 2017).

176 Chidi Oguamanam, *Tiered or Differentiated Approach to Traditional Knowledge and Traditional Cultural Expressions: The Evolution of a Concept*, at 7 (CIGI Papers No 185, Aug. 2018).

177 *Id.* at 6. See also Ruth Okediji, *Traditional Knowledge and the Public Domain* (CIGI Papers No. 176, June 2018).



While the tiered and differentiated approach to traditional knowledge (and traditional cultural expressions) remains a fluid and working concept in the WIPO IGC, it could also serve as a guide for the IP Protocol negotiations and law-making on the subject. Similarly, the negotiators should consult the CBD (Articles 8j and 15), Bonn Guidelines, Nagoya Protocol, ITPGRFA (Article 9) alongside related *United Nations Declaration on the Rights of Indigenous Peoples 2007* and the *United Nations Declaration on the Rights of Peasants and Other Peoples Working in Rural Areas 2018*, which all provide legal norms and principles on traditional knowledge and related access and benefit-sharing principles. The protection of traditional knowledge, which fails to fit neatly within the Western-centric characterisation of IP law remains a thorny topic at the international level. Nonetheless, I invite the AfCFTA Protocol negotiators to consult the African Group's submissions at the WIPO IGC to understand its position on the subject.<sup>178</sup> For example, in its first position paper on the subject presented at the third session of the WIPO IGC (13 to 21 June 2002), the African Group proposed that 'in developing effective national, regional and international systems of protection [for traditional knowledge], it is necessary to develop flexible *sui generis* systems that take customary laws, protocols and practices into account, to provide protection not adequately provided by existing rights and systems.'<sup>179</sup> If this proposal is adopted, the negotiators would need to consider the elements of the *sui generis* system (in line with the factors for clarification I outlined above).<sup>180</sup>

As a general point, to promote the overall integration objective of the AfCFTA, the negotiators should introduce a provision on regional exhaustion for all categories

178 World Intellectual Property Organisation, *WIPO Intergovernmental Committee (IGC) Meetings and Documents*, [https://www.wipo.int/meetings/en/topic.jsp?group\\_id=110](https://www.wipo.int/meetings/en/topic.jsp?group_id=110) (accessed Aug. 28, 2020).

179 World Intellectual Property Organisation, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, *The Position of the African Group: Paper Presented by the African Group' Third Session, Geneva 13 to 21 June 2002* (WIPO/GRTKF/IC/13/15 14 June 2002), [https://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_3/wipo\\_grtkf\\_ic\\_3\\_15.pdf](https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_3/wipo_grtkf_ic_3_15.pdf). The Position Paper follows from the 'Decision on Intellectual Property, Genetic and Biological Resources, Traditional Knowledge and Folklore in Africa' taken by the Council of Ministers and adopted by the Heads of African States at the Seventy-fourth Ordinary Session/Ninth Ordinary Session of the OAU from 5 to 8 2001 in Lusaka, Zambia and reflects the views and proposals developed by African States at a variety of meetings held in Africa.

180 See also World Intellectual Property Organisation, WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, *Elements of a Sui Generis System for the Protection of Traditional Knowledge*, Document Prepared by the Secretariat (Fourth session Geneva, December 9 to 17 2002, WIPO/GRTKFIC/48 (Sept. 30, 2002), [https://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_4/wipo\\_grtkf\\_ic\\_4\\_8.pdf](https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_4/wipo_grtkf_ic_4_8.pdf).

of IP.<sup>181</sup> This prevents IP owners from restricting the circulation of IP products around the continent. In other words, once the IP owner places a product in one African country, she cannot prevent its circulation around the continent. Nevertheless, the IP owner retains the right to prevent exportation or importation from countries outside Africa. A related subject for the negotiators to consider is the connection between IP and competition law.

Finally, some constraints to designing development-oriented AfCFTA IP Protocol based on Africa's terms include dependence on donor funds, conflicting bilateral/regional trade and investment agreements, limited legislative capacity and negotiating skills alongside limited understanding of IP norms and the interfaces between IP and development.<sup>182</sup> To address these constraints, the negotiations for the AfCFTA IP Protocol should be fully funded from African sources. The negotiators should prescribe terms of reference predicated on Africa's interests but compliant with international minimum standards and the AU should constitute a multidisciplinary team of IP negotiators that care about Africa and can creatively craft effective homegrown IP systems that challenge and expand the existing Western driven IP agenda. The AfCFTA IP Protocol negotiators should establish a working group with representatives of OAPI, ARIPO and the RECs to decide on the harmonisation strategy, while engaging in consultations with interest groups with stakes in IP, including from the agriculture, creative, cultural, education, health, industrial, manufacturing, science and technology sectors.

#### IV. CONCLUSION

In this article, I have mapped the major policy and legal frameworks relating to IP at the regional and sub-regional levels in Africa. This is important because of the renewed attention on IP in Africa following the entry into force of the AfCFTA and its promise to deliver a development-oriented IP Protocol. The AU (formerly, OAU) has, through the AfCFTA, decided to rekindle its founding principles of a 'unified Africa.' In his address at the launch of the OAU, Pan-Africanist Kwame Nkrumah ardently asserted 'Africa must unite now...The forces that unite us are intrinsic and greater

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181 On exhaustion of IP, see *INTELLECTUAL PROPERTY EXHAUSTION AND PARALLEL IMPORTS* (Irene Calboli & Edward Lee eds., Edward Elgar 2016); SHUBHA GHOSH & IRENE CALBOLI, *EXHAUSTING INTELLECTUAL PROPERTY RIGHTS: A COMPARATIVE LAW AND POLICY ANALYSIS* (Cambridge University Press, 2018).

182 Thanks to Johnson Ekpere for highlighting these points. Personal Communication with Johnson Ekpere (July 4, 2020).

than the superimposed influences that keep us apart.' Indeed, regional integration was the primary vision of the Pan-African leaders and African independence advocates like George Padmore, Haile Selassie, Jomo Kenyatta, Leopold Senghor and W.E.B Du Bois.<sup>183</sup> Remarkably, at a time when economic partnerships at international and regional sites are stalling or dismantling, Africa has decided to look to the past, to chart a new path for its future economic relations.

My ultimate thesis is that despite the regime complex for IP in Africa -comprising overlapping and non-hierarchical laws, policies and sub-regional organisations- the AfCFTA IP Protocol can deliver its desired development-oriented IP system that harmonises the fragmented IP landscape in Africa. While acknowledging the enormous efforts required to accomplish this, I argue that the AfCFTA IP Protocol negotiators should circumspectly but creatively build on the existing frameworks for harmonisation and cooperation in the region, including PAIPO, OAPI and ARIPO agreements as well as the COMESA- SADC-EAC T-FTA. To promote policy coherence, I suggest that the AU should establish an OAPI, ARIPO and RECs working group to explore apposite options for IP harmonisation along with an African-centric platform to coordinate IP positions both within the region and in international fora.

Phase II of the AfCFTA negotiations offers a watershed moment for the IP Protocol negotiators to carefully reconstruct the broken IP architecture in Africa by introducing systems that recognise and reward its unique forms of innovation and creativity. In this regard, I argue that the IP Protocol should prioritise geographical indications, *sui generis* plant variety protection (based on the African Model Law), traditional knowledge and traditional cultural expressions as these are areas of strength for Africa. Finally, interest-driven external donor funding and bilateral/regional/multilateral trade and investment agreements may sabotage the AU's development-oriented aspirations. Therefore, the AU must screen the external influences and participation in the AfCFTA IP Protocol negotiations and the domestic IP systems across Africa, to ensure that it sets and safeguards its IP agenda.

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183 On Pan-Africanism and regional integration, see Luwam G.Girar, *Rethinking and Theorizing Regional Integration in Southern Africa*, 28 EMORY INT'L L. REV. 123 (2014).