

THE AfCFTA IP PROTOCOL AND THE COMMERCIALISATION OF TRADITIONAL KNOWLEDGE IN AFRICA

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Abstract

The quest for traditional knowledge from Africa is witnessing increasing illicit commercialisation by multinational pharmaceutical firms and biotech companies. Scientific research and innovations have changed the way traditional knowledge (TK) is used, managed, and governed today. Intellectual property rights protection, such as patent rights, based on TK does not include TK holders' interests. African countries are frustrated with many multilateral arrangements such as the WTO TRIPs Agreement and international trade negotiations under the World Trade Organisation due to the complex and unequal bargaining powers in these negotiations. A kind of one-size-fits-all arrangement. The adoption of the Continental Free Trade Area Agreement (AfCFTA) with its proposed IP Protocol to the Agreement could be a way to balance the inequality and to harness intra-regional trade negotiations relating to the commercialisation of traditional knowledge (TK). This analysis posits that for the AfCFTA Agreement's objectives and the proposed IP Protocol to be achievable, the policies and laws of sub-regional bodies in Africa be harmonized to set minimum standards and effectively tackle the aspects of IP relating to the commercialisation of TK. Existing sub-regional organisations such as ARIPO and OAPI are fragmented along colonial backgrounds without harmonisation allowing for continuous illicit exploitation and commercialisation of TK in Africa.

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1. Introduction

The migration from the Organisation of African Unity to the launch of the African Union in Durban 2002, was *inter alia* to accelerate the political and socio-economic integration of the continent and defend African common positions on issues of interest for the continent. With this in mind, African Union (AU) Member States in 2013 adopted the AU Agenda 2063 as a shared framework for ‘inclusive growth and sustainable development for Africa’ including ambitious policies in a variety of areas of interest for the continent.¹ Sustainable development presupposes and necessitates the harmonisation of economic-related laws such as intellectual property laws that regulates the works of art, designs, marks and patent inventions.² With these in mind, African Union Member States at the 10th Extraordinary Summit of the AU Assembly of Heads of State and Government held on 21 March 2018, in Kigali, the Republic of Rwanda via the Kigali Declaration, adopted the Continental Free Trade Area which came into force on 30 May 2019. This is to ‘create a single market for goods, services, facilitated by movement of persons in order to deepen the economic integration of the African continent and in accordance with the AU Agenda 2063 Pan African Vision of “An integrated, prosperous and peaceful Africa”.’³ The negotiation of this Free Trade Agreement contains intellectual property rights provisions on copyright, geographical indicators, trademark, patent and trade secrets that will serve the standards of the African continent taking into account the protection of traditional knowledge.

Economic and technological expansions triggered in the late 19th century the importance to develop new international trade laws. The development of these laws was with the intent to promote multilateralism and regional trade agreements. While multilateralism is the most salient force in the post-war world economy, the existence of economic regionalism provides regional trade agreements in the form of customs unions and free trade areas.⁴

From May 2019, the Africa Continental Free Trade Area (AfCFTA) Agreement has become the world’s largest continental free trade area, creating a single market for goods and services that apply to 1.2 billion people.⁵ The adoption of the Agreement

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- 1 *Agenda 2063: The Africa We Want*, AFR. UNION (2015), https://au.int/sites/default/files/documents/36204-doc-agenda2063_popular_version_en.pdf (last visited Apr. 8, 2023).
 - 2 Yeukai Mupangavanhu, *The Protection of Intellectual Property Rights within the Continental Free Trade Area in Africa: Is a Balance between Innovation and Trade Possible?*, 15 INT’L J. BUS., ECON. & L. 14, 14 (2018).
 - 3 Afr. Union, Agreement Establishing the African Continental Free Trade Area, Mar. 21, 2018, https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf (last visited Apr. 8, 2023).
 - 4 KEVIN G. CAI, *Regional Economic Integration in East Asia*, in THE POLITICS OF ECONOMIC REGIONALISM 83 (2010).
 - 5 Titilayo Adebola, *Mapping Africa’s Complex Regimes: Towards an African Centred AfCFTA Intellectual Property Protocol*, 1 AFR. J. INT’L ECON. L. 233, 234 (2020).

includes the adoption of important Protocols to the Agreement to deal with specific areas of trade. Intra-Africa harmonisation of protection and commercialisation of TK requires a deeper regional integration in which political conditions permit faster movement toward free trade, which would then spill over to the world economy.⁶ Regional integration and development in Africa is not only a function of the structural transformation of economies but the advancement of science and innovation capacities.⁷ Africa trade agreements generally demonstrate high levels of ambition with low levels of implementation.⁸ Just like the Paris Convention for the Protection of Industrial Property of 1883, which seeks to harmonise national patent laws, the AfCFTA Protocols on Trade in Goods, Trade in Services, Investment, Intellectual Property Rights, Competition Policy, Rules and Procedures are high-level protocols to expand intra-African trade through the harmonisation and coordination of trade liberalisation across Africa.⁹

Africa continent is rich with biodiversity, genetic resources and traditional knowledge. The African Regional Intellectual Property Organisation (ARIPO) Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore refers to traditional knowledge as 'knowledge originating from the 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'.¹⁰ The *Echinops Giganteus* endemic plant of the Kingdom of Magha-Bamumbu is useful to prevent heart and gastric troubles. Traditional use of this plant is for anti-cancer purposes, with several effective cytotoxins. The indigenous communities of the Kingdom of Magha-Bamumbu, Lebialem Division, and South West Region of Cameroon have exploited the plant resource over the years. *Echinops Giganteus* is among other plants used traditionally by this community.¹¹ The trade of Traditional Knowledge (TK) has emerged as a contemporary global issue of importance resulting from the advances in technology and the interest of biotechnology companies in the genetic resources of developing countries. In recent years, the international community has intensified

6 See CAI, *supra* note 4, at 83.

7 Saidi Trust, Knowledge Valorisation for Inclusive Innovation and Integrated African Development, in INNOVATION, REGIONAL INTEGRATION, AND DEVELOPMENT IN AFRICA: RETHINKING THEORIES, INSTITUTIONS, AND POLICIES 97 (Samuel Ojo Oloruntoba & Mammo Muchie eds., 2019).

8 Gabila Nubong, Developmental Regionalism and the Success Prospects of Africa's Continental Free Trade Area (CFTA): Lessons from Africa's Early Integration Experience, 13 AFR. REV. 1, 3 (2021).

9 Afr. Union, Protocol to Trade in Goods and Services to the African Continental Free Trade Area (2018), <https://au-afcfta.org/trade-areas/market-access/> (last visited April 11, 3, 2023).

10 African Reg'l Intell. Prop. Org., Swakopmund Protocol on the Protection of Traditional Knowledge & Expressions of Folklore pt. I, § 2.1, Aug. 9, 2010, <https://www.aripo.org/wp-content/uploads/2019/06/Swakopmund-Protocol-on-the-Protection-of-Traditional-Knowledge-and-Expressions-of-Folklore-2019.pdf> (last visited Apr. 9, 2023).

11 See generally Mathieu Tene et al., Lignans from the roots of *Echinops giganteus*, 65 PHYTOCHEMISTRY 2101 (2004).

its search for effective remedial measures to counter perceived negative effects on indigenous communities arising from the exploitation and commercialisation of traditional knowledge by pharmaceutical and agriculture industries.¹² These advances in technology have led to a shift from subsistence or traditional use of plant resources to the high commercialisation of these species. The Devils Claw plant of the Cassel Community, North, West, South Africa is also one of the medicinal plants considered as gold and diamonds of Cassel Community. It is useful for arthritis relief, weight loss, kidney disease, natural pain relief and other diseases. The useful medicinal plant attracts bio prospectors who through intermediaries have been interested in buying even the 'mother tuber' of the plant at the cost of R400 as against R500 proposed by the traditional healer in which there was still the complaint that selling the 'mother tuber' of the plant was like giving away the power of the community.¹³ The commercial value of these species has led to unsustainable stalking from African communities' traditional knowledge of plant resources. This unsustainability is combined with the expansion of local and international markets which put at risk of extinction not only traditional knowledge but also the economies of the vulnerable communities.¹⁴ The phenomenon of tapping unquantifiable wealth from Africa to the global north can be seen in the ongoing unequal trade between the duos.¹⁵ Trade mispricing, commercial smuggling of TK, and lack of developmental investments are calculated as illegal capital flight from Africa. Trade mispricing may be through collusion between importers and exporters within the same invoice, not based on international principles or treaties by multinational corporations.¹⁶ These prejudices have caused many indigenous communities to oppose the integration of their inherent rights over their knowledge in a commercial system so complex and unequal.¹⁷

The continent is confronted by a fragmented IP architecture, comprising an array of partially overlapping and sometimes conflicting agreements, laws and policies. Africa needs a homegrown IP system that underscores the unique forms of innovation and

12 Paul Kuruk, *Mutual Recognition Agreements and the Protection of Traditional Knowledge*, 38 COMMONWEALTH TRADE HOT TOPICS 1, 12 (2005).

13 Otsile Ntsoane, *Intellectual Property Rights and Natural Resources: A Case Study of Harvesters of Medicinal Plants in the North-West Province, South Africa*, in INDIGENOUS KNOWLEDGE SYSTEMS AND INTELLECTUAL PROPERTY IN THE TWENTY-FIRST CENTURY: PERSPECTIVES FROM SOUTHERN AFRICA 114 (Isaac Mazonde & Thomas Pradip, eds., 2007).

14 Paul-Marie Loundou, *Medicinal Plant Trade and Opportunities for Sustainable Management in the Cape Peninsula, South Africa* (Dec. 2008) (M.Sc. Thesis, University of Stellenbosch) (on file with the University of Stellenbosch Library system), <http://scholar.sun.ac.za/handle/10019.1/2495>.

15 NKWAZI N. MHANGO, HOW AFRICA DEVELOPED EUROPE DECONSTRUCTING THE HIS-STORY OF AFRICA, EXCAVATING UNTOLD TRUTH AND WHAT OUGHT TO BE DONE AND KNOWN 13 (2018).

16 DEV KAR & DEVON CARTWRIGHT-SMITH, GLOB. FIN. INTEGRITY, ILLICIT FINANCIAL FLOWS FROM DEVELOPING COUNTRIES, 2002-2006 8 (2008).

17 JONATHAN CURCI, THE PROTECTION OF BIODIVERSITY AND TRADITIONAL KNOWLEDGE IN INTERNATIONAL LAW OF INTELLECTUAL PROPERTY 17 (2010).

creativity for the continent to deliver effective development-oriented IP protection of TK.¹⁸ Before analysing in greater detail the importance of the AfCFTA Protocol on intellectual property rights, it is worth highlighting the international dimension relating to the protection and commercialisation of traditional knowledge.

2. International Dimension on the Protection and Commercialisation of TK

The liberalization of the global trade policies and other economic reforms are evolving such that value-added product development and its commercialization has become one of the fastest economic activities in the world.¹⁹ In 1998, the African Department of the World Bank highlighted the need to integrate traditional knowledge into the development process by launching an Indigenous Knowledge for Development Program. Nicolas Gorjestani's World Bank paper on Indigenous Knowledge for Development states that TK has the potential to provide locally managed, sustainable and cost-effective survival strategies. Building on TK can be effective in helping to reach the poor since TK is often the only asset they control and are very familiar with.²⁰ In Malawi, TK of farmers and fishermen has been merged with scientific knowledge to improve the sustainable use of the Lake Malawi Basin resources. Kenya, Ethiopia and Ghana are developing projects from World Bank fundings to promote medicinal plants as an integral part of health-related TK to provide alternative sources of income and to maintain and protect biodiversity.²¹

Given that intellectual creativity require scientific validation for it to be granted exclusive rights within the framework of IPR, TK may require validation prior to the sharing of such knowledge beyond the original context.²² There are concerns that the exploitation of TK of developing countries, which are often used commercially and/or patented in developed countries with little or no benefit shared with the owners of the resources.²³ For many traditional communities in Africa and other developing countries, their TK entails a bundle of relationships and obligations rather

18 Adebola, *supra* note 5, at 234.

19 P. Pushpangadan & K. Narayanan Nair, *Value Addition and Commercialization of Biodiversity and Associated Traditional Knowledge in the Context of the Intellectual Property Regime*, 10 J. INTELL. PROP. RTS. 441 (2005).

20 Nicolas Gorjestani, *Indigenous Knowledge for Development: Opportunities and Challenges*, Presentation at UNCTAD Conference on Traditional Knowledge, at 2 (Nov. 1, 2000), https://web.worldbank.org/archive/website00297C/WEB/IMAGES/IKPAPER_PDF.

21 *Id.*

22 Gorjestani, *supra* note 20, at 18.

23 U.N. Conference on Trade and Development, Sophia Twarog, *Preserving, Protecting and Promoting Traditional Knowledge: National Actions and International Dimensions*, 61, UNCTAD/DITC/TED/10 (Sophia Twarog & Promila Kapoor eds., 2004).

than a bundle of economic rights as under the common law property system.²⁴ The international dimension is based on the western perception of intellectual property protection principles which entail exclusive rights and other legal measures that limit the use of the protected material by third parties. The protection principles also set conditions for their authorized users such as imposing compensation or patenting.²⁵ Article 10(c) of the Convention on Biological Diversity (1992) provides that ‘each Contracting Party shall, as far as possible protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements’.²⁶

Industrialized countries have made efforts to push for the harmonization of legal standards to render IP protection more efficient and more widespread. This has led to the adoption of the WTO TRIPs Agreement to include IP protection of TK. The European Union has influenced its member states to promote the effective protection of intellectual property which include innovations from TK.²⁷ The WTO TRIPs Agreement in its Article 66.1 made it flexible for least developed countries based on different levels of development by granting the LDCs a “grace period” during which they do not have to comply with the whole of the agreement.²⁸ The TRIPs Agreement after its adoption provided for an initial transition period up to 2006 which has been extended severally and will now run until 01 July 2034, or earlier should the LDC become a developing country before that date. A further transition period relates to pharmaceuticals that is in place until 01 January 2033 or earlier should the LDC cease to be an LDC before that date. In terms of this transition period, LDCs are not required to give exclusive marketing rights to pharmaceuticals that are subject of a patent application as is provided for in Article 70.9 of the TRIPs Agreement. LDCs currently have the policy space to make unique IP regimes that are appropriate to their socio-economic development during these extendable transition periods.²⁹

Developing and least developed countries are arguing that knowledge and creativity have been narrowly defined in the context of IP protection ignoring indigenous creativity of traditional knowledge. IP rights are theoretically property rights to products of the mind.³⁰ At the 2001 Doha Conference, developing and LDCs demanded a review

24 CURCI, *supra* note 17, at 92.

25 Julie Yassine, *IP Rights and Indigenous Rights: Between Commercialization and Humanization of Traditional Knowledge*, 20 SAN DIEGO INT’L L. J. 71, 76 (2018).

26 United Nations Convention on Biological Diversity (1992), Art.10(c).

27 *Id.* at 75.

28 The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS - 1995), art.66.1.

29 Caroline B. Ncube, *Intellectual Property and the African Continental Free Trade Area: Lessons and Recommendations for the IP Protocol*, 21 J. INT’L TRADE L. & POLY 1, 6 (2022).

30 VANDANA SHIVA, *THE PLUNDER OF NATURE AND KNOWLEDGE: BIOPIRACY* 9 (U.K. ed. 2011).

of the TRIPS Agreement and outstanding implementation issues before the TRIPS Council to cover the relationship between the TRIPS Agreement and the CBD, as well as the protection of traditional knowledge.³¹

Debates on the commercialisation of TK led to the establishment of the World Intellectual Property Organisation (WIPO) Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) whose mandate is to finalise a text-based negotiation agreement on international legal instrument(s), without prejudging the nature of the outcome, relating to the intellectual property which will ensure the balanced and effective protection of genetic resources (GRs), traditional knowledge (TK) and traditional cultural expressions (TCEs).³² The chairperson of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore has prepared a draft internationally binding instrument which provides in its Article 3 a clearer understanding of the modalities of international disclosure requirement in which policymakers can make informed decisions regarding the costs, risks and benefits of a disclosure arising from the commercialisation of traditional knowledge.³³ The draft instrument in its Article 3.2 provides that:

Where the claimed invention in a patent application is [materially/directly] based on Associated TK, each Contracting Party shall require applicants to disclose: (a) the indigenous peoples or local community that provided the Associated TK, or, (b) in cases where the information in sub paragraph (a) is not known to the applicant, or where sub paragraph (a) does not apply, the source of the Associated TK.³⁴

In a normal course of action, the acknowledgement of the material source of information is an important sign of good faith. Issues of biopiracy or illegal exploitation and commercialisation of TK usually arise when the user(s) of this knowledge is claiming patent protection of associated traditional knowledge which is not 'new' contrary to

31 U. N. Conference on Trade and Development, *Implications of the African Continental Free Trade Area for Trade and Biodiversity: Policy and Regulatory Recommendations*, 23, UNCTAD/DITC/TED/INF/2021/3 (2021), https://unctad.org/system/files/official-document/ditctedinf2021d3_en.pdf.

32 WORLD INTELL. PROP. ORG., TRADITIONAL KNOWLEDGE AND INTELLECTUAL PROPERTY 1 (2015), https://www.wipo.int/edocs/pubdocs/en/wipo_pub_tk_1.pdf.

33 See generally Ian Goss, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, *Draft International Legal Instrument Relating to Intellectual Property, Genetic Resources and Traditional Knowledge Associated with Genetic Resources* (Apr. 30, 2019), https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_40/wipo_grtkf_ic_40_chair_text.pdf.

34 https://www.wipo.int/tk/en/igc/draft_provisions.html

the requirement of novelty in a patent application. To avoid conflicts and illegality in the commercialisation of TK, the drafters of AfCFTA IP Protocol should adopt this proposition of WIPO IGC chairperson draft instrument and make a mandatory disclosure requirement that supports legal certainty and sanctions in case of a breach of the disclosure requirements for patent application arising from the use of TK in Africa. Proponents of intellectual property rights protection of TK hold the views that IPR provides legal entitlements to TK holders, safeguarding against the illegitimate acquisition of IPR over TK and ensuring the practice of prior informed consent (PIC) and access and benefit-sharing (ABS).³⁵

The standards set under the TRIPs Agreement have raised further debates such as being inconsistent and contrasting the provisions of the CBD Convention for the protection of TK. At the Doha Ministerial Conference negotiations to the TRIPs Agreement in 2001, the Africa Working Group supported by other developing countries protested for the amendment of the TRIPs Agreement. It was suggested at the Doha negotiations that patent applicants are required to disclose the country of origin of genetic resources and traditional knowledge used in their inventions, with evidence that the TK holders received prior informed consent.³⁶ Looking at the complexities in patent protection, alternative regulatory mechanism entails a balance in trade between TK holders and multinational firms.

Article 7 of the Nagoya Protocol to the Convention on Biological Diversity (CBD) requires that access to TK associated with genetic resources held by indigenous or local communities must be based on prior informed consent (PIC) and that a mutually agreed term has been established.³⁷ Asian Pacific Islands under the Pacific Islands Forum on Intellectual Property, Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources on their part held a conference in 2015 in Samoa in which it was stated that when traditional knowledge is lost, this can have an enormous impact on the cultural identity and way of life of indigenous communities.³⁸ Traditional knowledge form part of the rich cultural identity of Africa which must not be eroded through cross-border trade. The disproportionate exploitations and commercialisation of TK by multinational firms through bilateral trade agreements most often than not disregard the socio-economic wellbeing of the local owners of TK. Some scholarly

35 Pushpangadan & Narayanan Nair, *supra* note 19, at 444.

36 Intellectual Property: Geographical Indications and Biodiversity, WORLD TRADE ORG, (Dec. 2008), https://www.wto.org/english/tratop_e/dda_e/status_e/gi_e.htm.

37 U.N. Convention on Biological Diversity, 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, 7, Oct. 29, 2010, <https://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf>.

38 Veniana Qalo, Pacific Islands Forum Secretariat, Practical Workshop on Intellectual Property, Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources (Dec. 8, 2015), https://www.wipo.int/mdocs/mdocs/tk/en/wipo_ipTk_apa_15/wipo_ipTk_apa_15_remarks_iplcs_day.pdf.

analyses have shown that the protection of TK under the current IP rights regime does not provide an ecosystem for the balance of trade and equal benefits arising from the commercialisation of these resources.³⁹

The World Health Organisation Conference Declaration of Alma-Ata in 1978 in paragraph 3 of the Declaration expressed the need that:

[e]conomic and social development, based on a New International Economic Order, is of basic importance to the fullest attainment of health for all and to the reduction of the gap between the health status of the developing and developed countries. The promotion and protection of the health of the people is essential to sustained economic and social development [of all]⁴⁰

Social development entails equal and fair access of the greater population to their natural heritage and proceeds from trade in these resources. Intellectual property protection rights globally have created social and economic imbalances between the owners of TK and the users. The lack of harmonisation of international laws in the commercialisation of TK is based on the complex reasons that industrialised countries do not want to participate in a clear internationally binding mechanism for the fear that it may open a Pandora's box for intersecting claims over TK.

Meanwhile, the European Community Directive 98/44/EC of the European Parliament and of the Council of 06 July 1998 on the legal protection of biotechnological inventions in its preamble states that 'differences in the legal protection of biotechnological inventions offered by the laws and practices of the different Member States could create trade barriers and hence impede the proper functioning of the internal European market'.⁴¹ The EC have understood that 'uncoordinated development of national laws on the legal protection of biotechnological inventions in the Community could lead to further disincentives to trade, to the detriment of the industrial development of such inventions and the smooth operation of the European market'.⁴² Therefore, the EC Directive should serve as a reference for Africa to understand that for the AfCFTA IP Protocol to protect their TK and smooth operation of activities arising from the commercialisation of TK, a continental framework must be put in place for AU market.

39 U. N. Conference on Trade and Development, *Report of the UNCTAD-Commonwealth Secretariat Workshop on Elements of National Sui Generis Systems for the Preservation, Protection and Promotion of Traditional Knowledge, Innovations and Practices and Options for an International Framework*, 9 (Feb. 4-6, 2004), https://unctad.org/system/files/official-document/ditcted200518_en.pdf.

40 WHO, Declaration of Alma-Ata, III (1978).

41 Directive 98/44, of the European Parliament and of the Council of 6 July 1998 on the Legal Protection of Biotechnological Inventions (1998).

42 *Id.*

There is a contradiction between the CBD and TRIPs Agreement as well as the lack of legislative harmonisation of laws on the commercial use of TK. Article 7 of the TRIPs Agreement provides that:

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.⁴³

Technological innovations and the transfer of technology from industrialised countries to developing and LDCs has been highly contested among technology holders and if lackadaisically agreed, the agreement will be through a compulsory licence which is not cheap. Transfer and dissemination of technology within the international IP law system remains a huge and unsolved problem. Unequal trade relationships between industrialised countries and developing countries do not provide a mutual advantage to the holders and users of TK. IP rights standards as provided in article 27(3) of the TRIPs Agreement are complex and do not recognise indigenous creativity in Africa like other LDCs or developing countries. The use of the word 'should' in the provision in article 7 gives the impression that IP protection promotes innovation and economic growth. The WTO TRIPs Agreement in Article 27(3)(b) gives developing countries considerable flexibility concerning how they can choose to protect plants and new plant varieties by excluding plants from patentability although it requires them to protect plant varieties either by patents or by an effective *sui generis* system or by any combination thereof. But the ever-increasing setting up of IP protection standards does not recognise TK innovations in the competitive market economy. There is a lack of a multilateral binding mechanism that safeguards the general interest of humanity. Traditional knowledge importance for developing countries' development and trade may not be overemphasized. This, therefore, needs assistance to build regional capacities and develop institutional and consultative mechanisms for TK protection and TK-based innovation.⁴⁴

In South Africa, the Protection, Promotion, Development and Management of Indigenous Knowledge Act 6 of 2019 provides strict regulations on the commercial use

43 WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (as amended on 23 January 2017), art.7.

44 U.N. Conference on Trade and Development, Systems and National Experiences for Protecting Traditional Knowledge, Innovations and Practices, 1, U.N. Doc. TD/B/COM.1/EM.13/2 (Aug. 22, 2000), <https://unctad.org/system/files/official-document/c1em13d2.en.pdf>.

of indigenous knowledge. Article 25(1) of the Act states that ‘the National Indigenous Knowledge System Office (NIKSO) may at the request of an indigenous community facilitate the commercial use of indigenous knowledge’.⁴⁵ According to Article 25(2) of the Act:

NIKSO must, in respect of commercial use of indigenous knowledge—
(a) promote partnerships for innovation and product development;
(b) coordinate funding; (c) develop market strategies; and (d) promote commercial use of products, services, processes and the use of technology.

To facilitate the commercial use of indigenous or traditional knowledge, NIKSO must promote a partnership that encourages local innovations and/or the use of local technology. Such use will provide socio-economic benefits to the indigenous communities and the sustainable management and marketing of these resources. In Article 28 of the Act, ‘any third party, who infringes the rights of that indigenous community, is guilty of an offence and on conviction liable to pay a fine as prescribed’.⁴⁶ The South African framework law with provisions of sanction ensures a fair and equitable commercial use of TK as opposed to ARIPO Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore and other RECs framework laws in Africa.

The adoption of the Africa Continental Free Trade Area as a form of regional integration to serve as the fulcrum of hope in harmonising IP laws in the continent that will foster intra-Africa trade will reduce underdevelopment in the continent. This era of 4th industrial revolution (4IR) provides opportunities for countries and regions to make significant advances and lift huge sections of populations out of poverty, improve incomes and catalyse economic and social transformations.

3. IP Protocol to the AfCFTA and the Protection of Traditional Knowledge

Article 8 (1) of the Agreement Establishing the AfCFTA Agreement 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 shall upon adoption form an integral part of the Agreement’.⁴⁷ The IP Protocol to the AfCFTA may create incentive measures enabling the free circulation of

45 See generally Protection, Promotion, Development and Management of Indigenous Knowledge Act 6 of 2019 (S. Afr.).

46 Protection, Promotion, Development and Management of Indigenous Knowledge Act 6 of 2019, art.28

47 African Union Agreement Establishing the African Continental Free Trade Area (2012), art. 8.1.

goods and free access to information that would induce investment in Africa. A single continental market according to the AfCFTA objective entails the adoption of an IP Protocol that will serve as one-stop access and as an engine for increased innovative activities in the continent. African states should all have the same vision as to the protection of traditional knowledge and intellectual property rights.⁴⁸

IP can be a barrier or a catalyst to trade and investment. IP rights may prevent the importation of goods from one member state to another because of its territoriality principle. This is because IP rights are aimed at protecting the owner from competition arising from infringing copies made by a competitor. In so doing, IP can be an obstacle to the free movement of goods, which could lead to anti-competitive behaviour in the internal market. The harmonisation of IP laws is, therefore, important for the realization of a common market that has no or few barriers in the continent.⁴⁹ From 2000 onward the AU member states have adopted five principal IP instruments to set out African common positions on plant variety protection, geographical indicators, designs, patent and trademark policies and institutional roadmaps.⁵⁰

The principal IP instruments are: the Continental Strategy for Geographical Indications in Africa 2018–2023; 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 2015); the Science, Technology and Innovation Strategy for Africa (STISA-2024); the Pan African Intellectual Property Organisation (PAIPO 2016); Statute and the African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and the Regulation of Access to Biological Resources (AU Model Law 2000). In line with the realities and priorities on the continent, the IP system is designed into different categories such as copyrights and industrial property (patent, trademark, industrial designs, and geographical indicators) including the rights of plant varieties protection, traditional knowledge, cultural expression and folklore to stimulate socio-economic development in the continent. The IP system is simply designed to ensure compliance with multilateral agreements or conventions. An inclusive and sustainable industrial development should be associated with job creation, sustainable livelihoods, innovation, technology, skills development and/or equitable growth.⁵¹ In drafting the IP Protocol in the AfCFTA Agreement, it must be developed to maximise the benefits of trade liberalisation and

48 Tshimanga Kongolo, *The African Intellectual Property Organizations: The Necessity of Adopting One Uniform System for All Africa*, 3 J. WORLD INTELL. PROP. 265, 282 (2005).

49 Y. Mupangavanhu, *African Union Rising to the Need for Continental IP Protection? The Establishment of the Pan-African Intellectual Property Organization*, 59 J. AFR. L. 1, 6-7 (2015).

50 Adebola, *supra* note 5, at 237.

51 Gabila F. Nubong, *Africa's Industrialisation and Economic Transformation within a Developmental Regionalism Paradigm*, 5 EUR. J. ECON., L. & SOC. SCIS. 616, 618 (2021).

ensure an equitable distribution of these benefits. The continent's IP architecture is disconnected alongside colonial links - shaped by the realities of external influence or pressures through bilateral or multilateral trade arrangements.

The African Model Law for the Protection of the Rights of Local Communities, Farmers and Breeders, and the Regulation of Access to Biological Resources states in its preamble that 'it is necessary to protect and encourage cultural diversity, giving due value to the knowledge, technologies, innovations and practices of local communities with respect to the management and use of biological resources'.⁵² The Africa Model Law is construed to take into consideration the community interests of the local communities when there is a need to access TK for commercial use. Any such access would be based on prior informed consent (articles 3, 4 and 5 of the African Model Law). The AU Model law does not have any enforceable mechanism to protect the commercial benefit sharing of TK. The concept of intellectual property rights as expressed in the TRIPS Agreement was seen as alien to the indigenous understanding of property rights, and therefore, a more appropriate consideration to the local context such as community rights, traditional knowledge, technology, innovations, and practices was pursued in the Model Law. As a central principle, the OAU Model Law holds that patents on life forms are immoral and go against basic African values and virtues and should, therefore, be outlawed.⁵³

The AU Model Law speaks to the sui generis protection option as provided in the TRIPs Agreement flexibility to safeguard access and benefit-sharing arising from the commercialisation of TK and farmers' rights.⁵⁴ Nevertheless, for this soft law to have meaning among African communities, there must be a symbiotic integration of trade arising from the use of TK in Africa. It is worth noting that no African country has adopted this Model Law for their plant variety protection (PVP). Contrarily, about twenty African countries have introduced variations of PVP systems that disregard the African Model Law. Alongside the disregard for the African Model Law is the introduction of the International Convention for the Protection of New Varieties of Plants (UPOV) Act of 1991 on the continent although the African Group at the TRIPS Council in Doha 2001 rejected the UPOV Act of 1991 because of its narrow focus on plant breeders' rights.⁵⁵

52 African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources, ORG. OF AFRICAN UNITY [OAU] MODEL LAW (2000).

53 DANIEL ROBINSON, CONFRONTING BIOPIRACY: CHALLENGES, CASES AND INTERNATIONAL DEBATES 136 (2010).

54 Adebola, *supra* note 5, at 239.

55 Amaka Vanni, *What Should the AfCFTA's IP Agenda Be?*, AFRONOMICSLAW (Jan. 21, 2019), <https://www.afronomicslaw.org/2019/01/21/what-should-the-afctas-ip-agenda-be/>.

The adoption of the International Union for the Protection of New Varieties of Plants (UPOV) in 1961, which inspired the introduction of plant variety protection in the WTO TRIPS Agreement, countries in Africa are faced with IP obligations under these multilateral agreements 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.

The AU ABS Strategic Guidelines recommend Africa Union Member States to 'cooperate to develop compatible continental and regional procedures for granting prior informed consent including mutually agreed terms and monitoring compliance by users'.⁵⁶ The AU Member States' cooperation should include the 'sharing of relevant information between countries and with indigenous and local communities and all relevant stakeholders at all levels, including through the establishment of databases' for TK in the continent.⁵⁷ These recommendations are coming on the touchstone of the paradigm shift from common heritage for public benefits to economic investments that require IP protection of TK. The development of the AfCFTA IP Protocol may make important provisions to safeguard the haphazard and weak protection of TK in Africa. Christophe Geiger says that intellectual property rights today tend to become increasingly disassociated from 'creators to benefits' by large and unlovable multinational corporations.

TK protection within the framework of AfCFTA IP Protocol includes the development of geographical indications (GIs) strategy for the continent. GIs refer to products with specific characteristics, qualities or a reputation resulting essentially from their geographical origin.⁵⁹ The GIs for TK holders in Africa is fragmented and unorganized mostly from smallholders with less awareness and inadequate access to the market information system. International trade standards require the authorities to be capable to invest in both the protection and promotion of the GI tools such as certification, inspection, control, and accreditation. The current fragmentation of the IP legal framework in Africa which includes geographical indications does not provide enough effective enforcement concerning the protection and certification of TK innovations

56 AFR. UNION COMM'N, 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 3, 5-7 (2015), http://archive.abs-biotrade.info/fileadmin/media/Knowledge_Center/Pulications/African_Union_Guidelines/AU_Strategic_Guidelines_On_ABS_-_20150215.pdf.

57 Ibid

58 Christophe Geiger, *Intellectual Property and Investment Protection: A Misleading Equation*, in GESTALTUNG DER INFORMATIONSRECHTSORDNUNG [DESIGN OF THE INFORMATION LAW SYSTEM] 3 (V. Fischer et al. eds., 2021).

59 AFR. UNION DEP'T OF RURAL ECON. & AGRIC., CONTINENTAL STRATEGY FOR GEOGRAPHICAL INDICATIONS IN AFRICA 2018-2023 (2019), https://au.int/sites/default/files/documents/36127-doc-au_gis_continental_strategy_enng_with-cover-1.pdf.

in the continent.⁶⁰ A Continental Strategy on GIs promote sustainable social and economic development in Africa rich with biodiversity and traditional knowledge.⁶¹

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 AU Agenda 2063 and posits that the protection of traditional knowledge production requires the strengthening of intellectual property rights and regulatory regimes at all levels.⁶² One of the priority areas for the STISA-2024 flagship programme has been the establishment of a Pan-African Intellectual Property Organisation (PAIPO) to ensure the dissemination of patent information, provide technical and financial support to invention and innovation and promote protection and exploitation of research results.⁶³

The PAIPO was adopted in Addis Ababa on 30 January 2016 and has so far been signed by just six (6) Member States of the AU. This level of engagement falls short of the mandate of PAIPO 'responsible for intellectual property and other issues related to IP in Africa and to promote effective use of intellectual property system as a tool for economic, cultural, social and technological development of the continent as well as set IP standards that reflect the needs of the African Union, its Member States and RECs'.⁶⁴ Will the faith of an AfCFTA IP Protocol be different from that of PAIPO? While hoping that a new IP Protocol will address existing gaps, an integrated continental IP system can propel creativity, innovation and be an effective guide that promotes the acquisition and commercialization of intellectual creativity arising from the use of TK for sustainable growth and development in Africa. Six years after the adoption of the PAIPO, and only 6 countries have signed the treaty out of the 55 Member States of AU, none have ratified or acceded to this treaty. It is not clear whether the AU initiative establishing the PAIPO alongside the AfCFTA IP Protocol would play a significant role in the harmonisation of the IP system and intra-African trade.

One of the core objectives of the AfCFTA Agreement is continental cooperation on intellectual property rights that create a single market that will deepen the economic integration of the African continent. The use of TK from generation to generation have proven to provide important health benefits to the local communities. Africa and

60 *Id.* at 17.

61 Adebola, *supra* note 5, at 245.

62 AFR. UNION, SCIENCE, TECHNOLOGY AND INNOVATION STRATEGY FOR AFRICA 2024 26 (2020), https://au.int/sites/default/files/documents/38756-doc-stisa_science_tech_innovation_strategy.pdf.

63 *Id.* at 36.

64 African Union Statute of the Pan African Intellectual Property Organization (PAIPO) (2016).

other developing countries expressed concerns at the Doha Conference on access to essential medicine in which IPR places a barrier to the affordability of pharmaceutical products to poor LDCs. Although the Doha Declaration sought to clarify this aspect, more needs to be done. The AfCFTA Protocol on IPR may provide an opportunity for the Africa States to speak with one voice and to articulate that voice in a harmonious approach.⁶⁵ The existing IP systems under ARIPO and OAPI, for example, is fragmented, weak and have failed to achieve the socio-economic and technological development of the continent. These subregional organisations are fragmented, weak and have failed in the sense that they are simply trying to comply with international IP standards setup in the TRIPs Agreement not suitable to satisfy Africa's needs. Although least developed countries of Africa are exempted from the implementation of the TRIPs Agreement. It is still difficult to decipher a coherent approach to the AU's IP policy for the continent. A *sui generis* IP system that includes associated indigenous knowledge is necessary to promote an effective IP system that reflects the needs of African populations. This paper advocates a *sui generis* IP system which provides indigenous communities in Africa more power to control and to benefit from uses of knowledge developed and sustained by their members. The Statute of PAIPO is a Pan-African *sui generis* IP system to regulate the commercialisation of TK in Africa. However, it is not yet known whether the AfCFTA IP Protocol will seek to provide some mechanisms on the implementation of the PAIPO provisions which in its article 4(b) says the legislation shall 'facilitate the realisation and harmonisation of regional treaties with continental IP standards'.⁶⁶ An all-inclusive continental IP organization is necessary in order to increase economies of scale and for the development of scientific and technological resources that promote and protect the forms of IP relevant to Africa.⁶⁷

Article 1 of the Statute of PAIPO defines IP rights to include associated traditional knowledge within an IP system that assist the use of "intellectual property rights for the socio-economic development of Africa".⁶⁸ Continent-wide recognition and protection of traditional knowledge would be an important step in the right direction, and it would not be without precedent. Therefore, AU IP policies should adequately protect traditional knowledge for socio-economic benefits.⁶⁹ The PAIPO statute is also intended to harmonize IP standard in Africa that takes into account the human

65 Abrie du Plessis, The Proposed AfCFTA Protocol on Intellectual Property Rights, TRALACBLOG (May 17, 2019), <https://www.tralac.org/blog/article/14066-the-proposed-afcfta-protocol-on-intellectual-property-rights.html>.

66 Afr. Union, Statute of the Pan-African Intellectual Property Organisation (PAIPO), Jan. 31, 2016, <https://au.int/en/node/32549> [hereinafter PAIPO Statute].

67 Mupangavanhu, *supra* note 43, at 4.

68 PAIPO Statute, *supra* note 58.

69 J. Janewa Osei-Tutu, *IP in the African Union: Opportunities for New Discourse?* 1, 6 (Fla. Int'l Univ. Legal Stud. Rsch. Paper Series, Paper No. 21-06, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3795640.

development needs of AU member states.⁷⁰ Unfortunately, PAIPO does not include measures to protect key issues like public health and nutrition as it is found under article 8 of the WTO TRIPs Agreement.⁷¹ We hope that the AfCFTA IP Protocol draft document shall be able to close this gap. Associated traditional knowledge is useful for the economic and health benefits of local and indigenous communities in Africa. Protecting traditional knowledge practices maybe a way to promote local innovation and reduce reliance on foreign innovations or inventions.⁷²

Section 5(2) of the ARIPO Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore states that:

In the interest of transparency, evidence and the preservation of traditional knowledge, relevant national competent authorities of the Contracting States and ARIPO Office may maintain in registers or other records of the knowledge, where appropriate and subject to relevant policies, laws and procedures, and the needs and aspirations of the traditional knowledge holders concerned.⁷³

Maintaining records of TK is primordial to protect against illegal trading of this knowledge that does not meet the needs of the knowledge holders. Maintaining a registration or database of TK is necessary via a framework that reflects an explicit commitment to deepen Africa's socio-economic integration and trade cooperation for inclusive growth. Albeit the Swakopmund Protocol is not a continental framework adopted by all 55 Member States of the AU, the development of a continental IP Protocol may take into account existing frameworks like ARIPO and its related protocol, OAPI and RECs on IP rights. Economic cooperation between African countries still has a long way to go in the sense that most African countries prefer cooperating with European and American countries and more recently with China, than fostering the intra-African economic interchanges between them. This is also true of intellectual property protection.⁷⁴

For the AfCFTA IP Protocol to achieve any benefits, it should also be able to institute dispute resolution mechanisms for the settlement of IP disputes. It is critical to have an enforcement mechanism to ensure an effective system to resolve disputes over what

⁷⁰ *Id.* at 14.

⁷¹ Agreement on Trade-Related Aspects of Intellectual Property Rights art. 8, *in* Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Apr. 15, 1994, 1869 U.N.T.S. 299.

⁷² Janewa Osei-Tutu, *supra* note 61, at 11.

⁷³ The Swakopmund Protocol on Traditional Knowledge and Expressions of Folklore within the Framework of the African Regional Intellectual Property Organization (ARIPO) (2010).

⁷⁴ Mupangavanhu, 'African Union Rising to the Need for Continental IP Protection? The Establishment of the Pan-African Intellectual Property Organization' 59 *J. of African Law* at 20.

the rules provide and whether they have been broken in a specific case. This is essential to promote compliance with the rules and procedures.⁷⁵ This can be referenced from the WTO Dispute Settlement Mechanism which is based on GATT principles. Article XXIII (1) of the General Agreement on Tariffs and Trade (GATT) provides that the dispute settlement process may be invoked when one party claims that a benefit accruing to it under the General Agreement has been:

nullified or impaired [by another party] or that the attainment of any objective of the [General] Agreement is being impeded as the result of (a) the failure of another contracting party to carry out its obligations under [the General] Agreement, or (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of [the General] Agreement, or (c) the existence of any other situation.⁷⁶

It is worth noting that an effective tailor-made dispute settlement mechanism is critical to the operation of the Continental Free Trade Area. A system of rule enforcement is necessary to guarantee security and predictability in intra-African trade.⁷⁷ Article 3.2 of WTO Dispute Settlement Understanding states, for example, that “[t]he dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system”.⁷⁸

African Union Agenda 2063 principle of inclusive growth and sustainable development emphasizes that development is an integral part of its innovation strategy. Therefore, a balanced IP framework that also incorporates the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) flexibilities such as compulsory licensing may facilitate access to medicines and contribute to achieving sustainable development in the continent. Since TRIPS flexibilities allow the production of generic medicines, traditional knowledge creativity must be promoted and protected to close healthcare deficits in the continent. The AfCFTA IP Protocol should resist any temptation or pressure to expand the subject matter, scope, or duration of patent protection but focus on developing a framework that promotes local innovations.⁷⁹

The AU Assembly held its 25th Ordinary Session in South Africa in 2015 and adopted the African Union Strategic Guidelines [the Practical Guidelines] for the Coordinated

75 William J. Davey, *The WTO Dispute Settlement Mechanism* 1,2 (Ill. Pub. L. & Legal Theory Rsch. Papers Series, 2003).

76 General Agreement on Tariffs and Trade art. XXIII.1, Oct. 30,1947, 55 U.N.T.S. 194.

77 Davey, *supra* note 66, at 9.

78 World Trade Organization, Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 3.2, https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm.

79 Vanni, *supra* note 49.

Implementation of the Nagoya Protocol in Africa. The AU Strategic Guidelines are to facilitate access and benefit-sharing (ABS) implementation in Africa and to facilitate coordination and cooperation between African countries in the implementation of the Nagoya Protocol to the Convention on Biological Diversity (CBD) relating to access and benefit-sharing arising from the exploitation and commercialisation of TK. The Strategic Guidelines allow the AU Member States to tailor-made the Guidelines in a way that suits its national circumstances, priorities, needs and policies. Unfortunately, the Strategic Guidelines were not intended to provide uniform ABS measures in Africa.

4. Challenges and Opportunities of AfCFTA IP Protocol

The AfCFTA IP Protocol may present an opportunity to redefine the agenda for negotiation of IP issues in Africa that impact the international IP system. This IP Protocol should target a three-level alignment that seeks to protect existing policy spaces from erosion by trade agreements, support national efforts to craft appropriate IP legislative and policy framework to manage regional cooperation. There are general principles on the negotiation of the AfCFTA set out in the AU Statement on the Objectives and Guiding Principles for negotiating the Continental Free Trade Area. These principles also apply to the AfCFTA Protocols.⁸⁰

Public participation is important in the development of the process and substance of the IP Protocol as drawn from the principles developed by international IP experts for WIPO and the WTO facilitated by the Max Planck Institute for Innovation and Competition in Munich – Germany. This public participation includes transparency and consultation in the development of negotiating provisions. The AfCFTA IP Protocol must bear in mind the broader socio-economic development discussions aligning to the UN Sustainable Development Goals (SDGs 1, 3, 10 & 17) and the AU Agenda 2063 on specific issues such as access to medicine, innovations arising from the use of indigenous knowledge and access to copyright-protected works.⁸¹ AfCFTA negotiations must be geared towards ensuring good, fair, balanced and widely supported policy through democratic, open, transparent, inclusive and diligent processes. An example was the period leading to the adoption of the AfCFTA

80 Caroline Ncube et al., A Principled Approach to Intellectual Property Rights and Innovation in the African Continental Free Trade Agreement, in *INCLUSIVE TRADE IN AFRICA: THE AFRICAN CONTINENTAL FREE TRADE AREA IN COMPARATIVE PERSPECTIVE* 183-84 (David Luke & Jamie Macleod eds., 2019).

81 *Id.* at 184.

Agreement and the significance of national consultation in which the Government of Nigeria could not sign the Agreement without the consultation of the business community. The business community in Nigeria argued that its views had not been adequately considered and the country's signature at that stage would not be in the country's best interests.⁸²

It does not suffice to adopt IP protection with a registration office but also one that has a culture of respect and enforcement of IP rights, such respect is impossible to build as long as the substantive provisions of IP law are far removed from the realities of everyday life in Africa. The AfCFTA IP Protocol is expected to provide the requisite details on states co-operation and the significant impact on the regulation of IPRs on the African continent within the context of intra-Africa trade.⁸³ A challenging factor to the AfCFTA IP Protocol is Africa's dependence on donor funds, conflicting bilateral or regional trade and investment agreements, limited legislative capacity and negotiating skills for IP norms and the interfaces between IP and development in Africa.⁸⁴

Caroline Ncube suggests in her paper that the AfCFTA IP Protocol does not have to seek to regulate all aspects of IP but to provide for co-operation in IP as its stated mandate different from regulation in IP. This means that existing national IP laws and the statutes IP institutions at continental and regional levels, such as the PAIPO Statute and the regulatory instruments of RECs, ARIPO and OAPI, will continue to form the bedrock of regulation whilst the IP Protocol will focus on co-operation.⁸⁵ I agree with her point and to posit that the AfCFTA IP Protocol cannot be limited to co-operation but be tailored to harmonise and balance the IP system in Africa in a manner that promotes and protects indigenous or local creativity and equal trade. Article 21(4)(a)(d) of the 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 on cooperation to mean 'the reinforcement of good regulatory and standards setting practices, identifying and assessing instruments for trade facilitation such as the harmonisation'.⁸⁶ Good regulatory frameworks and standards setting practices form the bedrock of sustainable development in Africa. The challenges of colonial allegiance and underdevelopment necessitate the adoption of enforceable frameworks that promote intra-Africa trade and socio-economic growth.

82 *Id.* at 186.

83 Ncube, *supra* note 27, at 2.

84 Adebola, *supra* note 5, at 289.

85 Ncube, *supra* note 27, at 9.

86 Agreement Establishing a Tripartite Free Trade Area among COMESA, EAC and SADC (2008).

Conclusion

It is true that IP protection of TK is already regulated in some AU member states like South Africa and some RECs, informed by their obligations under international treaties, other agreements and bilateral trade agreements. The IP Protocol of AfCFTA must be able to incorporate these regulations that will ensure balance of trade and sustainable development in Africa. My arguments in this article also emphasize that the absence of effective continental policy and legislative measures or the insufficiency of existing mechanisms to ensure adequate protection of traditional knowledge has meant that illegal exploitation and their commercialisation by multinational corporations are allowed to prevail, to the disadvantage of the African peoples who are supposed to enjoy proceeds over these resources. The AfCFTA IP Protocol should lead and contribute to the recognition of the African vision within the international framework.

WTO TRIPs Agreement flexibility provisions and the proposal for a sui generis regime protection of indigenous knowledge have witnessed several changes arising from the exploitation and commercialisation of traditional knowledge in Africa. However, more is required to eliminate trade imbalances and the recognition of indigenous creativity in the market economy.

African governments should ensure that their stakeholders - business (both big and small), trade unions and civil society non-governmental organisations (NGOs) - are included in the AfCFTA IP Protocol national and regional consultation processes and provide their negotiators with clear mandates for negotiations. African countries need to build effective institutions that are inclusive and enable the fullest participation of stakeholders in the negotiating processes. This will improve both the quality and the sustainability of the AfCFTA Agreement and its Protocols.