AfCFTA, Technical Assistance and the Reproduction of Western-Style IP Norms in Africa

By:

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October 8, 2020

I have followed keenly development relating to the African Continental Free Trade Area (AfCFTA) and the forecast so far seems encouraging. At the handing over of the organization's Secretariat in August, the first Secretary-General of AfCFTA announced that the negotiation of the operational instruments involving phase I and phase II of the Agreement are expected to be completed soon to enable the commencement of duty-free trading among the Member States ofAfCFTA from January 2021. Phase II protocols include investment, intellectual property (IP) and competition policy. This comment focuses on the negotiation of the IP protocol and technical assistance from the World Intellectual Property Organization (WIPO).

The idea to write about the negotiation of the IP protocol came to mind when I first read about a roundtable discussion on IP and AfCFTA that was held in

Geneva between WIPO, the African Regional Intellectual Property Organization (ARIPO) and the Organization Africaine de la Propriété Intellectuelle (OAPI). The objective of the meeting was to allow participants to exchange views on the importance of protecting and exploiting IP assets to improve competitiveness and access to regional and global markets. While the meeting and its objectives appear equitable, I have long had reservations about such meetings and their outcomes. My doubts come on the back of a long history of the relationship between WIPO, ARIPO and OAPI and the role of WIPO in consolidating the institution of Western-style IP norms across Africa through its technical assistance programme.

The policy of offering technical assistance has often been criticized for introducing levels of IP protection that are inappropriate for the social and economic development of developing countries. Yet, once new treaties are concluded, technical assistance usually follows for countries lacking the capacity and institutions to implement the treaty. While African countries fall into the latter category, it is their action on the matter that calls for attention: there seems to be an unusual degree of dissonance in their position – which goes into two, somewhat opposite directions. One is discursive, which is, the degree of opposition expressed about international IP norms not being beneficial for their social and economic development. The other is pragmatic, which is, the institution of tight IP norms at national and regional levels that stand in sharp contrast to the former. I have argued elsewhere that technical assistance may account for the latter position.

This comment aims to highlight the above issue and call on African leaders and negotiators to proceed with caution on the kind of legal technical assistance they receive. The IP protocol should be negotiated based on an informed understanding of the issues at stake and the profound changes resulting from the geopolitical shift in the world's economic centre of gravity over the last 25 years. This shift nurtures the dominant and entrenched narrative that stronger IP rights lead to development. The literature, however, suggests no correlation between the two. On the contrary, it has been argued that stringent IP rules could stifle economic development. Thus the level of IP protection to be incorporated into the AfCFTA should be proportionate to the social, economic and development needs of African countries. AfCFTA should also prioritise to

protect what I call *our IP*: that is, those embedded in traditional knowledge and biodiversity. Africa is most likely to receive substantial benefits from the protection of traditional knowledge, traditional cultural expressions and genetic resources. These are fields of IP that do not fall within the mandate of the TRIPS Agreement.

There are already model legislations which the AfCFTA IP protocol could take inspiration from. The African Model Legislation for the Protection of the Rights of Local Communities, Farmers, Breeders and for the Regulation of Access to Biological Resources, and ARIPO's Swakopmund Protocol on Traditional Knowledge and Expressions of Folkloreare excellent examples. The latter for instance has substantive provisions on the criteria for the protection of traditional knowledge and expressions of folklore (Sections 4 and 16), the rights conferred by the protection of the same (Sections 7 and 19), and equitable benefit-sharing of traditional knowledge (Sections 9). A similar initiative developed by OAPI was adopted in 2007. The African Union Model Legislation is a soft law instrument and Member States of ARIPO have been slow at ratifying the Swakopmund Protocol. Thus, the inclusion of provisions from the Model Legislation and the above Protocols in the AfCFTA IP Protocol will automatically make them *trade-related*, raising the stakes for the protection of traditional knowledge, expressions of folklore and genetic resources. It will further make these provisions directly enforceable before national courts of the currently 30 countries (hopefully 54 countries soon) that have deposited their AfCFTA ratification instruments with the African Union Commission.

The emergence of IP technical assistance and Africa

Technical assistance has roots in the project of development. In its original form, technical assistance was propagated as a form of aid for less-developed countries to promote their development post-independence. A notable example was the United States (US) president Harry Truman's Point Four Program, which is widely considered to mark the birth of the development paradigm in politics. In the aftermath of independence, the development of the Third World was seen as crucial, and the means whereby development would occur was via technological transfers. An explicit assumption of development theories of this period was that the USA and Western European nations had achieved a high

level of development because of their IP systems that fostered innovation. Therefore, what worked for the West should work for the rest. IP was thus initially pushed as an element of development for developing countries. Unsurprisingly, most of the developing world embraced it. As Antony Anghie puts it, “development, just like good governance, has a very powerful and apparently universal appeal: all peoples and societies would surely seek good governance — in much the same way that all peoples and societies were seen as desiring development.”

When technical assistance moved to the international stage, WIPO became a lead provider in the IP field. The relationship that has developed over time between WIPO officials, IP office staff and diplomats in developing countries is telling. Increasingly, most national IP offices in the developing world rely heavily on WIPO and other developed country donors for technical, financial and in-kind assistance. In most cases, these IP offices are technical agencies at the domestic level and tend to attract little interest from their ministries or the relevant minister – except where the IP office forms part of a government ministry. This often leads to limited contact between IP officials and government departments, a situation that sometimes leads to the outcome that the policies of IP offices have few links to broader national development. While WIPO intervention can help build the professional capabilities, know-how, and institutional knowledge necessary for developing countries, on the other hand, that very intervention lends WIPO and other donors the power to promote their particular perspectives on IP protection. It fosters a transnational peer group of IP professionals who identify more closely with a network of international IP policy experts and officials – and with the objectives of WIPO – than with other colleagues within national governments or with national development objectives.

The story of Africa is a good example. Regional arrangements in the aftermath of independence facilitated the enduring influence of former colonial powers and WIPO on IP laws. Today the only continent to have two regional IP organizations is Africa. In 1970, WIPO and the United Nations Economic Commission for Africa (UNECA) facilitated the creation of ARIPO for Anglophone countries and served jointly as the Secretariat of ARIPO until 1981, when the organization established an independent Secretariat. Similarly, the French

National Patent Rights Institute and BIRPI assisted former French colonies to create OAPI, establishing a unified IP system with a central patent office for Francophone countries. Although the regional legal regimes and institutional framework for Anglophone and Francophone Africa differ in many respects, in both cases their members delegated significant responsibilities to their respective regional secretariat, with WIPO serving as their core source of financial, human, legal, and organizational support.

The WIPO Secretariat, for instance, hosts the website of both ARIPO and OAPI, has provided staff training, drafted legal texts for their respective conventions, and was involved in shaping their strategic direction through regular 'tripartite meetings' of the Secretariats. In the case of OAPI, legal and technical assistance from WIPO for its regional IP accord, the Bangui Agreement, ensuring that this Agreement was one of the most "TRIPS-plus" pieces of legislation among developing countries even though thirteen of its seventeen Members are LDCs. For example, Annex I of the Bangui Agreement (on patents) and its Article 2 (on patentable inventions) protects not only product and process patents but also, *to a use thereof*. (A use thereof is not defined). Also, Article 3(3) of the Annex professes a loose prior art mechanism. Thus to date, governments within the region are still struggling to accumulate sufficient expertise and influence over the OAPI Secretariat to revise the Agreement to better take advantage of the TRIPS flexibilities.

The AfCFTA IP protocol can remedy the situation created by the Bangui Agreement by taking into account the TRIPS flexibilities and other suggestions made above. There is no space to go into the legal question about the possibility of conflict between the two treaties – that is, the Bangui Agreement and the AfCFTA. However, in the context of the AfCFTA, the provisions of its IP protocol may be seen as *lex specialis*. If their application does safeguard the TRIPS flexibilities, this result, in turn, could arguably prevail over the ones flowing from the application of the Bangui Agreement.

Concluding remarks

The aim of this comment was not to insinuate that IP technical assistance is entirely bad. The literature has shown that IP technical assistance can be of great value if well targeted and aligned with the social and economic needs of

the recipient countries. While WIPO's technical assistance programme has been seen as less biased than much of the bilateral assistance on offer from the EU and the US, the history that Africa has with WIPO concerning cooperation in the provision of IP technical assistance can be said to have led to the introduction of Western-style IP norms across the continent. Our leaders and negotiators, therefore, need to proceed with caution in negotiating the AfCFTA IP protocol and the kind of technical assistance they receive. They must consult broadly and court the services of African scholars and experts on the matter. They can and should take inspiration from the African Model Law, the Swakopmund Protocol and related measure from OAPI. They must at all cost strive to balance the Protocol by protecting *our IP* and by incorporating flexibilities from the multilateral system.

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