The Importance of Traditional Knowledge and Traditional Cultural Expressions in the AfCFTA

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With the launching of the operational phase or phase 2 of the African Continental Free Trade Agreement (AfCFTA), debates and negotiations have started on different instruments that will govern this agreement. One of the main subjects would be intellectual property and particularly issues related to the protection of tradition knowledge (TK) and traditional cultural expressions (TCEs). The intellectual property (IP) Annex or chapter of the AfCFTA will give Africans countries a unique occasion to deal with these issues.

From an IP perspective, the AfCFTA represents an incredible opportunity for Africa. At first, it will contribute to harmonizing legal principles and rules of protection and exploitation of TK and TCEs by setting a new continental IP framework that will be implemented by all African countries. Secondly, it will foster the willingness to recalibrate the current paradigm of intellectual property from an economic and business orientation to a more suitable and

inclusive one by focusing on development, human and economic rights and protection of interests of indigenous peoples and local communities. For that purpose, as suggested by many academics[1] and promoted for years by the African Group at the World Intellectual Property Organization Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore WIPO IGC, the AfCFTA's IP Annex should be grounded on cross-cultural and granular approaches.

On the one hand, combining respect for customary law of indigenous peoples and local communities with international intellectual property will encourage involvement of all stakeholders in African countries (informal sector, artists, government, civil society, etc.) as it will reflect and express African people's values, culture, aspirations and interests neither compromising business opportunities nor violating international intellectual property agreements. On the other hand, this protection will contribute to fighting against biopiracy by introducing disclosure of origin of genetic resources and associated TK in patent and design laws in order to fulfill the African Union's strategy on ABS which aims is coordinating implementation the Nagoya Protocol[2]. This would give Africa the AU a trump card to play during international negotiations on protection of TK and TCEs including at the WIPO IGC and next year at the EU-ACP negotiations in which discussions on protection of intellectual property will be important.

On an economic scale, one could consider protection of TK and TCEs as one of the pillars of the African development. The AfCFTA will help in triggering implementation of the yet-be-launched cultural program of the NEPAD[3] which focuses on protection and exploitation of TK and TCEs. This means that implementation of the AfCFTA and its IP Annex will benefit full support from the AUDA-NEPAD as it considers that "it is essential to protect and effectively utilize indigenous knowledge that represents a major dimension of the continent's culture, and to share this knowledge for the benefit of humankind." Another underestimated consequence of TK and TCEs protection would be their contribution to poverty alleviation for millions of Africans and indigenous peoples and local communities. Protecting these assets will provide all stakeholders (international companies, states, indigenous peoples and local communities, informal sector entrepreneurs, civil society, universities, …) a

legal certainty that is necessary for their commercial and non-commercial projects. This means that a strategic use of protected TK and TCEs might substantially increase economic values for intuitional stakeholders as well as those of millions of Africans especially in the informal sector. Also, considering increasing use of non-authorized of TK and TCEs products in many areas such as design, movies, luxury, sportswear, cosmetics, etc., it is possible these assets could potentially have same economic importance as with geographical indications in European and Asian countries.

TK and TCEs protection will also impact significantly some aspects of business activities and practices of many companies. For example, foreign companies will have to increase the level of their business ethics practices and codes to comply with the requirement to respect of customary law when dealing with indigenous peoples and local communities. They will also be forced to adapt their IP strategy if they want not only to avoid the consumers' backlash globally through social media (Facebook, Twitter, Snapchat) and the press. That is the trend these days with the cultural appropriation issues. There is also increased risk risks of legal action and liability on the grounds of biopiracy

Reaching harmonization of protection of TK and TCEs throughout the continent is not beyond the African countries' capabilities as they already have all necessary resources at their disposal. Member states can rely on the African Union (AU) and associated institutions such the Pan-African Intellectual Property Organization's (PAIPO)[4] and the African Union Development Agency (AUDA-NEPAD) formerly known as the New Partnership for Africa's Development (NEPAD). They can also count on support from and expertise of the WIPO and contribution of the two sub-regional intellectual property organizations: the African Regional Intellectual Property Organization (ARIPO) and the African Intellectual Property Organization (OAPI). Both ARIPO and OAPI will have a strategic role to play on this as one of their functions is to assist their member states in establishing their IP policy and strategy.

[1] See C. Oguamanam, "International Law and Indigenous Knowledge: Intellectual Property, Plant Biodiversity, and Traditional Medicine", Toronto University Press, 2006 ; Brendan Tobin, "Biopiracy by the Law: European Union Draft Law Threatens Indigenous Peoples' Rights over their Traditional

Knowledge and Genetic Resources", Issue 2, 2014, pp. 124-136. [2] In 2015 the African Union adopted 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 Utilization" and the "African Union Practical Guidelines for the Coordinated Implementation of The Nagoya Protocol in Africa". [3] According to Art. 141 of the NEPAD's Charter, the NEPAD (now the AUDA-NEPAD) should work closely with the World Intellectual Property Organization (WIPO) in order to "take urgent steps to ensure that indigenous knowledge in Africa is protected through appropriate legislation". [4] Among of its missions, the PAIPO shall "harmonize intellectual property standards that reflect the needs of the AU, its Member States and RECs; ARIPO and OAPI". Article 4 a), Statute of the Pan-African Intellectual Property Organization.

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