AfCFTA Phase II: Towards active participation of ECOWAS in the Intellectual Property Rights Negotiations

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The strong influence of IP on trade, innovation and development, especially in this technological era, is undeniable. As such for African countries to remain competitive in an increasingly knowledge-based global economy, it is imperative to revamp current IP regimes on the continent, and adopt strategic approaches which incorporate IP at the core of its trade negotiations. To this end, Article 7 of the Agreement Establishing the African Continental Free Trade Area (AfCFTA) recognises the need to regulate Intellectual property (IP). However, negotiations on IP are scheduled for phase two of the AfCFTA process. The deferral of IP negotiations is not a new practice. Similarly, in the Economic Partnership Agreement (EPA) between the EU and West Africa, negotiations for IP were deferred to the second phase of negotiations (Article 106, EU-West

Africa EPA). On the one hand, deferments reinforce the notion that IP related negotiations are deemed to be low priority to African countries. On the other hand, however, postponing IP talks to the second phase of AfCFTA negotiations provides governments and Regional Economic Communities (RECs) enough time to come up with sustainable strategies which will support projected development trajectories.

Fragmented IP regulations at the REC level

While developing country-specific development objectives for IP is crucial, maximising the outcomes of IP within the AfCFTA, and the active participation of all the RECs is required. Article 5(b) of the AfCFTA stipulates that one of its governing principles is the participation of the RECs as building blocs for its successful implementation. However, it is important to distinguish in the case of IP how the participation of RECs, specifically in the ECOWAS, can be achieved, when there are no coherent IP frameworks in place at the REC level.

It would be amiss to state that there are no IP frameworks in place on the African continent, as there are two regional organisations that regulate IP -the African Regional Intellectual Property Organisation (ARIPO) and Organisation Africaine de la Propriété Intellectuelle (OAPI). ARIPO caters mostly to English speaking African countries, while OAPI caters primarily to the French-speaking African countries. Nonetheless, only 35 African countries are parties to either organisation, leaving 19 countries with national IP regulations that are, in most cases, obsolete.

The main difference between both organisations is underpinned in their *modus operandi* regarding the applicability of their laws on their respective Member States. On the one hand, ARIPO's legal processes require the active involvement of national regulatory processes. This means that the final approval for the registration of IP is still vested with the Member States. It can, therefore, be argued that ARIPO assumes a facilitative role in implementing IP Regimes at the REC level. On the other hand, OAPI's laws are directly applicable to its member states. To a large extent, OAPI adopts a representative role, considering that it possesses competences in deciding on IP regulations on behalf of its Member States. IP laws regulated by OAPI are

thus uniformly applied in all its Member States. However, this *modus operandi* challenges the integration objectives as stipulated in Article 3 of the AfCFTA.

In the ECOWAS, the fragmentation is more pronounced. Four ECOWAS Member states are parties to the ARIPO, while nine are OAPI member states. The other two, Nigeria and Cape Verde, are parties to neither. Instead, they choose to regulate IP matters at their national levels. Interestingly, the four largest economies in ECOWAS implement diverging IP regimes. Nigeria is self-regulatory, Ghana is an ARIPO member state while Ivory Coast and Senegal are OAPI Member States. In terms of the free movement of goods and services, this already presents complications and brings to bear the question of how full integration can be achieved regionally, and subsequently continentally when this fragmentation persists.

Possible solutions

There are two possible approaches to resolving the persisting fragmentation. The first approach is to champion the idea for the remaining non-member states to accede to either ARIPO or OAPI. This approach reduces the IP regimes on the continent to two, making the merger more manageable. The challenge with this approach, however, will lie in convincing all non-members to join either organisation, considering the low priority given to IP. Secondly, there is no guarantee that ARIPO and OAPI could merge, considering that fundamentally, they operate legal systems and operating processes. Although there is already a Memorandum of Understanding between the two organisations and the World Intellectual Property Organisation (WIPO) to harmonise IP in Africa, the challenges of implementation remain a major concern.

The second approach will be the harmonisation of IP on a regional level, a move that recognises the commitments and different strategies adopted by the Member States of the REC. For example, ECOWAS could initiate harmonisation processes that amalgamates processes from ARIPO, OAPI and national regulations. This harmonisation will ensure that in negotiating for IP on the continental level, the regional developmental objectives of the region are well-represented. Although there is little literature that examines this option, it is worth exploring. If Phase II negotiations on IP will yield any positive results for

West African Countries, and other regions, the discussion should begin at the regional level in ECOWAS. Finally, considering the ultimate goal of harmonising these structures on the continent (Article 3(L) Constitutive Act of the African Union), the AU's representation is essential in these discussions, to ensure that their outcomes align with the goal of the Union.

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