A Commentary on Titilayo Adebola's 'Mapping Africa's Complex Regimes: Towards an African Centred AfCFTA Intellectual Property Protocol'

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In her article, Dr Titilayo Adebola provides a timely overview of Africa's regional and continental intellectual property (IP) frameworks and presents some important contextual considerations that must be taken into account when drafting the upcoming African Continental Free Trade Area's (AfCFTA) IP Protocol. Indeed, 'context' appears to be the overriding theme of the piece, and this commentary strongly agrees with Adebola's emphasis on Africa's context in the upcoming IP Protocol.

Previous legal attempts, such as The Lagos Plan of Action, OAU Model Law, ARIPO's Treaty and the Protocol to the Treaty, provided opportunities to produce a contextualized and harmonized IP legal framework. Nonetheless, these were not taken up, resulting in fragmentation. This has been possible with the existence of compromising texts and the proliferation of pressure and economic coercion through trade regimes[1]. Under the AfCFTA, member states are bound to fulfil the obligations under the protocols they negotiate, the IP Protocol being one of them. Therefore, member states have no discretion on which protocols, annexes and appendixes to adopt[2].

Adebola advances that established policy frameworks exist at the African Union level, which the sub-regional organizations can draw from especially now with discussions surrounding the AfCFTA IP Protocol[3]. The Protocol provides an opportunity to systematically and comprehensively incorporate IP-related issues into the AFCFTA development-oriented agenda[4]. As succinctly expressed by Adebola, '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'[5].

We analyze her arguments by emphasizing the importance of understanding the Protocol as an opportune moment for Africa to realize trade-related IP needs that relate to its continental context, as well as the usefulness of situating the IP Protocol through its possible normative contributions in the broader multilateral trade context. By 'normative contributions', we mean the possible novel and useful expressions of IP categories and rules in the AfCFTA IP Protocol that can improve existing formulations of these same categories and comparable rules in multilateral trade instruments. Although this terminology may have broad relevance with regard to any notable improvements that the Protocol may make to existing constructions of IP, we limit its application here to the IP categories of traditional knowledge, folklore and genetic resources. These categories are emphasized for two reasons. Firstly, they happen to be inadequately addressed in existing multilateral trade law instruments when writing. Secondly, the IP Protocol is strongly expected to include IP rules on these matters[6]. The author justifies why she chose the GIs, traditional knowledge and folklore as significant measures in Africa and their usefulness in the global context.

By securing traditional knowledge, GIs, as recognized specific unique identifiers for the patents, safeguard the autonomy of artists and the owners of the traditional knowledge. Consequentially, the protection can allow them, in the long term, to transfer the utility patent of a product they own to another entity but still acquire financial incentives such as royalty payments. This unique protection means the unique categories in the African context can strongly be secured for the owners of the different patents that are safely recognized and registered.

According to Dr Adebola, these are the categories of IP in which Africa has a competitive advantage. With ongoing conversations at the international level on shaping their legal framework, Africa can define the scope of the said legal framework since IP is not scientifically derived but rather a construction of those who negotiated it into existence[7]. As Dr Adebola demonstrated in prioritizing these forms of IP, we should reconstruct the IP architecture to suit our African context. This raises a critical concern in the blind proposition to transplant them elsewhere. There is a need to analyze further whether the provisions in the AfCFTA IP Protocol will be context-specific within the global realm as well.

Before reflecting on the above point, we find it important to summarise the arguments Dr Adebola presents to convey the 'contextual approach' we have ascribed to her work. Implicitly, Dr Adebola invites policymakers to consider two key contextual features of the African continent when drafting the IP Protocol. The first is the fragmented and contradictory nature of existing regional and continental IP rules, and the second is the developmental needs of Africans in relation to IP[8].

In illustrating the disparity between continental realities and continental policy stances, Dr Adebola notes important differences between the African Union's development-oriented approach to IP with that of sub-regional and national approaches. For instance, while the African Union's Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders and for the Regulation of Access to Biological Resources 2000 emphasizes a mixture between commercialized plant breeder's rights and farmers' rights, countries and sub-regional organizations have instead adopted the plant variety framework under the International Convention for the Protection of New

Varieties of Plants (UPOV) which usually only provides for breeder's rights[9]. Farmers' rights are equitable collective rights that mitigate the exploitation of farming communities and recognize their traditional practices, which have contributed to diversity in plant biodiversity[10]. The UPOV system is frequently described as inadequate to serve the socio-economic needs and traditional practices of farming communities in Africa and is often more suitable in developed countries[11]. This is primarily premised on the UPOV not providing sufficient plant variety protection laws for the farmers, making it hard for them to protect the patents for their plant varieties autonomously[12].

Fragmentation is also illustrated between the two major sub-regional IP organizations in the continent, the African Regional Intellectual Property Organization (ARIPO – comprised of Anglophone African states) and the Organisation Africaine de la Propriété Intellectuelle (OAPI – comprised of Francophone African states)[13]. The two require differing levels of commitment from their members. OAPI obligates states to have uniform laws, and ARIPO has a more flexible IP structure[14]. Africa's sub-regional economic communities, such as 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), also prescribe different obligations for their members[15]. Notably, both sub-regional IP organizations and most of the economic blocs she examines have opted for the UPOV approach[16].

In resolving these realities, she aligns herself with the critical belief of scholars like Ruth Okedji that IP law is more instrumental than inherently valid[17]. Certainly, in a recent lecture she gave on this same paper at the Afronomicslaw Academic Forum, she argued that IP law is neither a construct of science nor of nature and that its content depends on the interests of those who acted it into existence[18]. If IP law is an instrument, then the instrument should be in harmony with the realities of those to whom it is applied. This particularly speaks to the second contextual element that we pointed out earlier on aligning the IP Protocol with Africa's socio-economic realities.

Therefore, it is unsurprising that Dr Adebola summarises her thesis as follows with regard to the IP Protocol: 'My central claim is that negotiators can confidently conceive original conceptualizations of IP that produce ingenious

legal norms, principles, and paradigms while working within the boundaries of the international IP order[19]'. In conceiving these conceptualizations and harmonizing them in a continental framework, she urges negotiators to prioritize the following important forms of IP that have played or are likely to play an essential in Africa's socio-economic development: patents, geographical indications, plant varieties, and traditional knowledge[20].

From the summary of the arguments provided above, one will note that Dr Adebola advances this argument almost entirely in relation to the African continent; in other words, negotiators can confidently conceive original conceptualizations of IP within the boundaries of the international IP order in a manner that caters for Africa's context. We find no problem with this specific link since this was, after all, the scope of her study, and it is indeed an essential observation. We, however, expand her arguments in the following regard. Africa is not only in a critical position to address its realities, but its possible formulation of trade-related rules in IP matters that have been largely neglected at the international level further positions the Protocol as a 'platform for legal change…within and outside of the international trade space'[21].

To reiterate, we limit our observations to the IP categories of traditional knowledge (TK), folklore and genetic resources (GR). As Dr Adebola observes in her article, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which is the most notable IP instrument in international trade law, does not cover these categories of IP[22]. This is despite the importance they hold in developing countries. In these countries, traditional knowledge is prone to 'bio-piracy', where large firms and researchers condense the knowledge they gain from indigenous communities into 'patentable' and commercialized packages[23]. Since traditional communities do not have property rights over this knowledge, they are left without compensation[24]. The exclusion of TK and GR from the TRIPS Agreement has been premised on the fact that TRIPS was built around traditional Western styles of IP[25].

This exclusion has not been without controversy. Indeed, the incorporation of TK and GR into trading rules at the global level has been an issue of great debate and sensitivity for developing states such as those in Africa[26]. Despite this, they have primarily been enshrined outside of the TRIPS framework in instruments such as the Convention on Biological Diversity, the Nagoya

Protocol on Access and Benefit-Sharing and the International Treaty on Plant Genetic Resources for Food and Agriculture[27]. While these are landmark instruments in the conservation of biodiversity that could serve as a foundation for trade law[28], they have not adequately assisted developing countries such as those in Africa in protecting and commercializing genetic resources and traditional knowledge to spur economic growth[29]. The link between the Convention on Biological Diversity and TRIPS has, for example, been termed 'attenuated' at best[30].

In light of this, a Doha Ministerial Declaration of 2001 instructed the TRIPS Council to review the TRIPS Agreement's implementation and reexamine its relationship with the Convention on Biological Diversity and the protection of TK[31]. However, this has not been achieved. As Kuhlman and Agutu put it, there is a 'gap in trade rules to protect genetic resources and indigenous communities that the AfCFTA IP Protocol could provide guidance on[32].

They further note that in bridging this gap, the Protocol could introduce important innovations such as 'through provisions such as mandatory disclosure requirements, traditional knowledge registries, and a clear system for patent research when indigenous knowledge and communities are involved'[33]. Dr Adebola importantly advocates that the AfCFTA IP Protocol could adopt and modify existing instruments in Africa that address these matters, such as the Swakopmund Protocol on the Protection of Traditional Knowledge and the aforementioned African Union Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources[34]. Among other significant prescriptions, she also urges negotiators to bridge existing instruments on TK and GI, such as the Convention on Biological Diversity, with the IP Protocol's trade aspects[35].

We concede that the 'normative contributions' of the IP Protocol might not necessarily result in immediate or significant 'normative change' in the multilateral context. We merely make the point that if negotiators rightfully heed the call from academics such as Dr Adebola, Kuhlman and Agutu to address traditional knowledge in the AfCFTA Protocol, the scope of the Protocol and its binding nature would provide an important precedent on how to (i) set binding trade rules in regard to these categories of IP on an unseen

geographical scale and (ii) how to substantively bridge existing international instruments on TK and GI with international trade law. Therefore, it is clear that the AfCFTA's IP Protocol presents Africa with an opportunity to form novel trade laws on TK and GI that would cater for its continental context and have significant implications in the global and multilateral context.

We, however, find that there is a need to take the research further by providing an analysis of what the said legal framework should entail. Therefore, aside from calling the negotiators of the AfCFTA's IP Protocol to action, there is a need for explicit construction of what the sui generis framework should look like or an analysis of some of the elements that should comprise the system. This, therefore, calls upon academic scholars to engage in acting, constructing, and proposing concrete solutions.

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