What Should the AfCFTA's IP Agenda Be?

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Introduction

Intellectual Property (IP) is one of the three items currently under negotiation in Phase II of the African Continental Free Trade Area (AfCFTA). The AfCFTA negotiations include IP because of the continued relevance of the innovative and creative sectors to trade in goods and services across the globe. With a focus on Pharmaceutical Patents, Plant Variety Protection (PVP), Geographical Indications (GIs) and Traditional Knowledge, this post suggests that the primary purpose of the Protocol on IP in the AfCFTA should be to promote socio-economic development on the continent. To achieve this, the negotiators should pay attention to: (i) the fragmented sub-regional IP and economic organisations, which have created conflicting and overlapping IP systems, (ii) the disconnect between the continent's rhetoric at the international level and its actions at the national/sub-regional levels, as well as (iii) the heterogeneity in terms of the geographical sizes, economic sizes and social contexts around

the continent.

Pharmaceutical Patents

The continent bears extensive health burdens. For instance, sub-Saharan Africa has more than two-thirds of all people living with HIV/AIDS globally, and within the sub-continent, South Africa has the highest number of people living with HIV in the world with 19% (7.2million) of global HIV burden. Malaria, tuberculosis and other neglected tropical diseases (NTDs) are most common in the majority of the countries within the continent. Consequently, a balanced IP framework that incorporates the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) flexibilities such as compulsory licensing to facilitate access to medicines (and healthcare) is crucial and contributes to achieving Sustainable Development Goals 3.The full use of TRIPS flexibilities will legally allow for the production of generic medicines and may encourage significant pharmaceutical investment in the form of foreign generic firms investing in a country's domestic pharmaceutical sector. The inclusion of TRIPS flexibilities aligns with initiatives by the African Union (AU) and the East African Community (EAC)to establish local pharmaceutical production in member countries. Since TRIPS entered into force, bilateral and regional trade agreements tend to set higher standards for IP protection. The AfCFTA should resist any temptation or pressure to expand the subject-matter, scope, or duration of patent protection. Instead, the Agreement should focus on developing a framework that allows for careful assessment of applications, which meet the conditions of novelty, inventiveness and applicability. Furthermore, the AfCFTA patent policy should focus on patent capacity building. According to the African Innovation Research (Open Air), African States are dumping grounds for patents with little or no examination of applications or public access to invention disclosures. The AfCFTAshould encourage the capacity building of patent examiners by collaborating with key international agencies such as the United Nations (UN) and World Intellectual Property Organisation (WIPO) in the technical training of local patent offices.

Plant Variety Protection (PVP)

The current PVP architecture on the continent comprises multiple and overlapping non-hierarchical systems, emblematic of regime complexity. In

other words, there is a discord around PVP systems on the continent. This discord is in sharp contrast to the African Group's rhetoric at international meetings, including the TRIPS Council, where they advocate for the introduction of sui generis systems, which balances small-scale farmers and large commercial farmers' interests. The AU sets an example of the proposed sui generis system through its African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources (African Model Law), 2000. No African country has adopted this Model Law. Instead, over twenty countries have introduced variations of PVP systems which disregard the African Model Law. Alongside the disregard for the African Model Law is the proliferation of the International Convention for the Protection of New Varieties of Plants (UPOV) 1991 Acton the continent. Notably, the African Group at the TRIPS Council rejects the UPOV 1991 Act because of its narrow focus on plant breeders' rights. Accordingly, the PVP negotiations should include an assessment of the existing systems and the African Model Law vis-à-vis the different farming systems and socio-economic needs across the continent.

Geographical Indications (GIs)

Similar to PVP and reflective of the flexibility provided under Section 3 of TRIPS, there are variations in the legal means for protecting GIs in Africa. For instance, some francophone countries have adopted sui generis systems of protecting GIs, while some anglophone African countries have adopted both sui generis systems and collective trademark laws, certification trademark laws or consumer protection laws. For example, the African Regional Intellectual Property Organisation (ARIPO) fulfils Section 3 of TRIPS through its Banjul Protocol on Marks. Similarly, although Kenya is currently in the process of drafting a Geographical Indications Bill, GIs can be registered as certification or collective marks under the Kenyan Trade Marks Act 2002. The negotiators should address the central debates around GIs such as the extension of higher levels of GIs as provided under Article 24 of TRIPS to products other than wines and spirits as well as exceptions to GI obligations. A creatively designed GIs system under the AfCFTA could be an excellent first step to realising the latent potentials of GIs on the continent. However, realising the potentials of GIs would also require other complementary factors such as adequate infrastructure, cooperation among stakeholders in supply chains, conducive

business environments and favourable political climate at the local and national levels.

Traditional Knowledge (TK)

There are currently three key regional/sub-regional initiatives around TK on the continent, namely: the African Model Law, the African Regional Guideline for Coordinated Implementation of the Nagoya Protocoland ARIPO's Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore. There are also promising developments on the protection of TK at the national levels. For example, Kenya passed its Protection of Traditional Knowledge and Cultural Expressions Billin 2016, while South Africa's Protection, Promotion, Development and Management of Indigenous Knowledge Systems Billis currently before the Parliament. The AfCFTAnegotiations can draw from these initiatives as a background to build a comprehensive TK system suited to Africa. With a rich variety of knowledge and practices unique to individuals and communities around the continent, the protection TK could contribute immensely to the continent's socio-economic development.Significantly, it would be useful for the AfCFTA negotiations to address the central definitional debates around TK, including what is TK, who are local peoples, who are local communities and who are indigenous peoples? To be concrete, the keywords used in the texts of the TK agreements should be clearly defined.

Conclusion

One of the key criticisms that plagued the TRIPS negotiations and other plurilateral agreements such as the Trans-Pacific Partnership was the secretive and opaque nature of negotiations, as well as the exclusion of certain stakeholders including civil society groups. Consequently, the AfCFTA negotiators should conduct the IP negotiations openly and transparently, in collaboration with all relevant stakeholders. Also, considering the esoteric and complex nature of some of the IP subject matters, a representative and qualified negotiating team should be engaged. The AfCFTA provides a fresh IP start for the continent in three ways. First, it provides the opportunity for a thoughtfully crafted bottom-up IP architecture for Africa. Second, it would become the benchmark for African countries when negotiating Free Trade Agreements outside the continent. Third, it could promote the use of IP as a tool to advance development. Adopting an IP approach reflective of the needs

and goals of the AfCFTA members will ensure the continent strikes the right balance between development goals, innovation and trade.

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