# The Harmonisation of IP Law in Africa: The AfCFTA, PVP Laws, and the Right to Food

**By:**

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There is a trend towards legal harmonisation in Africa. Or so it seems. Only time will tell how the current events and developments will eventually play out. This trend towards harmonisation is quite noticeable in the field of intellectual property law. In recent years, there have been two key initiatives aimed at the harmonisation of intellectual property law at the continental level in Africa. The first of these is the creation of the Pan-African Intellectual Property Organisation (PAIPO) via the adoption of the Statute of the Pan-African Intellectual Property Organisation (PAIPO Statute) by the African Union in January 2016.

The second is the inclusion of intellectual property in the second round of negotiations on the African Continental Free Trade Area (AfCFTA) Agreement. While the PAIPO Statute is not yet in force (only three signatories so far and no single ratification out of the 15 required for entry into force), the second round of negotiations on the AfCFTA is set to commence soon. The goal here is not to

comment on the merits or otherwise of this trend but to highlight some core guiding principles that should be considered by the relevant actors involved in all these processes. Specifically, this post will focus on the implications of this trend for plant variety protection and the right to food in Africa.

Firstly, the negotiations on intellectual property rights in the context of the AfCFTA should be guided by the need to ensure that there is a balance between the protection of intellectual property rights on the one hand and securing access to important knowledge goods such as medicines, books, and seeds on the other hand. This approach to designing intellectual property law and policy is equally grounded in International Intellectual Property Law, and it is enshrined in Articles 7 and 8 of the WTO's TRIPS Agreement. It is thus important that the mistakes made in the process leading to the adoption of the PAIPO Statute are not repeated here. Importantly, a cursory look at the PAIPO Statute reveals that its drafters were primarily concerned with protecting intellectual property rights while they overlooked the importance of securing access to knowledge goods for members of the society. This lack of balance is most noticeable in Article 4 of the PAIPO Statute.

Secondly, the negotiations should also be informed by the need to ensure that intellectual property rights are used as tools for promoting and protecting human rights such as the right to food. The first enunciation of a human right to food at the international level can be found in Article 25(1) of the Universal Declaration of Human Rights (1948) which provides, among other things, that 'everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services'.

A more detailed articulation of the right to food is contained in Article 11 of the International Covenant on Economic, Social, and Cultural Rights of 1966 (ICESCR). Article 11(1) of the ICESCR provides, among other things, that states parties to the covenant recognise 'the right of everyone to an adequate standard of living for himself and his family, including adequate food'. Article 11(2) of the ICESCR also provides for a right to be free from hunger as it obliges states to take measures which are needed to, among other things, 'improve methods of production, conservation and distribution of food by making full use

of technical and scientific knowledge'.The right to food in this context implies access to the means of food production, and this implicates intellectual property rights on seeds and plant varieties.

In May 1999, the UN Committee on Economic, Social and Cultural Rights (CESCR) adopted General Comment No. 12 (GC12) on the right to adequate food contained in Article 11 of the ICESCR. The CESCR identified three levels of state obligations in paragraph 15 of GC12, i.e. the obligation to respect, protect, and fulfil the right to food. According to the CESCR, the obligation to respect the right to food requires states 'not to take any measures that result in preventing' access to food. This suggests that states should ensure that their intellectual property laws on seeds and plant varieties do not make it difficult for farmers to gain access to seeds at affordable prices or impede the ability of farmers to save and exchange seeds.

Also, according to the CESCR, the obligation to protect requires 'measures by the state to ensure that enterprises or individuals do not deprive individuals of their access to adequate food'. The obligation to protect thus has implications for how states regulate the exercise and enforcement of intellectual property rights on seeds/plant varieties by corporate actors. Furthermore, according to the CESCR, the obligation to fulfil implies that states must, among other things, 'proactively engage in activities intended to strengthen people's access to and utilisation of resources and means to ensure their livelihood, including food security'.

In conclusion, it is crucial to incorporate both a balanced approach and a human rights perspective into the negotiations on intellectual property in the context of the AfCFTA. In this regard, it should be noted that the TRIPS Agreement gives countries considerable flexibility with regard to how they can choose to protect plants and new plant varieties because Article 27(3)(b) of the TRIPS Agreement permits countries to exclude plants from patentability although it requires them to provide protection for plant varieties either by patents or by an effective *sui generis* system or by any combination thereof. This important flexibility should not be overlooked in the context of the AfCFTA negotiations.

As the former UN Special Rapporteur in the field of cultural rights, Farida Shaheed, notes in her report on the implications of patent policy for the human right to science and culture: from a trade law perspective, flexibilities remain optional; but 'from the perspective of human rights … they are often to be considered as obligations'. Thus, countries have an obligation to utilise the flexibilities available to them to ensure that their intellectual property law on seeds and plant varieties takes into account the needs and interests of farmers and not just the interests of owners of intellectual property rights.

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