

THE PROTECTION OF INTELLECTUAL PROPERTY RIGHTS WITHIN THE CONTINENTAL FREE TRADE AREA IN AFRICA: IS A BALANCE BETWEEN INNOVATION AND TRADE POSSIBLE?

Yeukai Mupangavanhu

ABSTRACT

The multilateral trading system has been facing major challenges. Trade negotiations have been characterised by some form of stalemate such as the Doha Development Round. This has increased pressure on member states of the World Trade Organisation, including African countries, to find alternative means of enhancing trade. Intra-regional trade among African countries has remained low over the years. In order to harness the potential of synergies and take advantage of their economies, African countries are moving towards the establishment of free trade areas. Accordingly, this article examines the emerging Continental Free Trade Area in view of intellectual property protection since it has the potential to undermine the objectives of the free trade area. The article makes a case for African countries to seek a balance between the continent's development goals, innovation and trade.

Key words: intellectual property, regional free trade area, development goals, innovation.

INTRODUCTION

African countries are frustrated by the multilateral trading system and the global economy which has previously been characterised by challenges such as the Seattle protests, the financial crisis, stalemates in negotiations, and the lack of progress in the World Trade Organisation's (WTO) Doha Development Round (UNECA, 2017). These challenges have increased pressure on the WTO member states, including African countries, to find alternative means of enhancing trade. Intra-regional trade among African countries is estimated at 18 percent of the continent's total trade and it has remained relatively low over the years (UNCTAD, 2017). Consequently, African countries are moving towards the establishment of free trade areas, namely the Tripartite Free Trade area (TFTA) which comprises three economic blocks and the Continental Free Trade Area (CFTA) which is open to all the African Union's (AU) member states. These free trade areas are not limited to the promotion of intra-regional trade and therefore negotiations include issues relating to competition, intellectual property (IP) as well as free movement of persons. This is because economic integration presupposes and necessitates the harmonisation of economics-related laws such as IP laws that regulates designs, marks and inventions (Dlagnekova, 2009).

The protection of intellectual property (IP) rights remains key and it is premised on various reasons which have been emphasised by IP optimists, namely: the need to give statutory expression to the moral and economic rights of creators in their creations; promote creativity and the dissemination of the creation (Van der Merwe, Geyer, Kelbrick, Koornhof, Pistorius, Sutherland, Tong & Spur, 2016). IPRs thus provide incentives to inventors to develop new knowledge and for artists to create some form of artistic expression (Fink & Maskus, 2005). The right to obtain a patent for an invention, for example, encourages the investment of money and effort in research and development. The granting of a patent itself encourages investment in the industrial application of the invention. The protection of IP rights does not therefore only promote fair trading but it also contributes to economic and social development. While an efficient patent system stimulates innovation, it is however, necessary that the development objectives of the country concerned are reflected in the IP standards of the country to ensure that the system serves the interests of the country (WIPO, 2004).

According to Ncube (2013), the role of IP law as a means of achieving economic development has been misconstrued in the past. This was due to a misbelief that having an IP system that is akin to developed countries' current systems would guarantee economic growth. Her argument is that this a strong IP system is not *sine qua non* for economic growth. Baker, Jayadev and Stiglitz (2017) support this view and state that a poorly designed IPR regime may result in societal losses both in the short and long term since stronger IPR may constitute a barrier to the ability of the businesses catching up with their counterparts in the developed nations. Baker, Jayadev and Stiglitz (2017, p.30) further strongly argue that "by the standards of today's global rules, every advanced industrialised country would have been classified as an intellectual property violator at the early stages of development when they freely used ideas and technologies generated elsewhere".

Peukert (2017) states that the hypothesis that legal protection fosters economic development is problematic since the effects of stronger IPR protection are generally negative, and not so much interrelated to the levels of foreign direct investment in a country. Fink & Braga (2005) also concur with these writers and opine that there is little evidence that demonstrates that stronger IPRs will promote technology transfer and encourage innovation. Their view is that a weak IPR regime might allow domestic firms to imitate foreign technologies and thereby contribute to productivity and income growth. The view is based on the assumption that the local firms can master all components of new technologies without the participation of the intellectual property holders.

On the basis of the above discussion, this article seeks to examine the importance of creating a balanced IP system within the CFTA. IP is pertinent because of its crosscutting nature ranging from agriculture, chemistry, biotechnology, information technology to creative industries and public health. IP laws may also hinder or promote economic growth within the CFTA. The next part provides an overview of the establishment of the CFTA and its objectives. The third part deals with the development goals which have been adopted at regional and international level. This is in view of the fact that AU member states have to adhere to the aspirations contained in Agenda 2063 as well as the sustainable development goals adopted by the United Nations. The article does not purport to discuss all the goals in detail due to practical restrictions as well as the lack of a nexus between some goals and economic integration. The fourth part focuses on the protection of IP within the context of the CFTA while the last part discusses the lessons that African and Asian countries can draw followed by a conclusion.

A. Research questions

The legal issues which are addressed in this article are as follows:

- i) Are strong IPRs known as TRIPs-plus standards suitable for African countries? Alternatively, do strong IP standards give rise to more inventions, FDI as well as economic development?
- ii) Is a balance between innovation and trade possible?

B. Methodology

A qualitative method is employed in this study to gain an in depth understanding and answers to the above questions. The article engages in an expansive discussion of IP and does not focus on any specific type of IP protection. The research considers a desk review of primary and secondary sources that deal with IP and the interrelated disciplines. The primary sources include, amongst others, international agreements, treaties and conventions. Secondary sources relied upon are journal articles, books, discussion papers, working papers, and policy documents. The study thus focuses on the applicable legislation and draws from the studies that have been done from both a legal and economic perspective. It also analyses the experiences in and outside Africa insofar as the promotion of trade and innovation is concerned. The experiences' of developed countries such as Switzerland and Germany as well as emerging economies is instructive to what developing countries need to do in order to create an enabling environment.

AN OVERVIEW OF THE CONTINENTAL FREE TRADE AREA

A free trade area is one of the six forms of economic integration. It is whereby member countries reduce or abolish all trade impediments among themselves but retain their individual policies and trade barriers with the outside world (Lee, 2003; Mupangavanh, 2016; Murinde, 2017). All the tariffs and quantitative restrictions on substantially all trade are eliminated. A free trade area is therefore about liberalising trade among African countries. The creation of a free trade means that each member country has the power to determine or fix its own tariff rates on imports from non-member countries. It also means that the rules of origin are designed in such a manner that preferential treatment is confined to goods or services emanating from within the free trade area (Murinde, 2017). By so doing, member states are able to derive benefits from the preferential trading arrangements.

The emerging TFTA and CFTA are part and parcel of AU's regional integration strategy to overcome the constraint of small and fractioned economies since African markets are small and fragmented (UNCTAD, 2017). Their establishment is consistent with the international trading system under the WTO as provided in terms of Article XXIV of the General Agreement on Tariffs and Trade of 1947, the Enabling Clause and Article V and V bis of the General Agreement on Trade in Services. The CFTA is a free trade agreement among African countries. Its establishment is one of the AU's step towards greater African integration (UNCTAD, 2016; UNECA, 2017). The CFTA is a mega-regional agreement which will encompass 55 member countries of the AU and eight recognised Regional Economic Communities (RECs). It covers a market of more than 1.2 billion people, and a combined gross domestic product (GDP) of more than US\$3.4 trillion (TRALAC, 2018). The CFTA stands to be the world's largest free trade area since the formation of the WTO in 1995. Its establishment is a stepping stone towards the creation of the African Economic Community (AEC) envisaged in the Abuja Treaty. It intends to build on the work already done by the RECs (UNECA, 2017).

African leaders recently held an Extraordinary Summit from 17-21 March 2018 in Kigali, Rwanda to adopt the Agreement Establishing the African CFTA (African Union, 2018). A total of 44 countries signed the consolidated text of the CFTA Agreement while 47 signed the Kigali Declaration including South Africa. The Agreement establishing the CFTA will come into force when 22 member states have ratified the treaty. There are outstanding issues regarding Phase I of the negotiations. This is partly the reason that countries such as South Africa only signed the Kigali Declaration while others such as Nigeria failed to attend the Extraordinary Summit.

The CFTA Agreement has a wide coverage. Its scope covers trade in goods and trade in services which form Phase I of the negotiations. Phase II of the negotiations will be dedicated to investment, IP rights and competition policy with the draft legal texts being due for submission to the Assembly by January 2020 (African Union, 2018). The objectives of the CFTA are to create a single continental market for goods and services; expand intra-African trade through better harmonisation and coordination of trade liberalisation and facilitation regimes and instruments across RECs and across Africa; resolve the challenges of multiple and overlapping memberships and expedite the process of regional and continental integration; and lastly to enhance industrial competitiveness through exploitation of scale of production, market access and better allocation of resources (African Union, 2018).

The CFTA has the potential to provide new impetus and dynamism to economic integration in Africa through a number of ways, namely: boosting intra-African trade; stimulating investment and innovation; promoting structural transformation; improving food security; enhancing economic growth and export diversification. Lastly, the CFTA will play an important role in

rationalising the overlapping trade regimes of the main RECs. Accordingly, the CFTA is expected to foster regional value chains that can facilitate the integration of region into the global economy (UNECA, 2017) – thus strengthening industrialisation and innovation. It is also expected to increase competitiveness since most of goods produced within the CFTA will no longer face tariff barriers (UNCTAD, 2016). The CFTA is therefore an important pillar and driver for Africa's growth and development. Not all AU member states are WTO members. There are nine countries that do not belong to the WTO and are thus not governed by WTO rules (WTO, 2018). The CFTA is therefore a vehicle that is set to facilitate intra-African trade for all the AU member states including those that are not WTO members.

According to UNECA (2017, p.3), “designing the CFTA at the technical level, and ensuring its effective implementation, is now the critical task at hand”. Without good policies, laws and institutions, the objectives of the CFTA will not be fully realised. To maximise its gains, the CFTA require policies that ensure that the benefits are shared more equally to produce a win-win outcome for all countries. Special attention must be given to the compatibility of the CFTA instruments with the commitments undertaken under the WTO (UNCTAD, 2016). In other words, the laws cannot deviate from the provisions contained in the WTO laws. The creation of free trade areas particularly the CFTA serves as a means of attaining development goals, which are discussed below.

IP AND DEVELOPMENT GOALS

United Nations sustainable development goals

The IP norm-setting activities in the CFTA should be undertaken in conformity with the development goals agreed within the United Nations system known as Sustainable Development Goals (SDGs) which are a successor to the Millennium Development Goals (MDGs) (United Nations General Assembly, 2015). This is because IP standards should promote global development and thus IP protection needs to be balanced with other important goals such as SDGs (Yu, 2016). The SDGs are a new universal development agenda which will be implemented across the world and all the UN member states are required to use these SDGs to frame their agendas and policies. The 17 SDGs expand and build on the MDGs which only focused on developing countries.

The aims of the SDGs are to end poverty, hunger and inequality (United Nations General Assembly, 2015). They are also aimed at reducing especially maternal mortality to below 70 per 100,000 live births, end HIV/AIDS, tuberculosis, malaria and other tropical diseases. This is significant since developing countries and least developed countries (LDCs) are besieged with high mortality rates due to poor conditions, malnutrition and lack of medicines (WHO, 2014; Pheage, 2016). In addition, the SDGs will ensure quality education and gender equality; achieve universal access to safe drinking water and energy; address climate change; and achieve at least a 7% global economic growth.

Goal 8 of the SDGs promotes sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all (United Nations General Assembly, 2015). This goal is aimed at increasing economic growth by at least 7 percent per annum in the LDCs. The level of growth is, however, dependent on the circumstances of each country. Higher levels of economic productivity will be achieved through diversification, value addition, technological upgrading and innovation. This goal also incorporates the need to promote development-oriented policies that support productive activities, decent job creation, entrepreneurship, creativity and encourage the formalisation and growth of small and medium-sized (SMEs) enterprises. Access to financial services is also key to the SMEs and creators of IP who usually need financial support to drive business growth.

Goal 9 deals with the need to build resilient infrastructure, promote inclusive and sustainable industrialisation and foster innovation. At the core of Goal 9 is the need for a reliable infrastructure across Africa; increased use of efficient clean and environmentally sound technologies and industrial processes by 2030; increased scientific research, the upgrading of technological capabilities of industrial sectors particularly in developing countries. The development of infrastructure is important for economic development. Goal 9 is closely linked to Goal 7 which is aimed at ensuring access to affordable, reliable, sustainable and modern energy for all (United Nations General Assembly, 2015). Energy is at the heart of industrialisation since factories cannot operate without energy. The need to invest in clean energy technology in both developed and developing countries cannot be overstressed in view of climate change and its devastating effects.

Goal 14 aims at the conservation and the sustainable use of the oceans, seas and marine resources for sustainable development. It goes hand in hand with Goal 15 which focuses on the protection, restoration and promotion of sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, land degradation and biodiversity loss. The protection of biodiversity is pertinent in Africa since genetic resources form part of its IP. African countries need to continue actively pushing for greater protection of genetic resources, traditional knowledge and traditional cultural expression (Yu, 2016). The Convention on Biological Diversity (1992) and the Nagoya Protocol on Access and Benefit-Sharing (2014) have been a great tool in the conservation of biodiversity but these instruments have not adequately helped developing countries in protecting and commercialising genetic resources and traditional knowledge in such a way that these resources could contribute to Africa's economic growth.

The SDGs and their targets align with Africa's priorities. Innovation contributes directly to the achievement of certain SDGs such as zero hunger and good health. Innovation may additionally result in the realisation of other SDGs such poverty reduction and decent work. The CFTA is based on a developmental approach and its IP system should incorporate and reinforce these development goals. The IP framework should be aligned to the SDGs. The protection of IP should promote industrialisation and foster innovation. African countries cannot afford IP laws which hamper but rather facilitate development on the continent. There is therefore a need for a balanced and calibrated level of IP.

Africa's Agenda 2063

Agenda 2063 is anchored on the AU's vision and it serves as an action plan. The Agenda 2063 encompasses seven aspirations and targets which are closely linked to the SDGs (African Union Commission, 2015). African countries have committed to the aspirations which include, *inter alia*, inclusive growth and sustainable development, an integrated continent, development which is people-driven to ensure that Africa becomes a strong, united, resilient and influential global player and partner. Ighobor (2015) explains that these goals complement the SDGs and reduce them to aspirations which are more specific and focused on the transformative policies that can make a difference to the region. Agenda 2063 is designed to give effect to the SDGs. The two agendas are mutually supportive and coherent despite some differences that exist (Ighobor, 2015). The SDGs are, for example too broad with 17 goals while Agenda 2063 is more specific with only seven goals. The agendas, however, converge on issues that are a priority to Africa countries such as economic growth, innovation and inclusivity. The infusion of SDGs will take place as African countries conform to the objectives of Agenda 2063.

RECs are expected to adopt Agenda 2063 and its associated ten year implementation plan as the basis for developing their regional visions and plan (African Union Commission, 2015). National plans are supposed to be submitted to the AU and New Partnership for Africa's Development (NEPAD) which is a developmental agency of the AU. The decision to establish the CFTA was given impetus in the "First Ten-Year Implementation Plan 2014 – 2023" during its 18th Session of the AU Assembly of the Heads of State held in Ethiopia (Assembly of the Union, 2012). It also endorsed an Action Plan for Boosting Intra-Africa Trade (BIAT) aimed at addressing the main constraints and challenges of intra-African trade, and at significantly enhancing the trade benefits for the attainment of sustainable economic growth and development. The BIAT contains seven major clusters which include trade-related infrastructure, trade policy and market integration. The creation of the CFTA and the implementation of BIAT provide a comprehensive framework which is development orientated. The next part discusses the protection of IP at international level vis-a-vis legal framework envisaged in the CFTA.

THE GLOBAL PROTECTION OF IP

The WTO and IP

There is a general consensus that intellectual property rights (IPR) do matter and that it can be a tool for technological and economic development. IPRs have long been recognised at both regional and international level (WIPO, 2004). The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) under the WTO establishes a universal, comprehensive and legally binding set of substantive minimum IP standards (Schmidt-Szalewski, 1998; Sikoyo, Nyukuri & Wakhungu, 2006; Deere, 2009). The TRIPS Agreement provides the minimum level of protection and member states have the freedom to provide extensive protection that go beyond this level. Article 7 of the TRIPS Agreement provides that "the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations". The word "should" implies that there is a guarantee that IP promotes innovation and economic growth. The assumption has given rise to the question whether the ever-increasing legal protection of IP results in more innovations and economic development. There have been mixed reactions to this "expansion narrative". IP optimists have relied on the advantages of a high globalised level of protection while IP pessimists hold a different view and are against the idea of strong protection particularly for developing countries and LDCs.

The TRIPS Agreement, however, recognises the special needs of LDCs in relation to the domestic implementation of IP laws and regulations. It gives them some flexibility in order to enable them to create a sound and viable technological base. The transitional period for implementing the TRIPS Agreement for LDCs was extended to 1 July 2021 or until a particular country ceases to be in the least developed category, whichever date is earlier (WTO Council, 2013). This is to allow these countries to prepare for domestic implementation of the laws in a way which will not have a devastating effect on the economy of their countries. Developed countries are expected to promote technological transfer and offer technical and financial support to enable these countries to develop an IP infrastructure (Peukert, 2017). The question whether this has actually been done remains unanswered. Developing countries argue that TRIPS ignored and forced them to sacrifice "the policy space" that richer countries had harnessed in early stages of their growth ((Deere, 2009; Nguyen, 2010); Yu, 2016. The implementation of the TRIPS Agreement has accordingly given rise to a global debate on the relationship between IP protection and development.

The development dimension under WIPO

The World Intellectual Property Organisation (WIPO) adopted a Development Agenda which emphasises the importance of the use of IP for development (WIPO, 2009). The Agenda concerned with ensuring that development considerations form an integral part of WIPO's programs and activities which include but are not limited to addressing the specific needs and priorities of the developing countries and the LDCs. WIPO's Technical Assistance and Capacity Building (TACB) program has been designed to give effect to Strategic Goal III which deals with the use of IP for development. The program is aimed at facilitating the development of modern and balanced IP systems in developing and LDCs, and in promoting its use for improving the business environment, encouraging innovation, creativity and transfer of technology. The TACB is hinged on the understanding that the IP framework should be inclusive, member driven, development oriented and that it must make into account the special needs and priorities of LDCs (WIPO, 2009). Furthermore, the IP framework should take into consideration the different levels of development as well as the balance between costs and benefits. The IP framework in Africa should reflect these development considerations espoused in the WIPO's Development Agenda.

It is important to note that at regional level, different forms of IP are governed by instruments adopted currently under the *Organisation Africaine de la Propriété Intellectuelle* (OAPI) and under the *African Regional Intellectual Property Organization* (ARIPO). The process of creating a regional IP organisation known as Pan African Intellectual Property Organisation (PAIPO) are still ongoing.

IP WITHIN THE CFTA

Negotiations on competition policy and IPRs are expected to be launched after the conclusion of negotiations on goods and services (African Union, 2018). This part of article discusses what could be the significant aspects of such the IP framework in light of the existing international rules. Innovation is an indispensable tool for economic growth (Van der Merwe *et al.*, 2016). IP laws may, however, undermine creativity and innovation which will in turn adversely affect economic growth in Africa.

Much of the trade between African countries is informal and thus not recorded in official statistics. Similarly, much of the innovation takes place informally as the “informal is becoming the new normal” (Elahi, De Beer & Kawoya, 2013). For example, it is estimated that 20 per cent of Benin’s GDP is based on informal trade with Nigeria alone (UNECA, 2017). The approach in the area of IP, must take into account the reality that innovation in Africa is occurring mostly in the informal sector and in the absence of strong IP institutions. The informal economy is becoming a permanent feature in most countries in Africa. Policies need to shift to embrace the informal sector alongside the formal sector. National innovation systems that give attention to what comes from the informal sector are now required for the growth of African economies. This is because there is a symbiotic relationship between the formal and informal sector (Elahi, De Beer & Kawoya, 2013). The forms of IP that provide valuable competitive advantage to entrepreneurs in the informal sector are trade secrets and confidential information. The continental IP agreement must address overlapping sub-regional IP organisations and the proliferation of IP matters in RECs, while ensuring alignment with the continent’s overall development goals. The agreement should also address the particular demands of African countries by incorporating appropriate procedural and substantive rules.

Firstly, the IP Agreement should contain a provision dealing with special and differential treatment. AU comprises of member states that have huge disparities in economic and industrial development levels, institutional capacities, and in terms of size. The geography and demography also vary across the countries. Generally, this makes a one-size-fits-all approach to IP laws impossible since the CFTA has a large number of LDCs (Ncube, 2013; UNECA, 2016). Each country’s socio-economic status and developmental goals have to be taken into consideration. The CFTA negotiations on IP should thus be based on the principle of flexibility as well as the special and differential treatment (Erasmus, 2015). LDCs should be given a longer implementation period since they experience economic, financial and administrative constraints (WTO, 2018). Each LDC must be able to determine the IP standards which apply based on its capacity and should be consistent with the provisions under the TRIPS Agreement. Time frames for implementation of IP standards cannot thus be the same for both developing and LDCs. Member states are likely to be more willing to sign and implement IP agreements if there is scope for flexibility to protect industries and promote innovation.

A balanced system that takes into account the advantages and disadvantages of strong IP protection is necessary for the CFTA. The establishment of the CFTA affects the AU member states in divergent ways since these countries have different socio-economic conditions. Therefore, there is a need for laws that promote innovation and growth in the region. It should also best advance the standard of living and this may be achieved if IP standards support the particular needs of different countries and are consistent with national development, industrialisation and innovation in Africa as a whole. A closer look at Nigeria’s film industry popularly known Nollywood is important. Nollywood produces on average 1 500 films per year. The Nigerian film industry remains largely informal and it experiences rampant piracy (Oyewole, 2014; Philip & Ole, 2016). Nigeria’s Copyright Act has not kept pace with the technological developments which resulted in huge copyright infringements (Philip & Ole, 2016). Effective implementation of the Copyright Act has also been impeded by a plethora of issues including limited penalties, high costs of litigation, delays, as well as lack of funds on the part of film makers to pursue the matter (Oyewole, 2014).

A regulatory environment that supports the continued development of Nollywood and the creative arts as a whole is required. This does not necessarily translate to strong copyright laws. Instead, Nigeria needs to enforce its laws aimed at fighting piracy in the form of criminal sanctions and should also adopt measures such as the German’s solution of a special levy on recording devices which may be distributed to the film producing companies (Ploman & Hamilton, 1980). Furthermore, Nigeria should ensure that its copyright laws are in tandem with the actual needs of the film industry for the benefit of both the creators and the users.

The AU has made strides towards the promotion of science and technology in its attempt to encourage creativity and innovations. The continental IP agreement should facilitate this goal. List states that “it is a very common clever device that when anyone has attained the summit of greatness, he kicks away the ladder by which he has climbed, in order to deprive others of the means of climbing after him” (List, 1885, p.295 as cited in Michie, 2011, p.468). Developed countries appear, in their pursuit for stronger IPR, to be doing what List had in mind. As proponents of IP maximalism, developed countries appear to forget that they followed a completely different policy during the catch-up phase (Ncube, 2013; Peukert, 2017). Unlike the “latecomers”, most of these developed countries began with minimal IP. For example, the United States, Germany and Japan first had low levels of innovation. They were conservative and had no or weak patent laws during the catch-up period. Switzerland, for example, introduced a Patent Act in 1888 but granted no protection for methods and chemical products until 1907. Peukert (2017) avers that this created room for Swiss chemical and pharmaceutical companies to copy products patented in other countries such as France without hindrance. Netherlands became highly industrialised when it revoked its patent law in 1869 until 1912.

Therefore, most developed countries had lower levels of IP protection during their technological catch-up phase than that demanded of African and other developing countries in multilateral and bilateral treaties (Ncube, 2013; Peukert, 2017). The level of protection increased gradually when there was a corresponding need for protection within a certain industry. The same approach is being used in emerging economies such as China and Brazil. These countries have weaker IP systems which have

been calibrated to meet their national interests (Ncube, 2013). While China on paper conforms to IP international standards, in practice enforcement is regarded as lacking. Arguably, informal technology and knowledge transfer has been taking place, and economic growth has been recorded in these emerging economies which may be directly linked to their conservative IP regimes (Peukert, 2017). China has developed to the extent that it's moving from being a pirating nation to one that respects IPRs as evidenced by the number of applications being filed every year (Yu, 2016).

Secondly, the question whether strong IPRs are a tool for economic development remains valid and one which African countries must be willing to interrogate. Some bilateral agreements such as the Economic Partnership Agreements (EPAs) contain IP provisions that go beyond what is required in terms of the TRIPS Agreement. These agreements continue to proliferate as proponents of high level protection such as the USA and Europe resort to alternative ways to pursue the expansion narrative (Phiri, 2009; Peukert, 2017). The protection of IPRs which is TRIPS-plus should be avoided since it is not suitable to the level of development in most African countries. IP pessimists rightly argue that the effect of IP laws has been to preclude "latecomers", who are mostly developing and LDCs from imitating technologies (Peukert, 2017). They further argue that strong IPRs that are introduced too early are bound to prevent a country from catching up over a long period. This might be the position in which African countries will find themselves if they sign agreements with provisions that contain TRIPS-plus level of IP protection. In such situations, the fear of IP infringement becomes a disincentive for the informal sector to innovate and move to the formal structure that has long-term gains. Stronger IP laws will also prevent AU member states from obtaining high technology at affordable prices and it will lead to reduced exports. Furthermore, it will result in the transfer of more money in the form of royalty payments from developing to developed countries as well as higher commodity prices. Therefore, the view that IP protection is good and that more protection is needed, based on the expansionist paradigm, is untenable (Peukert, 2017).

The demand for stronger IP laws does not appear to be in the interests of African countries who need access to medicines and knowledge to promote education and information. The fact that there are neglected diseases such as malaria and tuberculosis in Africa refutes the assumption that global IP law generates innovations that are tailored to their needs. The levels of investments documented in countries such China and India who are "accused" of not combating local IP infringement effectively seem to indicate that strong IP laws are not going to be a panacea to Africa's need for foreign direct investment. This is well demonstrated by South Africa which has a relatively strong IP system yet it has experienced less foreign direct inflows compared to China, India and Russia which have weaker IP systems (UNCTAD, 2017). The history of IP protection in developed countries also, as shown above, suggests that the level of IP protection increased as their industrial and technological capacities improved (UNECA, 2016). African countries should draw some important lessons from these experiences, and adopt minimal IP protection within the bounds set in the TRIPS Agreement. Stronger IP laws are not necessarily going to promote innovation within the CFTA. The opposite is true. African countries should be alive to the fact that IP protection does not become a tool of neo-mercantilism than a "public good" instrument for promoting innovation (UNECA, 2016). A conservative IP regime which favours minimalism should thus be preferred and the continental IP agreement should not contain TRIPS-plus provisions.

Fourth, there is need for a balance between the protection of IP and the promotion of technological development. It holds true that IP should be a means to an end, not an end in itself. Therefore, the protection of IP should not be done at the expense of economic growth and development. There is a need to integrate IP and economic development since IP has a role in promoting creativity and innovation in the region (Merso, 2013). The provisions in the IP Agreement should be consistent with the imperative of industrial development under the CFTA's industrial pillar. On the one hand, the CFTA should adopt IP laws that serve the development objectives, policy priorities and domestic situation of individual countries. On the other hand, member states should not simply translate IP provisions into national law but should tailor and apply the laws in a way which is not detrimental to their growth. There is a need to harness the IP system to better promote economic development. An incremental approach which leaves enough space for poorer countries within the CFTA to assume more demanding IP commitments at their own pace is necessary. Undoubtedly, the IP laws should promote the socio-economic and technological development of the member states.

SIGNIFICANCE OF THE STUDY TO THE ASIAN ENVIRONMENT

Asia comprises of countries are at different levels of development ranging from developed countries such as Japan, to LDCs such as Afghanistan, Cambodia, Bangladesh, Nepal and Yemen. The impact of strong IPR on these developing countries and LDCs in Asia will be similar to those in Africa. This is because developing and LDCs face the same challenges such as lack of access to medicines, educational materials and food security despite their geographical location. The Asian and African community share some similarities which forms the basis of cooperation between these regions.

These countries should continue to oppose strong IPRs and actively push for a development agenda in international negotiations (Yu, 2016). The rights and interests of these countries should be safeguarded particularly LDCs since they are impoverished and vulnerable. Furthermore, developing countries should advocate for a balance between IP protection and public interest. The Protocol Amending the TRIPS Agreement which entered into force on 23 January 2017 is consistent with the idea of IP laws that address the needs of developing and LDCs that are facing public health problems (WTO, 2017). It has created a permanent legal avenue for WTO members' that lack or have limited pharmaceutical production capacity to import generic medicines produced in other countries. The amendment is a milestone since it brings into force the commitment by WTO members to provide access to medicines to poor countries by adapting the rules of the global trading system. By so doing, the flexibility to protect public health becomes an integral part of the TRIPS Agreement. In light of this development, developing countries and LDCs should seek to influence more IP development-oriented laws at international and regional level.

Developing and LDCs on both continents need to build on what has worked and avoid what has not properly worked in pursuing regional economic integration and innovation. Important lessons can be drawn from the OAPI which adopted a uniform system

of protecting IP and a common industrial property office (Merso, 2013; Mupangavanh, 2015). OAPI has 17 member states in total, 12 of which are LDCs (Merso, 2013). The administrative procedures, IP practices as well as the laws are uniform under OAPI since uniformity is one of its cornerstones (Kongolo, 2013). The OAPI system does not therefore allow for differential treatment of its LDC members. This lack of differentiation resulted in these countries being negatively affected since they were forced to relinquish their benefits under TRIPS such as longer implementation periods. A uniform IP system, in both Asia and Africa, will pose a devastating effect on developing countries and LDCs due to their levels of economic and technological development. Harmonisation is best suited to the two regions as opposed to unification. This is because harmonisation allows a nuanced approach to IP protection while unification will result in the same IP law applying in all the countries. Unification appears to be contrary to the spirit of an equitable and balanced IP system.

The Bangui Agreement which OAPI adopted provides extensive protection for the existing IP (Kongolo, 2000, 2013). In some cases the agreement is regarded as TRIPS-plus. For example, its standards on the protection of new varieties of plants are based on the standards of the International Union for the Protection of New Varieties of Plants (UPOV) and goes beyond TRIPS (Merso, 2013). The major lesson to be drawn from the OAPI's experience is that a one-size-fits-all approach will produce undesirable results and should be avoided. Consequently, countries at different levels of development should be treated differently. In addition, developing countries and LDCs should not adopt stronger IP protection or rather TRIPS-plus protection since this could erode the very benefits which should be derived from regional economic integration. IP laws and policies play a crucial role in generating significant economic, social and cultural benefits if used effectively and efficiently (Yu, 2000; Lewis, 2008; Edou, 2011). The protection of IP in Asia and Africa should take into consideration the special needs of developing countries. It must facilitate trade, job creation and help governments to promote the economic well-being of their nationals.

CONCLUSION

With effective implementation and political commitment, African countries are likely to derive mutual gains from the CFTA. There is no scientific evidence that strong IP laws give rise to more inventions, FDI as well as economic development. Instead, strong IP laws may harm trade, innovation and development. It is therefore recommended that AU member states should not adopt strong IP laws. A conservative IP regime is needed to enable African countries to catch-up with their more developed counterparts. A balance between the promotion of trade and innovation may be achieved if the region creates an enabling environment by adopting minimal IP protection with respect to, for example, patent laws so that companies are able to imitate technologies. Such an IP system will promote innovation, technological and industrial competitiveness, economic growth, SDGs goals and the public interest. A development-oriented IP regime thus appears suitable for Africa.

It is further recommended that the region should oppose strong IPR in bilateral and international negotiations to ensure that they are not forced to adopt laws that are inappropriate to the development of the AU member states. The CFTA should ensure that the IP system in Africa is aligned with the needs, interests, priorities, conditions and realities of the region. This requires a strategic approach to ensure that the interests of LDCs are taken into account. The effective use of flexibilities and the principle of special and differential treatment will be imperative to ensuring that the IP protection safeguards the advancement of basic development goals as well as the needs of LDCs. The IP system should be suitable for the different developmental stages of CFTA's member states. This means that countries should have the flexibility to adopt IP rules that are consistent with their level of industrial development. It should also be consistent with the AU's 2063 Development Agenda since the set goals are dependent on a balanced and calibrated use of IP. Therefore, there is a need for a gradual approach when integrating IP laws in the region.

REFERENCES

Articles

- Dlagnekova, P. (2009). The need to harmonise trade-related laws within countries of the African-Union: An introduction to the problems posed by legal divergences. 15-1, *Fundamina*, 1-37.
- Ighobor, K. (2015). Sustainable development goals in sync with Africa's priorities. *United Nations Africa Renewal Department of Information* 3-11.
- Kongolo, T. (2000). The African Intellectual Property Organisations: The necessity of adopting one uniform system for all Africa. 3 *The Journal of World Intellectual Property*, 265-88.
- Mupangavanh, Y. (2015). African Union rising to the need for a continental IP protection? The establishment of Pan-African Intellectual Property organization. 59 *Journal of African Law*, 1-24.
- Ncube C.B. (2013). Harnessing intellectual property for development: Some thoughts on an appropriate theoretical framework. 16/4 *PER* 369-487.
- Peukert, A. (2017). Intellectual property and development –narratives and their empirical validity. *The Journal of World Intellectual Property* 2-23.
- Philip, H.F. & Ole, G.C. (2016). Limits of copyright protection in contemporary Nigeria: re-examining the relevance of the Nigerian copyright act in today's digital and computer age. *Journal of International Law*, 211-225.
- Phiri, D.S. (2009). Economic Partnership Agreements and Intellectual Property Rights Protection: Challenges for the Southern African Development Community Region *South African Institute of International Affairs*. 1-27.
- Schmidt-Szalewski, J. (1998). The international protection of trade marks after the TRIPS Agreement. 9 *Duke Journal of Comparative and International Law*, 189-211.
- Yu, PK. (2016). Five decades of intellectual property and global development. 8 *WIPO Journal*, 1-10.

Books

- Deere, C. (2009). *The implementation game: The TRIPS Agreement and the global politics of intellectual property reform in developing countries*. Oxford, New York: Oxford University Press.

- Elahi, S.; De Beer, J.; Kawoya, D.; Oguamanam C.; Rizk, N. (2013). *Knowledge and innovation in Africa: Scenarios for the future*, Cape Town: Open A.I.R Network.
- Fink, C. & Maskus, K.E. (2005). Why we study intellectual property rights and what we have learned in *Intellectual Property and Development: Lessons from Recent Economic Research*. New York: World Bank & University Press.
- Kongolo, T. (2013). *African contributions in shaping the worldwide intellectual property system*. Surrey, England: Ashgate Publishing Limited.
- Lee, M.C. (2003). *The political economy of regionalism in Southern Africa*. Lansdowne, South Africa: University of Cape Town Press.
- Michie, J. (ed) (2011). *The handbook of globalisation*. Cheltenham, UK: Edward Elgar.
- Mupangavanh, Y. (2016) *The regional integration of African trade mark laws: Challenges and possibilities* Glienicke: Galda Verlag.
- Murinde, V. (ed) (2017). *The Free Trade Area of the Common Market for Eastern and Southern Africa*. Abingdon, Oxon: Routledge.
- Nguyen, T.T. (2010). *Competition law, technology transfer and the TRIPS Agreement: implications for developing countries*. Cheltenham, United Kingdom: Edward Elgar Publishing Limited.
- Ploman, E.W. & Hamilton, L.C. (1980) *Copyright: Intellectual property in the information age*. London: Routledge & Kegan Paul.
- UNECA. (2017) *Assessing regional integration in Africa VII: Bringing the Continent Free Trade Area about*. Addis Ababa, Ethiopia: United Nations Economic Commission for Africa.
- Van der Merwe, A.; Geyer, S; Kelbrick R; Klopper, Koornhof, Pistorius, T; Sutherland, P, Tong, L; Van der Spuy P. (2016) 2ed *Law of intellectual property in South Africa*, 2nd ed, South Africa: Lexis Nexis
- WIPO, (2009). *WIPO development agenda*. Geneva, Switzerland: WIPO Publication No. L1015/E.
- WIPO. (2004). *Intellectual property handbook: Policy, law and use*, 2nd ed, Geneva, Switzerland: WIPO Publication No. 489 (E).
- World Trade Organisation. (2002) *The legal texts the results of the Uruguay Round of multilateral trade negotiations*. Geneva, Switzerland: WTO Publications.
- Yu, P.K. (ed) (2007). *Intellectual Property and Information Wealth: Issues and practices in the digital age* Westport, CT: Praeger Publishers.

Official Documents

- African Union Commission, (2015). *Agenda 2063: The Africa we want*.
- African Union Commission, (2015). *Agenda 2063: The Africa we want: First Ten-Year Implementation Plan 2014 – 2023*.
- African Union Decision. Assembly of the Union Tenth Extraordinary Session 21 March 2018 Kigali, Rwanda. (2018) Ext/Assembly/AU/Dec.1(X).
- Baker, D. Jayadev A. & Stiglitz J. (2017). *Innovation, Intellectual Property, and Development: A better set of approaches for the 21st century*. Centre for Economic and Policy Research.
- Lewis, (2008). *Intellectual Property Protection: Promoting Innovation in a Global Information Economy, A Report to the CSIS*.
- Sikoyo, G.M.; Nyukuri, E. & Wakhungu J.D (2006). *Intellectual Property Protection in Africa: Status of Laws, Research and Policy Analysis in Ghana, Kenya, Nigeria, South Africa and Uganda*.
- UNCTAD, (2016) African continental free trade area: Policy and negotiation options for trade in goods UNCTAD/WEB/DITC/2016/7.
- UNCTAD, (2017). From Regional Economic Communities to a Continental Free Trade Area: Strategic tools to assist negotiators and agricultural policy design in Africa UNCTAD/WEB/DITC/2017/1.
- United Nations General Assembly, (2015). Transforming our world: the 2030 Agenda for Sustainable Development.
- WHO, (2014). *The African Regional Health Report* World Health Organisation, Regional Office for Africa ISBN: 978 929 023 261 2.
- WTO, (2013). Council for Trade-Related Aspects of Intellectual Property Rights, Extension of the transition period under Article 66.1 for least developed country members' decision of the Council for TRIPS of 11 June 2013. IP/C/64.

Internet Sources

- AU. Indications of legal instruments signed at the 10th Extraordinary Session of the Assembly on the launch of the AFCFTA. Retrieved from <https://au.int/sites/default/files/pressreleases/34033-pr-indication20of20signing20authority20-20updated20final20final20docx.pdf>
- WIPO, Cluster B: Norm-Setting, Flexibilities, Public Policy and Public Domain: *WIPO Development Agenda* Publication No. L1015/E (2009) 6.
- Edou, E. (February 2011). Raising awareness in West Africa. *WIPO Magazine*. Retrieved from <http://www.wipo.int/>
- Merso, F. (2013). A look into the real picture of IP challenges for African LDCs, 2/7 *The Bridges*. Retrieved from <https://www.ictsd.org/bridges-news/bridges-africa/news/a-look-into-the-real-picture-of-ip-challenges-for-african-ldc>
- Oyewole, S. (2014). A peek into Nigeria's film industry. *WIPO Magazine*. Retrieved from http://www.wipo.int/wipo_magazine/en/2014/02/article_0001.html
- Pheage, T. Dying from lack of medicines, African Renewal. Retrieved from <http://www.un.org/africarenewal/magazine/december-2016-march-2017/dying-lack-medicines>
- TRALAC. African Continental Free Trade Area, Legal Texts and Policy Documents. Retrieved from <https://www.tralac.org/resources/by-region/cfta.html>
- WIPO. The 45 Adopted Recommendations under the WIPO Development Agenda. Retrieved from <http://www.wipo.int/export/sites/www/ip-development/en/agenda/recommendations.pdf> (accessed on 26 March 2018).

WTO News, (2017). WTO IP rules amended to ease poor countries' access to affordable medicines. Retrieved from https://www.wto.org/english/news_e/news17_e/trip_23jan17_e.htm
WTO. Members and observers. Retrieved from https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm.

Yeukai Mupangavanh
Law Faculty
University of the Western Cape, Bag XI7,
Bellville 7535, South Africa
Email: ychandaengerwa@gmail.com