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Negotiating the Intellectual Property Protocol under the Agreement Establishing the African Continental Free Trade Area: Priorities and Opportunities for Nigeria

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Abstract: Early March 2021, following its ratification of the Agreement Establishing the African Continental Free Trade Area (AfCFTA agreement), Nigeria's National Office of Trade launched a consultative process into issues constituting the country's priorities as it prepares to participate in the negotiation of the AfCFTA agreement's protocol on intellectual property rights (IPRs). We contributed a position paper to that process, with a focus on key policy considerations that should form Nigeria's negotiation priorities on IPRs. This article describes some of the most important points of our submission and concludes by stressing that the broad policy focus should be to champion initiatives that promote Nigeria's national interest and, at the same time, recognize and accommodate the ideals of inclusiveness, openness, and collaboration within the context of the AfCFTA. In this regard, the paper recommends that Nigeria should prioritize negotiations in recognition of her strongest economic assets in copyright-related sectors and focus on institutional capacity-building for its patent and technology transfer offices so that Nigeria can effectively take advantage of the relevant Trade-Related Aspects of Intellectual Property Rights flexibilities locally. Nigeria can learn from South Africa in domesticating the appropriate legal framework for benefit sharing and the general protection of traditional knowledge and genetic resources. The Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore 2010, the Arusha Protocol for the Protection of New Varieties of Plants 2015, and the African

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Union model law for the protection of the rights of local communities, farmers, breeders, and for the regulation of access to biological resources offer relevant guidance.

Keywords: AfCFTA agreement, IPRs, trade, Nigeria, access to medicines

1 Background

Nigeria signed the African Continental Free Trade Area (AfCFTA) agreement on 7 July 2019 and ratified it on 5 December 2020.¹ Phase II negotiations covering intellectual property rights (IPRs), competition policy, sustainable investment, and e-commerce, are scheduled to commence in 2021, along with other issues outstanding from phase I negotiations, with an end date of 31 December 2021.² As the Nigerian Office for Trade Negotiation (NOTN) embarks on the AfCFTA phase II negotiations, this paper highlights and examines key policy considerations that should form Nigeria's national negotiation priorities on IPRs, which include patent, designs, copyright, trademarks, and the broader but related areas of traditional knowledge (TK), traditional cultural expression (TCEs), and genetic resources (GRs).

In phase II negotiations, the NOTN has the mandate to ensure that Nigeria's trade relations in Africa align with the Federal Government's strategic objectives and priorities for economic development and growth. The broad strategic objectives include the restoration of growth, investment in the Nigerian people, and building a globally competitive economy. The strategic priorities are to be achieved through specific policy goals, which include the development of medium, small, and micro enterprises, creation of jobs, boosting of manufacturing, preservation, and promotion of infant industries, increasing Nigeria's foreign exchange earnings and promotion of exports, and overall economic growth in Nigeria.³

The national strategic objectives and specific goals are important not only because of their local relevance but also in their alignment with the core objectives of the AfCFTA, which can be aptly summarized as the achievement of pan-African trade liberalization, economic integration, and socioeconomic development, and

1 TRALAC, *African Continental Free Trade Area (AfCFTA) Legal Texts and Policy Documents*, available at: <<https://www.tralac.org/resources/by-region/cfta.html>>, accessed April 23, 2021.

2 T. Chidede, *AfCFTA phase II and III Negotiations – Update*, available at: <<https://www.tralac.org/blog/article/15090-afcfta-phase-ii-and-iii-negotiations-update.html>>, accessed April 23, 2021.

3 B. Ihua et al., *An Independent Study on the Potential Benefits of the African Continental Free Trade Area (AfCFTA) on Nigeria: Study Report* (May 2018), <http://www.notn.gov.ng/bundles/notn/docs/AfCFTA_Study_Final_REPORT_May_2018.pdf>, accessed April 23, 2021.

global economic competitiveness of African states in line with the aspirations set out in the African Union (AU) Agenda 2063.⁴ Recognizing the importance of IPRs in the attainment of these core objectives, the AfCFTA agreement tasks member states to cooperate on IPRs policy, among others.⁵ The negotiation of an IPR Protocol under the AfCFTA is informed by this mandate and is to be guided by the principles outlined in article 5 of the AfCFTA agreement.

The inclusion of IPRs within the AfCFTA framework is not novel as IPRs continue to be a significant component of global and regional trade agreements since the Uruguay rounds negotiations that brought about the World Trade Organization's (WTO) Agreement on the Trade-Related Aspects of Intellectual Property, 1994 (TRIPS Agreement). However, the AfCFTA phase II negotiations afford Africa an opportunity to develop an IP framework that is driven by Africans, in tune with the realities in Africa, and one that promotes African collective interest and advances African economic growth and development ambitions,⁶ as set out in the AU's Agenda 2063. This is important because, as studies have shown, the over-a-hundred-year history of Africa's involvement in Global IP treaty making is characterized by the formulation of intellectual property (IP) principles that are pro-west, rooted in western ideologies, and promoting western growth and development.⁷

To ensure an African-centered and focused IP framework, the *Assessing Regional Integration in Africa IX* (ARIA IX Report),⁸ informed – among others – by

4 African Union Commission, *Agenda 2063: The Africa We Want* (2015), available at: <https://au.int/sites/default/files/documents/36204-doc-agenda2063_popular_version_en.pdf>, accessed April 23, 2021.

5 Article 3 of the Agreement Establishing the African Free Trade Area (AfCFTA Agreement).

6 C. Ncube, *Decolonising Intellectual Property Law in Pursuit of Africa's Development*, 8 *The WIPO Journal*, no. 1 (2016), 34–40; C Ncube, T Schonwetter, J. de Beer and C Oguamanam, *Intellectual Property Rights and Innovation: Assessing Regional Integration in Africa (ARIA VIII) Open AIR Working Paper 5* (2017) <<https://openair.africa/intellectual-property-rights-and-innovation-assessing-regional-integration-in-africa-aria-viii/>>, accessed April 23, 2021; T. Adebola, *Mapping Africa's Complex Regimes: Toward an African Centered AfCFTA Intellectual Property Protocol*, 1 *African Journal of International Economic Law* (2020), 233–290.

7 J. de Beer, J. Baarbe, and C. Ncube, *Intellectual Property Treaty Landscape in Africa, 1885–2015*, Open AIR Working Paper 4, May 5, 2017, available at: <<https://openair.africa/wp-content/uploads/2020/05/WP-4-Intellectual-Property-Treaty-Landscape-in-Africa.pdf>>, accessed April 23, 2021.

8 UNECA, AU, ADB, and UNCTAD, *Assessing Regional Integration in Africa – ARIA IX: Next Steps for the African Continental Free Trade Area Report* (2019), available at: <https://www.uneca.org/archive/sites/default/files/PublicationFiles/aria9_report_en_4sept_fin.pdf>, accessed April 23, 2021 (ARIA IX Report).

Ncube et al.'s expert study,⁹ already sets out broad policy recommendations that negotiators should consider for the IPR Protocol. Although the broad IPR policy recommendations are regional in their scope and outlook, as shown in part four below, they offer useful guidance and policy spaces for member states to set out and pursue their national priorities in the negotiation of the IPR Protocol. Moreover, member states can also find guidance in the principles encapsulated in article 5 of the AfCFTA agreement and those developed by global experts on trade-related IPR issues under the auspice of the Max Planck Institute of Innovation and Competition (MPI Principles)¹⁰ discussed in part two below. The MPI Principle formed a basis for Ncube et al.'s expert study from which this paper extensively draws on to make policy recommendations for Nigeria's national negotiation priorities for an IPR protocol under the AfCFTA agreement.

Going into the negotiations, however, it is important for the NOTN to have a firm understanding of Nigeria's existing international commitments on IPRs and the national IPRs regimes, as shown in part three below. More importantly, the NOTN's position in the AfCFTA phase II negotiations should be guided by the key principles of togetherness, inclusiveness, openness, and flexibility as opposed to individualism and excessive protectionism.¹¹ This is so because the role IPRs play

⁹ Ncube et al., "Intellectual Property Rights and Innovation," *supra* note 6.

¹⁰ H. Ruse-Khan et al., *Principles for Intellectual Property Provisions in Bilateral and Regional Agreements*, 44 IIC – International Review of Intellectual Property and Competition Law, 18 (2013) 878–883, available at: <https://www.ip.mpg.de/fileadmin/ipmpg/content/forschung_aktuell/06_principles_for_intellectua/principles_for_ip_provisions_in_bilateral_and_regional_agreements_final1.pdf>, accessed April 23, 2021 (MPI Principles).

¹¹ Examples can be found in the failed Trans-Pacific Partnership (TPP), and the Anti-Counterfeiting Trade Agreement (ACTA). Commenting on the contribution of wrongly headed IPR provisions to the failure of the TPP, Ncube et al. submitted that

the procedural and substantive failures around IP issues in various contexts have contributed significantly to the backlash against trade agreements generally. Concerns have been simmering since the negotiation of the WTO's Agreement on Trade-related Aspects of Intellectual Property (TRIPS), which heavily favored the interests of the most developed countries in exchange for false hopes provided to the world's least developed countries. Even in developed countries, academic experts and business leaders testified the TPP would have created major impediments to innovation and major losses on IP and digital and cultural policies. Nongovernmental organizations were also highly critical of the agreement's impact on electronic commerce and Internet policy. The impact of patents on access to medicines was another major problem with TPP. Indeed, the *Washington Post* editorial board noted: "No issue caused more conflict in the latest round of talks—or in the general political debate over the TPP—than the question of intellectual property and other protections for the U.S. pharmaceutical industry." In developing countries, such concerns were even more acute.

Ncube et al., "Intellectual Property Rights and Innovation," *supra* note 6, at 5–6.

in the scarcity of the coronavirus disease 2019 (COVID-19) vaccine, and the implication of this on public health, in Africa,¹² teaches us a lesson that no one is safe (and empowered) until everyone is safe (and empowered) and an open, inclusive, and flexible IP regime is important to ensure safety and empowerment for all. In this connection, it is important to avoid the temptation of canvassing for more and stronger IPR protection that favors private commercial interest, unless to the extent possible to promote, preserve, and protect the national interests within the AfCFTA. Part five summarizes the policy considerations that should be considered for Nigeria's national negotiating priorities for an IPR protocol in the AfCFTA phase II negotiations.

2 Negotiation Principles

Article 5 of the AfCFTA agreement provides broad principles to govern its implementation, including the negotiation of the protocols falling under it. With specific reference to IPRs, particular attention must be paid to the principles that require negotiators to

- a. be transparent, ensure disclosure of information, and flexible outcomes;
- b. promote reciprocity, national, and most-favored-nation treatment;
- c. preserve the *acquis*;
- d. consider existing national, regional, and international best practices; and
- e. ensure the negotiations are driven by member states.

These governing rules find support in the MPI *Principles for Intellectual Property Provisions in Bilateral and Regional Agreements* (MPI Principles).¹³ The MPI Principles are a set of “process and substance”¹⁴ rules that can lead to “a better, mutually advantageous, and balanced regulation” of IPRs, especially within trade agreements such as the AfCFTA. The MPI Principles were developed by the MPI in consultation with global experts on IPR and trade policies.¹⁵

The MPI Principles opens with noting the growing body of bilateral and regional agreements with IPR components, especially between developed and developing countries, and/or least developed countries since the 1990s. It also

¹² A. Vanni, *On intellectual property rights, access to medicines and vaccine imperialism* (TWAIL Review, March 23, 2021), available at: <<https://twailr.com/on-intellectual-property-rights-access-to-medicines-and-vaccine-imperialism/>>, accessed April 23, 2021.

¹³ MPI Principles, *supra* note 10.

¹⁴ Ncube et al., “Intellectual Property Rights and Innovation,” *supra* note 6, 5.

¹⁵ See generally, the special issue of (2013) 44 (8) *IIC – International Review of Intellectual Property and Competition Law*.

noted the existence of international treaties, such as the TRIPS Agreement and the policy space it provides for countries to tailor their domestic IP regimes to suit their national priorities. Importantly, its recommendations were made against the backdrop of the bilateral and regional agreements made between developed and developing, and/or least developing countries and the demands for the transplant of strong, inflexible, and detailed national IP regimes made by the developed countries.¹⁶

Interestingly, countries going into the AfCFTA phase II negotiations for IPRs are a combination of developing and least developed countries, which in many respects, face similar economic, political, and social challenges. Importantly, the demand for IPRs in the AfCFTA agreement can be said to be jointly made since cooperation on IPRs forms one of the specific objectives of the AfCFTA. In this connection, reliance on the guiding rules enunciated in the MPI Principles, and enshrined in article 5 of the AfCFTA agreement, would help to address external influences and pressures in the development of intellectual property laws in Nigeria and in many other African countries.¹⁷ This is also the case with warding off potential conflicts on IPR issues in the AfCFTA phase II negotiations that may be caused by the (impending) trade commitments between individual member states and third parties, such as the ongoing talks around a possible US-Kenya FTA.¹⁸

Specifically, the MPI Principles will offer useful guidance to the NOTN as it embarks on the AfCFTA phase II negotiations on IPRs, especially given the congruence of the principles with the broad governing rules in article 5 of the AfCFTA agreement. Furthermore, the MPI Principles are not only useful for multilateral negotiations. Indeed, taken together, the MPI Principle and AfCFTA IPR protocol to be negotiated would be useful guides for Nigeria to develop and articulate its long overdue, but conspicuously absent, IPR policy. Such IPR policy will serve a myriad of purposes.¹⁹ It would form the basis for reforming Nigeria's IP laws and operate as a strong buffer against external influence in the development the domestic IP laws

16 MPI Principles, *supra* note 10, paras 1–9.

17 S. Jandhyala, *International and domestic dynamics of intellectual property protection*, 50 *Journal of World Business*, no. 2 (2015), 284–293.

18 Sean Hackbarth, *The Opportunities are Vast in a Potential U.S.-Kenya Free Trade Agreement* (US Chambers of Commerce, May 6, 2021) available at: <<https://www.uschamber.com/series/above-the-fold/the-opportunities-are-vast-potential-us-kenya-free-trade-agreement>>, accessed June 12, 2021; Moses Ogutu, *Caught Between Africa and the West: Kenya's Proposed US Free Trade Agreement* (Africa Portal, June 19, 2020), available at: <<https://www.africaportal.org/features/caught-between-africa-and-the-west-kenyas-proposed-us-free-trade-agreement/>>, accessed June 12, 2021.

19 C. Ncube, *Intellectual Property Policy, Law and Administration in Africa: Exploring Continental and Sub-regional Co-operation* (Routledge, 2016).

in Nigeria. Furthermore, an IPR policy would shape Nigeria's priorities for the negotiation of future bilateral and/or multilateral agreements; and serve as a reference point for Nigeria's engagement with international organizations (such as World Intellectual Property Organisation [WIPO]) in the areas of IP.²⁰

Moreover, as shown below, the MPI Principles speaks to both process and substance rules that can aid the NOTN in formulating Nigeria's national negotiation priorities in the IPR protocol. The key recommendations from the MPI Principles are highlighted below.

2.1 Process

This refers to the procedures to be adopted in the negotiation of IPR provisions in a bilateral or regional treaty, such as the AfCFTA agreement. To ensure transparency, inclusiveness, and equal participation in the negotiation of the IPR protocol, it is important for the negotiating parties to individually develop their own proactive agenda on IPR issues through a "consultative and participatory process", which will make the text of the proposed IPR available to members of the public in the negotiating countries and enable public scrutiny of its provisions. The "consultative and participatory process" should be followed by an open and transparent negotiating process that allows the effective participation of, and consultation with, right owners groups, right users groups, relevant public officers, and stakeholders in the negotiating countries. The process should also allow for evaluation, by way of impact assessment, of the IPR provisions by the negotiating parties.²¹

2.2 Substance

This refers to the content of the IPR provisions in a bilateral or regional treaty, such as the AfCFTA agreement. In terms of the MPI Principles, negotiating parties should take into account the "international principles of development coope

20 In this regard, it is to be noted that the WIPO Nigeria Office (WNO) established in Abuja in January, 2020 has made significant strides in closely engaging with the Nigerian Government and IP stakeholders in Nigeria, to expand the knowledge, accessibility, awareness, and strategic use of IP for economic, social, and cultural development in Nigeria. As one of WIPO's external offices, the WNO can provide strong support in the drafting of and engagement with an IPR policy for Nigeria. See WIPO External Offices <<https://www.wipo.int/about-wipo/en/offices/>>, accessed 14 June 2021.

21 MPI Principles, *supra* note 10, paras 10–17.

ration, the recommendations of WIPO Development Agenda, and the level of development of their negotiating partners” while negotiating the IPR protocol. The goal here is not to downplay the need for IPR protection, but to ensure, among others, that sufficient flexibilities are included in the IPR framework to cater to the social and economic needs of all negotiating parties. In particular, the contents of the IPR protocol should be formulated in such a way as not to shrink or erode the policy space provided by the TRIPS Agreement for negotiating parties to develop their own domestic IPR regimes. Importantly, negotiating parties should adopt provisions that take into cognizance their existing international commitments, particularly “those relating to the protection of human rights, biological diversity, the environment, food security, and public health.”²²

3 Nigeria’s International Commitments and National Regime on IPRs

Nigeria has signed and ratified/acceded a number of key international IPR treaties as shown in Table 1 below. At the regional level, most of the norm-setting actions on IPRs occur within the framework of the African Regional Intellectual Property Organization (ARIPO) and the *Organization Africaine De La Propriete* (OAPI – African Intellectual Property Organization).²³ The proposed Pan-African Intellectual Property Organization (PAIPO) is not yet operational because its establishing Statute,²⁴ which was adopted on 30 January 2016, has not come into force. The Statute has only six signatories so far and Nigeria has neither signed nor ratified/acceded the Statute.²⁵ The AfCFTA phase II negotiations offer an opportunity for the setting of Africa-wide norms on IPRs.

Nigeria is not a member of ARIPO and OAPI. Nonetheless, Nigeria may draw from some of the IPR frameworks formulated by these organizations in developing its national priorities for the AfCFTA phase II negotiations. Notable among the IPR frameworks are the *Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore 2010*, and the *Arusha Protocol for the*

²² MPI Principles, *supra* note 10, paras 11, 18–22.

²³ ARIPO, <<https://www.aripo.org/>>, accessed April 23, 2021; OAPI, <<http://oapi.int/index.php/fr/>>, accessed April 23, 2021.

²⁴ Statute of the Pan-African Intellectual Property Organization, 2016 (PAIPO Statute).

²⁵ African Union, *List of Countries which have Signed, Ratified/Acceded the Statute of the Pan-African Intellectual Property Organization*, available at: <<https://au.int/sites/default/files/treaties/32549-sl-STATUTE%20OF%20THE%20PAN%20AFRICAN%20INTELLECTUAL%20PROPERTY%20ORGANIZATION%20%28PAIPO%29%20%281%29.pdf>>, accessed April 23, 2021.

Table 1: International IPR Treaties.

Treaty/guideline/domes- tic law	IPR covered	Objective	Accession/ ratification
Paris Convention for the Protection of Industrial Property, 1883	Industrial property including, patent, designs, trademarks, trade names, geographical indication	Provides common rules for the protection of industrial property; stipulates the principle of national treatment and the right of priority	17 July 1963
Berne Convention for the Protection of Literary and Artistic Works, 1886	Copyright and related rights	Defines the substance and scope of the rights conferred on the authors of authorial works such as literary, artistic, musical, and dramatic works. Provides exceptions to the rights. Stipulates minimum standards for the protection of rights. Introduces the principle of national treatment	10 June 1993
Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 1961	Copyright and related rights	Secures protection for performers, music producers, and broadcasters in their performances, sound recordings, and broadcasts, respectively	29 October 1993
Convention on Biological Diversity, 1992 (CBD)	Traditional Knowledge, Genetic Resources, Patent	Makes provisions for the conservation of biological diversity; sustainable use of the components of biological diversity; and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources	29 August 1994
World Trade Organization (WTO) – Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), 1994	Patents, designs, trademarks, geographical indications, trade names, utility models, layout designs of integrated circuits, competition, trade	It sets out IPR objectives within a trade context; contains minimum standards and ceilings, including rights and flexibilities, within which national regimes and	1 January 1995

Table 1: (continued)

Treaty/guideline/domes- tic law	IPR covered	Objective	Accession/ ratification
	secrets, plant variety, copyright, and related rights	regional agreements should operate; creates policy spaces for the development of domestic IPR policy within the minimum standards and ceilings.	
International Treaty on Plant Genetic Resources for Food and Agriculture	Traditional Knowledge, Genetic Resources, Patent	Provides for “the conser- vation and sustainable use of plant genetic resources for food and agriculture and the fair and equitable sharing of the benefits arising out of their use, in harmony with the (CBD), for sustainable agriculture and food security”	20 January 2021
Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (ABS) to the CBD	Traditional Knowledge, Genetic Resources, Patent	To provide a framework for the fair and equitable sharing of the benefits arising out of the utiliza- tion of genetic resources	Not ratified/ acceded, but signed on 1 February 2012
Beijing Treaty on Audio- visual Performances, 2012	Copyright and related rights	It confers reproduction, distribution, rental, and the making available rights on performers of audio-visual performances	4 October 2017
Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled, 2013	Copyright and related rights	This is the first user rights treaty within the interna- tional copyright frame- work. It has a human rights and social dimen- sion; and its main goal is to establish a set of mandatory exceptions and limitations for the benefit of the blind, visually impaired,	4 October 2017

Table 1: (continued)

Treaty/guideline/domes- tic law	IPR covered	Objective	Accession/ ratification
WIPO Copyright Treaty, (1996)	Copyright and related rights	otherwise, print disabled (VIPs) It deals with the protec- tion of works and the rights of their authors on the internet; provides new economic rights in addition to those covered by the Berne Convention; makes provisions relating to the protection of computer programs and databases.	4 October 2017
WIPO Performances and Phonograms Treaty, 1996	Copyright and related rights	It deals with the rights of performers (actors, singers, musicians, etc.) and producers of sound recordings on the internet.	4 October 2017

Protection of New Varieties of Plants 2015. In addition, Nigeria may draw from some existing regional and sub-regional guidelines and policies such as the AU model law for the protection of the rights of local communities, farmers, and breeders and for the regulation of access to biological resources;²⁶ guidelines for the coordinated implementation of the Nagoya Protocol in Africa;²⁷ and the Economic Community of West African States (ECOWAS) harmonized policy for the deployment of the flexibilities in the TRIPs Agreement to improve access to medicines in West Africa.²⁸

²⁶ African Model Legislation for the Protection of the Rights of Local Communities, Farmers, Breeders and for the Regulation of Access to Biological Resources, 2000, <<https://www.wipo.int/edocs/lexdocs/laws/en/oau/oau001en.pdf>>, accessed April 23, 2021.

²⁷ African Union Practical Guideline for Coordinated Implementation of the Nagoya Protocol, <https://www.biodiversityinternational.org/fileadmin/user_upload/campaigns/Treaty_and_Nagoya_Workshop_2015/AU_Practical_Guidelines_on_ABS-English.pdf>, accessed April 23, 2021.

²⁸ ECOWAS, Development of a Harmonized TRIPs Policy for Adoption by ECOWAS Member States that Employ TRIPs Flexibilities to Improve Access to Medicines in the Region, available at: <https://www.healthresearchweb.org/?action=download&file=ECOWASTRIPSPOLICY_English.pdf>, accessed April 23, 2021.

The following tables present the global architecture with respect to key global IPR treaties to which Nigeria is committed (Table 1), and Nigeria's domestic IPR regimes (Table 2), which should be considered when setting Nigeria's national negotiation priorities.

4 Broad IPRs Policy Recommendations under ARIA IX Report

The *Assessing Regional Integration in Africa IX* (ARIA IX Report) is part of a series of official reports jointly authored by United Nations Economic Commission for Africa (UNECA), AU, African Development Bank (AfDB), and United Nations Conference on Trade and Development (UNCTAD). Informed by studies conducted by African experts on different aspects of the AfCFTA, the ARIA IX Report contains high-level policy recommendations to guide the formulation of different protocols under the AfCFTA, including on IPR.

Within the context of the AfCFTA, the ARIA IX Report recognizes, among others, IPRs not only just as private exclusive rights but also as veritable policy tools for the promotion of innovation, competition, investment, entrepreneurship, and the maintenance of public policy objectives relating to traditional learning, knowledge sharing, and public health. The ARIA IX Report, thus, regards the negotiations for an IPRs protocol under the AfCFTA as “an opportunity to advance a continental approach to a balanced (IPRs) system that responds to the aspirations contained in (AU) Agenda 2063.”²⁹ As admonished by the authors of the Report, the negotiations for an IPR protocol under the AfCFTA must be “open, transparent and inclusive”³⁰ in view of the very controversial nature of IPRs.

Concerning substantive issues, the ARIA IX Report recommends the following high-level policy options for a viable IPRs protocol under the AfCFTA:³¹

- a. Provide guiding principles for national IP law and policy, as well as for engagement of African countries in international IP treaties.
- b. Provide for nondiscrimination among nationals of states parties on matters of IP rights.
- c. Develop norms to safeguard African interests, including nondiscrimination among African countries on matters pertaining to IP rights.

²⁹ ARIA IX Report, *supra* note 8, at 130.

³⁰ ARIA IX Report, *supra* note 8, at 131.

³¹ ARIA IX Report, *supra* note 8, at 131.

Table 2: National IPR Regimes.

Legislation	IPR covered	Objective	Commencement
Patents and Designs Act, Cap P2, Laws of the Federation of Nigeria, 2004	Patent and designs	Makes comprehensive provisions for the registration and proprietorship of patents and designs in Nigeria and other related matters	1 December 1971
Trade Marks Act, Cap T13, Laws of the Federation of Nigeria, 2004	Trademarks, certification trademarks, etc.	Makes provisions relating to the registration and ownership of trademarks and related matters	1 June 1965
Copyright Act, Cap C28, Laws of the Federation of Nigeria, 2004	Copyright, and neighboring or related rights (performers rights, and rights in expressions of folklore or traditional cultural expressions)	Provides for the definition, protection, infringement of copyright, and the remedy and penalty for same, in literary, musical, artistic, and audio-visual works, sound recordings, broadcast, performances, and expressions of folklore (traditional cultural expressions). Provides limitations and exceptions to copyright and other related matters.	19 December 1988
Plant Variety Protection Act, 2021	Plant Variety and Breeding	Promotes increased staple crop productivity for small-holder farmers in Nigeria and encourages investment in plant breeding and crop variety development; promotes increased mutual accountability in the seed sector; protects a new variety of plants; and establishes the plant variety protection office in Nigeria.	21 May 2021

- d. Establish a regional IP exhaustion system to prevent fragmentation of the AfCFTA market and encourage regional value chain development.
- e. Provide the minimum requirements for the protection of TK, GRs, and TCEs, but with sufficient flexibility for domestic law and multilateral negotiations on these issues.

- f. Require the ratification of the Marrakesh Treaty, with the additional commitment to adhere to any other multilateral agreement that promotes access to work for persons with disabilities.
- g. Require the ratification of the protocol amending the TRIPS Agreement, 2005, in order to benefit from the facilitated production and exportation of pharmaceuticals for a regional trade agreement in which 50% of the members are least developed countries.
- h. Oblige the protection of geographic indications through either a sui generis system or certification and collection marks.
 - i. Develop minimum standards on plant variety protection, including availability, scope of protection, and exceptions to plant breeders' rights and the protection of traditional and new farmers' varieties.
 - j. Develop guidelines on procedures for the enforcement of IP rights.

The foregoing options afford very strong models for the formulation of Nigeria's national priorities, and if framed within a local context, have the potential to contribute toward achieving the strategic objectives and specific goals for the attainment of national economic growth and development as identified in Section 1 above.

5 Policy Considerations for Nigeria's National Negotiation Priorities

Guided by the negotiation principles, international commitments and national regime on IPR, and the high-level policy recommendations in the ARIA IX Report as indicated in Sections 2, 3, and 4 above, this part posits as follows in relation to Nigeria's negotiation priorities for the AfCFTA IPR Protocol and set out recommendations under various recognized categories of IPRs: patents, designs, trademarks, copyright, and TK, TCEs, and GRs. In making these recommendations for Nigeria, it is recognized that there is potential for conflicts with other countries' positions during the negotiations, particularly due to the level of development of the negotiating partners. However, as stated earlier in this paper, the recommendations here are guided by the MPI Principles, which encourage taking cognizance of the negotiating parties' level of development particularly in the substance of the regional treaties such as the IPR Protocol.

5.1 Patents

Like other African countries, innovative activities in Nigeria largely occur in informal settings and in situations (open collaborative processes) that are often not readily in tune with Nigeria's patent system.³² This is not to say that innovation does not occur in the formal settings in Nigeria. Evidence abounds of impactful innovative activities, especially in the areas of information and communication technology and medical technology in Nigeria. These innovative activities are driven by Nigeria's growing innovation hubs³³ and tertiary institutions. For instance, the President of Nigeria recently in 2021 unveiled locally manufactured cell phones, known as Industrial Training Fund (ITF) Mobile, in a virtual Federal Executive meeting. The phone was produced by the Electrical/Electronics Technology Department of the ITF's Model Skills Training Center.³⁴ Also, researchers in the Ahmadu Bello University (ABU) developed a Four-in-One Hand Sanitizing Machine (ABUSANIT-20) and an Intensive Care Ventilator (ABUVENT-20) as part of their contribution to the national efforts to combat the COVID-19 pandemic in 2020.³⁵ Although ABU has obtained patents for the invention behind ABUSANIT-20 and ABUVENT-20,³⁶ the Nigerian patent system is still under-utilized locally owing to lack of capacity, awareness and requisite skills to take advantage of the regime.

Thus, for patents, the key focus should be on institutional capacity-building so that Nigeria can effectively take advantage of the relevant TRIPS flexibilities locally. The existing local patent regime encourages the dumping of foreign patents with no substantive examination of a patent application or access to invention disclosures in patent application.³⁷ Nigeria's patent system shares this

32 S. Elahi et al. *Knowledge and Innovation in Africa: Scenarios for the Future* (Open AIR, 2013), available at: <<https://openair.africa/wp-content/uploads/2013/01/Knowledge-Innovation-Africa-Scenarios-for-Future.pdf>> accessed June 12, 2021.

33 For instance, see NOTN, *Innovation Hubs*, available at: <http://www.notn.gov.ng/innovation_hubs>, accessed June 12, 2021.

34 *Buhari Receives Made in Nigeria Cell Phone* (Premiumtimes, June 9, 2021), available at: <<https://www.premiumtimesng.com/news/top-news/466689-buhari-receives-made-in-nigeria-cell-phone.html>>, accessed June 12, 2021.

35 Latonia Akubuko, ABU gets Patent Certificate for use of own Inventions (Education Monitor, June 4, 2021), available at: <<https://educationmonitornews.com/2021/06/04/abu-gets-patent-certificates-for-use-of-own-inventions/>>, accessed June 12, 2021.

36 *Ibid.*

37 A. Vanni, *Patent Games in the Global South: Pharmaceutical Patent Law-Making in Brazil, India and Nigeria* (Hart Publishing, 2019).

feature with those of other negotiating member states under the AfCFTA.³⁸ Recent efforts to improve capacity and processes include the IPRs Action for Africa program funded by the European Union Intellectual Property Organization (EUIPO).³⁹ Nigeria should actively support such programs and maximize benefits from them; and champion the inclusion of provisions in the proposed IPR protocol that will enable and enhance institutional capacity-building for an effective national patent system.

In doing so, however, Nigeria should avoid lending itself to the moves to grant more patents but rather tap into the world of open science, open data, and open innovation.⁴⁰ Nigeria's focus should be on kick-starting and strengthening her substantive examination system to ensure that patents are only granted to inventions that meet the highest standards of novelty, inventiveness, and industrial applicability. In this regard, Nigeria could start by having full membership status in ARIPO in order to benefit from the organization's patent examination system.

Nigeria's negotiating priorities should also focus on sectors and issues of particular relevance to the Nigerian economy and national realities. Notable in this regard are issues of pharmaceuticals and access to medicines as well as Nigeria's emerging technology industry buzzing with growing tech hubs and innovation in health technology and telemedicine.⁴¹

On the topic of pharmaceuticals, Nigeria's priorities must align with other AfCFTA member states on increasing and improving access to medicines. This would require not just championing the inclusion of appropriate provisions in the proposed IPR protocol that does not only shrink the policy space provided by the TRIPS Agreement but also boldness and unwavering support to and with other AfCFTA member states to utilize TRIPS flexibilities especially compulsory licensing measures, to their fullest extent.⁴²

38 I. Mgbeoji, "African Patent Offices Not Fit for Purpose" in J. de Beer et al. (eds.), *Innovation & Intellectual Property: Collaborative Dynamics in Africa* (UCT Press, 2014), pp. 234–247.

39 AFRIP, *About AFRIP*, <<https://internationalipcooperation.eu/en/afripi/about-afripi>>, accessed April 23, 2021.

40 Ncube et al., "Effects of the South African IP Regime on Generating Value from Publicly Funded Research: An Exploratory Study of Two Universities," in J. de Beer et al. (eds.), *Innovation and Intellectual Property: Collaborative Dynamics in Africa* (UCT Press, 2014), pp. 282–315.

41 World Economic Forum, "What Nigeria's tech sector can learn from India", <<https://www.weforum.org/agenda/2020/11/nigeria-tech-information-data-india/>>, accessed April 24, 2021.

42 WTO, *Members discuss TRIPS waiver request, exchange views on IP role amid a pandemic*, available at: <https://www.wto.org/english/news_e/news21_e/trip_23feb21_e.htm>, accessed April 24, 2021.

5.2 Designs

In many jurisdictions, design application filings have significantly increased. According to WIPO, global filings of design applications numbered approximately 1.36 million in 2019 as compared to 1.34 million in 2018, and 656,000 in 2008.⁴³ On the African continent specifically, the market importance of design protection has garnered greater attention as has the efforts to facilitate the ability to gain design protection globally and at the regional level. The recent efforts to improve capacity and processes with the IPRs Action for Africa program funded by the EUIPO has indicated the integration of the EUIPO's DesignView – a centralized access point to registered designs information held by participating National IP Offices – into national and regional IP offices in Africa.⁴⁴

Like other countries in the African Group at the WIPO General Assembly, Nigeria's interest in the designs space also involves considerations of policy space for the exploitation of culturally distinctive works. TCEs such as designs, carvings, paintings, artifacts, etc. and TK (e.g. distinctive wearing techniques) can be used to create protectable designs. At the WIPO Standing Committee on Trademarks, Industrial Designs, and Geographical Indications (GIs), one of the controversial issues concerns policy space for disclosure of origin requirements in designs applications. Such disclosure of origin requirements envisages disclosure of TCEs and TKs used in designs creation as distinct from the proposal to recognize TCEs and TKs as *sui generis* rights or categories of protectable works subject to (new) economic and moral rights (discussed in Section 5.5, below).

Within that controversy (i.e. disclosure of origin requirement), the interest of the African Group and its clamor for policy space on the disclosure of origin requirement within the Design Law Treaty (DLT) is to allow countries to require the disclosure of the origin of TCEs, TK, or biological or GRs used in creating a design.⁴⁵ While there are strong oppositions against this proposal, the IPR Protocol offers Nigeria and the other AfCFTA negotiating parties an opportunity to advance the

⁴³ World Intellectual Property Organization (WIPO), "World Intellectual Property Indicators" (2020) 8, 128, <https://www.wipo.int/edocs/pubdocs/en/wipo_pub_941_2020.pdf>, accessed June 14, 2021].

⁴⁴ AFRIP, *About AFRIP*, <<https://internationalipcooperation.eu/en/afripi/about-afripi>>, accessed April 23, 2021.

⁴⁵ M. Bagley, "Designing Disclosure: Disclosure of Cultural and Genetic Resources Utilization in Design Protection Regimes," in S. Frankel (ed.) *The Object and Purpose of Intellectual Property* (Edward Elgar, 2019) 129.

proposal on the continent especially seeing as work on the DLT has stalled since the introduction of the Africa Group's proposal.

As far as this aspect of the design protection regime is concerned, it is important for Nigeria to prioritize negotiations in support of this proposal particularly in view of its rich cultural and GRs. A good example concerns its striking and unique *batik* designs, *akwete* cloth, etc. which are finding their way into fashion brands and even movies.⁴⁶ While design protection would not prevent a third party from making an article out of such materials, the requirement of disclosure of origin would prevent the substantive reproduction of the appearance of such materials in protectable designs.⁴⁷

The basic features of designs protection under the Patent and Designs Act in terms of substantive requirement essentially cover designs that are new under a registration, as opposed to an examination, system.⁴⁸ However, Nigerian courts in design infringement cases have often embarked on an examination excursion. A 2020 Federal High decision in Lagos has confirmed this judicial trend,⁴⁹ which has shaped the contours of design protection in terms of having judges act as 'ex-post examiners' in the absence of an examination system properly so called. In this scenario, companies go through the expense of registering designs and face the risk of nullification on the ground of the design not being new based on the assessment of a judge's untrained eyes. To this end, it is important for Nigeria to prioritize, champion, and canvass for the inclusion in the proposed IPR protocol of provisions that would not erode the policy space for Nigeria to develop such designs examination systems locally. While design protection has proved useful in the global textile industry, it is even more so highly beneficial for the Nigerian fashion industry. Consequently, as a matter of IP priority for Nigeria, such protection for rapidly local industry with its potential expansion to the African market under the AfCFTA fits into the framework of IPR protocol.

⁴⁶ N. Neophytou, "How African fashion has conquered film", available at <<https://www.bbc.com/culture/article/20210326-how-african-fashion-has-conquered-film>>, accessed June 14, 2021.

⁴⁷ Bagley, "Designing Disclosure", *supra* note 45, at 139.

⁴⁸ See sections 15 and 16 of the Patents and Designs Act, Chapter P2, Laws of the Federation of Nigeria, 2004. The only substantive examination by the registrar is as to whether the design is contrary to public order or morality under section 13(1)(b).

⁴⁹ *West African Cotton Company Limited (WACCOL) v Hozelock Excel* Suit nos. FHC/L/CP/1240/2013.

5.3 Trademarks

As probably the most visible IPR in the marketplace, trademark protection in a trade agreement is indispensable. There is no shortage of goods and services offered by Nigerian businesses and entrepreneurs. What remains a key challenge is access to regional and international markets especially for small- and medium-scale producers, especially those focusing on TK-based products and whose trades are communal in nature. Recognizing the significance of this challenge, Nigeria's priorities should be championing and supporting the inclusion of provisions in the proposed IPR protocol that allows the development of communal trademark protection mechanisms such as collective marks, certification marks, and GIs locally. Communal trademark protection strategies combine trademark-like protection with recognition of the collaborative nature of production in Nigeria.⁵⁰

As a study by Adewopo et al. on the Nigerian leather and textile industries has shown,⁵¹ the production of goods is substantially the result of the collaboration of individual and small-scale producers, operating largely in the informal sectors, utilizing traditional techniques and producing and distributing goods in clusters. Evidence from other empirical studies also show the existence of similar collaboration dynamics in agro-based Small and Medium-sized Enterprises (SMEs) in Africa,⁵² and Information and Communication Technology (ICT)-based enterprises in Nigeria.⁵³

Although current trademark law in Nigeria has some provisions to cater to communal marks (certification marks),⁵⁴ Adewopo et al.'s study shows that more still needs to be done in the form of reforms to take advantage of protection strategies inherent in other forms of communal trademark protection systems, such as collective marks, and to tap from the potentials of the GI mechanism.

50 A. Adewopo, H. Chuma-Okoro and A. Oyewunmi, "A Consideration of Communal Trademarks for Nigerian Leather and Textile Products," in J. de Beer et al. (eds) *Innovation & Intellectual Property: Collaborative Dynamics in Africa* (UCT Press, 2014) 109–131.

51 *Ibid.*

52 T. Dagne and C. Oguamanam, *ICTs in Agricultural Production and Potential Deployment in Operationalising Geographical Indications in Uganda*, OpenAIR Working Paper 14 (August 2018), <<https://openair.africa/wp-content/uploads/2020/05/WP-14-ICTs-in-Agricultural-Production-and-Operationalising-GIs-in-Uganda.pdf>>, accessed April 23, 2021.

53 O. Jegede and O. Jegede, *Determinants of Innovation Capabilities in Informal Settings: The Case of Nigeria's Clustered ICT Microenterprises*, Open AIR Working Paper 12 (August 2018), <<http://openair.africa/wp-content/uploads/2018/09/WP-12-Determinants-of-Innovation-Capability-in-Informal-Settings.pdf>>, accessed April 23, 2021.

54 See section 43 of the Trade Marks Act, Chapter T13, Laws of the Federation of Nigeria, 2004.

Nigeria's priorities should promote the inclusion of provisions in the proposed IPR protocol that allows sufficient policy space for the initiation and execution of legal reforms aimed at taking full advantage of all forms of communal marks.

5.4 Copyright

As far as copyright is concerned, it is important for Nigeria to prioritize negotiations in recognition of her strongest economic assets. In this regard, Nigeria's creative industry (particularly, its music and film sectors) leads the way. The Nigerian movie industry (Nollywood), rated in late 2020 as the second largest globally in terms of the number of films produced, creates employment for about one million people; contributes over USD7 billion to the Nigerian economy; and accounts for 1.4% of Nigeria's national Gross domestic product (GDP). Nollywood makes about 2500 movies annually and it is projected to generate, from the growing cinemas across the country, the sum of USD22 million by 2021. On its part, the Nigerian music industry's revenue increased from USD26 million in 2014 to USD34 million in 2018 and is projected to increase at a 13.4% of Compound Annual Growth Rate to USD73 million in 2021.⁵⁵

Viewed from the perspective of their significant contribution to national economic growth, it may be tempting to take an overzealous approach to copyright protection in the AfCFTA IPR Protocol. Such an overzealous approach would involve focusing (almost) solely on the exclusive rights of authors and copyright owners without appropriate advertence to the rights and interests of users and future creators of copyright-protected works. Such an approach ignores the evidence from research on the operations and processes of these industries contrary to best practices that urges policymaking and implementation to be backed by evidence.⁵⁶

In this connection, Oguamanam's empirical study of the innovation and entrepreneurial models in Nollywood is an important resource. The study shows that Nollywood's evolution and development are goaded by a complex aggregation of technology, "culture, ethnicity, marketing, and entrepreneurial ingenuity, liberal art infrastructure, and Nigeria's abundant social capital." The study also

⁵⁵ International Trade Administration, "Nigeria – Country Commercial Guide", <<https://www.trade.gov/country-commercial-guides/nigeria-media-and-entertainment-industry-nollywood-and-nigerian-music>>, accessed April 23, 2021; Statista, *Music Industry Revenue in Nigeria from 2014–2023*, available at: <<https://www.statista.com/statistics/939157/nigeria-music-industry-revenue/>>, accessed April 23, 2021.

⁵⁶ J. de Beer, *Evidence-Based Intellectual Property Policymaking: An Integrated Review of Methods and Conclusions*, 19 *Journal of World Intellectual Property*, no. 5–6 (2016), 150–177.

shows that the success of Nollywood is based largely on its “pragmatic and evolving approach to (IP) systems and openness” and its representation of “a grassroots indigenous entrepreneurial cultural initiative” based on the ideals of collaboration and progress.”⁵⁷

From the foregoing, it is evident that a significant amount of copyright-protected works (particularly in these sectors) is from individuals creating outside of typical commercial enterprises. Some of the activities of these individuals fall within what has been recognized as the “informal economy” where activities that have market value and would add to tax revenue and GDP exist but are not recorded.⁵⁸

Aside from what is considered her strongest assets, it must be acknowledged that Nigeria’s developmental advancement calls for prioritizing citizens’ access to research and educational materials, especially for persons leaving with different forms of disabilities. Both at the national and continental level, evidence abounds that overzealous protection can create severe access barriers to the dissemination of research, cultural, and educational materials. Furthermore, such overzealousness in, and a visceral focus on, the protection of the interests of commercial copyright owners can stifle new and collaborative modes of creativity, such as open education, open science, and open data, that hold great promise for development and growth.⁵⁹

An overzealous approach can also hamper the development and deployment of technological assistive devices for the education and research endeavors of persons living with disabilities,⁶⁰ and, therefore, contravenes Nigeria’s commitment under the Marrakesh Treaty; and the *UN Convention for the Rights of Persons with Disabilities, 2007*, which has largely been domesticated through the *Discrimination Against Persons with Disabilities (Prohibition) Act 2018*. Thankfully, Nigeria has shown commitments to domesticate the Marrakesh Treaty through the Copyright Amendment Bill 2018 (awaiting transmission to the National Assembly)⁶¹ and to make

57 C. Oguamanam, *The Nollywood phenomenon: Innovation, Openness, and Technological Opportunism in the Modeling of Successful African entrepreneurship*, 23 *Journal of World Intellectual Property*, no. 3–4 (2020), 518–545.

58 IMF, *What is the Informal Economy*, <<https://www.imf.org/external/pubs/ft/fandd/2020/12/what-is-the-informal-economy-basics.htm>>, accessed April 23, 2021.

59 C. Okorie, *Open Educational Resources – A Nigerian Perspective*, available at: <<http://afro-ip.blogspot.com/2013/06/open-educational-resources-nigerian.html>>, accessed April 23, 2021.

60 C. Ncube, B. Reid and D. Oriakhogba, *Beyond the Marrakesh VIP Treaty: typology of copyright access-enabling provisions for persons with disabilities*, 23 *Journal of World Intellectual Property*, no. 3–4 (2020), 149–165.

61 Earlier draft of the bill can be found at <http://graduatedresponse.org/new/wp-content/uploads/2016/02/DRAFT_COPYRIGHT_BILL_NOVEMBER-_2015.pdf>, accessed April 23, 2021.

provisions for other disabilities not covered by the Treaty.⁶² This action by the government can serve as the impetus for championing the inclusion of the provision in the proposed IPR protocol that will allow policy space for member states to formulate legal mechanisms that will promote the development of open education, open science, and open data resources generally, and access enabling devices for persons leaving with disabilities.

Finally, Nigeria's key considerations when tackling the issue of copyright protection in the AfCFTA IPR Protocol should also prioritize support for guiding principles that would encourage multi-territorial digital copyright licensing. Already, African collective management organizations have recorded some significant success with establishing multi-territorial digital copyright licensing hub for music content online.⁶³ What is now needed is the formulation of guiding principles perhaps in the form of soft law for multi-territorial licensing aligned with the proposed IP protocol.⁶⁴ Nigeria should champion and support such initiatives within the broad context of the proposed IPR protocol.

5.5 Traditional Knowledge, Traditional Cultural Expressions, and Genetic Resources

Like other member states of the AfCFTA,⁶⁵ Nigeria is very rich in GR as evidenced by her strong biodiversity base; TK in food production, preservation, and general agriculture, medicine and spirituality, environmental preservation, among others. The country is also blessed with a vast array of TCEs or expressions of folklore as evidenced by her diverse traditional arts and craft.⁶⁶

⁶² D. Oriakhogba, *Bringing the WIPO Internet Treaties, Audiovisual Performances and Marrakesh VIP Treaties in Tune with the Access to Knowledge and Development Demands in Nigeria*, 5 ABUAD Journal of Public and International Law, no. 1 (2018), 44–57.

⁶³ M. Stassen, *Multi-territory Digital Licensing Hub in Africa Shows Signs of Success Ahead of Potential 'Streaming Boom*, available at: <<https://www.musicbusinessworldwide.com/multi-territory-digital-licensing-hub-in-africa-shows-signs-of-success-ahead-of-potential-streaming-boom/>>, accessed April 23, 2021.

⁶⁴ D. Oriakhogba and C. Okorie, *Multi-territorial digital copyright licensing within the AfCFTA* (22 July 2020) <<https://openair.africa/multi-territorial-digital-copyright-licensing-within-the-afcfta/>>, accessed April 23, 2021.

⁶⁵ Parts of this section 5.5 are culled from the following: A. Oyewunmi et al., "Intellectual Property Teaching and Research in Nigeria: Emerging Trends and Future Direction" (2019) Unpublished Paper (forthcoming in the next volume of Nigerian Teachers Association Conference Proceedings).

⁶⁶ A. Adewopo, *Intellectual Property Rights in Nigeria: Law and Development* (NIALS Press, 2015), 168–300; NF Unuigbo, *Traditional Ecological Knowledge and Global Pandemics: Biodiversity and Planetary Health Beyond Covid-19* (Routledge, 2021); S. Oloruntoba, A. Afolayan and

A critical aspect of TK and GR is the medicinal and therapeutic uses of plants and this includes the discovery, collection, and management of medicinal GRs. Medicinal TK and GR are very valuable in the creation of increasingly popular nature-based products and it contributes to modern biotechnological, pharmaceutical, and cosmetic sectors. However, the recognition and accommodation of these valuable forms of knowledge under the IP regime has been problematic because of the nature of TK and GR, which according to various studies, are not easily suited to the traditional understanding of IP.

A whole body of scholarship has, therefore, evolved around the concept of biopiracy, which refers to the ways that corporations and government organizations (mostly from developed countries) claim ownership of, free ride on, or otherwise take unfair advantage of biological resources and the related TK of local communities in the biologically diverse Africa, including Nigeria without due acknowledgment or benefit sharing.⁶⁷ This is inimical to the actualization of the philosophical underpinnings of the IP regime as a tool for the safeguarding of ownership of rights and attendant enjoyment of the resulting economic and moral benefits deriving from such rights.

The absence of a legal framework for benefit sharing and the general protection of TK and GR in Nigeria continue to enable the theft and wrongful use of GR and TK in Nigeria. Although Nigeria has ratified the CBD and signed the Nagoya Protocol on access and benefit sharing, no steps have been taken to domesticate these important treaties. It is important, with AfCFTA, for Nigeria to domesticate

O. Yakob-Haliso, *Indigenous Knowledge Systems and Development in Africa* (Palgrave Macmillan, 2020); I. Mgbeoji, *Bio-cultural Knowledge and the Challenges of Intellectual Property Rights Regimes for African Development*, 1 NIALS Journal of Intellectual Property, no. 2 (2012), 1–43; A. Lawal-Arowolo, *Patent Regimes and African Traditional Medicine Practitioners: Toward a Synergy*, 2 NIALS Journal of Intellectual Property, no. 1 (2013), 124–149; D. Oriakhogba and A. Fenemigho, “Exploring the Intellectual Property, Traditional Cultural Expression, and Gender Dimensions of the Benin Bronze Casting Art: An Agenda for Research” in F. Orunmwense et al. (eds.), *National Development and Human Security* (University of Benin, 2019), pp. 84–105.

67 For instance, there is a United States patent in respect of “a series of compounds of general structure I and metal salts thereof”, useful in the treatment of diabetes mellitus and associated conditions when administered in an effective nontoxic dose in the form of a pharmaceutically acceptable composition resulting in cell regeneration. In the Disclosure of Invention, it is revealed that the compounds of the present invention are isolated from the leaf of the common *Vernonia amygdalina* plant (bitter leaf). The inventor is listed as an individual Nigerian, but no reference is made to the traditional custodians of the knowledge relating to the medicinal uses of bitter leaf and, of course, there is no evidence of benefit sharing with any local community in Nigeria.

these treaties. In this connection, there is some lesson to learn from South Africa,⁶⁸ the Swakopmund Protocol, as well as the AU model law for the protection of the rights of local communities, farmers, and breeders and for the regulation of access to biological resources; guidelines for the coordinated implementation of the Nagoya Protocol in Africa and from the existing African and regional and sub-regional guidelines mentioned in Section 3 above.

More importantly, the AfCFTA phase II negotiations on IPR afford Africa the opportunity to formulate effective protocols, with appropriate policy space for the development of local mechanisms, for the protection of TK and GR in Africa. Nigeria's priorities, in this regard, should be to champion and support such ventures.

Concerning TCEs, the unabated digitization of stolen Nigerian artifacts by major international museums without due compensation of the local communities from where the artifacts originate is a key source of concern.⁶⁹ While there is a legal framework under the Copyright Act for the protection of TCEs in Nigeria,⁷⁰ it has not been effectively implemented. Moreover, the legal framework does not take cognizance of, and the need to provide compensation for, the local communities from where the TCEs originate in situations of exploitation by third parties. It simply confers the Nigerian Copyright Commission with rights in, and the powers to administer, the TCEs.

Again, the AfCFTA phase II negotiations on IPR affords Africa and African countries the opportunity to formulate effective protocols, with appropriate policy space for the development of local mechanisms, for the protection of TCEs in Nigeria that will sufficiently cater to the interest of local communities in Nigeria.

6 Conclusion

So far, this paper has highlighted and discussed the negotiation principles inherent in the AfCFTA agreement and those espoused by global experts under the aegis of the MPI Principles, which are recommended as appropriate guides for Nigeria in developing its national negotiation priorities as it embarks on the AfCFTA phase II negotiations. As a further guide, the paper highlighted and examined the ARIA IX broad policy recommendations for a viable IPRs protocol

68 See the Patents (Amendment) Act, 20 of 2005 (South Africa), particularly Sections 30 and Section 61. The Intellectual Property Law (Amendment) Act, 28 of 2013 (South Africa – not yet in force) and the Protection, Promotion, Development and Management of Indigenous Knowledge Act, 6 of 2019 (IKS Act, South Africa)

69 For instance, see K. Opoku, *From Restitution to Digitalization: Looted Benin Treasures to go Online*, *Modern Ghana*, 27 April 2020, <<https://www.modernghana.com/news/998338/from-restitution-to-digitalization-looted-benin.html>>, accessed April 23, 2021.

70 See sections 31–33 of the Copyright Act, Chapter C28, Laws of the Federation of Nigeria, 2004.

under the AfCFTA agreement. In addition, the paper presented Nigeria's current international IPRs commitments and the extant national IPRs regimes because they are important in the determination of the limits and scope of the policy space within which Nigeria can formulate its negotiation priorities.

As Nigeria embarks on the AfCFTA phase II negotiations on IPR, the broad policy focus should be to champion initiatives that promote Nigeria's national interest and, at the same time, recognize and accommodate the ideals of inclusiveness, openness, and collaboration within the context of the AfCFTA. In this regard, it is important to put in place appropriate legal and policy mechanisms that take care of private commercial rights, but match the rights with sufficient flexibilities that will enable the achievement of the public interest objectives in the protection of IPR both at the national and regional levels. Accordingly, the following recommendations are apposite for the formulation of Nigeria's national negotiation priorities in the AfCFTA phase II negotiations on IPR.

For patents, negotiators must focus on institutional capacity-building so that Nigeria can effectively take advantage of the relevant TRIPS flexibilities. Nigeria should actively champion the inclusion of provisions in the proposed IPR protocol that will enable and enhance institutional capacity-building for an effective national patent system. In doing so, however, Nigeria should not attempt to grant more patents but benefit from the world of open science, open data, and open innovation. Nigeria must reinforce its substantive patent examination system to ensure that patents are granted only to inventions that meet the highest standards of novelty, inventiveness, and industrial applicability. In addition, Nigeria's negotiating priorities should also focus on sectors and issues of particular relevance to the Nigerian economy, including pharmaceuticals and access to medicines. The priorities must also include Nigeria's emerging technology industry with growing technological centers and innovation in health technology and telemedicine. In this connection, Nigeria's priorities must align with other AfCFTA member states on increasing and improving access to medicines. This would require not just championing the inclusion of appropriate provisions in the proposed IPR protocol that does not only shrink the policy space provided by the TRIPS Agreement but also the adoption of TRIPS flexibilities with better clarity and certainty from the lessons learned from TRIPS experience over the years.

For designs, although post-grant validity challenges should be encouraged as avenues for the quality of registered designs to be tested judicially, it is imperative that Nigeria's priorities should be improving its pre-grant designs examination systems. To this end, it is important for Nigeria to adopt as one of her negotiating priorities the formulation of design regimes that includes a pre-grant examination system for the sake of its textile and fashion industry for the inclusion in the proposed IPR protocol.

In the case of trademarks, access to regional and international markets especially for small- and medium-scale producers, especially those focusing on TK-based, agro-based, and ICT-based products and whose trades are communal in nature, remains a key challenge in Nigeria. To confront this challenge, Nigeria's priorities should be championing and supporting the inclusion of provisions in the proposed IPR protocol that allows the development of communal trademark protection mechanisms such as collective marks, certification marks, and GIs locally. Communal trademark protection strategies combine trademark-like protection with recognition of the collaborative nature of production in Nigeria.

Regarding copyright, it is important for Nigeria to prioritize negotiations in recognition of her strongest economic assets. In this regard, Nigeria's creative industry (particularly, its music and film sectors) leads the way as it contributes significantly to the growth and development of Nigeria's economy. In view of this, it may be tempting to take an overzealous approach to copyright protection in the AfCFTA IPR Protocol. Such an overzealous approach would involve focusing (almost) solely on the exclusive rights of authors and copyright owners without appropriate advertence to the rights and interests of users and future creators of copyright-protected works including protection of SMEs which largely constitute the informal economy. Such an overzealous approach has strong tendencies to undermine the efforts of SMEs constituting an informal economy within the copyright commercial landscape in Nigeria. Also, it must be acknowledged that Nigeria's developmental advancement calls for prioritizing citizens' access to research and educational materials, especially for persons living with different forms of disabilities. Overzealous protection of copyright can create severe access barriers to the dissemination of research, cultural, and educational materials; and stifle new and collaborative modes of creativity, such as open education, open science, and open data, that hold great promise for development and growth; and hamper the development and deployment of technological assistive devices for the education and research endeavors of persons living with disabilities, and contravenes Nigeria's treaty commitments and domestic legislative ventures in this regard. Finally, Nigeria's key considerations when tackling the issue of copyright protection in the AfCFTA IPR Protocol should also prioritize support for guiding principles that would encourage multi-territorial digital copyright licensing.

Regarding TK, GR, and TCE, the absence of a legal framework for benefit sharing and the general protection of TK and GR in Nigeria continues to enable the theft (biopiracy) and wrongful use of GR and TK in Nigeria. Although Nigeria has ratified the CBD and signed the Nagoya Protocol on access and benefit sharing, no steps have been taken to domesticate these important treaties. In this connection, there is some lesson to learn from the Swakopmund protocol, as well as the AU model law for the protection of the rights of local communities, farmers, and

breeders and for the regulation of access to biological resources; guidelines for the coordinated implementation of the Nagoya Protocol in Africa and from the existing African and regional and sub-regional guidelines. Also, the unabated digitization of stolen Nigerian artifacts by major international museums without due compensation of the local communities from where the artifacts originate is a key source of concern. The AfCFTA phase II negotiations on IPR affords Africa the opportunity to formulate effective protocols, with appropriate policy space for the development of local mechanisms, for the protection of TK, GR, and TCE in Africa, within the context of trade. Nigeria's priorities, in this regard, should be to champion and support such endeavors that will sufficiently cater to the interest of local communities in Nigeria.

Although existing templates and guidelines as indicated will prove useful in the negotiating process, the AfCFTA and its IPR protocol remain unique to Africa and the visions of African integration. On the final analysis, careful, inclusive, and comprehensive consideration of key imperatives will make for a sound and effective IPR protocol.

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