

THE ROLE OF INTELLECTUAL PROPERTY RIGHTS IN THE SUCCESS OF THE AFRICAN CONTINENTAL FREE TRADE AGREEMENT (AfCFTA)

WHAT IS THE AFRICAN CONTINENTAL FREE TRADE AGREEMENT?

The AfCFTA is the world's largest free trade agreement¹ bringing together the fifty-five countries which make up the African Union². For purposes of completion, a free-trade agreement is defined as an arrangement between two or more countries where the countries agree on certain obligations that affect trade in goods and services, protection of investors and intellectual property rights among other topics³. The AfCFTA entered into force almost four years ago on May 30 2019. The agreement has to date, been signed by fifty-four out of the fifty-five African countries which make up the African Union. Furthermore, the agreement is designed to canvass protocols namely the protocol on Trade in Goods, the protocol on Trade in Services, protocol on Intellectual Property Rights, protocol on Competition Policy and the protocol on rules and procedures on Settlement of Disputes. While the process has commenced, the protocol on intellectual property rights is yet to be finalised. This article will assess the role intellectual property rights will play in the success of the AfCFTA and ways in which the success can be achieved.

WHAT ARE THE OBJECTIVES OF THE AFRICAN CONTINENTAL FREE TRADE AGREEMENT?

The objectives of the AfCFTA are outlined in article three of the Agreement. These objectives are in conformity with the goals of Agenda 2063 for economic integration in Africa. The key objectives of the AfCFTA include:

- i. to create a single market for goods and services facilitated by free movement persons,
- ii. to create competitiveness of the economies of State parties within the continent, and

¹ Measured by the number of countries participating in the agreement

² www.au-afcfta.org

³ United States Department of Commerce, International Trade Administration- www.trade.gov



- iii. to promote industrial development through diversification and regional value chain development⁴.

In order to fulfil the objectives of the Agreement, State Parties are expected among other things to cooperate on investment, intellectual property rights and competition policy. In addition, State Parties are to cooperate on the implementation of trade facilitation measures. This is expected from the enactment and enforcement of national laws which promote the objectives of the AfCFTA.

WHAT ARE INTELLECTUAL PROPERTY RIGHTS AND WHAT IS THEIR CONTRIBUTION TO ECONOMIC DEVELOPMENT?

Intellectual property refers to creations of the mind such as inventions, literary and artistic works, designs and symbols, names and images used in commerce.⁵ Intellectual property rights refer to the rights which are usually exclusive, given to persons over the creations of their minds. Such rights protect the creator's work from being copied by other persons or being used without their authorisation. Intellectual property rights are recognised as human rights in article 27(2)⁶ of the **Universal Declaration of Human Rights** which states that:

Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

It is important to highlight that, intellectual property rights allow creators to proffer their protected works to the public at a cost and earn income. This promotes innovation and contributes to the growth of any economy at any level. It is reported that sectors that rely on intellectual property rights represent a significant part of developed and developing economies in terms of the gross domestic product (GDP) with many companies having eighty percent of their market value being attributable to intangibles including intellectual property⁷. While this is the case, it cannot be denied that countries appreciate and benefit from intellectual property at different levels. Some countries are more innovative than others and are therefore developing faster than the rest. The Global Innovation Index published by the

⁴ Article 3 of AfCFTA

⁵ www.wipo.int

⁶ Article 27 of the Universal Declaration of Human Rights

⁷ International Chamber of Commerce: Powerhouse for Innovation and Economic Growth page 5



World Intellectual Property Office in 2022 provided rankings with the top four innovation economies in Africa being Mauritius, South Africa, Botswana and Kenya⁸.

INTELLECTUAL PROPERTY RIGHTS IN THE AfCFTA AND INTERNATIONAL LAW PRINCIPLES APPLICABLE TO ITS EFFECTIVE IMPLEMENTATION

As already discussed, the AfCFTA seeks to create a single market for goods and services as well as promote industrial development in Africa. The ultimate goal of the Agreement is to have a continent where most, if not all economies are highly developed. In terms of intellectual property, the Agreement fosters technology transfer and unfettered movement of goods and services across the continent. This means an extended market from which intellectual property owners will earn more income automatically resulting in growth. At the same time, it means creation of opportunities for the least developed countries to learn from the inventions and products of the developed ones. This will foster development and growth of the countries lagging behind in terms of inventions and intellectual property in general.

While this is a great initiative, such exposure of assets (intellectual property) in markets where the creators have little or no control makes it important to come up with universal standards of protection of intellectual property rights in such foreign markets. There are established principles of international law which already deal with situations as these. It is important to highlight that these are enshrined in the Agreement on Trade Related Aspects of Intellectual Property commonly referred to the 'TRIPS Agreement'. The principles shall be discussed below.

a) NATIONAL TREATMENT PRINCIPLE

This is an intellectual property principle enshrined in article 3 of the TRIPS as follows:

Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection⁹ of intellectual property, subject to the exceptions already provided in, respectively, the Paris Convention (1967), the Berne Convention (1971), the Rome Convention or the Treaty on Intellectual Property in Respect of Integrated Circuits.

⁸ www.wipo.int-global-innovation-index-2022

⁹ For the purposes of Articles 3 and 4, "protection" shall include matters affecting the availability, acquisition, scope, maintenance and enforcement of intellectual property rights as well as those matters affecting the use of intellectual property rights specifically addressed in this Agreement.



It follows therefore that all member states should follow the set standards and give protection to foreign businesses the way it protects that of its nationals. The national treatment principle prohibits internal trade discrimination.¹⁰ In the application of the national treatment principle, equality is formal, that is, it depends entirely on the treatment Member states accord to their own nationals.¹¹ Simply put, the equality obtained by national treatment is the absence of discrimination. In essence, whatever protection of intellectual property rights that State Parties of AfCFTA give to their nationals is the very same that businesses from fellow State parties shall be expected to receive.

b) MOST-FAVOURED NATION PRINCIPLE

This is a principle outlined in article 4 of the TRIPS and it provides that;

With regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members.

This is an economic position which aims to ensure that any advantage extended to one Member state is equally enjoyed by all the other member states. In essence, if a State Party improves the benefits that it gives to one trading partner, it has to, immediately and unconditionally give the same improved and best treatment to all the other signatories to the AfCFTA so that they all remain 'most favoured'¹². The two principles of national treatment and most-favoured national are fundamental to the effective implementation of the AfCFTA

RECOMMENDATIONS ON THE EFFECTIVE IMPLEMENTATION OF THE AfCFTA WITH REGARD TO INTELLECTUAL PROPERTY RIGHTS.

It has already been alluded to, that the different countries in Africa are developing and realizing economic results from intellectual property at different rates. The creation of a single market as envisioned by the AfCFTA will therefore affect State Parties in different ways.

¹⁰ Gail E. Evans-TRIPS and sufficiency of the Free Trade Principles

¹¹ *ibid*

¹² www.wto.org



While some parties will benefit and realize economic growth through technology transfer and access to intellectual property, the developed parties are exposed and prone to having their intellectual property rights violated or abused. The intellectual property protocol in the AfCFTA, although not finalized, must seek to strike a balance between the interests of more economically developed countries in Africa and the developing ones. Some of the ways in which this can be achieved shall be discussed below:

i. POLICY COHERENCE

The starting point is to have harmonized standards of protection of intellectual property rights which shall apply to the State Parties. It is salient to have agreed standards of utilization and protection of intellectual property rights which shall be acceptable and agreed upon by the State Parties. This will clearly state out the standards expected from each State Party when it ratifies and incorporates the protocol into its national laws. The expectation shall be that, State Parties will abide by the agreed standards. None of the parties shall be allowed to provide another with treatment that falls short of such agreed standards. It may be necessary for purposes of ensuring that the parties abide by the standards to penalize failure to abide by the agreed standards. This will bring peaceful trade relations and to a greater extent guarantee the success of the AfCFTA.

ii. THE 'WIGGLE-ROOM' CONCEPT

This is a concept which is important in achieving the success of the AfCFTA. The protocol must provide some flexibility to accommodate the least developed countries, allowing them to benefit from being signatories to the Agreement. Wiggle room refers to flexibilities which allow some space to steer away from the agreed standards. In this case, it will be created by making exceptions to the strict adherence to the agreed standards. Guidelines may be taken from the TRIPS which in article 13 provides for exceptions to the standards of protection of intellectual property rights laid out in the agreement¹³. The wiggle room will reduce cases of monopolies where some State Parties will solely benefit single continental market leaving other countries lagging behind. Most importantly, the wiggle room will allow least the developed countries in the continent to learn and benefit from the intellectual property of the developed ones.

¹³ Article 13 of TRIPS Agreement



This will pave way for growth of all the economies as envisioned by the AfCFTA in accordance with the 2063 agenda.

iii. DISPUTE RESOLUTION BODY TO MANAGE ENFORCEMENT OF AGREED STANDARDS

It shall be important to have a functional and efficient dispute resolution board to ensure the enforcement of the agreed standards. This is because there's more to protection of intellectual property rights than just mere enactment of legislation. The right legislation coupled with effective administrative means of enforcement equals effective protection of intellectual property rights. In the international case of the **United States v India**¹⁴, the World Trade Organisation Appellate Body held that:

...the lack of adequate administrative procedures in such a way that it deprives both existing and intending intellectual property rights holders of the benefits which they would have enjoyed had there been appropriate mechanism in place is wrong

It is clear that the importance of having a body to deal with the enforcement of the agreed standards cannot be emphasised enough. The penalisation of failure to abide by the agreed standards as discussed above, will help in curbing situations of paper tigers- laws very vicious on paper but in reality, extremely ineffective. The setting up of a dispute resolution body to specifically deal with intellectual property matters will ensure the protection of the standards agreed upon by the State Parties and to a larger extent guarantee the success of the AfCFTA.

CONCLUSION

In conclusion, it has been discussed that intellectual property significantly contributes to the economic growth of most African countries. However, it is important to recognize that this is happening at different paces. The African Free Continental Free Trade Agreement seeks to achieve economic development by the utilization intellectual property rights throughout the continent while at the same time ensuring that the interests of rights holders are protected.

¹⁴ WT/DS50/AB/R9 (December 1997)



This goal can be achieved through creating coherent policies, provision of wiggle room and the setting up of an efficient dispute resolution body to ensure enforcement of the Agreement.

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