



# Facilitating Intra-African Trade: AfCFTA Protocol on Intellectual Property Rights

**G. ELIAS**

## Introduction

Thanks to the concerted efforts of stakeholders and African leaders, Africa has been alive to its potentials in the global digital ecosystem and the pivotal role of intellectual property rights (“**IP Rights**”). Chief among these efforts aimed at leveraging the African economy as one market is the African Continental Free Trade Area (“**AfCFTA**”). The AfCFTA is the world’s largest free trade area bringing together the 55 countries of the African Union (“**AU**”) and eight (8) regional economic communities to create a single market for the continent. The aim is to enable the free flow of goods and services across the continent and boost the trading position of Africa in the global market.

The AfCFTA agreement (the “**Agreement**”), which was adopted in 2018 is a high ambition trade agreement, with a comprehensive scope that includes critical areas of Africa’s economy, such as digital trade and investment protection, amongst others. By eliminating barriers to trade in Africa, the objective of the AfCFTA is to significantly boost intra-African trade, particularly trade in value-added production and trade across all sectors of Africa’s economy.

After a critical evaluation of the Agreement by the Federal Government of Nigeria (FGN), the FGN approved the ratification of the Agreement on November 4, 2020, and deposited the instrument of ratification on December 15, 2020, which made Nigeria the 34<sup>th</sup> state party to ratify the Agreement. However, considering the fast-paced digital world that we are currently in, the attempt at unifying and leveraging the African market did not stop at the adoption of the AfCFTA.

Recently, the AU adopted the Protocol to the Agreement on IP Rights (the “**Protocol**”). In this article, we examine the economic prospects and the enforcement of the Protocol vis-à-vis the objectives of the AfCFTA as set out in Article 3 of the AfCFTA which seeks to establish harmonized rules and principles for the promotion and protection of IP Rights in Africa.<sup>1</sup>

### The Protocol: Objectives, Scope and Principles

The specific objectives of the Protocol include to (a) support intra-African trade, (b) promote a harmonized system of IP protection in Africa, (c) promote African innovation, creativity and deepen IP culture in Africa, (d) contribute to the promote of science, industrialization, investment, digital trade, technology and technology transfer, and regional value chains and (e) promote a coherent IP Rights policy in Africa.<sup>2</sup>

The Protocol is a testament that protecting and promoting innovation is pivotal to fostering economic development. The Protocol aims to create a harmonized and balanced framework for IP protection among AfCFTA state parties.<sup>3</sup> It does not seek to merely harmonize existing IP standards but also addresses issues specific to the African context, such as traditional knowledge, access to genetic resources, and technology transfer.

The Protocol promotes national treatment of the state parties and its nationals with respect to the protection of IP Rights.<sup>4</sup> State parties are also required to ensure that any advantage, favour, privilege, or immunity that a state party grants to nationals of another state party or third party with respect to the protection of IP Rights, are promptly and unconditionally accorded to the nationals of the state parties, subject to the exceptions provided under international treaties applicable to the state party.<sup>5</sup>

The guiding principles for the protection and enforcement of IP Rights by state parties include (a) prevention of the abuse of IP Rights or the resort to practices that unreasonably restrain trade or

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<sup>1</sup> Article 1 of the Protocol.

<sup>2</sup> Article 2 of the Protocol.

<sup>3</sup> State party means a member state that has ratified or acceded to the Protocol and for which the Protocol is in force.

<sup>4</sup> Article 6 of the Protocol.

<sup>5</sup> Article 5 of the Protocol.

adversely affect the transfer of technology, (b) promotion of intra-African trade, (c) facilitation of access to medicines, vaccines and other essential healthcare tools consistent with the relevant treaties on IP Rights, (d) facilitation of access to clean and efficient energy as well as promotion of just and fair energy transition and environmental sustainability and (e) promotion of digital trade along with new and emerging technologies to foster Africa's digital transformation.<sup>6</sup>

The Protocol applies to all categories of IP including copyright and related rights, marks, patents, utility models, industrial designs, plant varieties, geographical indications, undisclosed information including trade secrets, layout designs (topographies) of integrated circuits, traditional knowledge, traditional cultural expressions, and expressions of folklore, genetic resources, and emerging technologies.<sup>7</sup> We have set out below key provisions of the Protocol on the standards for the protection of IP Rights.

#### **a. Copyright and Related Rights**

State parties are to ensure adequate protection of copyright and related rights. This encompasses access to and use of intellectual works for education, scientific research and inquiry, cultural preservation, development of public facilities for welfare and sustainable growth. Remarkably, vulnerable persons such as visually impaired persons must equally be considered in the framework for access to published works. However, notwithstanding the provisions of the Protocol in this regard, state parties in exercise of their sovereignty and interests of national developments and priorities, can limit the exercise of rights conferred on copyrights and related rights.

#### **b. Marks**

State parties are to provide for the protection of all categories of marks. Although, the Protocol is silent on the specific categories of marks, it is assumed that trademarks, service marks, certification marks, collective marks etc fall under the scope of marks to be protected. State parties are also to, amongst others, encourage the registration of marks for environmentally friendly goods and services and ensure that registrability of marks are dependent on use, without setting actual use of a mark as being a condition for filing an application for registration. This obligation will in no way prejudice the right of a state party to provide exceptions and limitations to the rights conferred by a mark consistent with IP Rights treaties to which they are party, in view of their developmental priorities and interests.

#### **c. Patents**

State parties are to grant patents for inventions, in all areas of technology that are new, industrially applicable and involve an inventive step.<sup>8</sup> In granting patents for inventions in all areas of technology, state parties must ensure that extant local laws do not operate to hinder access to essential healthcare inputs such as medicines, vaccines, diagnostics, therapeutics, etc.<sup>9</sup> The Protocol mandates state parties to ratify the 2005 Protocol amending the World Trade Organization (WTO) Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) in relation to public health and provide for procedures that enable the export of pharmaceutical products produced under the compulsory license for the benefit of State Parties that have limited or no domestic pharmaceutical manufacturing capacity.

Members of the WTO which are also state parties to the Agreement are obligated to, within three (3) years of the coming into force of the Protocol, provide procedures that will enable the export

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<sup>6</sup> Article 4 of the Protocol.

<sup>7</sup> Article 3 of the Protocol.

<sup>8</sup> Article 12(1) of the Protocol.

<sup>9</sup> Article 12(3) of the Protocol.

of pharmaceutical products produced under the compulsory license for the benefit of state parties that have limited or no domestic pharmaceutical manufacturing capacity.

**d. *Protection of New Plant Varieties and Geographical Indications.***

The Protocol mandates state parties to uniquely offer protection to new plant varieties through a *sui generis* system with attendant recognition of farmers' rights, plant breeders' rights, and access and benefit sharing.<sup>10</sup>

State parties are also mandated to specifically provide for the protection of geographical indications. A database and information portal of registered geographical indications is to be established by the AfCFTA Secretariat.<sup>11</sup>

**e. *Traditional Knowledge, Traditional Cultural Expression and Folklore***

Traditional knowledge includes know-how, skills and practices that are developed, sustained, and passed on from generation to generation within a community, often forming part of its cultural identity. The Protocol mandates state parties to provide for the protection of traditional knowledge,<sup>12</sup> cultural expressions and folklore<sup>13</sup> and take measures to prevent and prohibit the unauthorised utilisation of traditional knowledge, traditional cultural and expressions and expressions of folklore in all categories of IP Rights.

Applicants for all applicable categories of IP Rights relating to traditional knowledge, cultural expressions and folklore are to provide specific information on (i) the source of the traditional knowledge, cultural expressions and expressions of folklore utilised in the invention or creation; (ii) proof of free prior and informed consent of the regulatory authorities under the applicable national regime; and (iii) proof of fair and equitable benefit sharing under the relevant national regime.<sup>14</sup>

**f. *Industrial Designs and Layout Designs (Topographies)***

The Protocol mandates state parties to provide for the protection of industrial designs that are new or original and encourage the registration of environmentally friendly industrial designs as well as the protection of designs that contribute to the development of key industries and value chains.<sup>15</sup> State parties are also to provide for the protection of layout designs (topographies) of integrated circuits that are original and not commonplace among creators of layout designs of integrated circuits at the time of creation.<sup>16</sup>

**g. *Utility Models and Genetic Resources***

State parties are to provide for the protection of utility models and make relevant technical assistance available to entrepreneurs and micro, small and medium enterprises in various manufacturing fields for the effective implementation of utility models.<sup>17</sup>

The Protocol also mandates state parties to provide for the protection of genetic resources and take measures to prevent and prohibit the unauthorised utilisation of genetic resources in all categories of IP Rights.<sup>18</sup> Applicants for all applicable categories of IP Rights relating to genetic resources are to

<sup>10</sup> Article 8 of the Protocol.

<sup>11</sup> Article 9 of the Protocol.

<sup>12</sup> Article 18 of the Protocol.

<sup>13</sup> Article 19 of the Protocol.

<sup>14</sup> Articles 18(2) and 19(2) of the Protocol.

<sup>15</sup> Article 14 of the Protocol.

<sup>16</sup> Article 16 of the Protocol.

<sup>17</sup> Article 13 of the Protocol.

<sup>18</sup> Article 20 of the Protocol.

provide specific information on (i) the source of the genetic resources utilised in the invention or creation; (ii) proof of free prior and informed consent of the regulatory authorities under the applicable national regime; and (iii) proof of fair and equitable benefit sharing under the relevant national regime.

### **Enforcement Mechanisms**

On enforcement, state parties are to enforce IP Rights in accordance with the provisions of the Protocol, its national laws, and other treaties to which they are party to.<sup>19</sup> This implies that for the Protocol to achieve its objectives, the onus lies on state parties, not excluding the committee on IP Rights as established by the Council of Ministers in accordance with Article 11 of the Agreement, who are responsible for facilitating the implementation of the Protocol and to further its objectives.<sup>20</sup>

### **Prospects**

While the Protocol holds immense potential, challenges persist. The differences in the level of IP development among state parties, inadequate infrastructure for IP management and potential, and conflicts between the Protocol and existing national laws, are areas of concern. Moreover, balancing the need for IP protection with ensuring access to essential goods and services remains a delicate task. Looking ahead, the effective implementation of the protocol will be crucial. State parties must collaborate to build capacity, streamline IP processes, and foster an environment that encourages innovation. Stakeholders' engagement, particularly involving local communities and industries, will be vital in ensuring the Protocol's success.

### **Conclusion**

Commendably, the Protocol reflects African realities regarding digital engagements and protection of IP Rights. The Protocol particularly demonstrates a progressive strategy for fostering innovation and economic development in Africa. It is expected that as state parties continue to navigate the complexities of implementing the Protocol, the objectives of the Protocol will be significantly achieved in promoting intra-African trade and development.

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<sup>19</sup> Article 25 of the Protocol.

<sup>20</sup> Article 30 of the Protocol.

## Authors



**Favour Ogini**  
Associate  
[favour.ogini@gelias.com](mailto:favour.ogini@gelias.com)



**Lilian Ezekwu**  
Associate  
[lilian.ezekwu@gelias.com](mailto:lilian.ezekwu@gelias.com)

## LOCATIONS

**LAGOS OFFICE**  
6 Broad Street  
Lagos, Nigeria

**ABUJA OFFICE**  
2nd Floor, Abia House,  
Plot 979, First Avenue,  
Central Business District  
F.C.T, Abuja.

T: +234 (1) 460 7890  
E: [gelias@gelias.com](mailto:gelias@gelias.com)

T: +234 (1) 888 8881

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