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# **IP in the African Union: Opportunities for New Discourse?**

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# IP in the African Union: Opportunities for New Discourse?

by  
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## Introduction

The African Union (AU) has embarked on the important process of creating intellectual property (IP) law and policy for the African continent. As it stands, it is difficult to decipher a coherent approach to IP for the African continent and little has been written on the subject. However, as this chapter will illustrate, there are some common themes in AU documents that should help shape its Pan-African IP framework.

The AU, comprised of fifty-five member states,<sup>1</sup> was officially launched in 2002 as a successor to the Organization of African Unity.<sup>2</sup> The AU was established to create an “integrated, prosperous, and peaceful Africa . . . .”<sup>3</sup> Its fifty-five member states, comprised of over one billion people, make up all the countries on the African continent.<sup>4</sup> As a Pan-African organization, the AU creates common policies for increased economic integration of the African continent. The AU’s potential role in developing IP policy for Africa is significant. Since most African countries have been identified by the United Nations as “developing” and “least-developed,” human development and human flourishing must be central to any successful Pan-African IP policies.

The AU Agenda 2063 sets out ambitious AU policies in a variety of areas.<sup>5</sup> The Agenda 2063 is described as the “shared framework for inclusive growth and sustainable development for Africa...”<sup>6</sup> There are various AU documents that present policy statements regarding IP in the AU. In addition, the AU created an IP organization for the African continent and member states negotiated a continental free trade area that will contain IP provisions.

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<sup>1</sup> *Member States*, AFRICAN UNION, [https://au.int/en/member\\_states/countryprofiles2](https://au.int/en/member_states/countryprofiles2) (last visited June 11, 2020) (“The AU is made up of 55 Member States which represent all the countries on the African continent. AU Member States are divided into five geographic regions, which were defined by the OAU in 1976 (CM/Res.464QCXVI”). The following list shows “all members states grouped by region, in alphabetical order, and their date of joining the AU or its predecessor the OAU.”) *Id.*

<sup>2</sup> *About the African Union*, AFRICAN UNION, <https://au.int/en/overview> (last August 22, 2020)

<sup>3</sup> *AU in a Nutshell*, AFRICAN UNION, <https://au.int/en/au-nutshell> (last visited Oct. 23, 2016).

<sup>4</sup> *Member States*, AFRICAN UNION, *supra* note 1.

<sup>5</sup> *Agenda 2063: The Africa We Want*, AFRICAN UNION, <https://au.int/en/agenda2063/overview> (last visited June 11, 2020).

<sup>6</sup> *Agenda 2063, The Africa We Want, Background Note 01*, AFRICAN UNION COMMISSION, 2 (2015), [https://au.int/sites/default/files/documents/33126-doc-01\\_background\\_note.pdf](https://au.int/sites/default/files/documents/33126-doc-01_background_note.pdf).

However, the AU has not yet articulated a clear vision of IP for its member states. Ideally, however, a Pan-African IP policy will account for human rights and promote human development on the African continent, while allowing AU member states sufficient flexibility to accommodate national differences. In particular, the health-related policy space that has been achieved under the international IP framework, as is evident through instruments such as the Doha Declaration on the TRIPS Agreement and Public Health<sup>7</sup>, should be preserved and expanded.

The AU has an opportunity to create a framework for Pan-African IP laws and policies that will benefit African nations and their citizens. While laws and standards may be developed in the future through the Protocol to the African Continental Trade Area or as part of the standard-setting work of the Pan-African Intellectual Property Organization (PAIPO), existing international IP obligations will largely shape what the AU and its members states can do legislatively. Due to international obligations, there are constraints in creating African-centered IP laws, but there is some flexibility to tailor IP policies to meet regional and national health and development objectives.<sup>8</sup>

This chapter begins with a brief introduction to existing international IP obligations. It then discusses the AU's IP policies as derived from AU policy statements and language from the statute of the PAIPO. Although the treaty establishing the PAIPO is not yet in force, it gives some indication of the possible AU approaches to IP. Finally, the chapter examines the African Continental Free Trade Area and identifies some possibilities for this agreement to create and implement development-oriented IP.

## **Existing international IP obligations**

Most nations in the world are members of the World Trade Organization (WTO).<sup>9</sup> This means that, even if a nation is not a WTO member state, it will likely have some trading relationships with WTO member states and have to take the WTO rules into account. Since nearly all AU members are also members of the WTO,<sup>10</sup> any agreement on IP must be consistent with the IP obligations under the WTO. The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) creates obligatory minimum standards for IP protection.<sup>11</sup> Thus, the TRIPS Agreement obligations limit what member states can do with their national laws. For example, all WTO members must offer a minimum twenty-year term of protection for

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<sup>7</sup> World Trade Organization, Ministerial Declaration of 14 November 2001, WTO Doc. WT/MIN (01)/DEC/1, 41 ILM 746 (2002) [hereinafter Doha Declaration].

<sup>8</sup> Of course, these IP policies cannot run afoul of international obligations.

<sup>9</sup> See *Members and Observers*, WTO, [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (last visited June 11, 2020) (detailing how the WTO has a total of 164 member states since July 2016. No additional states have joined the since that time).

<sup>10</sup> *Id.* (showing that not all AU member states are WTO member states. For instance, Algeria, Egypt, Ethiopia, Eritrea, Somalia, Sudan and South Sudan were not WTO members at the time of writing).

<sup>11</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement].

patents,<sup>12</sup> provide patent protection for all fields of technology, including for pharmaceutical drugs.<sup>13</sup>

Developing and least developing countries were not required to immediately implement the TRIPS Agreement IP standards when the agreement came into force in 1995,<sup>14</sup> but were initially given five and ten additional years before they had to revise their national laws to comply.<sup>15</sup> Even with the delayed period for implementation, several commentators observed that the harmonized standards were not appropriate for non-industrialized nations.<sup>16</sup> Indeed, in 2013, the least developed nations sought and obtained an additional delay for implementation of some of the minimum IP standards under the TRIPS Agreement until July 2021.<sup>17</sup>

High standards of IP protection are valuable for industrialized countries that export IP-protected goods to other nations. For example, according to a 2016 United States (US) government report, the US is a top producer of IP goods and its IP exports are valued at several hundred billion dollars.<sup>18</sup> However, at an earlier stage of development, the US and other countries had less stringent IP standards.<sup>19</sup> For many African countries, the internationally mandated IP standards

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<sup>12</sup> *Id.* art. 33.

<sup>13</sup> *Id.* art. 27.1.

<sup>14</sup> See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 1867 U.N.T.S. 14, 33 I.L.M. 1143 (1994) [hereinafter Final Act] at art. 14 (As part of the Marrakesh agreements, TRIPS came into force on January 1, 1995).

<sup>15</sup> TRIPS Agreement, *supra* note 11, at art. 66.

<sup>16</sup> See Peter K. Yu, *TRIPS and its Discontents*, 10 MARQ. INTELL. PROP. L. REV. 369, 379 (2006) (discussing developing countries dissatisfaction with the WTO and the TRIPS Agreement.)

<sup>17</sup> Council for Trade-Related Aspects of Intellectual Property Rights, *Extension of the Transition Period under Article 66.1 for Least Developed Country Members*, WTO Doc. IP/C/64 (June 12, 2013) (The extension did not apply to Most-favored nations, or national treatment obligations set out in articles 3, 4, and 5 of the TRIPS Agreement. As paragraph 3 of the Decision notes, further extensions are possible.) “This Decision is without prejudice to the Decision of the Council for TRIPS of 27 June 2002 on ‘Extension of the Transition Period under Article 66.1 of the TRIPS Agreement for Least-Developed Country Members for Certain Obligations with respect to Pharmaceutical Products’ ( [IP/C/25](#) ), and to the right of least developed country Members to seek further extensions of the period provided for in paragraph 1 of Article 66 of the Agreement.” *Id.*

<sup>18</sup> Justin Antonipillai, et al., *Intellectual Property and the U.S. Economy: 2016 Update*, ECON. & STATS. ADMIN., U.S. PAT. & TRADEMARK OFF., iii (2016) <https://www.uspto.gov/sites/default/files/documents/IPandtheUSEconomySept2016.pdf>. This 2016 update is the latest publicly available U.S. government data and is the same information as cited in the IPEC February 2019 Annual Intellectual Property Report to Congress prepared by the Trump administration. See also *Annual Intellectual Property Report to Congress*, U.S. INTELL. PROP. ENFORCEMENT COORDINATOR, (Feb. 2019), <https://www.whitehouse.gov/wp-content/uploads/2019/02/IPEC-2018-Annual-Intellectual-Property-Report-to-Congress.pdf>.

<sup>19</sup> AMAKA VANNI, *PATENT GAMES IN THE GLOBAL SOUTH: PHARMACEUTICAL PATENT LAW MAKING IN BRAZIL, INDIA AND NIGERIA*, 43-44 (Hart Publishing, 2019) (discussing the hypocrisy of international IP and the TRIPS standards, “TWAAIL also highlights the perceived hypocrisy and double standard apparent not only within the TRIPS Agreement but also in the politico-economic pressure that bears on Third World countries in the way they interpret their TRIPS Agreement obligations locally. The fact that many of today’s advanced economies did not allow patents on chemical and pharmaceutical substances afforded them the opportunity to develop their pharmaceutical industries via imitation or otherwise. For example, chemical substances remained un-patentable until 1967 in West Germany, 1968 in the Nordic countries, 1976 in Japan, 1978 in Switzerland, and 1992 in Spain. Pharmaceutical products remained un-patentable until 1967 in West Germany and France, 1979 in Italy, and 1992 in Spain, while pharmaceutical products were also un-patentable in Canada into the 1990s. It was only when these countries began

in TRIPS are less beneficial to them because they do not typically produce and export significant amounts of IP-protected goods. For instance, as net consumers rather than producers of patented pharmaceutical goods, high standards of patent protection are often more costly than beneficial for African countries.<sup>20</sup> This is not to say that African nations do not benefit at all from IP. While they may not be strong in patent-related industries, African nations produce significant amounts of cultural works and products,<sup>21</sup> which means that copyrights, trademarks, and geographical indications could be beneficial, particularly if African nations export cultural works and products to other nations. Also, from a health perspective, effective trademark enforcement could help stem the trade in dangerous counterfeit medicines, for example.

In sum, the AU member states must comply with TRIPS standards. As briefly discussed, this can have both positive and negative effects. The next section attempts to decipher the AU approach to IP based on its publicly available documents and in light of AU linkages to the Sustainable Development Goals and human rights instruments.

### **Ascertaining the Pan-African approach to intellectual property**

The AU does not have a specific IP policy for the continent. However, it has created policies that are related to IP, and it has also made statements that give an indication of its potential IP policies. Finally, the statute for the PAIPO is an additional source that can be used to discern the direction the AU might take as it develops its approach to IP for the African continent.

#### *The AU Agenda and IP strategy*

The AU 2063 Agenda has several continental frameworks, including the *Science, Technology and Innovation Strategy for Africa 2024*, the *Boosting Intra African Trade*, and the *Accelerated*

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to achieve technological breakthroughs that their preference for weak IP laws changed and fueled the calls for a stronger global patent system. In other words, it was only when owners and manufacturers of innovations saw the considerable advantages in IP monopolistic potentials that states increased support for stronger international protection.”).

<sup>20</sup> See Naomi A. Bass, *Implications of the Trips Agreement for Developing Countries: Pharmaceutical Patent Laws in Brazil and South Africa in the 21<sup>st</sup> Century*, 34 GEO. WASH. INT’L L. REV. 191, 204-06, 211–15 (2002); Marianne Buckley, *Looking Inward: Regional Parallel Trade as a Means of Bringing Affordable Drugs to Africa*, 41 SETON HALL. L. REV. 625, 628 (2011); John A. Harrelson, *Trips, Pharmaceutical Patents, and the HIV/aids Crisis: Finding the Proper Balance Between Intellectual Property Rights and Compassion*, 7 WIDENER L. SYMP. J. 175, 190 (2001); Ellen T H’oen, *TRIPS, Pharmaceutical Patents, and Access to Medicines: Seattle, Doha and Beyond*, 3 Chi. J. Int’l L (2002)

<sup>21</sup> See Boatema Boateng, *The Hand of the Ancestors: Time, Cultural Production, and Intellectual Property Law*, 47 LAW & SOC’Y REV. 943, 943–951 (2013). See also Paul Kuruk, *Protecting Folklore Under Modern Intellectual Property Regimes: A Reappraisal of the Tensions Between Individual and Communal Rights in Africa and the United States*, 48 AM. U. L. REV. 769, 776–788 (1999); Sean Pager, *Accentuating the Positive: Building Capacity for Creative Industries into the Development Agenda for Global Intellectual Property Law*, Am. Uni. Int’l L. Rev. 223 (2012) 263-270 (discussing copyright laws, infringement and Nigeria’s Nollywood.) Id.

*Industrial Development for Africa*, among others.<sup>22</sup> The strategy that is most pertinent to its IP policy is the *Science, Technology and Innovation Strategy for Africa* (STISA).<sup>23</sup>

The STISA is part of a broad and ambitious agenda that has innovation and human development as its main goals.<sup>24</sup> It outlines the first ten years of the AU science technology and innovation strategy goals as part of the overall AU 2063 Agenda.<sup>25</sup> The introductory paragraphs explain the AU Agenda 2063 as “underpinned by science, technology and innovation as multi-function tools and enablers for achieving continental development goals.”<sup>26</sup> The AU Commission is responsible for providing policy leadership on the STISA.<sup>27</sup> The STISA envisions that the PAIPO,<sup>28</sup> which still requires additional signatures before it comes into force, would implement IP policy for the AU.<sup>29</sup>

The STISA is based on six priority areas that are relevant to the AU vision for the continent. These priority areas include eradicating hunger, preventing and controlling diseases, and wealth creation.<sup>30</sup> The pillars upon which the AU intends to develop its strategy are, among other things, building and upgrading research infrastructure, promoting innovation and entrepreneurship, and creating an enabling environment.<sup>31</sup> A thoughtful IP strategy will be essential to creating a strong foundation for African innovation and human development. For instance, because food security and prevention and control of diseases are essential to promoting health and well-being on the continent, one would expect the AU IP policy to reflect such considerations. Although the AU member states must maintain IP laws that are TRIPS-consistent, there is sufficient policy space to develop African-oriented policies that align with these AU priority areas.<sup>32</sup>

The STISA document appears to recognize classic Western approaches to IP, but also acknowledges African traditional medicinal knowledge.<sup>33</sup> Strengthening IP rights is among the “strategic objectives” listed under section 2.2 of the STISA. Specifically, section 2.2(d) states as an objective to “[p]rotect knowledge production (including inventions, and indigenous

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<sup>22</sup> AU An Overview of Agenda 2063, p 6, [https://au.int/sites/default/files/documents/33126-doc-11\\_an\\_overview\\_of\\_agenda.pdf](https://au.int/sites/default/files/documents/33126-doc-11_an_overview_of_agenda.pdf) (last visited June 15, 2020.)

<sup>23</sup> *Science, Technology and Innovation Strategy for Africa 2024*, AFRICAN UNION COMMISSION [hereinafter STISA], [https://au.int/sites/default/files/newsevents/workingdocuments/33178-wd-stisa-english\\_-\\_final.pdf](https://au.int/sites/default/files/newsevents/workingdocuments/33178-wd-stisa-english_-_final.pdf).

<sup>24</sup> *Id.* at 10.

<sup>25</sup> *Id.* (“STISA-2024 is the first of the ten-year incremental phasing strategies to respond to the demand for science, technology and innovation to impact across critical sectors such as agriculture, energy, environment, health, infrastructure development, mining, security and water among others.”)

<sup>26</sup> *Id.* at 8.

<sup>27</sup> *Id.* at 35 (“The African Union Commission as the AU secretariat shall be responsible for providing political and policy leadership for implementation of this Strategy.”).

<sup>28</sup> See section III (d) for a discussion of the PAIPO.

<sup>29</sup> STISA, *supra* note 21, at 36 (“PAIPO is in the process of being established to implement AU policy in the field of Intellectual property. It will ensure dissemination of patent information, provide technical and financial support to invention and innovation and promote protection and exploitation of research results.”).

<sup>30</sup> *Id.* at 10.

<sup>31</sup> *Id.*

<sup>32</sup> TRIPS Agreement, *supra* note 11, arts. 1.1, 7, & 8.

<sup>33</sup> STISA, *supra* note 21, at 22 (recognizing the need “to promote research, invention and innovation in traditional medicine and strengthening local health ecosystems, taking into account the socio-cultural and environmental situation of the people.”).

knowledge) by strengthening Intellectual Property... and regulatory regimes at all levels.”<sup>34</sup> This is already distinct from the TRIPS Agreement, which makes no reference to traditional knowledge.

As it relates to health and IP, the AU may be signaling an intent to create some formal policies relating to the protection of traditional and indigenous knowledge. The World Intellectual Property Organization has been working for several years on a draft treaty to protect traditional knowledge, but has yet to conclude any agreement.<sup>35</sup> Continent-wide recognition and protection for traditional knowledge would be an important step in the right direction, and it would not be without precedent. As will be discussed below, there are international agreements and recent trade agreements that recognize traditional knowledge, so regional recognition and protection for traditional knowledge would not be without precedent.<sup>36</sup>

In addition to protecting indigenous medicinal knowledge and cultural IP, African nations would benefit from IP policies that adequately protect IP rights without sacrificing public health. Because Africa is not a monolith, the AU policies can be expected to account for differing levels of development and the particular needs of its member states. Of course, the AU policies will ultimately be implemented at a continental level and, most importantly, at the national level.<sup>37</sup> Ideally, this would result in African approaches rather than adopting Western approaches to IP that may not be suitable for the continent and that may not align with the “African shared values”<sup>38</sup> that the AU wishes to advance. Unfortunately, as will be discussed below, the draft PAIPO statute was criticized for doing just that: creating IP policies that make sense for a Western industrialized country but are of little benefit for African nations.<sup>39</sup>

Finally, as African nations work to achieve the Sustainable Development Goals, the AU can be creative in ensuring that its IP policies recognize and prioritize human development. This is important because human development objectives, such as improving health outcomes, may be overlooked in international intellectual property disputes to prioritize and to protect IP rights.<sup>40</sup>

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<sup>34</sup> *Id.* at 25.

<sup>35</sup> See WORLD INTELL. PROP. ORG. [WIPO], *First session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*, WIPO/GRTKF/IC/1 (2001), [https://www.wipo.int/meetings/en/details.jsp?meeting\\_id=4295](https://www.wipo.int/meetings/en/details.jsp?meeting_id=4295); see also WIPO, *Decision of the Report on the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC)*, [https://www.wipo.int/export/sites/www/tk/en/igc/pdf/igc\\_mandate\\_2020-2021.pdf](https://www.wipo.int/export/sites/www/tk/en/igc/pdf/igc_mandate_2020-2021.pdf) (The IGCGR TKF had its mandate renewed for 2020-2021 as negotiations continue).

<sup>36</sup> See section IV.

<sup>37</sup> STISA, *supra* note 21, at 10 (“At the national level, Member States should incorporate this strategy into their National Development Plans. At regional level, Regional Economic Communities (RECs), regional research institutions, networks and partners should leverage the strategy in designing and coordinating initiatives. At continental level, the African Union Commission (AUC), NEPAD Agency and their partners should advocate and create awareness, mobilize necessary institutional, human and financial resources, track progress and monitor implementation.”).

<sup>38</sup> STISA, *supra* note 21, at 23.

<sup>39</sup> See Section III(d) *infra*.

<sup>40</sup> See J. Janewa Osei-Tutu, *Human Development as a Core Objective of Global Intellectual Property Law*, 105 KY L.J. 1 (2016).

As the next section explains, the Sustainable Development Goals are integral to the AU Agenda 2063 and should, therefore, be an important part of Pan-African IP policy.

### *The Sustainable Development Goals*

The AU strategy emphasizes sustainable socio-economic growth, reducing poverty, achieving food security, promoting public health, and protecting the environment.<sup>41</sup> This is a model that envisions innovation and human development occurring together. If this framework is well executed, African countries could develop and implement IP policies that promote human flourishing as an integral part of the innovation model. The Sustainable Development Goals (SDGs), which the AU links to its strategy, also support a human-centered IP model.

The United Nations developed seventeen SDGs that member states aim to achieve by the year 2030.<sup>42</sup> The SDGs replace the prior set of goals, the Millennium Development Goals, which were in place from 2000 to 2015.<sup>43</sup> The United Nations characterizes the SDGS as a “call for action for all countries – poor, rich, middle-income, to promote prosperity while protecting the planet....”<sup>44</sup> As this statement makes clear, sustainable development is essential for all countries.

The seventeen SDGs are: (1) end poverty; (2) zero hunger; (3) good health and well-being; (4) quality education; (5) gender equality; (6) clean water and sanitation; (7) affordable and clean energy; (8) decent work and economic growth; (9) industry, innovation, and infrastructure; (10) reduced inequality; (11) sustainable cities; (12) responsible production and consumption; (13) climate action; (14) life below water; (15) life on land; (16) peace, justice, and strong institutions; and (17) partnerships.<sup>45</sup>

These SDGs cover a wide range of topics and, at a glance, it is apparent that several of the SDGs can be supported by development-oriented IP policies. For example, patent rights may be implicated in the development of environmental technologies, health-related technologies, and

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<sup>41</sup> STISA, *supra* note 21, at 11.

<sup>42</sup> Sustainable Development Goals, *17 Goals to Transform Our World*, UNITED NATIONS DEVELOPMENT PROGRAMME, <https://www.un.org/sustainabledevelopment/> (last visited June 11, 2020).

<sup>43</sup> Sustainable Development Goals, *Background on the goals*, UNITED NATIONS DEVELOPMENT PROGRAMME, <https://www.undp.org/content/undp/en/home/sustainable-development-goals/background.html> (last visited June 11, 2020). (“The Sustainable Development Goals (SDGs) were born at the United Nations Conference on Sustainable Development in Rio de Janeiro in 2012. The objective was to produce a set of universal goals that meet the urgent environmental, political and economic challenges facing our world. The SDGs replace the Millennium Development Goals (MDGs), which started a global effort in 2000 to tackle the indignity of poverty. The MDGs established measurable, universally-agreed objectives for tackling extreme poverty and hunger, preventing deadly diseases, and expanding primary education to all children, among other development priorities. For 15 years, the MDGs drove progress in several important areas: reducing income poverty, providing much needed access to water and sanitation, driving down child mortality and drastically improving maternal health. They also kick-started a global movement for free primary education, inspiring countries to invest in their future generations. Most significantly, the MDGs made huge strides in combatting HIV/AIDS and other treatable diseases such as malaria and tuberculosis.”).

<sup>44</sup> Sustainable Development Goals *supra* note 40.

<sup>45</sup> Sustainable Development Goals, *About the Sustainable Development Goals*, UNITED NATIONS DEVELOPMENT PROGRAMME, <https://www.un.org/sustainabledevelopment/sustainable-development-goals/> (last visited June 11, 2020).



medicines, as well as access to food and clean water. Copyrights can facilitate or hinder access to education, and the various forms of IP are relevant to industry, innovation, and infrastructure, and wealth generation. These areas are all pertinent to African nations at their varying levels of development.

In its document on linkages with the SDGs, the AU Agenda 2063 maps the twenty AU Agenda goals onto the SDGs to show how they intersect. The AU goals that are most closely related to, or potentially affected by, IP rights are AU Goals 1-4, and 16.<sup>46</sup> The AU identifies its Goals 1 through 4 as intersecting with SDGs 1- 4, 8, 9, and 11. As it relates to health and well-being, the most pertinent are AU Goal 1 (quality of life), Goal 2 (education), and Goal 3 (health). Also pertinent is the AU Goal 16, which is “African cultural renaissance,” and includes traditional cultural heritage, creative arts, and businesses as a priority.<sup>47</sup> In addition, the AU Goal 4, which can impact quality of life but will not be discussed here, is transformed economies.<sup>48</sup> I will focus this discussion on the AU Goals 1, 2, and 3 and the SDGs as they relate to IP rights, human development, and health.

The first AU goal is a fairly broad one: “a high standard of living, quality of life and well-being for all citizens.”<sup>49</sup> The same is true for the second goal, which is “well-educated citizens and [a] skills revolution underpinned by science, technology and innovation,” and the third goal, which is “healthy and well-nourished citizens.” These three AU goals – quality of life, education, and health – are interrelated.

As the access to medicines debate illustrates, IP rights positively affect human health to the extent patents can incentivize the creation of new medicines that improve or save lives. On the other hand, patents can limit access to lifesaving medicines due to the potential effects on pricing.<sup>50</sup> Traditional medicinal knowledge, which may fall under AU Goal 16, could also be pertinent to improving health outcomes. Protecting effective traditional medicinal practices may also be a way to promote local innovation and reduce reliance on foreign medicines. Encouraging traditional knowledge as a form of localized IP could encourage the use and efficacy of traditional medicinal knowledge.

Education is relevant to health outcomes, and both education and health affect one’s well-being.<sup>51</sup> Education improves people’s lives by creating opportunities. As it relates to health, education can be essential in reducing and managing non-communicable diseases, such as

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<sup>46</sup> *Agenda 2063 Linkages with Sustainable Development Goals*, AFRICAN UNION, 1-2, <https://www.un.org/en/africa/osaa/pdf/events/20160420/linkagesagenda2063sdg.pdf>.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> Cynthia M. Ho, *should all Drugs be Patentable? A Comparative Perspective*, 17 VAND. J. ENT. L. 295, 305 (2015) (“Both of the requirements on patentability and disclosure are intended to ensure that the social harm of higher prices is limited to situations where society would most benefit, justifying the burden of a patent.”).

<sup>51</sup> See generally Robert A. Hahn & Benedict Truman, *Education Improves Public Health and Promotes Health Equity*, 45 INT’L J. HEALTH SERV. 657-78 (May 19, 2015) (“We argue that education – the product and personal attribute acquired – is both a critical component of a person’s health and a contributing cause of other elements of the person’s concurrent and future health. Consistent with other definitions of health, a person who lacks basic elements of an education is not fully healthy.”).

diabetes and asthma, as well as limiting the spread of communicable diseases.<sup>52</sup> For instance, the spread of diseases such as Ebola, swine flu, and other viral outbreaks were partially contained by educating the public about prevention.<sup>53</sup>

The AU Goals 1 through 3 (quality of life, health, and education) align with a number of SDGs. With a view to implementing the SDGs as part of its IP policy, the AU could be expected to emphasize a Pan-African IP policy that prioritizes human development and human flourishing.

As the next section outlines, respect for human rights, which enable human flourishing, is also integral to the broader AU agenda.

### *Human rights*

The AU issued a statement relating to human rights, describing the advancement of human rights as a “core priority” for the AU.<sup>54</sup> In its statement, the AU acknowledges the role of the Universal Declaration of Human Rights (UDHR)<sup>55</sup> in shaping and inspiring the African Charter on Human and Peoples’ Rights, which is one of the core African human rights instruments.<sup>56</sup>

The stated importance of human rights to the AU is also reflected in the AU founding instruments.<sup>57</sup> According to the founding documents, the AU aims to promote sustainable development, raise the standard of living, and encourage research in all fields, particularly science and technology. It also seeks to eradicate disease and promote good health on the African continent.<sup>58</sup>

Given the significance of human rights to the AU, it would be logical for human rights to shape the AU’s approach to IP rights. The AU Commission created a Human Rights Strategy for Africa,<sup>59</sup> which makes no reference to IP. This is not surprising, particularly since human rights

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<sup>52</sup> WORLD HEALTH ORG. [WHO], *Noncommunicable Diseases*, <https://www.who.int/news-room/fact-sheets/detail/noncommunicable-diseases> (last visited June 11, 2020) (“To lessen the impact of NCDs on individuals and society, a comprehensive approach is needed requiring all sectors, including health, finance, transport, education, agriculture, planning and others, to collaborate to reduce the risks associated with NCDs, and promote interventions to prevent and control them.”)

<sup>53</sup> *More than 300,000 people reached with awareness-raisin campaign to contain deadly Ebola outbreak in DRC*, UNICEF (June 5, 2018), <https://www.unicef.org/press-releases/more-300000-people-reached-awareness-raising-campaign-contain-deadly-ebola-outbreak>.

<sup>54</sup> Addis Ababa, *Statement on the Launch of the Campaign in the Lead-up to the 70<sup>th</sup> Anniversary of the Universal Declaration of Human Rights*, AU (Dec. 10, 2017), <https://au.int/ar/node/33466> (“The advancement of human and people’s rights is a core priority of the African Union.”).

<sup>55</sup> G.A. Res. 217 (III) A, Universal Declaration of Human Rights, (Dec. 10, 1948) [hereinafter UDHR], art. 29.

<sup>56</sup> African (Banjul) Charter on Human and Peoples’ Rights, AFRICAN COMMISSION ON HUMAN AND PEOPLES’ RIGHTS (June 1, 1981) OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 [hereinafter Banjul Charter].

<sup>57</sup> CONSTITUTIVE ACT OF THE AFRICAN UNION, Lome, Togo, 11 July 2000 [hereinafter AU Constitution] (The preamble and art. 3(h) refer to the AU determination to “protect human and peoples’ rights, consolidate democratic institutions and culture....”).

<sup>58</sup> *Id.* at art. 3 (j), (k), (m), (n).

<sup>59</sup> *Human Rights Strategy for Africa*, DEPARTMENT OF POLITICAL AFFAIRS AFRICAN UNION COMMISSION, [https://au.int/sites/default/files/documents/30179-doc-hrsa-final-table\\_en3.pdf](https://au.int/sites/default/files/documents/30179-doc-hrsa-final-table_en3.pdf).

and IP are not typically seen as related to one another. Still, scholars have proposed a human rights framework for IP, which can serve as a basis for IP policies that promote human rights.<sup>60</sup>

Importantly, article 25 of the UDHR recognizes a human right to health, stating in part, “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family...”<sup>61</sup> Similar language is found in article 12 of the International Covenant on Economic Social and Cultural Rights (ICESCR), which recognizes “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”<sup>62</sup> The right to health includes the right to the prevention and control of diseases and promoting public health.<sup>63</sup> Related to the right to health is the right to food, because adequate nutrition is a basic requirement for a healthy life.<sup>64</sup> The right to food is found in article 11 of the ICESCR.<sup>65</sup> Articles 16 and 17 of the African Charter on Human and Peoples’ Rights also guarantee the right to health and the right to education.<sup>66</sup> These human rights are relevant to the AU Goals of improving quality of life, health and education, as well as to several SDGs.

### *The Pan-African Intellectual Property Organization*

One of the initiatives of the AU was to adopt an instrument establishing the PAIPO to address IP throughout the African continent. Among other things, the PAIPO shall “harmonize intellectual property standards that reflect the needs of the AU,” its member states, and regional organizations.<sup>67</sup> There are currently two regional African IP organizations: the African Regional Intellectual Property Organization and the Organisation Africaine de la Propriété Intellectuelle, which is the French equivalent. These institutions provide IP services and facilitate cooperation among member states.<sup>68</sup> They do not, however, set IP policy for the continent. In this regard, the

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<sup>60</sup> See Laurence R. Helfer, *Toward a Human Rights Framework for Intellectual Property*, 40 U.C. DAVIS L. REV. 971 (2007); Peter K. Yu, *Ten Common Questions About Intellectual Property and Human Rights*, 23 GA. ST. U. L. REV. 709 (2007); Audrey R. Chapman, *Approaching Intellectual Property as a Human Right: Obligations Related to ICESCR Article 15(1)(C)*, 35 UNESCO 4 (2001).

<sup>61</sup> UDHR, *supra* note 51, at art. 25.

<sup>62</sup> G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights, at art. 12 (Dec. 16, 1966) [hereinafter ICESCR].

<sup>63</sup> Committee on Economic, Social and Cultural Rights, General Comment 14, U.N. Doc. E/C.12/2000/4, at ¶ 16 (Aug. 11, 2000).

<sup>64</sup> *Id.* ¶ 3 (“The right to health is closely related to and dependent upon the realization of other human rights, as contained in the International Bill of Rights, including the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information, and the freedoms of association, assembly and movement. These and other rights and freedoms address integral components of the right to health.”).

<sup>65</sup> See Committee on Economic, Social and Cultural Rights, Twentieth Session, General Comment 12, U.N. Doc. E/C.12/1999/5, at 3–4 (12 May 12, 1999) (The right to food includes both the availability of food and economic accessibility of food).

<sup>66</sup> Banjul Charter, *supra* note 52.

<sup>67</sup> African Union, Statute of the Pan-African Intellectual Property Organisation, art. 4 (adopted at Addis Ababa, Ethiopia, Jan. 31, 2016) [“PAIPO Statute”], available at [https://au.int/sites/default/files/treaties/32549-treaty-0053\\_-\\_paipo\\_e.pdf](https://au.int/sites/default/files/treaties/32549-treaty-0053_-_paipo_e.pdf). (Art. 4 states: “The PAIPO shall harmonize intellectual property standards that reflect the needs of the AU, its member states, RECs; ARIPO and OAPI.” *Id.*

<sup>68</sup> See *About ARIPO*, ARIPO, <https://www.aripo.org> (last visited June 11, 2020) (“The African Regional Intellectual Property Organization (ARIPO) is an inter-governmental organization (IGO) that facilitates cooperation among member states in intellectual property matters, with the objective of pooling financial and human resources, and

PAIPO, once it receives the required ratifications, should play a significant role in developing Pan-African IP law and policy for the continent.

The statute creating the PAIPO was adopted by the AU on January 2016.<sup>69</sup> It will enter into force after it has been ratified by fifteen member states.<sup>70</sup> Only six of fifty-five member states have signed the agreement, but none have yet ratified the PAIPO statute.<sup>71</sup> Interestingly, some African countries, such as Ghana, have signed the PAIPO statute, but other African economic powerhouses, such as Nigeria, South Africa, and Kenya, have not signed the agreement.<sup>72</sup> The most recent signatory was Tunisia on June 19, 2019.<sup>73</sup> Tunisia will host the PAIPO headquarters and Secretariat.<sup>74</sup>

The preamble to the PAIPO statute makes it clear that “development” is one of the priorities of the organization, stating that AU member states are “determined to promote a development-oriented intellectual property system in order to achieve the objectives of the African Union.”<sup>75</sup> The preamble also references the WIPO Development Agenda, and notes the importance of development and traditional and indigenous knowledge.<sup>76</sup> Article 1 of the PAIPO statute defines IP to include indigenous and traditional knowledge.<sup>77</sup> The PAIPO’s stated mandate is to take responsibility for IP and emerging issues related to IP in Africa and to promote “effective use of the intellectual property system as a tool for economic, cultural, social, and technological development.”<sup>78</sup> Finally, it is supposed to set standards that reflect the needs of the AU, its member states, and pertinent regional organizations.<sup>79</sup>

Despite its seemingly pro-development mandate, prior iterations of the PAIPO statute were criticized as reflecting the ideals of “true believers of IP-maximalist ideology” with an agenda of expanding IP protection and enforcement.<sup>80</sup> Commentators also observed that the language in the

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seeking technological advancement for economic, social, technological, scientific and industrial development.”); *See Member States*, ARIPO, <https://www.aripo.org/member-states/> (last visited June 11, 2020) (ARIPO has 19 Member states, mostly in eastern and southern Africa).

<sup>69</sup> PAIPO Statute, *supra* note 63.

<sup>70</sup> *Id.* at art. 24.

<sup>71</sup> *See* Addis Ababa, *List of Countries Which Have Signed, Ratified/Accessed to the Statute of the Pan African Intellectual Property Organization (PAIPO)*, AFRICAN UNION (, (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>). (last visited June 13, 2020)

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> African Union Assembly of the Union, Twenty-third Ordinary Session, 26-27 June, 2014, adopted at Malabo, Equatorial Guinea Assembly/AU, Dec.522(XIII) Decision on Pan-African Intellectual Property Organization, Doc. Ex.CL/839/XXV available at <https://au.int/en/decisions/decisions-declarations-and-resolution-assembly-union-twenty-third-ordinary-session> (last visited June 24, 2020).

<sup>75</sup> PAIPO Statute, *supra* note 63, at pmbl.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at art. 1.

<sup>78</sup> *Id.* at art. 3.

<sup>79</sup> *Id.*

<sup>80</sup> Brook Baker, *Intellectual Property Incoherence at the African Union threatens Access to Medicines*, INFOJUSTICE (Sept. 28, 2012), <http://infojustice.org/archives/27392>.

draft PAIPO statute referred to potential benefits of IP protection, but made no reference to the need for balance between protection and access and was silent about protecting limitations and exceptions to IP protection.<sup>81</sup>

Some of the criticized provisions, such as article 5 of the draft PAIPO statute, do not appear in the final version. Article 5 of the draft contained the objectives, which included: “the harmonization of intellectual property systems of its Member States, with particular regard to protection, exploitation, commercialization and enforcement of intellectual property rights....”<sup>82</sup> It also referred to “activities that strengthen the human, financial and technical capacity of Member States to maximize the benefits of the intellectual property system to improve public health and eradicate the scourge of piracy and counterfeits on the continent....”<sup>83</sup> This strong language – scourge of piracy – implies that the non-enforcement of IP rights on the continent is highly damaging. Yet, the AU member states are not major producers of IP products, which leads one to ask whose interests did the draft PAIPO statute seek to protect?

It is evident from the draft statute that the drafters viewed high levels of IP protection as beneficial for the African continent, and as a tool for economic development.<sup>84</sup> Yet, this is contrary to the views held by many developing country advocates.<sup>85</sup> It is doubtful, for example, that increased IP enforcement to eradicate piracy and counterfeiting should be an African priority. This would be a relevant goal for IP owners, many of whom would be foreign-owned companies, but it is not clear how such language would align with African interests.<sup>86</sup> In light of all the criticism of the TRIPS standards as being inappropriate for developing countries, it is no surprise that the approach in the draft PAIPO statute was met with skepticism.

While the draft article 5 did not find its way into the final version of the PAIPO statute. Unfortunately, it was not replaced with any development-oriented “objectives” or any objectives at all. The PAIPO statute does, however, have a “mandate” which, as discussed above, is to “promote the effective use of the intellectual property system as a tool for economic, cultural, social, and technological development.”<sup>87</sup>

The absence stated objectives in the PAIPO statute is a deficiency, particularly since, in the context of the TRIPS Agreement, the stated objectives and principles (found in articles 7 and 8)

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> AU/STRC/522, African Union Scientific, Technical and Research Commission, FINAL DRAFT STATUTE OF THE PAN-AFRICAN INTELLECTUAL PROPERTY ORGANIZATION (PAIPO), 2012. For a brief discussion of the history behind the draft statute, see Inside Tech Media, “Final Text Agreed for the Creation of a Pan-African Intellectual Property Organization,” (October 5, 2012) available at <https://www.insidetechmedia.com/2012/10/05/final-text-agreed-for-the-creation-of-pan-african-intellectual-property-organization-paipo/>

<sup>84</sup> *Id.* (The preamble states the “[d]etermin[ation] to promote the development of the continent through an effective intellectual property system in order to achieve objectives of the African Union; RECOGNIZING that Intellectual Property rights are tools for economic growth and dissemination of knowledge . . .”). *Id.*

<sup>85</sup> Baker, *supra* note 82; For a discussion of some of the criticisms of the TRIPS Agreement, see Peter K Yu, *TRIPS and its Discontents*, 10 MARQ. INTEL. PROP. L. REV. 369 (2006)

<sup>86</sup> Baker, *supra* note 75.

<sup>87</sup> PAIPO Statute, *supra* note 69.

have been central to the arguments for IP policy flexibility for developing countries.<sup>88</sup> By comparison, the IP chapter of the Comprehensive and Progressive Trans-Pacific Partnership Agreement<sup>89</sup> reproduces articles 7 and 8 of the TRIPS Agreement, and expressly references the Doha Declaration on the TRIPS Agreement and Public Health.<sup>90</sup>

Article 7, the “objectives” of the TRIPS Agreement, makes clear the need for balance between protecting IP rights and providing access, stating:

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

While article 7 leaves no doubt that IP protection requires a balancing of interests with a view to the public welfare, article 8(1) of the TRIPS Agreement creates policy space for the purpose of protecting public health and nutrition.<sup>91</sup> This moderating language can make a significant difference in the interpretation of IP obligations. Articles 7 and 8 of the TRIPS Agreement have been central to discussions about the appropriate IP balance for developing countries. For example, these core provisions have been cited repeatedly in academic articles about the effects of harmonized IP standards on access to medicines and education.<sup>92</sup> Many scholars have emphasized the policy space created by articles 7 and 8 of the TRIPS Agreement, in addition to the exceptions and limitations to IP protection that are available for all forms of IP.<sup>93</sup>

Similar language is notably absent from the PAIPO statute. Admittedly, the PAIPO statute includes some African innovations, such as defining IP to include indigenous and traditional knowledge systems, and folklore.<sup>94</sup> The PAIPO preamble also speaks to the need to strengthen national capacity and affirms the recommendations of the WIPO Development Agenda.<sup>95</sup> But there is little else in the PAIPO statute that indicates a desire to create IP laws and policies to address some of the concerns that have been expressed by developing countries, including

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<sup>88</sup> See Matthew Flynn, *Corporate Power and State Resistance: Brazil's Use of TRIPS Flexibilities for its National Aids Program*, in INTELLECTUAL PROPERTY, PHARMACEUTICAL AND PUBLIC HEALTH 149 (Kenneth C. Shadlen et al. eds., 2011).

<sup>89</sup> *What is the CPTPP?*, INTERNATIONAL.GC.CA, <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/index.aspx?lang=eng> (last visited June 11, 2020) (“The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) is a free trade agreement between Canada and 10 other countries in the Asia-Pacific region.”).

<sup>90</sup> CPTPP, art. 18.2, 18.3.

<sup>91</sup> TRIPS Agreement, *supra* note 11, at art. 8 (1) (“Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.”).

<sup>92</sup> See Margaret Chon, *Intellectual Property from Below: Copyright and Capability for Education*, 40 U.C. DAVIS. L. REV. 803, 810 (2007) (discussing distributive justice as it relates to the global trading system.).

<sup>93</sup> See Sam Halabi, *International IP Shelters*, 90 TUL. L. REV. 903 (2016).

<sup>94</sup> PAIPO Statute, *supra* note 63, at Pmbl.

<sup>95</sup> See WIPO, *The 45 Adopted Recommendations under the WIPO Development Agenda*, <https://www.wipo.int/ip-development/en/agenda/recommendations.html> (last visited \*DATE\*). The *WIPO Development Agenda*, which was created in 2007, contains 45 recommendations relating to IP and development.

African States, about harmonized IP standards under the TRIPS Agreement. Since the statute authorizes the PAIPO to lead negotiations on international IP issues for Africa and to ensure a common African position, it is troubling that the PAIPO statute says nothing about the need to appropriately calibrate the interests of users and producers of IP.

Regrettably, when it comes to health and IP, the PAIPO statute is also silent about the availability of measures to protect public health and nutrition, such as those found under article 8 of the TRIPS Agreement.<sup>96</sup> Since it does not create any substantive IP provisions, one would not expect to find extensive details about IP standards in the statute. However, given that the statute characterizes IP policy and law as drivers of growth and an earlier draft described piracy on the continent as a “scourge,” it would be appropriate, at a minimum, to reference the need for balance in IP law and policy.

Moreover, as discussed earlier, the PAIPO is supposed to harmonize IP standards with a view to the needs of its member states. The constitutive document is a disappointment in this regard. Fortunately, since there is not yet a Pan-African IP policy, it is still possible for the AU to improve upon what it has done thus far. The AU can advance the goals of African countries by ensuring a balanced system of IP protection that takes into account the human development needs of its member states.

As the Assessing Regional Integration in Africa Report IX notes, the African Continental Free Trade Area will allow the AU “to advance a continental approach to a balanced IP rights system that responds to the aspirations contained in Agenda 2063.”<sup>97</sup>

## **The African Continental Free Trade Area and IP**

In 2012, the AU decided to establish a continental free trade area.<sup>98</sup> In line with that plan, the AU member states concluded the Agreement Establishing the African Continental Free Trade Area (AfCFTA) on March 21, 2018.<sup>99</sup> By May 2019, the AfCFTA had already secured the necessary

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<sup>96</sup> TRIPS Agreement, *supra* note 11, art. 8 (“Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.”).

<sup>97</sup> U. N. ECON. COMMISSION FOR AFRICA ET AL., *Assessing Regional Integration in Africa, ARIA IX: Next Steps for the Continental Free Trade Area*, at iv (2019), [https://www.uneca.org/sites/default/files/PublicationFiles/aria9\\_report\\_en\\_4sept\\_fin.pdf](https://www.uneca.org/sites/default/files/PublicationFiles/aria9_report_en_4sept_fin.pdf).

<sup>98</sup> AU Decision on Boosting Intra-African Trade and Fast Tracking The Continental Free Trade Area, Assembly/AU/Dec.394(XVIII), Doc. EX.CL/700(XX) <https://au.int/en/decisions-21>; *African Continental Free Trade Area (AfCFTA) Legal Texts and Policy Documents*, TRALAC <https://www.tralac.org/resources/our-resources/6730-continental-free-trade-area-cfta.html> (last visited June 11, 2020) (“The 18th Ordinary Session of the Assembly of Heads of State and Government of the African Union, held in Addis Ababa, Ethiopia in January 2012, adopted a decision to establish a Continental Free Trade Area by an indicative date of 2017. This deadline was, however, not met. The Summit also endorsed the Action Plan on Boosting Intra-Africa Trade (BIAT) which identifies seven priority action clusters: trade policy, trade facilitation, productive capacity, trade related infrastructure, trade finance, trade information, and factor market integration.”).

<sup>99</sup> *African Continental Free Trade Area (AfCFTA) Legal Texts and Policy Documents*, TRALAC.ORG, <https://www.tralac.org/resources/our-resources/6730-continental-free-trade-area-cfta.html> (last visited June 11, 2020).

signatures and ratifications for entry into force. The AfCFTA will cover, among other things, trade in goods, services, investments, and IP.<sup>100</sup>

The AfCFTA does not directly regulate IP rights. However, according to article 4 of the AfCFTA, the member states will cooperate on IP.<sup>101</sup> There is little substance to the provisions of the Agreement, but article 6 clarifies that IP will be part of the AfCFTA through a Protocol on IP.<sup>102</sup> The Protocols will be an integral part of the Agreement and all members states of the AU will have to comply with the IP provisions of the AfCFTA.<sup>103</sup> This is similar to the requirement for all WTO member states to comply with the TRIPS Agreement.<sup>104</sup> The substantive IP provisions of the AfCFTA will be negotiated in “phase II” negotiations, which take place after the adoption of the agreement and which will be annexed as a Protocol to the AfCFTA.<sup>105</sup> The negotiations on the IP Protocol are anticipated to conclude by December 2020.<sup>106</sup>

Beyond the standards required by the TRIPS Agreement, one can only speculate about the IP obligations that will be created under the AfCFTA because, at the time of writing, there are no publicly available draft IP provisions. Even without having the IP Protocol in place, there are various AU documents that give some indication of what one might expect from the AfCFTA IP Protocol. The next section elaborates on how the IP Protocol might achieve development-oriented IP within the AfCFTA.

### *Possibilities for pan-African IP in the AfCFTA*

The forthcoming IP Protocol creates new opportunities for discourse about IP that is tailored to the needs of African countries. The majority of WTO member states are developing countries, many of which are African nations.<sup>107</sup> It is logical for a Pan-African approach to IP to reflect African views on innovation, progress, and development. As this chapter has discussed, the AU policy, as reflected in its publicly available policy documents, emphasizes that development is an integral part of its innovation strategy. The inclusion of an IP Protocol in the AfCFTA could lead to human development-oriented IP that expressly mentions and reinforces respect for human rights.

National and regional approaches to IP obligations can influence the interpretation of international obligations. Article 31 of the Vienna Convention on the Law of Treaties<sup>108</sup> guides treaty interpretation at international law. It states that subsequent agreements and practice are

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<sup>100</sup> Agreement Establishing the African Continental Free Trade Area, Mar. 21, 2018 [hereinafter “AfCFTA”]

<sup>101</sup> *Id.* at art. 4.

<sup>102</sup> *Id.* at art. 6.

<sup>103</sup> *Id.* at art. 8.

<sup>104</sup> Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, art. II.2 [hereinafter Marrakesh Agreement].

<sup>105</sup> AfCFTA, *supra* note 92, at art. 7.

<sup>106</sup> Addis Ababa, Assembly of the Union, Thirty-Third Ordinary Session, AU Doc. Assembly/AU/Dec.749-795(XXXIII) (Feb., 2020), [https://au.int/sites/default/files/decisions/38180-assembly\\_au\\_dec\\_749-795\\_xxxiii\\_e.pdf](https://au.int/sites/default/files/decisions/38180-assembly_au_dec_749-795_xxxiii_e.pdf).

<sup>107</sup> WTO, *Who Are the Developing Countries in the WTO?*, [https://www.wto.org/english/tratop\\_e/devel\\_e/d1who\\_e.htm](https://www.wto.org/english/tratop_e/devel_e/d1who_e.htm) (last visited Feb., 2020).

<sup>108</sup> Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 33, art. 31.



relevant in interpreting international obligations.<sup>109</sup> It is essential, therefore, to have regional expressions of IP law that promote human development and human rights, and that recognize human development-oriented IP as consistent with the objectives of the TRIPS Agreement.<sup>110</sup>

The AfCFTA preamble references, among others, the aspirations of the AU Agenda 2063, the importance of human rights, and the flexibility for member states to “achieve legitimate policy objectives in areas including public health, safety, environment... and cultural diversity.”<sup>111</sup> This matters because, under international law, preambular statements serve as important interpretive tools.<sup>112</sup> The terms of a treaty are to be interpreted in their context, of which the preamble is part, and in light of their object and purpose.<sup>113</sup>

With this background and context, a Pan-African approach to IP may seek to emphasize African IP interests and priorities, such as those relating to cultural diversity, access to medicines, and traditional knowledge. In the IP Protocol, the AU could emphasize the importance of IP as it relates to agricultural production, medicines, and health. Of course, the AfCFTA must be consistent with existing international obligations, but there is some policy space to tailor the agreement to the needs of the AU member states. While the IP provisions must be drafted to comply with WTO obligations, they can and should also account for international and regional human rights instruments as well as the United Nations SDGs. This would reflect the AU’s commitment to human rights and human development.<sup>114</sup>

There has been a great deal of discussion about exceptions to IP protection and the related flexibilities under the current international IP system. But rather than accepting a protectionist IP model, one could choose to expressly build human development and human flourishing objectives into the IP framework.<sup>115</sup> Further, to the extent that trade agreements express an understanding of IP’s role in society, these regional agreements can contribute to norm-setting for international IP. For example, regional and domestic protections for traditional knowledge and folklore under national IP laws signal a commitment to protecting traditional cultural medicines within the context of an IP regime.<sup>116</sup> Similar to African approaches in other contexts, the AU could take leadership in this area.<sup>117</sup> The AU could also expressly include language within its Pan-African IP policy that signals that human development and human flourishing are explicit objectives of pan-African IP policy.

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<sup>109</sup> *Id.*

<sup>110</sup> International Law Commission, Draft Conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries, GA Doc. A/73/10 (2018) [https://legal.un.org/docs/?path=../ilc/texts/instruments/english/commentaries/1\\_11\\_2018.pdf&lang=EF](https://legal.un.org/docs/?path=../ilc/texts/instruments/english/commentaries/1_11_2018.pdf&lang=EF).

<sup>111</sup> AfCFTA, *supra* note 92, at pbml.

<sup>112</sup> VCLT, art. 31(1), (2).

<sup>113</sup> *Id.*

<sup>114</sup> See section III(c) *infra*.

<sup>115</sup> See J. Janewa Osei-Tutu, *supra* note 38.

<sup>116</sup> See, i.e., The Copyright Act 2005, § 4 (Ghana). (The Ghanaian Copyright Act recognizes a right to folklore, which vests in the President in trust for the people of Ghana. The folklore is protected indefinitely).

<sup>117</sup> For a discussion of Africa’s leadership in developing regional standards that may have broader implications for international law, see Adulquwi A. Yusuf, “The Public Law of Africa and International Law: Broadening the Scope of International Rules and Enriching them for Intra-Africa Purposes,” in C. JALLOH AND O. ELIAS, EDS., SHIELDING HUMANITY: ESSAYS IN INTERNATIONAL LAW IN HONOUR OF JUDGE ABDUL G. KOROMA (BRILL, 2015), 513.

The AfCFTA IP Protocol should have language that mirrors the language of the Doha Declaration on the TRIPS Agreement and Public Health (Doha Declaration) to ensure that IP rights do not interfere with health-related objectives. The Doha Declaration reinforces policy space to protect public health. The IP Protocol could further emphasize the importance of this policy space. The Doha Declaration has been important in facilitating the ability of WTO members to resist IP enforcement that limits access to medicines. In the seizure of generic drugs in transit, for instance, India referenced the WTO Decision<sup>118</sup> to implement a waiver of the TRIPS domestic compulsory licensing provision. That decision arose as a result of the Doha Declaration.<sup>119</sup> India relied, in part, on that WTO decision and the Doha Declaration to buttress its argument that a patent owner cannot interfere with the transit of generic drugs legally manufactured in India.<sup>120</sup>

Additionally, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which is a recently concluded agreement that involved both developing and developed countries, serves as an interesting comparison in this regard.<sup>121</sup> This agreement takes a relatively development-friendly approach to IP.<sup>122</sup> The IP Chapter of the CPTPP not only reproduces articles 7 and 8 of the TRIPS Agreement,<sup>123</sup> it also incorporates the Doha Declaration.<sup>124</sup> The CPTPP clearly states that “the obligations of this Chapter do not and should not prevent a party

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<sup>118</sup> Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, Doc. WT/L/540 and Corr.1 (July 29 2005), [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-DP.aspx?language=E&CatalogueIdList=51809,2548,53071,70701&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=51809,2548,53071,70701&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True)).

<sup>119</sup> European Union and a Member State – Seizure of Generic Drugs in Transit, WT/DS408/1/G/L/921/IP/D/28, at 3 (19 May 2010). “Article 28 read together with Article 2 of the TRIPS Agreement, Article 4bis of the Paris Convention, 1967 and the last sentence of paragraph 6(i) of the Decision of the General Council of August 30, 2003 on the Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health (the “August 30, 2003 Decision”) because a cumulative reading of these provisions confirms, inter alia, that the rights conferred on the owner of a patent cannot be extended to interfere with the freedom of transit of generic drugs lawfully manufactured within, and exported from, India” *Id.*

<sup>120</sup> *Id.* (“India considers further that the measures at issue also have a serious adverse impact on the ability of developing and least-developed country members of the World Trade Organization to protect public health and to provide access to medicines for all. Accordingly, the provisions of the TRIPS Agreement referred to above must be interpreted and implemented in light of the objectives and principles set forth in Articles 7 and 8 of the TRIPS Agreement, the Doha Ministerial Declaration on the TRIPS Agreement and Public Health adopted on 14 November 2001 and in the light of Article 12(1) of the International Covenant on Economic, Social and Cultural Rights, which recognizes the right of all persons to the enjoyment of the highest attainable standard of physical and mental health.”).

<sup>121</sup> *What is the CPTPP?*, *supra* note 82 (“On December 30, 2018 the CPTPP entered into force among the first six countries to ratify the agreement – Canada, Australia, Japan, Mexico, New Zealand, and Singapore. On January 14, 2019, the CPTPP entered into force for Vietnam.”).

<sup>122</sup> Wang, Heng, *The Future of Deep Free Trade Agreements: The Convergence of TPP (and CPTPP) and CETA?*, 53 J. WORLD TRADE 317, 317–42 (2019) (comparing the CPTPP to the EU-Canada Comprehensive Economic Trade Agreement and “TPP entails a number of new and interesting formulations on protecting traditional knowledge, or the need to find an appropriate balance in IPs, which CETA does not address as a pact among industrialized countries.”).

<sup>123</sup> CPTPP, art. 18.2, 18.3.

<sup>124</sup> *Id.* at art. 18.6

from taking measures to prevent public health.”<sup>125</sup> Further, article 18.6(1)(b) explicitly references the parties’ commitment to access to medicines, the Doha Declaration, and WTO decisions aimed at protecting the public health.<sup>126</sup> The CPTPP describes this as the “TRIPS/health solution.”<sup>127</sup>

It would be helpful to include a similar provision in the AfCFTA IP Protocol. This kind of provision emphasizes the need for IP laws to promote public health and human development and underscores the importance of protecting public health. Such a provision will not automatically lead to reduced IP standards, but focuses on the use of IP to improve human lives. Although much of the access to medicines discussion centers on the way patent rights can increase costs or limit access, it is also possible to recognize that patent rights may create incentives for health-related innovations that are relevant to the African continent. In addition, trademarks can be used as a tool to help promote authentic medicines in the marketplace.

Another pertinent area is traditional medicinal knowledge. Protection for traditional knowledge and cultural expressions have been important for African countries and can be an integral part of their development agendas. If the IP Protocol addresses traditional knowledge, it will not be the first multilateral agreement to do so. In article 8(j), the Convention on Biological Diversity recognizes traditional knowledge by referencing the need to “preserve knowledge, innovations, and practices of indigenous and local communities” that embody traditional lifestyles and promote biological diversity.<sup>128</sup> The CPTPP IP Chapter, though it creates no firm obligations in the area of traditional knowledge, recognizes its relevance to IP systems.<sup>129</sup> Given that African countries are among the demanders for traditional knowledge protection, the AfCFTA could reflect African interests by including provisions relating to the protection of traditional and indigenous knowledge.<sup>130</sup>

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<sup>125</sup> *Id.* at art. 18.6(1)(a).

<sup>126</sup> *Id.* at art. 18.6(1)(b) (“In recognition of the commitment to access to medicines that are supplied in accordance with the Decision of the WTO General Council of August 30, 2003 on the *Implementation of Paragraph Six of the Doha Declaration on the TRIPS Agreement and Public Health* (WT/L/540) and the WTO General Council Chairman’s Statement Accompanying the Decision (JOB(03)/177, WT/GC/M/82), as well as the Decision of the WTO General Council of December 6, 2005 on the *Amendment of the TRIPS Agreement*, (WT/L/641) and the WTO General Council Chairperson’s Statement Accompanying the Decision (JOB(05)/319 and Corr. 1, WT/GC/M/100) (collectively, the “TRIPS/health solution”), this Chapter does not and should not prevent the effective utilisation of the TRIPS/health solution.”).

<sup>127</sup> *Id.*

<sup>128</sup> *The Convention on Biological Diversity*, Rio 1992, article 8(j), available at <https://www.cbd.int/doc/legal/cbd-en.pdf>.

<sup>129</sup> CPTPP, *supra* note 82, art. 18.16.

<sup>130</sup> Sri Ragavan, *Protection of Traditional Knowledge*, 2 MINN. INTELL. PROP. L. REV. 1, 10 (2001) (Several incidents have occurred which developing countries describe as unauthorized appropriation of their knowledge. These countries find this appalling, especially since most of such indigenous people are living in conditions devoid of human rights, which the UN Charter regards as a condition for living with human dignity. These incidents are often viewed in the developing countries as instances where third parties steal information to expand their own industries and increase profit margins. That the developed nations are aware that if the holders were given even a portion of the profits, it would greatly improve their living conditions, only enhances the feelings of bitterness. This has led the indigenous people to organize themselves to protect their knowledge and resources by various means.”).

## **Conclusion**

As this chapter has outlined, there are reasons to expect that the AU will create an African-centered IP policy for Africa. An effective Pan-African IP policy will, in light of the AU Agenda 2063, recognize the need to protect public health, and promote human development and human flourishing while encouraging innovation. Such goals should be an integral part of a Pan-African framework for IP that seeks to meet the needs of the ordinary citizen. While it is somewhat challenging to discern the direction the AU will take, this chapter has discussed the AU policies that suggest that human development, human flourishing, and human rights should influence the AU approach to IP.

Indeed, the language and history of the PAIPO statute could be an indication that the AU approach to IP might be inconsistent with its stated goals for the continent. If the AU chooses to adopt protectionist approaches to IP, which are more suitable to IP-producing industrialized countries, it may find that its IP policies conflict with its overarching commitments to human rights, development and shared African values.

It will be critical, as a starting point, to recognize that IP laws and policies have implications for human rights and human development on the African continent, as in all nations. The AU decisions regarding its IP policies will influence the direction of IP for the African continent. In implementing its Agenda 2063 and developing the AfCFTA IP Protocol, the AU has a terrific opportunity to create human-centered IP policies for Africa.