

Technical Assistance as a Tool for Implementing and Expanding Intellectual Property Treaty Obligations

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ABSTRACT

This chapter examines critically the role of technical assistance in the implementation and expansion of intellectual property (IP) norms in Africa, using the protection of plant variety as an illustrative example. It focuses mainly on technical assistance from the World Intellectual Property Organization and the International Union for the Protection of New Varieties of Plants. Relying on Third World Approaches to International Law scholarship and doctrine, it traces the origins of IP technical assistance and its role in the institution of IP norms and protection in Africa. The chapter further discusses the fragmented and complex regime of IP laws in Africa, and finally, the place of technical assistance in the burgeoning plant variety regime on the continent. The central claim is that technical assistance should be seen as a vector of ideas and practices that have progressively led to the systemic integration of African countries into the international IP system (“adherence overdrive”) and the curious case of countries that inadvertently neglect the flexibilities inherent in the IP system when formulating national laws and policy (“compliance overdrive”).

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A. INTRODUCTION

In the late nineteenth century, when intellectual property (IP) was first harmonized at the international level,¹ legal technical assistance was backstage. Through the agency of colonialism,² the contracting European countries to the Paris and the Berne Conventions³ decided to incorporate their colonies as “countries of the Union” without being regarded members thereof.⁴ Specific provisions included in both treaties permitted the European powers to impose their IP rules on their colonies,⁵ without any requirement for technical assistance.⁶ All this changed

¹ In the form of the Paris and the Berne Conventions. See the Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 13 U.S.T. 2, 828 U.N.T.S. 107, as last revised at the Stockholm Revision Conference, July 14, 1967, 21 U.S.T. 1538, 828 U.N.T.S. 303 [hereinafter Paris Convention]. The Paris Convention governed “patents, utility models, industrial designs, trademarks, service marks, trade names, indications of source or appellations of origin, and repression of unfair competition.” The second convention was the Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as last revised July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221. [hereinafter Berne Convention], which governed copyright and related rights.

² Alexander Peukert (2016), “The Colonial Legacy of the International Copyright System,” in Ute Röchenthaler and Mamadou Diawara (eds.), *Copyright Africa: How Intellectual Property, Media and Markets Transform Immaterial Goods* (Sean Kingston Publishing); Tsimanga Kongolo (2014), “Historical evolution of copyright legislation in Africa,” 5 *The WIPO Journal* 2; Tsimanga Kongolo (2013), “Historical Developments of Industrial Property Laws in Africa,” 5 *The WIPO Journal* 1; Ruth L. Okediji (2003), “The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System,” 7 *Singapore Journal of International & Comparative Law*.

³ Paris and Berne Conventions, n 1.

⁴ Accounts have it that this decision was made in the absence of representation from the relevant African colonies (except Tunisia and Liberia regarding Berne) and Asian colonies (except India) – and in most cases, without the consent of the colonized nations. In the case of Tunisia, a French law professor represented the country in Berne, and French diplomats represented Tunisia in Madrid and The Hague. See Peukert, n 2; Kongolo (2013 & 2014), n 2.

⁵ Declaration of the application of the Berne Convention was made following Article 19 of the original text of the convention. Article 19 stated that “the countries acceding to this Convention also have the right to accede at any time for their colonies or foreign possessions.” Declaration of the applicability of the Paris Convention was made in terms of Article 16 bis (1)–(2) of the London Act of 1934 and the Lisbon Act of 1958 of the convention. Today, this provision can be found in Article 24 of the 1979 Act of the convention, albeit in refined language.

⁶ It should, however, be noted that some colonial powers offered technical assistance early on – especially before and during the interwar period. In relation to Britain, see Michael Worboys

during the decolonization period in the 1950s and 1960s, when many European colonies in Africa and Asia became independent.⁷ All of a sudden, legal technical assistance gained currency. As newly independent states moved to carve their national IP laws, the engineers of the post-war world economic order were faced with the question of how to move on.⁸ The decolonization process had exposed the numerous contracts between post-colonial states and private investors from European countries to the mercy of transnational law.⁹ Technical assistance, therefore, became a managerial tool to socialize these newly independent states to the international IP system to protect European (or Western) assets and interests.

The World Intellectual Property Organization (WIPO) played a principal role in this development.¹⁰ At the inception of the Trade-Related Aspects of Intellectual Property (TRIPS) Agreement, technical assistance received a new boost with the inclusion of a provision in the agreement requiring developed countries to provide legal technical assistance in favor of the developing and Least Developed Countries (LDCs), based on mutually agreed terms and conditions.¹¹ The result is that today, technical assistance has become a powerful – albeit informal – tool for the implementation of the various IP regimes explored in the general introduction to this volume, mostly in the Global South.

Relying on Third World Approaches to International Law (TWAIL) scholarship and doctrine, this chapter looks critically at the role of technical assistance in the institution and implementation of international IP treaty obligations in Africa, using the protection of plant variety as an illustrative example. It focuses mainly on technical assistance from WIPO and the International Union for the Protection of New Varieties of Plants (UPOV).¹²

My central claim is that technical assistance should be seen as a vector of ideas and practices that progressively led to the systemic integration of African countries

(1996), “British Colonial Science Policy: 1918–1939,” in Patrick Petitjean (ed.), *Colonial Sciences: Researchers and Institution* (Volume 2, L’instituturta Nçaidse Recherchsec Ientifipquoeu Rle Développement En Cooperation Paris).

⁷ Daniel Acquah (2017), *Intellectual Property, Developing Countries and the Law and Policy of the European Union: Towards Postcolonial Control of Development* (IPR University Center).

⁸ Keith Aoki (1998), “Neocolonialism, Anticommons Property, and Biopiracy in the (Not-so-Brave) New World Order of International Intellectual Property Protection,” 6 *Indiana Journal of Global Legal Studies* 11.

⁹ Prabhakar Singh and Benoît Mayer (2014), *Critical International Law: Postrealism, Postcolonialism, and Transnationalism* (Oxford University Press, India, New Delhi), p. 12.

¹⁰ For a detailed discussion of WIPO’s leading role, see Daniel Acquah (2021), “Technical Assistance as a Hedge to IP Exclusivity,” in Jonathan Griffiths and Tuomas Mylly (eds.) *Global Intellectual Property Protection and New Constitutionalism: Hedging Exclusive Rights* (Oxford University Press). Available on SSRN at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3682646.

¹¹ Article 67 TRIPS.

¹² International Convention for the Protection of New Varieties of Plants (UPOV) of December 2, 1961 (entered into force August 10, 1968), as revised at Geneva on November 10, 1972, on October 23, 1978, and on March 19, 1991.

into the international IP system, which I call “adherence overdrive,” and the curious case of countries inadvertently neglecting the flexibilities inherent in the international IP system when formulating their national IP laws and policy (“compliance overdrive”). The term “adherence overdrive” and its meaning is my creation. The term “compliance overdrive” is borrowed from Caroline B. Ncube (see footnote 118 in this chapter). However, how the term is used in this article and its usual meaning differ slightly.

Besides the introduction and conclusion, this chapter is divided into three parts. Part B explores the origins of IP technical assistance and the concept of TWAIL. Part C examines the role of WIPO in the development of IP laws in Africa through its technical assistance program from the post-war period to the present. WIPO’s enduring relationship with the two regional IP organizations is highlighted, that is, the *Organization Africaine de la Propriété Intellectuelle* (OAPI), comprised chiefly of francophone African countries, and the African Regional Intellectual Property Organization (ARIPO), comprised chiefly of anglophone African countries. That discussion further sheds light on how WIPO has influenced and conditioned the scope and content of African IP law both regionally and nationally. Part D focuses narrowly on plant variety protection (PVP) in Africa, reviewing the extent to which WIPO and UPOV assistance in the area has led to a regime of PVP that has been criticized as unfavorable to the continent’s social and economic development.

B. THE ROOTS OF IP TECHNICAL ASSISTANCE AND THIRD-WORLD APPROACHES TO INTERNATIONAL LAW

The origins of IP technical assistance lay within the broader international law framework within which technical assistance evolved and of which the international IP system is a part. Decolonization accelerated after World War II and this acceleration provided the setting for programs of international technical assistance on an unprecedented scale.¹³ It is thus widely agreed that the post-war period marked the birth of the development paradigm¹⁴ – although an alternative description points to the inter-war period.¹⁵ Two contemporaneous development account for this trend.

¹³ Guy Fiti Sinclair (2020), “Forging Modern States with Imperfect Tools: United Nations Technical Assistance for Public Administration in Decolonized States” *Humanity Journal*, p. 59.

¹⁴ Amy Staples (2006), *The Birth of Development* (Kent State University Press). For more critical versions of this narrative, see Arturo Escobar (1995), *Encountering Development* (Princeton University Press); Sundhya Pahuja (2011), *Decolonizing International Law* (Cambridge University Press).

¹⁵ Guy Fiti Sinclair (2017), *To Reform the World: International Organizations and the Making of Modern States* (Oxford University Press), p. 29; Sinclair, n 13, p. 59 (Arguing that such assistance had already been offered by institutions such as the International Labour Organization, the Permanent Mandates Commission, and the technical organizations of the League of Nations).

First, barely three years into its formation, the United Nations (UN) General Assembly passed two key resolutions that prepared the ground for a much-expanded approach to international technical assistance for economic development. The first resolution called upon the Economic and Social Council (ECOSOC) and the specialized agencies to “give further and urgent consideration to the whole problem of the economic development of under-developed countries in all its aspects,” and the second amassed funds to enable the Secretary General to provide technical assistance to governments in connection with their economic development programs.¹⁶

In the years that followed, the UN General Assembly went on to establish an Expanded Programme of Technical Assistance (EPTA), comprising the United Nations and seven specialized agencies as well as a Technical Assistance Board to coordinate their work.¹⁷ The EPTA extended to non-self-governing territories as well.¹⁸ In addition, the development at the United Nations coincided with the election of Harry Truman as President of the United States, who, in his inauguration speech in January 1949, proposed the Point Four Program,¹⁹ a worldwide program of development through technical assistance. He invited other countries to “pool their technological resources” in a cooperative enterprise in which all nations work together through the United Nations and its specialized agencies wherever practicable.²⁰ In parallel, both programs facilitated the spread of technical assistance schemes in diverse areas – including the field of IP and public administration – to countries of the Global South.

During the post-war period, the development of the Third World was seen as critical. Efficiency in public administration and technological transfers were seen as ways to promote economic and social development in these countries.²¹ An explicit assumption was that the USA and Western European nations had achieved a high

¹⁶ Ibid., citing UNGA Res 198 (III) (December 4, 1948) UN Doc A/ RES/ 198(III) para 3; UNGA Res 200 (III) (December 4, 1948) UN Doc A/ RES/ 200(III).

¹⁷ Olav Stokke (2009), *The UN and Development* (Indiana University Press), pp. 46–50.

¹⁸ Guy Fiti Sinclair (2019), “A Battlefield Transformed: The United Nations and the Struggle over Postcolonial Statehood,” in Jochen von Bernstorff and Philipp Dann (eds.), *The Battle for International Law: South-North Perspectives on the Decolonization Era* (Oxford University Press), p. 266.

¹⁹ The Point Four Program was a US policy of technical assistance and economic aid to underdeveloped countries. It was so named because it was the fourth point of President Harry S. Truman’s 1949 inaugural address. Some technical assistance was furnished through specialized UN agencies, but most was provided initially mainly by the USA and, on a bilateral basis, frequently through contracts with US business and educational organizations. Eventually several new national and international organizations were created to contribute to various aspects of development – such as the International Finance Corporation, the Development Loan Fund, and the Inter-American Development Bank, the Export-Import Bank, the World Bank, and the International Monetary Fund. See <https://academic.eb.com/levels/collegiate/article/Inter-American-Development-Bank/42536>.

²⁰ Sinclair, n 18, p. 267.

²¹ Aoki, n 8; Sinclair, n 13, p. 64.

level of development because of their efficient public administration policies and IP systems that fostered innovation. Therefore, what worked for the West should work for “the rest.”²² Technical assistance was packaged as a tool for development for the Global South. Yet, concerning the international IP system, and also the international investment regime,²³ good governance was embodied in the international minimum standards that IP- and capital-exporting countries had perpetuated as a benchmark for all other countries to adhere to.²⁴ Using narratives of “development” and “good governance” as a basis to deploy technical assistance thus amounted to framing political relations as apolitical.²⁵

The idea of providing technical assistance predates the formation of WIPO, which was established in 1970 and became a UN specialized agency in 1974. Its forerunner, the International Bureaux for the Protection of Intellectual Property (BIRPI), had actively provided technical assistance according to the ethos of the time.²⁶ For instance, in 1969, BIRPI organized two industrial property seminars, one for Arab countries and the other for South American countries.²⁷ The objective for the meetings was to exchange views on, first, questions concerning industrial property and its importance for developing countries, and second, the application of the Paris Convention.²⁸ BIRPI also drafted the Model Law for Developing Countries on Inventions in 1965²⁹ and subsequently the Model Law on Industrial Designs, together with a commentary, which was submitted to a Committee of Experts from Developing Countries that met in Geneva from October 27 to 29, 1969.³⁰

Consequently, technical assistance was one of the seven functions envisaged for WIPO in its convention.³¹ Thus, while WIPO was to be a site for norm-making in IP, it was also to provide technical assistance for the modernization and development of the Global South. The construction of modern states on a broadly Western

²² Richard Warren Perry (1996), “Rethinking the Right to Development: After the Critique of Development, After the Critique of Rights,” 18 *Law & Policy* 225, 237–8; Sinclair, n 13.

²³ Mavluda Sattorova (2018), *The Impact of Investment Treaty Law on Host States: Enabling Good Governance?* (Oxford: Hart Publishing).

²⁴ *Ibid.*, pp. 1–3.

²⁵ Acquah, n 10.

²⁶ See Industrial Property: Monthly Review of the United International Bureaux for the Protection of Intellectual Property (BIRPI) Geneva, 9th Year No. 1 (January 1970) (Hereafter, BIRPI Monthly Review).

²⁷ *Ibid.*, pp. 4–5, and 18.

²⁸ *Ibid.*

²⁹ Edith Penrose (1973), “International Patenting and the Less-Developed Countries,” 83 *The Economic Journal* 331, p. 779.

³⁰ See BIRPI Monthly Review, n 26, p. 5. BIRPI did more. For example, it also provided technical assistance programs for government officials of developing countries, in cooperation with the competent authorities of member countries of the Paris Union. Fellowships for the training of nine government officials of developing countries were organized in 1969.

³¹ Article 4 (v) Convention Establishing WIPO.

model in the decolonized states can be seen as an axis that links the concept of technical assistance to TWAIL.

Technical assistance has often been criticized for introducing levels of IP protection that are inappropriate for the social and economic development of developing countries.³² In particular, it has been argued that the advice provided does not always fully take into account all the possible options and flexibilities to accommodate innovation, technological, and other development objectives.³³ These criticisms relate primarily to the fact that the providers of technical assistance focus mainly on the promotion of the interest of IP holders and do not integrate broader development concerns. This view of technical assistance has led to the criticism that it merely constitutes a reproduction of the dominant Western-constituted view of IP rights and is, therefore, a political project rather than a technical provision or neutral measure.³⁴

Looking at technical assistance this way resonates with the broader dialectic of TWAIL as a critical perspective to international law and policy. Historically, the Third World has viewed international law as a regime and discourse of domination and subordination, not resistance and liberation.³⁵ TWAIL problematizes and contests the dominant, historically Eurocentric accounts of the origin of international law and its claims of universality, justice, and equity.³⁶ In this regard, TWAIL doctrine and scholarship is a response to decolonization and the end of direct European colonial rule over non-Europeans. The distinguished TWAIL jurist Makau Mutua insightfully elaborates the basic objectives of TWAIL as comprising three interrelated and purposeful objectives:

The first is to understand, deconstruct, and unpack the uses of international law as a medium for the creation and perpetuation of a racialized hierarchy of international norms and institutions that subordinate non-Europeans to Europeans. Second, it seeks to construct and present an alternative normative legal edifice for international governance. Finally, TWAIL seeks through scholarship, policy, and politics to eradicate the conditions of underdevelopment in the Third World.³⁷

³² Health Action International (HAI) and *Médecins Sans Frontières* (MSF) (September 2015), "Empty gestures: The EU's commitments to safeguard access to medicines": Review of the European Union's Trade & Investment Policy," 6, available at <<https://haiweb.org/publication/empty-gestures-the-eus-commitments-to-safeguard-access-to-medicines/>>.

³³ B. N. Pandey and Prabhat Kumar Saha (2011), "Technical Cooperation under Trips Agreement: Flexibilities and Options for Developing Countries," 53 *Journal of the Indian Law Institute* 4.

³⁴ Christopher May (2004), "Capacity Building and the (Re)production of Intellectual Property Rights," 25 *Third World Quarterly* 5; Acquah, n 10.

³⁵ Makau W. Mutua (2000), "What Is TWAIL?" 94 *Proceedings of the ASIL Ann. Meeting*, p. 31, available at: <https://digitalcommons.law.buffalo.edu/articles/560>.

³⁶ Karin Mickelson, Ibironke Odumodu and Pooja Parmar (2008), "Situating Third World Approaches to International Law (TWAIL): Inspirations, Challenges and Possibilities," *International Community Law Review*, 10(4), 351–354.

³⁷ *Ibid.*

If indeed international law is the common denominator through which global protection of IP is secured, then international IP law is not immune from TWAIL inquiry – even if TWAIL scholarship in the area of IP is relatively nascent and inadequate.³⁸

C. WIPO'S TECHNICAL ASSISTANCE AND THE COMPLEX AND FRAGMENTED REGIME OF IP LAWS IN AFRICA

The timing of WIPO's technical assistance to countries in Africa immediately following their independence has particular salience. Many of the newly independent countries, burdened by the need for economic and social transformation, bought into the liberal-progressive thought about development and good governance at the time. Antony Anghie has argued that “development, just like good governance, has a very powerful and universal appeal: all peoples and societies would surely seek good governance – in much the same way that all peoples and societies were seen as desiring development.”³⁹

Nonetheless, the reception of many African countries to the above idea is rather puzzling for two reasons. First, many of the countries were only just emerging from an immediate past of colonial rule where IP laws were more of an imposition than borrowed.⁴⁰ Colonial IP laws were designed mainly to protect colonial investments and to extract raw industrial materials from the colonies for the colonizers as much as possible.⁴¹ As such, these laws were not designed for the development of the local

³⁸ In the wake of the economic liberalization processes that swept across the globe in the 1980s and 1990s, and the related mushrooming of the various IP regimes addressed in this volume – whose implications for developing countries are well studied – some commentators started looking at the role of colonialism and neo-colonialism in the pervasive international IP system and to rationalize the persistent crises of legitimacy that confront the system as applied to developing countries. See, for example, Alan H Lazar (1969), “Developing Countries and Authors' Rights in International Copyright,” 19 *Copyright Law Symposium* 1, 18; Andreas Rahmatian (2009), “Neo-Colonial Aspects of Global Intellectual Property Protection,” 12 *The Journal of World Intellectual Property* 1; Acquah, n 7; Acquah, n 10; Kongolo, n 2; Peukert, n 2; Aoki, n 8.

³⁹ Antony Anghie (2000), “Civilization and Commerce: The Concept of Governance in Historical Perspective,” 45 *Villanova Law Review*, 887.

⁴⁰ An exception to this was the South African colonies, which became a dominion in 1910, known as the Union of South Africa, some states of which had their local copyright laws by 1880. According to the *Encyclopaedia Britannica*, dominion was the status, prior to 1939, of each of the British Commonwealth countries of Canada, Australia, New Zealand, the Union of South Africa, Eire, and Newfoundland. Although there was no formal definition of dominion status, a pronouncement by the Imperial Conference of 1926 described Great Britain and the dominions as “autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown and freely associated as members of the British Commonwealth of Nations.”

⁴¹ George Sipa-Adjah Yankey (1987), *International Patents and Technology Transfer to Less Developed Countries: The Case of Ghana and Nigeria* (Gower Publishing Co.), p. 104;

communities. A cursory look at the auxiliary development of international IP law suggests that it was birthed along similar lines. Accounts of the histories of the Paris and Berne Conventions undeniably reveal their Eurocentric characteristics and vision.⁴² Considering that the international systems of patent and copyright instituted by these two conventions were developed with minimal participation of developing countries, the rules formulated were a response to the needs of developed nations.⁴³ By the time the majority of the developing countries had attained independence, the principles inherent in these treaties had been firmly established for long time. The agitations from developing countries in the 1970s for reforms in international IP regulation attest to this point. One would therefore have expected some caution on the part of newly independent African states.

Secondly, the colonial administrations did not build local expertise and institutions for IP in Africa. Thus, most of the countries emerged with weak institutions, fragile governments, and little or no expertise on IP matters. Yet, these former colonies' memberships of international organizations presented a growing need for national or regional IP laws. For many of these countries then, forging IP laws for national development post-independence was and has been an odyssey. As the then Secretary General of the United Nations, Dag Hammarskjöld, noted, the self-determination of peoples is closely linked to the process of economic development; to the extent that the United Nations could provide technical assistance to support the latter, it would also advance the former.⁴⁴ However, economic development was difficult in countries that lacked an "independent administrative tradition"⁴⁵ or local expertise in the Western construct of IP and its protection. Concerning IP, WIPO filled the gap by deploying technical assistance as an instrument to assist African countries in their economic, social, and technological development.

Today, it can be said that WIPO's intervention on matters of IP governance has contributed to a fragmented IP architecture in Africa. The patchwork of IP regimes on the continent comprises the IP instruments of the African Union, formerly the

Samuel Obeng Manteaw (2008–2010), "Patents and Development in Ghana: Proposals for Change," 24 *University of Ghana Law Journal* 111, p. 6.

⁴² For the Paris Convention, see Alfredo C. Robles, Jr. (1999), "History of the Paris Convention," 15 *World Bulletin: Bulletin of the International Studies of the Philippines*, pp. 1–75, <https://heinonline.org/HOL/PDFsearchable?handle=hein.journals/wrldbul15&collection=journals§ion=5&id=&print=section§ioncount=1&ext=.pdf&nocover=&display=0>; for the Berne Convention, see Sam Ricketson and Jane Ginsburg (2015), "The Berne Convention: Historical and Institutional Aspects," in Daniel J. Gervais (ed.), *International Intellectual Property: A Handbook of Contemporary Research* (Edward Elgar Publishing, Cheltenham, UK), pp. 5–16.

⁴³ Robles, n 42, p. 1.

⁴⁴ Sinclair, n 13, p. 54, citing Dag Hammarskjöld, "An International Administrative Service," in Dag Hammarskjöld and Wilder Foote (eds.), *Servant of Peace: A Selection of the Speeches and Statements of Dag Hammarskjöld, Secretary-General of the United Nations, 1953–1961* (New York: Harper & Row, 1962), 115.

⁴⁵ *Ibid.*

Organization of African Unity (OAU)⁴⁶ – even though the OAU Charter and the Constitutive Act of the African Union do not mention IP;⁴⁷ the OAPI and ARIPO frameworks; the eight subregional economic communities (RECs) recognized by the African Union;⁴⁸ and of course, the national laws of ARIPO (and to an extent OAPI) Member States⁴⁹ as well as the laws of countries that are not members of either OAPI or ARIPO.⁵⁰ Overall, there is a sharp disconnect between regional aspirations and subregional realities, which are also shaped by external influences such as bilateral, regional, and multilateral trade agreements.⁵¹ This combination of factors materially contributes to the policy incoherence and inconsistency of IP regimes on the continent.⁵²

A recent addition to the above mix is the ongoing negotiation of an IP Protocol as part of the continent-wide free trade zone created by the Agreement Establishing the African Continental Free Trade Area (AfCFTA). The first phase of the AfCFTA negotiations focused on the framework agreement establishing the AfCFTA and negotiations on protocols on trade in goods and services and dispute settlement. The second phase of negotiations, which was expected to end in June 2021 but was extended due to delays caused by Covid-19, is dedicated to investment, competition

⁴⁶ For consistency, African Union (AU) will be used in place of OAU, unless where its use would otherwise alter the meaning.

⁴⁷ These instruments are the AU's African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources 2000; the Continental Strategy for Geographical Indications in Africa 2018–2023; the African Union Strategic Guidelines for the Coordinated Implementation of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation in Africa; the Science, Technology and Innovation Strategy for Africa (STISA–2024); and the Pan African Intellectual Property Organisation (PAIPO) Statute. These instruments embody the AU's positions on plant variety protection, GIs, copyright; and IP policies. The instruments also inform the African Group's submissions at the international level in fora like the WTO and WIPO. As their names suggest, they are only 'model laws' or 'non-prescriptive guidelines' and as such, non-binding on AU Member States.

⁴⁸ The Regional Economic Communities recognized by the AU are the Arab Maghreb Union (UMA); the Common Market for Eastern and Southern Africa (COMESA); the Community of Sahel-Saharan States (CEN-SAD); the East African Community (EAC); the Economic Community of Central African States (ECCAS); the Economic Community of West African States (ECOWAS); the Intergovernmental Authority on Development (IGAD); and the Southern African Development Community (SADC).

⁴⁹ ARIPO advances a flexible IP structure. Beyond the Lusaka Agreement, which confers ARIPO membership, Member States are not automatically bound to any of its protocols. ARIPO Member States can choose which protocols to sign. By contrast, the Libreville Agreement forming OAPI introduced a threefold standard for cooperation, which is still in force in the OAPI region: uniform laws, common authority/IP office for Member States, and common/centralised procedures – including the issuance of a single title of registration for all Member States.

⁵⁰ For example, countries like Algeria, Angola, Burundi, Egypt, Djibouti, Democratic Republic of Congo, Nigeria, Ethiopia and so on are not members of either organization.

⁵¹ Titilayo Adebola (2020), "Mapping Africa's Complex Regimes: Towards an African Centred AfCFTA Intellectual Property Protocol," *African Journal of International Economic Law* 1.

⁵² *Ibid.*

policy, and IP. While waiting for the final product of the negotiations, experts anticipate that the IP Protocol will not depart from the principles and objectives of the AfCFTA, which are, *inter alia*, related to sustainable and inclusive socio-economic development, resolving the challenges posed by the crow's nest of obligations arising from multiple and overlapping trade regimes – including IP regimes – that accompany the existing RECs and IP organizations such as OAPI and ARIPO and expedite regional and continental legal harmonization.⁵³

Commentators have expressed the prospect that the AfCFTA IP Protocol will fulfill the above principles and objectives by streamlining the IP regime in Africa, considering the protocol's special and historic status.⁵⁴ However, questions remain as to how this new agreement will operate relative to the eight RECs, many of which have overlapping memberships and also approach economic integration differently.⁵⁵ Indeed, the AfCFTA text acknowledges this interplay and the potential for incoherence, stating that those countries involved in “other regional economic communities, regional trading arrangements and custom unions, which have attained among themselves higher levels of regional integration than under this agreement, shall maintain such higher levels among themselves.”⁵⁶ Otherwise, the AfCFTA text is meant to take precedence, unless otherwise specified.⁵⁷ Nearly all African countries are members of the World Trade Organization (WTO) (see Table 12.1). Because of the national treatment and Most Favored Nation principles under the WTO Agreement on TRIPS, this wording will necessarily lead to providing these extra protections also to all other right holders, at least as long as the type of protection is within the ambit of the TRIPS non-discrimination clauses.

More generally, one could say that such fragmented regimes can only really be “disentangled” by harmonizing upward (to the highest common denominator, or beyond). That in itself is a highly problematic feature of the international IP system.

Questions also remain about the influence of donor support and IP technical assistance, for instance, from WIPO and the European Union for the negotiation of

⁵³ See generally, Articles 3, 4, and 5 of the Agreement Establishing the African Continental Free Trade Area (hereafter, AfCFTA Agreement). Also, see Wend Wendland, *Multilateral Matters #7: The Draft Protocol on Intellectual Property Rights to the African Continental Free Trade Agreement (AfCFTA): Annotations on Genetic Resources, Traditional Knowledge and Cultural Expressions* (Infojustice, October 7, 2020).

⁵⁴ Daniel Acquah, “The AfCFTA, Technical Assistance and the Reproduction of Western-Styled IP Norms in Africa,” *Symposium on Intellectual Property Law, Afronomics Law* (October 8, 2020); Adebola, n 51.

⁵⁵ Gerhard Erasmus, “What happens to the RECs once the AfCFTA is in force?” (*tralacBlog*, May 17, 2019), <https://www.tralac.org/blog/article/14051-what-happens-to-the-recs-once-the-afcfta-is-in-force.html>; Sofia Baliño, “African Continental Free Trade Area Completes First Month of Trading,” *International Institute for Sustainable Development* (February 1, 2021), <https://sdg.iisd.org/commentary/policy-briefs/african-continental-free-trade-area-completes-first-month-of-trading/>

⁵⁶ Article 19 (2), AfCFTA Agreement.

⁵⁷ Article 19 (1), AfCFTA Agreement.

the AfCFTA IP Protocol.⁵⁸ Such reservations come on the back of the long history of the relationship between WIPO, OAPI, and ARIPO and the role of WIPO in consolidating the institution of Western-style IP norms across Africa through its technical assistance program.

I. *The Formation of OAPI*

In 1962, the first regional IP organization in Africa, called *Office Africa in et Malgache de la Propriété Industrielle* (OAMPI) – the predecessor to OAPI – was formed, after twelve francophone African countries signed the Agreement Relating to the Creation of an African and Malagasy Office on Industrial Property (the Libreville Agreement).⁵⁹ The French National Industrial Property Institute (INPI) and WIPO assisted former French colonies to create OAMPI. The Libreville Agreement, which was a replica of the extant French laws, protected patents, trademarks, and industrial designs. The agreement introduced threefold criteria for cooperation, which are still in force in the OAPI region to date: (a) the adoption of a uniform system of industrial rights protection based on uniform legislation; (b) the creation of a common authority to serve as the office for the protection of industrial property for each of the Member States; and (c) the application of common and centralized procedures, such that a single title issued by OAPI would be valid in all Member States.⁶⁰

With this agreement, francophone African countries paved the way for delegating responsibility for IP administrative decisions to the regional level.⁶¹ In 1977, OAMPI was renamed OAPI, after the adoption of the Bangui Agreement on the Creation of an African Intellectual Property Organization (Bangui Agreement) and withdrawal of the Malagasy Republic.⁶² No domestic legal instrument is required to enact the Bangui Agreement as national legislation. What this means is that not only is there no need for national laws, but that national implementing laws are not conceivable, since only the regional rights may exist, which are based on regional legislation (at least for the types of IP rights covered). The only exception is in the area of

⁵⁸ Acquah, n 54.

⁵⁹ The twelve countries were Cameroon, Central African Republic, Chad, Congo, Côte d'Ivoire, Dahomey (now Benin), Upper Volta (now Burkina Faso), Gabon, Mauritania, Senegal, Niger, and Malagasy Republic. The Agreement entered into force on January 1, 1964.

⁶⁰ Carolyn Deere (2009), *The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries* (Oxford University Press), p. 250.

⁶¹ *Ibid.*

⁶² The African Intellectual Property Organization (OAPI) was created by the Bangui Agreement on March 2, 1977 and came into force on February 8, 1982. It was revised in 1999, and the revision entered into force on February 28, 2002. The current members of OAPI are Benin, Burkina Faso, Cameroon, the Central African Republic, Chad, the Comoros, the Congo, Côte d'Ivoire, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Mali, Mauritania, the Niger, Senegal, and Togo.

copyright, where the regional agreement may coexist with national laws in each Member State.⁶³ As the discussion below shows, legal and technical assistance from WIPO for the Bangui Agreement and its subsequent revision in 1999 guaranteed that this agreement was – and remains – one of the most TRIPS-plus pieces of legislation among developing countries, even though thirteen of its seventeen members are LDCs.⁶⁴

The revised Bangui Agreement provides for the protection of ten categories of IP, as follows: Patents (Annex I), Utility Models (Annex II), Trademarks and Service Marks (Annex III), Industrial Designs (Annex IV), Trade Names (Annex V), Geographical Indications (Annex VI), Literary and Artistic Property (Annex VII), Protection Against Unfair Competition (Annex VIII), Layout-Designs (Topographies) of Integrated Circuits (Annex IX), and Plant Variety Protection (Annex X). The Annexes for PVP, which came into force in January 2006⁶⁵ (discussed in Part D), and the protection of layout designs (topographies) of integrated circuits (not yet in force) are new additions that were not protectable in the OAPI countries beforehand.⁶⁶

The agreement requires members to accede to twenty-three international conventions, including the WTO and allied TRIPS Agreement. Eleven of these treaties were added during the 1999 revision, whereas no such obligations exist in TRIPS.⁶⁷ In addition, the agreement includes special protection for geographical indications (GIs) related to wines and spirits and extends the term of protection for copyright and patents. For example, regarding patents, the agreement not only has a low threshold for novelty⁶⁸ but also imposes more stringent conditions for the use of compulsory licenses by third parties or by governments than does the TRIPS Agreement, thus sacrificing the full use of flexibilities affirmed by the Doha Declaration.⁶⁹ It demands a judicial procedure in national civil courts before licenses to third parties can be granted.⁷⁰ Furthermore, the agreement expands the scope of patent protection, for instance, to pharmaceutical products – regardless

⁶³ Deere, n 60, p. 255.

⁶⁴ United Nations, Department of Economic and Social Affairs. Economic Analysis: LDCs at a Glance. See www.un.org/development/desa/dpad/least-developed-country-category/ldcs-at-a-glance.html. Thirty-three out of the forty-six LDCs are in Africa. Among the seventeen members of OAPI, only Cameroon, Côte d'Ivoire, Equatorial Guinea, and Gabon are developing countries; the rest are all LDCs. The purpose of the amendment was to make the Agreement consistent with the requirements of the TRIPS Agreement to simplify procedures for issuing titles, and to broaden the scope of protection, among others.

⁶⁵ Annex X of the revised Bangui Agreement 2002.

⁶⁶ Deere, n 60, p. 253.

⁶⁷ *Ibid.*, p. 259.

⁶⁸ Article 3(3) of Annex I of the Bangui Agreement.

⁶⁹ Deere, n 60, p. 257. Also, see Articles 49–52 of Annex I of the Bangui Agreement.

⁷⁰ Article 51–52 of Annex I of the Bangui Agreement. Even though Article 58 of Annex I of the Agreement provides for non-voluntary licenses in the national interest by an administrative order, it is not entirely free from related conditions and judicial review.

of the decision of the TRIPS Council to extend the general transitional period for LDCs to implement the TRIPS Agreement until July 1, 2034⁷¹ and for pharmaceutical products until January 1, 2033.⁷² To be certain, the terms of the LDC extension by WTO prevent countries from reducing or withdrawing existing protections,⁷³ thus locking countries into the revised Bangui Agreement, which otherwise states that any country can exit from their obligations under the treaty.⁷⁴

The decision to extend protection to pharmaceutical products and to increase the term of patent protection rendered LDCs of OAPI vulnerable to higher prices and licensing costs for technologies some thirty-two years earlier than TRIPS required, and thirty-one years earlier in the case of pharmaceutical products.⁷⁵ The consequences of such choices are overt. To date, African countries are net importers of medicinal and pharmaceutical products. The United Nations Economic Commission for Africa (UNECA) estimates that the continent covers 94 per cent

⁷¹ The TRIPS Agreement Article 66 obliged developed countries to create incentives for technology transfer to LDCs and to support their efforts to implement the Agreement through technical and financial cooperation, on request and on mutually agreed terms and conditions. It allowed LDCs ten years from 1995 to apply the bulk of TRIPS obligations. This transition period has been extended twice for all LDC members in response to a specific request by the LDC Group. In its decision of November 29, 2005, the TRIPS Council extended the period until July 1, 2013, and on June 11, 2013, it extended this further until July 1, 2021 – or when a particular country ceases to be in the LDC category, if that happens before 2021. At the meeting of the Council for TRIPS on October 15–16, 2020, WTO members discussed (among other issues) the proposal presented by Chad, on behalf of the LDC Group, to extend the general transitional period for LDCs to implement the TRIPS Agreement. At its meeting on June 29, 2021, the Council agreed to extend the deadline until July 1, 2034. Under the agreed decision, LDC country members shall not be required to apply the provisions of the TRIPS Agreement, other than Articles 3, 4 and 5, until July 1, 2034, or until the date when they cease to be an LDC, whichever date is earlier, www.wto.org/english/news_e/news21_e/trip_30jun21_e.htm.

⁷² The extension of the “pharmaceutical transition period” was originally set to expire on January 1, 2016 but has been further extended to January 1, 2033 (or earlier in case a particular country ceases to be in the LDC category), https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_Sooq-DP.aspx?CatalogueIdList=228924,135697,117294,75909,77445,11737,50512,1530,12953,20730&CurrentCatalogueIdIndex=1. This claim is true despite the fact that Article 46 of the Bangui Agreement on transitional provisions relating to pharmaceutical products specifically refers to this waiver for LDCs. However, its effectiveness is ambivalent because of the uniform treatment of LDC member states and non-LDCs member states by OAPI and ARIPO. This point is corroborated by research. New empirical evidence shows that LDC signatories to the Bangui Agreement and members of OAPI do not exempt pharmaceutical products from patentable subject matter. In fact, out of the thirty-three LDCs in Africa, only Angola, Madagascar, Liberia, Rwanda, and Uganda have explicitly excluded pharmaceutical products from patentability criteria in their national laws. For more on this analysis, see Marion Motari, Jean-Baptiste Nikiema, Ossy M. J. Kasilo, Stanislav Kniazkov, Andre Loua, Aissatou Sougou and Prosper Tumusiime (2021), “The Role of Intellectual Property Rights on Access to Medicines in the WHO African Region: 25 Years after the TRIPS Agreement,” 21 *BMC Public Health*, 490.

⁷³ Article 65(5) TRIPS.

⁷⁴ Article 48 Bangui Agreement.

⁷⁵ Deere, n 60, p. 257.

of its pharmaceutical needs through imports.⁷⁶ With the outbreak of COVID-19, many of the countries providing these pharmaceuticals were heavily disrupted, and in 2020, at least ninety-four countries in the world restricted their exports of medical supplies as part of their response to COVID-19.⁷⁷ This scenario placed Africa in a perilous position in accessing essential supplies.

The outcome of the revised Bangui Agreement should not be surprising. The text of the revised agreement was written by a Cameroonian national, Denis Ekani, who served for nineteen years as the first Director General of OAPI, from 1965 to 1984.⁷⁸ He worked closely with the OAPI Secretariat and the staff of WIPO, UPOV, and INPI, the latter of which also hired an external consultant to assist with legal drafting.⁷⁹ Based on their training and professional networks, elites like Ekani tend to identify more closely with a network of international IP policy experts and officials – and with the objectives of WIPO – than with national governments or regional development objectives.⁸⁰ Indeed, it should be remembered that OAPI Member States had (and still have) limited expertise on IP matters, and the few staff in their IP offices are usually the product of training by INPI, WIPO, and European or US universities – which transfer their own pro-IP views regarding the importance of strengthened IP protection.⁸¹ Hence, the perspective of staff on the technical aspects of TRIPS (and IP in general) tends to focus narrowly on compliance.⁸²

Besides, governments within the region regarded IP decision-making as a technical domain, the legal details of which could be left to experts from OAPI or donor agencies such as WIPO or INPI, rather than a policy issue worthy of explicit integration into a broader national development policy.⁸³ Thus, while accounts from the OAPI Secretariat stress that the Bangui revision went through several stages and formalities in the drafting and negotiation process,⁸⁴ Carolyn Deere contends that:

At no point in the Bangui revision process was there any formal interstate negotiation of the draft text. Within the OAPI countries, there was no substantive parliamentary discussion about the proposed revisions to the Bangui Agreement.

⁷⁶ OECD, Policy Response to Coronavirus (COVID-19), “Africa’s Response to COVID-19: What roles for trade, manufacturing and intellectual property?” (June 23, 2020).

⁷⁷ *Ibid.*

⁷⁸ Deere, n 60, p. 260.

⁷⁹ *Ibid.*

⁸⁰ Acquah, n 10.

⁸¹ *Ibid.*, n 7.

⁸² Deere, n 60, p. 262.

⁸³ *Ibid.*, p. 261.

⁸⁴ OAPI (2001), “Information Memo on the Revised Bangui Agreement,” Yaoundé, Cameroun. According to the OAPI Secretariat, the draft instruments were submitted in 1997 to governments for comments, suggestions, and further elaboration, and also to other partners, such as WIPO, UPOV, the European Patent Office, and INPI. This process was combined with meetings of experts from OAPI member states and partners in Conakry (November 1997), Abidjan (February 1998), Ouagadougou (July 1998), and Nouakchott (November 1998).

Parliamentarians had little knowledge of IP issues or the revision process and thus limited capacity to monitor or participate in matters of IP policy and decision-making.⁸⁵

This situation meant that any national participation in the Bangui revision process was left in the hands of a small group of staff at the OAPI Secretariat and national IP offices, who would bow to pressure from their financiers. The mainly agrarian-based and net technology importing OAPI countries mostly develop low-cost indigenous innovations and rely on traditional knowledge and practices for everyday activities.⁸⁶ Africa's rich agricultural resources, traditional knowledge, and cultural repositories afford it comparative advantages with GIs, PVP, traditional knowledge, and traditional cultural expressions. However, except for GIs and PVP, the OAPI IP framework does not extend to the rest. The revised Bangui Agreement, therefore, ought to have maximized the flexibilities permitted in TRIPS, for instance, by introducing IP systems that protect and promote farmers' rights, access to medicines, and access to knowledge.

II. *The Formation of ARIPO and the Reception of International Norms*

More than a decade after the formation of OAPI, anglophone African countries established the Industrial Property Association for English-speaking Africa (ESARIPO), with the assistance of WIPO and UNECA. WIPO laid the foundation in a regional seminar on patents and copyright for nine anglophone African countries in Nairobi in 1972, which recommended the establishment of a regional industrial property organization.⁸⁷ This agenda was moved forward when WIPO and UNECA responded to a formal request from anglophone African countries for assistance in establishing the regional organization in 1973. In line with this move, a series of meetings were held at the UNECA headquarters in Addis Ababa and WIPO in Geneva, which led to a draft Agreement on the Creation of the Industrial Property Organisation for English-speaking Africa.⁸⁸ This agreement was subsequently adopted in a diplomatic conference held in Lusaka, Zambia, in 1976, thus deriving the name "the Lusaka Agreement."⁸⁹ UNECA and WIPO served jointly as

⁸⁵ Deere, n 60, p. 261.

⁸⁶ Adebola, n 51, pp. 257–8.

⁸⁷ The nine countries were Ghana, Kenya, Lesotho, Liberia, Malawi, Nigeria, Tanzania, Uganda, and Zambia.

⁸⁸ ARIPO, *Our History*, 2021.

⁸⁹ See ARIPO, Agreement on the Creation of the African Regional Intellectual Property Organization as adopted by the Diplomatic Conference for the adoption of an Agreement on the Creation of an Industrial Property Organization for English-Speaking Africa at Lusaka (Zambia) on December 9, 1976, and amended by the Administrative Council of ARIPO on December 10, 1982, December 12, 1986, and November 27, 1996, and as amended by the Council of Ministers on August 13, 2004, available at www.aripo.org/wp-content/uploads/2018/12/Lusaka-Agreement1.pdf. As of December 31, 2020, ARIPO has twenty members: Botswana,

the Secretariat of ESARIPO until 1981, when the organization established an independent Secretariat.⁹⁰

The Lusaka Agreement established a regional system for the protection of industrial property, which sought to harmonize the national laws of Member States and promote cooperation.⁹¹ In 2004, almost three decades after the formation of ESARIPO, the organization was renamed ARIPO to expand its mandate from industrial property to other categories of IP.⁹² Unlike OAPI, which has a uniform IP structure outlined in the ten annexes to the Bangui Agreement, ARIPO advances a flexible IP structure. Beyond the Lusaka Agreement, which confers ARIPO membership, Member States are not automatically bound to any of its protocols. ARIPO has four protocols and Member States can choose which protocols to sign. The four protocols are the Harare Protocol on Patents and Industrial Designs (Harare Protocol), the Banjul Protocol on Marks (Banjul Protocol), the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore (Swakopmund Protocol), and the Arusha Protocol for the Protection of New Varieties of Plants (Arusha Protocol).⁹³ ARIPO also has a Draft Policy and Legal Framework for the Protection of Geographical Indications and a Model Law on Copyright and Related Rights.

Just like OAPI, the deference and reliance on WIPO, the European Patent Office (EPO), WTO, and UPOV, among others, for technical and financial support in developing its regional IP system and capacity-building has presented ARIPO with contradictory policy positions. For example, although ARIPO adopted the commendable Swakopmund Protocol, which recognizes the significant traditional practices of its Member States, it also adopted the UPOV 1991-styled Arusha Protocol, which undermines their traditional farming practices.⁹⁴ Interestingly, while the Swakopmund Protocol protects traditional knowledge and expressions of folklore,

Eswatini, Gambia, Ghana, Kenya, Lesotho, Liberia, Malawi, Mauritius, Mozambique, Namibia, Rwanda, Sao Tome and Principe, Sierra Leone, Somalia, Sudan, Tanzania, Uganda, Zambia, and Zimbabwe.

⁹⁰ Carolyn Deere-Birkbeck (2009), "Developing Country Perspectives on Intellectual Property in the WTO: Setting the Pre-TRIPS Context," in Carlos M. Correa (ed.), *Research Handbook on Intellectual Property Law and the WTO* (Edward Elgar: Oxford), available at SSRN: <https://ssrn.com/abstract=1405430>.

⁹¹ ARIPO, *Our History*, 2021.

⁹² Such as traditional knowledge, copyright, genetic resources, and expressions of folklore.

⁹³ The Harare Protocol on Patents was adopted on December 10, 1982. This Protocol has been amended on fourteen occasions, the latest one being on November 20, 2019. The Banjul Protocol on Marks was adopted by the Administrative Council at Banjul, The Gambia, on November 19, 1993 and amended on nine occasions, the latest being November 20, 2019. The Swakopmund Protocol was adopted by a Diplomatic Conference of ARIPO at Swakopmund, Namibia, on August 9, 2010 and amended on December 6, 2016. The Arusha Protocol was adopted by a Diplomatic Conference of ARIPO at Arusha, Tanzania, on July 6, 2015. The Arusha Protocol is not yet in force. It will enter into force twelve months after four States have deposited their instruments of ratification or accession.

⁹⁴ Adebola, n 51 p. 262.

ARIPO does not register traditional knowledge and expressions of folklore because Section 5 of the Swakopmund Protocol excises any formality for traditional knowledge.⁹⁵

Concerning PVP, however, ARIPO is earmarked to conduct a formal and substantial examination of applications for plant breeders' rights under the Arusha Protocol⁹⁶ – just as it does for patents, utility models, industrial designs (conducts only a formal examination), and trademarks. Considering the importance of traditional knowledge and expressions of folklore for African innovation and development, in contrast to the implications of a UPOV-plus PVP regime for Africa (discussed in detail in the next section), it is alarming to see that ARIPO does not register traditional knowledge but is rather assigned to register PVP.

While the regional legal regimes and institutional frameworks for francophone and anglophone Africa differed in important respects, in both cases their members delegated significant responsibilities to their respective regional secretariats, and WIPO served as their core source of financial, human, legal, and organizational support.⁹⁷ The WIPO Secretariat, for instance, hosts the websites of both ARIPO and OAPI, and it provided staff training, drafted legal texts for their respective conventions, and was involved in shaping their strategic direction through regular “tripartite meetings” of the secretariats.⁹⁸ Moreover, to increase its usefulness to the technological development efforts of their Member States, WIPO assisted in establishing a quadripartite agreement to promote cooperation between WIPO, OAPI, ARIPO, and the African Regional Centre for Technology.⁹⁹ The center is overseen by a Consultative Committee, which exercises decisive leadership and influence on IP decision-making and capacity in the region.¹⁰⁰ To further bring its assistance programs closer, WIPO in 2019 and 2020 opened two external offices in Algeria and Nigeria respectively.

⁹⁵ Section 5(2) of the Swakopmund Protocol provides that “Contracting States and ARIPO Office may maintain registers or other records of the knowledge, where appropriate and subject to relevant policies, laws and procedures.”

⁹⁶ Article 17 of the Arusha Protocol.

⁹⁷ Carolyn Deere Birkbeck (2016), “WIPO’s Development Agenda and the Push for Development-oriented Capacitybuilding on Intellectual Property: How Poor Governance, Weak Management, and Inconsistent Demand Hindered Progress,” Oxford University Global Economic Governance Programme Working Paper 105, 1, www.geg.ox.ac.uk/publication/geg-wp-2015105-wipos-development-agenda-and-push-development-oriented-capacitybuilding.

⁹⁸ *Ibid.*

⁹⁹ Deere, n 60, p. 268. The Consultative Committee meets annually, often attended by the heads of OAPI, ARIPO, and the Africa Bureau of WIPO, sometimes with additional staff or guests from OAPI and WIPO. Deere asserts that there are usually not more than nine participants at Committee meetings and no representatives of the OAPI or ARIPO member states ever attend. This further illustrates how through this Committee a relatively small group of international bureaucrats exercise decisive leadership and influence on IP decision-making and capacity in the region.

¹⁰⁰ *Ibid.*

At present, WIPO administers twenty-six treaties (including the WIPO Convention) and provides technical and legal assistance to developing countries on the ratification and implementation of these treaties. This has led to the criticism that WIPO uses its technical assistance function to help promote uncritical ratification of existing international agreements and to further the upward harmonization of IP standards in ways that work against the interest of developing countries – Africa being an example.¹⁰¹ In doing so, the development implications of proposed treaties, treaty accessions, or implementation options and alternatives are not often explored.¹⁰²

As depicted in Table 12.1, OAPI is a member of UPOV, which it joined in July 2014 as its first intergovernmental member.¹⁰³ All OAPI Member States are members of the Patent Cooperation Treaty (PCT) and the Paris Convention. For each OAPI Member State also party to the PCT, Article 3(2) of the Bangui Agreement provides that OAPI shall serve as “national office, designated office, elected office or receiving office.” Except for Comoros and Equatorial Guinea, all OAPI members are also contracting parties to the WTO Agreements.

All ARIPO Member States are contracting parties to the PCT. In addition, ARIPO can be designated as an international search authority under the PCT.¹⁰⁴ Article 3bis (5) of the Harare Protocol states that the ARIPO Office shall act as elected Office under the Patent Cooperation Treaty concerning an international application where a Contracting State is elected for international preliminary examination under the Patent Cooperation Treaty. In addition, all ARIPO Member States are parties to the WIPO Convention, and all apart from Sao Tome and Principe, Somalia, and Sudan are parties to WTO TRIPS.

III. *The Continental (African Union) Level*

At the African Union level, policymakers appear eager to endorse “effective” IP systems for Africa, despite the organization churning out five instruments that set out Africa’s position in some areas of IP.¹⁰⁵ This posture makes it look as though policymakers on the continent have adopted a half-in, half-out approach to IP administration that simultaneously insists on stronger IP rights and at the same time

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹⁰³ OAPI is a party to the UPOV 1991 Act. See www.upov.int/edocs/pubdocs/en/upov_pub_423.pdf.

¹⁰⁴ Article 3bis (4) of the Harare Protocol carries that the ARIPO Office “shall act as designated Office under Article 2(xiii) of the Patent Cooperation Treaty in relation to an international application referred to in Subsection (2) of this section.” Article 3bis (3) further notes that “the Office may act as receiving Office under Article 2(xv) of the Patent Cooperation Treaty in relation to an international application filed by an applicant who is a resident or national of a Contracting State which is also bound by the Patent Cooperation Treaty.”

¹⁰⁵ For a list of these instruments, see n 47.

TABLE 12.1. *African countries' membership of selected WIPO Treaties and WTO*

State or intergovernmental organization	Paris Convention	Berne Convention	Patent Cooperation Treaty	Patent Law Treaty	UPOV Convention	WTO
OAPI					X	
ARIPO						
Algeria	X	X	X			
Angola	X		X			X
Benin	X	X	X			X
Botswana	X	X	X			X
Burkina Faso	X	X	X			X
Burundi	X	X				X
Cabo Verde		X				X
Cameroon	X	X	X			X
Central African Republic	X	X	X			X
Chad	X	X	X			X
Comoros	X	X	X			
Congo	X	X	X			X
Côte d'Ivoire	X	X	X			X
Democratic Republic of the Congo	X	X				X
Djibouti	X	X	X			X
Egypt	X	X	X		X	X
Equatorial Guinea	X	X	X			
Eritrea						
Eswatini	X	X	X			X
Ethiopia						
Gabon	X	X	X			X

(continued)

TABLE 12.1. (continued)

State or intergovernmental organization	Paris Convention	Berne Convention	Patent Cooperation Treaty	Patent Law Treaty	UPOV Convention	WTO
Gambia	X	X	X			X
Ghana	X	X	X			X
Guinea	X	X	X			X
Kenya	X	X	X		X	X
Lesotho	X	X	X			X
Liberia	X	X	X	X		X
Libya	X	X	X			
Madagascar	X	X	X			X
Malawi	X	X	X			X
Mali	X	X	X			X
Mauritania	X	X	X			X
Mauritius	X	X				X
Morocco	X	X	X		X	X
Mozambique	X	X	X			X
Namibia	X	X	X			X
Niger	X	X	X			X
Nigeria	X	X	X	X		X
Rwanda	X	X	X			X
Sao Tome and Principe	X	X	X			
Senegal	X	X	X			X
Seychelles	X		X			X
Sierra Leone	X		X			X
Somalia						
South Africa	X	X	X		X	X
South Sudan						
Sudan	X	X	X			

Togo	X	X	X		X
Tunisia	X	X	X	X	X
Uganda	X		X		X
United Republic of Tanzania	X	X	X	X	X
Western Sahara (Disputed)					
Zambia	X	X	X		X
Zimbabwe	X	X	X		X

Source: the author

advocates for a balance regarding access, local innovation, and creativity. Technical assistance and capacity-building measures may best explain this dilemma.

In 2015, for example, a High-Level African Ministerial Conference organized by WIPO in cooperation with others¹⁰⁶ explored ways in which IP could promote creativity and spur growth by ensuring the development of sound innovation systems. The speakers and panelists, many of whom were chosen by the WIPO Secretariat, did not include the African Group in Geneva or pro-development civil society organizations.¹⁰⁷ Among the many sessions at the conference,¹⁰⁸ there was one on food and agriculture, under the theme “Promoting Research and Development in Food and Agriculture.”¹⁰⁹ Speaking at this session was Mr Peter Button, Vice Secretary General of UPOV, who spoke on the topic “Promoting New Plant Varieties for Enhanced Agricultural Productivity and Food Security.” The content of the presentation was such that one cannot deny its partial and political tone. No wonder among the recommendations from the conference, Member States were encouraged to use all forms of IP in meeting the needs of the agricultural sector, and PVP was said to be a particularly important mechanism to promote the research and transfer of technology to farmers, thereby increasing productivity and value addition in agriculture.¹¹⁰ Furthermore, UPOV membership was recognized as a key factor in maximizing the impact of PVP.

A key outcome of the conference was the Dakar Declaration.¹¹¹ In the Declaration, the AU Ministers pledged to, among others, provide a conducive environment with dynamic IP systems that propel creativity, innovation, and inventiveness and effectively guide the promotion, acquisition, and commercialization of IP for sustainable growth and development and the well-being of African populations. They also pledged to take advantage of the opportunities available within WIPO technical assistance and capacity-building programs, and to consider joining relevant WIPO-administrated treaties to which they were not yet parties.¹¹² An

¹⁰⁶ The conference was organised by WIPO, in cooperation with the AU Commission, the Government of the Republic of Senegal, and the Japan Patent Office. The objective of the conference was to highlight the relevance of intellectual property as an engine for promoting creativity, innovation, and the scientific and technological transformation of African economies.

¹⁰⁷ Susan Isiko Štrba (2017), “Legal and Institutional Considerations for Plant Variety Protection and Food Security in African Development Agendas: Solutions from WIPO?,” 12 *Journal of Intellectual Property Law & Practice* 3, p. 195.

¹⁰⁸ African Ministerial Conference 2015: Intellectual Property for an Emerging Africa, November 3–5, 2015, Dakar, Senegal. For the full program as prepared by WIPO, see www.wipo.int/meetings/en/details.jsp?meeting_id=37206.

¹⁰⁹ Ibid.

¹¹⁰ African Ministerial Conference 2015, “Cluster I Report: Science, Technology and Innovation for the Transformation of African Economies,” (November 5, 2015), available at www.wipo.int/meetings/en/doc_details.jsp?doc_id=321080.

¹¹¹ WIPO, Dakar Declaration on Intellectual Property for Africa, WIPO Doc. (November 5, 2015). www.wipo.int/meetings/en/doc_details.jsp?doc_id=321041.

¹¹² Ibid.

account has it that this declaration was negotiated behind closed doors and that African ministers of trade were not present at the time of its adoption – which raises doubts.¹¹³ Ultimately, the event served as a forum for knowledge circulation and capacity-building in Africa, albeit lopsided toward the Western-centric corpus of IP systems that the sponsors favor.

The Science, Technology and Innovation Strategy for Africa (STISA-2024)¹¹⁴ acknowledges the lack of technology readiness of the continent, which stands in sharp contrast to what is happening at the level of policy and legislation. Policymakers of the continent may well learn from the advanced countries. The history of the development of the advanced industrialized countries shows that they did not all start with strong IP laws. Countries such as the USA, Germany, and Japan, in the early stages of their technological development and catching-up, used instruments such as imitation, reverse engineering, sheer copying, or technology transfer, among others, to develop their innovation ecosystems; only when they had achieved considerable success did they begin to regulate IP strictly.¹¹⁵ It is only when countries have accumulated sufficient indigenous capability, with an extensive science and technology infrastructure sufficient to undertake creative imitation, that IP rights become an important element in technology transfer and industrial activities.¹¹⁶ This point is not often stressed in technical assistance and capacity-building projects.

It may come as no surprise, then, that central initiatives – both the African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources 2000 (African Model Law)¹¹⁷ of the AU and the Swakopmund Protocol of ARIPO– have had little influence on the continent. Despite some criticisms against both instruments, it was expected that they would have an impact on the continent, but that has not been the

¹¹³ Štrba, n 107.

¹¹⁴ The Science, Technology and Innovation Strategy for Africa is the first phase of a ten-year strategy (2014–2024) that positions science, technology, and innovation at the core of the AU Agenda 2063 and maintains the AU's commitment to promoting IP in Africa.

¹¹⁵ Mario Cimoli, Giovanni Dosi, Keith E. Maskus, Ruth L. Okediji, Jerome H. Reichman and Joseph E. Stiglitz (eds.), *Intellectual Property Rights: Legal and Economic Challenges for Development* (Oxford University Press 2014), pp. 32–35. See also Peukert, in this volume.

¹¹⁶ Kim Linsu (2003), "Technology Transfer & Intellectual Property Rights: The Korean Experience," UNCTAD–ICTSD Project on IPRs and Sustainable Development, Issue Paper No. 2, available at <https://unctad.org/en/PublicationsLibrary/ictsd2003ipd2_en.pdf>.

¹¹⁷ The African Model Law was designed to assist AU Members in crafting national laws that reflect their "political orientation, national objectives and level of socio-economic development" and to fulfil interconnected obligations under the WTO TRIPS Agreement and the Convention on Biological Diversity (CBD). See J. A. Ekpere (2000), *The OAU's Model Law: The Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources. An Explanatory Booklet* (OAU, Scientific, Technical and Research Commission, Lagos Nigeria).

case.¹¹⁸ In practice, the African Model Law rejects the unconditional adoption of the UPOV 1991 model and patents for plant varieties,¹¹⁹ rather embracing the *sui generis* option under TRIPS. It is anchored on the principle of balanced regional, sub-regional and national laws in Africa that cater to stakeholders' divergent needs.¹²⁰ It protects the innovations, technologies and practices of local communities, including farming communities and indigenous peoples who conserve and enhance biological diversity for the benefit of present and future generations, alongside commercial plant breeders who develop new plant varieties based on farmers' varieties.¹²¹ As the next section shows, instead of this model being applied, curiously, quite the opposite is happening in Africa.

D. THE PLANT VARIETY REGIME IN AFRICA

The WIPO and UPOV are the leading international organizations in providing technical assistance and legislative advice on PVP laws, management, and enforcement in Africa. This situation further highlights WIPO's strong influence on national and regional implementation of international obligations in the area of IP. Before discussing the plant variety regime in Africa, a look at the relationship between WIPO and UPOV will shed some light and contribute to our understanding of the situation in Africa.

I. WIPO's Agreement with UPOV: An Uptick in Plant Variety Protection

In 1982, WIPO and UPOV formalized an existing arrangement on administrative and technical cooperation between the two organizations,¹²² whereby the Director

¹¹⁸ Commentators argue that the African Model Law fails to offer clear templates to facilitate the implementation of novel provisions such as community rights in Part IV and farmers' rights in Part V – considering that most African countries lack expertise on plant variety protection and are unable to carve out IP/TRIPS complaint laws from it. Further, the AU does not offer support with the design and introduction of plant variety protection laws at the subregional and national levels. The Swakopmund Protocol has been criticized for vesting “control of third-party use of expressions of folklore” in Member States and their national competent authorities rather than in the indigenous communities where those expressions originate. It has also been criticized for granting ownership rights in respect of traditional knowledge and folklore to individuals, as this approach is considered to be contrary to the practices of indigenous communities. See Adebola, n 51, p. 241; Caroline B. Neube (2018), “Three Centuries and Counting: The Emergence and Development of Intellectual Property Law in Africa,” in Rochelle Dreyfuss and Justine Pila (eds.), *The Oxford Handbook of Intellectual Property Law* (Oxford University Press), p. 422.

¹¹⁹ Ekpere, n 117.

¹²⁰ *Ibid.*

¹²¹ *Ibid.*; Adebola, n 51, p. 238.

¹²² UPOV (1982) Agreement between the World Intellectual Property Organization and the International Union for the Protection of New Varieties of Plants, signed on November 26, 1982 (UPOV/INF/8).

General of WIPO is designated as the Secretary General of UPOV, with the power to approve the appointment of the UPOV Vice Secretary General.¹²³ Under this agreement, the UPOV Office was to be located in the WIPO building in Geneva, where UPOV meetings are also held. Hence, WIPO services the UPOV Office and manages the financial administration of UPOV, among other things.¹²⁴ The agreement affirms the complete independence of the WIPO International Bureau and the UPOV Office in respect of the exercise of their functions. However, while UPOV is legally separate from WIPO, and is not part of the UN, the relationship that has ensued between UPOV and WIPO has led to the criticism that WIPO's technical assistance for developing countries and LDCs is biased toward the UPOV 1991 regime.¹²⁵ This criticism implicates the position of WIPO as a neutral voice in the area of IP.

For example, the WIPO Academy offers two advanced distance learning courses on PVP. One of them is on the "Examination of Applications for Plant Breeders' Rights" (DL-305-UPOV).¹²⁶ Additionally, WIPO frequently provides opportunities to make UPOV known. The UPOV Office has given presentations about plant variety and UPOV during the WIPO Summer Schools on IP and at conferences organized by WIPO (such as the African Ministerial Conference discussed above). Likewise, WIPO technical assistance programs often include references to UPOV and advice to UPOV non-members as to how to introduce UPOV-consistent PVP legislation.¹²⁷ Rather than assessing each country's specific needs and advising on how UPOV could best be applied to the applicant's circumstances, the advice tends to consist of providing the applicant countries with the model UPOV legislation.¹²⁸ Graham Dutfield, for example, has argued that some draft PVP legislation proposed through WIPO technical assistance contained a chapter on implementation, including provisions on enforcement and supervision that went beyond what is required under the UPOV Convention itself.¹²⁹

The methodology of WIPO for the development of national IP strategies, which was approved by the WIPO Member States under the "Development Agenda Project,"¹³⁰ has also not been without criticism. The project aimed to provide a

¹²³ Graham Dutfield (2011), "Food, Biological Diversity and Intellectual Property: The Role of the International Union for the Protection of New Varieties of Plants (UPOV)," *QUNO Intellectual Property Issues Paper* 9, p. 12.

¹²⁴ Agreement between WIPO and UPOV, n 122, Article 1.

¹²⁵ Catherine Saez (2015), "Interrelations Between Plant Treaty, UPOV, WIPO, Farmers' Rights – Do They Equate?" (Intellectual Property Watch).

¹²⁶ The other is on the "Introduction to the UPOV System of Plant Variety Protection (DL-205-UPOV)." See WIPO, *The WIPO Academy Portfolio of Education, Training & Skills Development Programs* 2021, available at www.wipo.int/publications/en/details.jsp?id=4535.

¹²⁷ Dutfield, n 123, p. 12.

¹²⁸ *Ibid.*, p. 9.

¹²⁹ *Ibid.*

¹³⁰ Committee on Development and Intellectual Property, *WIPO Methodology and Tools for the Development of National IP Strategies: Development Agenda project on Improvement of*

coherent and harmonized approach, including a set of tools and mechanisms to guide the Member States in the development of national IP strategies. The methodology has four parts: The Process,¹³¹ Baseline Questionnaire,¹³² Benchmarking Indicators,¹³³ and National IP Strategy Online Platform.¹³⁴ It also sets the benchmarking indicators relevant for promoting PVP to include: (a) Plant variety protection office: legal status, autonomy, key functions and staffing; (b) Importance of breeders' rights; (c) National agricultural policy or strategy; and (d) Plant breeding and seed associations.¹³⁵ The South Center has criticized the benchmarking indicators for not stating the contributions that farmers have made – and continue to make – in the development of varieties adapted to local evolving conditions, and for failing to give any reference to *sui generis* systems (such as those adopted in India, Malaysia, and Thailand) that do not follow the UPOV model and which recognize rights over farmers' varieties.¹³⁶ Also, the methodology has often included a recommendation to the country receiving assistance to accede to UPOV 1991 and establish a PVP office as part of legislative and institutional reform.¹³⁷

The UPOV Office has over the years been active in discouraging developing countries from adopting PVP systems that diverge from the UPOV norm, as has been documented concerning Asian countries,¹³⁸ and in the specific case of Africa, as seen in the PVP laws of OAPI and ARIPO. The African Model Law, in particular, received opposition and criticism from WIPO and UPOV, OAPI, and the African Seed Trade Association.¹³⁹ For example, WIPO rejected the principle of inalienability of community rights, which is one of the pillars of the Model Law,¹⁴⁰ and further argued that the Model Law's prohibition of patent on life forms was a violation of TRIPS Article 27.3(b), which requires patents on at least micro-

National, Sub-regional and Regional Institutional User Capacity, Development Agenda Project DA_10_05 (2014), available at www.wipo.int/ipstrategies/en/methodology/.

¹³¹ *Ibid.*, Tool 1: The Process.

¹³² *Ibid.*, Tool 2: Baseline Questionnaire.

¹³³ *Ibid.*, Tool 3: Benchmarking Indicators.

¹³⁴ *Ibid.*, Tool 4: National IP Strategies, Online Survey.

¹³⁵ *Ibid.*, Tool 3: Benchmarking Indicators, p. 63.

¹³⁶ Saez, n 125.

¹³⁷ See Committee on Development, n 130, Tool 3: Benchmarking Indicators.

¹³⁸ Rajeswari Kanniah (2005), "Plant Variety Protection in Indonesia, Malaysia, the Philippines and Thailand," 8 *Journal of World Intellectual Property* 3, p. 283.

¹³⁹ It is said that in 2001, the AU (then OAU) hosted a conference to discuss the Model Law, where UPOV and WIPO were invited to give comments. In a four-page submission to the AU, WIPO technically criticized some important issues that the Model Law addressed. The UPOV Office provided a ten-page critique, which included the redrafting of more than thirty of the model's articles, allegedly to turn the Model Legislation into UPOV 1991. This highly critical stance did not sit well with those concerned about its enthusiastic promotion of the UPOV Convention at the OAPI. See Genetic Resources Action International Network (GRAIN), "IPRs Agents Try to Derail OAU Process: UPOV and WIPO Attack Africa's Model Law on Community Rights to Biodiversity" (June 18, 2001), (hereafter, GRAIN IPR), available at <https://grain.org/article/entries/1966>.

¹⁴⁰ *Ibid.*; Ekpere, n 117.

organisms.¹⁴¹ For its part, UPOV submitted a ten-page document criticizing and reworking more than thirty articles of the Model Law, recommending, among others, that farmers' rights should be subject to or subordinate to plant breeders' rights.¹⁴² In 2001, the African Union sought to reconcile its differences with WIPO and UPOV, but to no avail.¹⁴³ Importantly, however, the text of the current Model Law shows that the African Union did not implement those recommendations. Even so, the African Model Law was overlooked by regional IP organizations, RECs, and many African countries when they enacted plant variety laws.

II. *The Protection of Plant Variety under OAPI*

As noted earlier, the revised Bangui Agreement had as one of its outstanding features the inclusion of Annex X on PVP, which establishes a regional framework applicable to the members of OAPI. The WIPO, the UPOV Office, WTO, and INPI played key roles in this agreement. It started with a series of meetings and discussions between the UPOV Secretariat and WIPO about proposals for revising the Bangui Agreement and the need to include the creation of a PVP system in the OAPI region in 1996.¹⁴⁴ In 1997, the UPOV Office consulted the French Ministry of Agriculture as well as Francois Burgaud, who was in charge of international relations within the French National Interprofessional Seed and Seedlings Grouping (GNIS), about providing technical assistance on PVP to francophone African countries, including providing a financial contribution for the organization of a regional seminar in Burkina Faso.¹⁴⁵ There was also a meeting between the Director General of OAPI, Anthioumane N'Diaye, and UPOV officials to discuss the possible inclusion of PVP in the revised Bangui Agreement in September 1997.

With funding from the French government, UPOV organized the said regional seminar in Ouagadougou, Burkina Faso, on December 17–19, 1997, in cooperation with the Government of Burkina Faso and OAPI.¹⁴⁶ The seminar focused on the nature and rationale for the protection of plant varieties and was attended by participants from Benin, Burkina Faso, Cameroon, Chad, Côte d'Ivoire, Gabon, Guinea, Mali, Mauritania, Niger, Senegal, and Togo.¹⁴⁷ The UPOV also

¹⁴¹ GRAIN, n 139; Also see Noah Zerbe (2005), "Biodiversity, Ownership, and Indigenous Knowledge: Exploring Legal Frameworks for Community, Farmers, and Intellectual Property Rights in Africa," 53 *Ecological Economics* 493.

¹⁴² GRAIN, n 139; Mohamed Coulibaly, Robert Ali Brac de la Perrière, and Sangeeta Shashikant (2019), "A Dysfunctional Plant Variety Protection System: Ten Years of UPOV Implementation in Francophone Africa" (APBREBES Working Paper), p. 13, available at www.apbrebes.org/files/seeds/APBREBES_OAPI_EN_def_o.pdf.

¹⁴³ Štrba, n 107, p. 193.

¹⁴⁴ Coulibaly et al., n 142, p. 9, citing UPOV doc. C/31/2.

¹⁴⁵ Ibid. Citing UPOV doc. C/32/2.

¹⁴⁶ Ibid.

¹⁴⁷ Ibid.

participated in a WIPO Academy session for French-speaking countries to lecture on UPOV and PVP.¹⁴⁸ The UPOV further engaged the Head of the Seed and Plant Breeding Office in the French Ministry of Agriculture and Fisheries regarding the organization and financing of “roving seminars” in OAPI Member States. Earlier, in April 1997, the Director General of WIPO had sent to OAPI draft texts for the revision of the Bangui Agreement, which included a draft Annex relating to PVP drawn up by the UPOV Secretariat.¹⁴⁹

According to the OAPI Secretariat, the draft text was submitted to governments for comments, suggestions, and further elaboration and also to other partners, such as WIPO, UPOV, the EPO, and INPI. This process was followed by meetings of experts from OAPI Member States and partners in Conakry (November 1997), Abidjan (February 1998), Ouagadougou (July 1998), and Nouakchott (November 1998).¹⁵⁰ The definitive text was adopted by national IP officials at a further meeting in Nouakchott (Mauritania) at the end of December 1998.¹⁵¹ On February 15, 1999, ten days before the diplomatic conference where OAPI members were scheduled to sign the revised Bangui Agreement, a joint UPOV–WIPO–WTO workshop was held for developing country delegates in Geneva to convey the message that UPOV 1991 would be the best option for implementing the PVP system required by Article 27.3(b).¹⁵²

To be sure, a position paper by UPOV on the outstanding issue of the review of Article 27.3(b) before the WTO Council for TRIPS in 2002 affirmed this position when it stated that “the plant variety protection system established on the UPOV Convention meets the requirements of Article 27.3(b) of the TRIPS Agreement.”¹⁵³ The statement further noted that “the introduction of a system which differs significantly from the harmonized approach based on the UPOV Convention will raise questions with regard to the implementation of the TRIPS Agreement.” As Graham Dutfield notes, “this statement gives the impression that UPOV membership is essential for TRIPS compliance, which is false. But for countries unsure of where their interests lie concerning IP protection in the field of plant breeding and anxious to avoid being criticized for failing to meet their TRIPS commitments, this is a powerful statement.”¹⁵⁴ It appears that the TRIPS Agreement has been good for UPOV membership despite the flexibilities and special and preferential treatments for LDCs included in it. In the context of Africa, instead of advising the

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*

¹⁵⁰ Deere, n 60, pp. 260–1.

¹⁵¹ *Ibid.*, p. 263.

¹⁵² *Ibid.* Also see Coulibaly et al., n 142 p. 10.

¹⁵³ UPOV (undated) “International harmonization is essential for effective plant variety protection, trade, and transfer of technology,” UPOV position based on an intervention in the Council for TRIPS, September 19, 2002, available at www.upov.int/about/en/pdf/international_harmonization.pdf.

¹⁵⁴ Dutfield, n 123, p. 9.

countries – especially the LDCs – on how to utilize the flexibilities and transitional arrangement inherent in the agreement for their economic and social development, the UPOV, WIPO, and developed nations like the European Union and the USA along with their seed industries, saw an opportunity to get these countries to join the UPOV Act 1991.

From February 22–25, 1999, the revised Bangui Agreement was opened for signature at a diplomatic conference in Bangui, with fifteen OAPI Member States signing. Before Annex X was adopted, the UPOV Council had to certify it in 2000 as complying with UPOV 1991, as required under Article 34(3) of the UPOV 1991 Convention. The UPOV Council has conducted this task over the years through a detailed examination of the legislation of would-be acceding countries, thereby strongly influencing the legal regime applicable to PVP. Countries that deviate from the rigid model established by the convention are not allowed to join.¹⁵⁵ The revised Bangui Agreement came into force in 2002 for all OAPI members. However, Annex X was delayed due to a lack of capacity to implement PVP.¹⁵⁶ Funding and technical support from the French government and the UPOV Office were directed toward capacity-building, especially regarding the establishment of the system for technical examination of plant varieties, identification of initial eligible genera and species for PVP, and the required personnel and institutional support.¹⁵⁷

In January 2006, Annex X of the Bangui Agreement became operational, paving the way for OAPI and its Member States to deposit instruments of accession to UPOV.¹⁵⁸ Key provisions of Annex X, modeled after the UPOV Act 1991, may be problematic for the region. For example, Annex X extends to “all botanical taxa” except wild species, that is, species that have been neither planted nor improved by man.¹⁵⁹ This means that any variety that fulfills the required criteria may be granted protection.¹⁶⁰ Critics contend that it is unnecessary to extend PVP to all genera and species in the OAPI region, not least because of the lack of experience and capacity concerning implementation; in addition, it may not be wise to develop procedures and extend protection to crops that offer no or limited commercial value to the country.¹⁶¹ Furthermore, Annex X of the Bangui Agreement fails to include any flexibility for its members, not even the limited transitional arrangement contained

¹⁵⁵ Carlos M. Correa et al. (2015), “Plant Variety Protection in Developing Countries: A Tool for Designing a Sui Generis Plant Variety Protection System: An Alternative to UPOV 1991,” (APBREBES), available at www.apbrebes.org/files/seeds/ToolEnglishcompleteDez15.pdf.

¹⁵⁶ Chidi Oguamanam (2015), “Breeding Apples for Oranges: Africa’s Misplaced Priorities over Plant Breeders Rights,” 18 *Journal of World Intellectual Property* 5, p. 173.

¹⁵⁷ *Ibid.*

¹⁵⁸ Coulibaly et al., n 142, p. 11, citing UPOV doc. C (Extr.)/17/6.

¹⁵⁹ Article 3 Annex X of the Bangui Agreement. For a detailed analysis and explanation of the technicalities relating to these terminologies and PVP, see Kochupillai and Köninger, in this volume.

¹⁶⁰ Coulibaly et al., n 142, p. 16.

¹⁶¹ *Ibid.*

in UPOV 1991 concerning scope and protection.¹⁶² This goes beyond the UPOV Act 1991 and further ignores the TRIPS Agreement's transitional arrangements – in essence, failing to consider the fact that OAPI member countries may need policy space in fulfilling their treaty obligations.

Concerning the duration of protection, Article 33(1) of Annex X states that a plant variety certificate shall expire twenty-five years after its date of issue. The duration of protection is more extensive than in both the UPOV 1978 and 1991 Conventions. In addition, the rights conferred by a plant variety certificate in Article 32 of Annex X are extensive as far as they cover harvested material obtained through the unauthorized use of the propagating material of the protected variety, unless the breeder has had a reasonable opportunity to exercise his right concerning the said propagating material.¹⁶³ Moreover, Article 32(4) of Annex X further applies breeders' rights to (a) varieties that are essentially derived from the protected variety, where the protected variety is not itself an essentially derived variety; (b) varieties that are not clearly distinguishable from the protected variety as provided in Article 6; and (c) varieties whose production requires repeated use of the protected variety.

The provision on essentially derived varieties (EDVs) – a concept introduced by UPOV 1991 – has become one of the most problematic provisions for interpretation and application by administrative authorities and judges.¹⁶⁴ Further, of major concern is the extensive provisions dealing with infringement and other unlawful acts, which among others stipulate injunctions, civil damages, criminal sanctions, and seizures. According to Article 54 of Annex X, any person who knowingly commits an act of infringement under subparagraph (1) of Article 48 or an act of unfair competition within the meaning of Annex VIII commits an offense and is liable to a fine of between 5,000,000 and 15,000,000 CFA francs or imprisonment of one to six months or both of these penalties, without prejudice to civil damages. Considering that criminal sanctions are not required under TRIPS except in cases of willful trademark counterfeiting or copyright piracy on a commercial scale, it is excessive to include such provisions in an agreement allegedly concluded by some of the world's most deprived countries.¹⁶⁵ In most countries, including the developed countries, no criminal sanctions are provided for in the area of PVP or other areas of IP, such as patents.¹⁶⁶

It is no wonder that, ten years after the entry into force of Annex X of the Bangui Agreement, a 2019 research paper by Coulibaly and colleagues revealed that only seven of OAPI's seventeen members had used the PVP system – and “at great cost and the expense of public funds.” The authors added that the system has neither produced a substantial increase in plant breeding activities in the OAPI Member

¹⁶² *Ibid.*

¹⁶³ Article 32(2) Annex X of the Bangui Agreement.

¹⁶⁴ See Chapter 3 of Correa et al., n 155.

¹⁶⁵ Article 61 TRIPS.

¹⁶⁶ Correa et al., n 155, p. 68.

States nor resulted in the growth of the seed industry in the subregion. On the contrary, it has raised alarms about the misappropriation of farmers' varieties.¹⁶⁷

III. *Plant Variety Protection under ARIPO and Others*

Amid the African Union's effort to promote a non-UPOV 1991 plant variety regime in Africa and its consequential call on OAPI to reconsider the provisions of Annex X of the revised Bangui Agreement, ARIPO pre-emptively announced in 1998 that it would stand by the AU position and not endorse any specific IP regime for plants.¹⁶⁸ It may therefore come as a surprise that in 2015, ARIPO adopted a PVP regime along the lines of the UPOV Act 1991. It all started in 2009 when the ARIPO Council of Ministers requested the ARIPO Office to implement its decision to develop a regional legal framework for the protection of plant varieties.¹⁶⁹ Based on this mandate, ARIPO initiated the process of developing a legal framework for plant varieties in collaboration with UPOV and WIPO. After consultations with the latter organizations, a first draft was drawn up in 2011. Further revisions to the first draft led to the release of a second draft in 2013.¹⁷⁰ After further consultations and clarifications with UPOV on specific issues, the ARIPO agreed on a final text of the "Draft Legal Framework for Plant Variety Protection" in March 2014.

The last regional workshop on the Draft ARIPO Plant Variety Protocol was co-organized by ARIPO, UPOV, and the US Patent and Trademarks Office¹⁷¹ – further showing the extent of the contribution and power of these international organizations in shaping the ARIPO development agenda through PVP. As the UPOV rules require, the draft instrument was sent to the UPOV Council for examination and approval. The UPOV Council replied, noting that:

The Draft [ARIPO] protocols incorporate the substantive provisions of the 1991 UPOV Act. Once the Draft Protocol is adopted with no changes and the Protocol is in force, the Contracting States of the Protocol and ARIPO itself, in relation to the territories of the Contracting States to the Protocol, would be in a position to "give effect" to the provisions of the 1991 Act, as required by Article 30(2).¹⁷²

¹⁶⁷ Coulibaly et al., n 142, p. 30.

¹⁶⁸ Deere, n 60, p. 266.

¹⁶⁹ Oguamanam, n 156, p. 174.

¹⁷⁰ See Draft Regional Policy and Legal Framework for Plant Variety Protection, ARIPO/CM/ XIII/o (September 30, 2013).

¹⁷¹ Regional Workshop on the Draft ARIPO Protocol for the Protection of New Varieties of Plants, organized by ARIPO in Cooperation with UPOV and with the Assistance of USPTO, October 29–31, 2014, Harare, Zimbabwe, Doc No ARIPO/HRE/2014/INF/1 (September 1, 2014), available at www.ip-watch.org/weblog/wp-content/uploads/2014/11/aripo_upov_Harare_14_inf_1_01_09_2014.pdf.

¹⁷² UPOV Council, Thirty-First Extraordinary Session, "Examination of the Conformity of the Draft ARIPO Protocol for the Protection of New Varieties of Plants with the 1991 Act of the UPOV Convention," Geneva, April 11, 2014, UPOV (Extr.)/31/2 p. 7 (dated March 14, 2014).

Technically, this response qualified ARIPO to join UPOV. However, during the meeting of the Administrative Council to adopt the Arusha Protocol, ARIPO Member States opposed and rejected Article 4 of the Draft Plant Variety Protocol, which empowered ARIPO to grant PVP rights on behalf of its members without their consent.¹⁷³ The amendment of this article meant that ARIPO could not become a member of UPOV 1991.¹⁷⁴ However, according to the “Status in Relation to UPOV Report 2021,”¹⁷⁵ ARIPO is still in the process of becoming a party to UPOV 1991. Attending the meeting of the ARIPO Administrative Council that adopted the Arusha Protocol were intergovernmental organizations and cooperating partners, including WIPO and UPOV.¹⁷⁶ Similar to the case of OAPI, stakeholders – including representatives of farmer groups in Africa – were not invited to the processes and discussions leading to the draft legislation and the subsequent adoption of the Arusha Protocol.¹⁷⁷

As it turns out, most of the concerns expressed about the Bangui Agreement, Annex X, of the OAPI apply here too. Article 3 of the Arusha Protocol extend the scope of protection under PVP to all plant genera and species. While its preamble acknowledges the need to fulfill the TRIPS Agreement Article 27.3(b), the protocol falls short of including the flexibilities inherent in the TRIPS Agreement or its transitional arrangements. Concerning the duration of protection for PVP, the protocol follows the UPOV 1991 order of twenty years from the date of the grant of the breeder’s right, excluding trees and vines, for which a breeder’s right shall be granted for a period of twenty-five years from the said date.¹⁷⁸ The following Article 26(2) of the protocol, however, states that “[n]otwithstanding sub-paragraph (1), the term of protection may be extended for an additional five years by a notice in writing to the ARIPO Office in respect of specific genera and species.” The conditions for such an extension are not spelled out, thus making it possible to go beyond the UPOV standard.

Furthermore, Article 21.3(a) of the protocol, on the scope of a breeder’s right, extends to harvested material obtained through unauthorized use of the propagating material of the protected variety, unless the breeder has had a reasonable opportunity to exercise his right concerning the said propagating material. And just as in the

¹⁷³ Štrba, n 107, p. 197, citing ARIPO, Administrative Council, 9th Extra-Ordinary Session, Arusha,

United Republic of Tanzania, July 2–3, 2016, Doc No ARIPO/AC/IXEX/8 (July 3, 2015), para 3.

¹⁷⁴ *Ibid.*

¹⁷⁵ UPOV: Status in Relation to the International Union for the Protection of New Varieties of Plants (UPOV) as of February 22, 2021, available at www.upov.int/members/en/pdf/status.pdf.

¹⁷⁶ Štrba, n 107, p.196. (Emphasis added), citing ARIPO, Administrative Council, 9th Extra-Ordinary Session, Arusha, United Republic of Tanzania, July 2–3, 2016, Doc No ARIPO/AC/IXEX/8 (July 3, 2015).

¹⁷⁷ Štrba, n 107, p. 197.

¹⁷⁸ Article 26(1) of the Arusha Protocol.

case of OAPI, Article 21.4(a) of the Arusha Protocol stipulates that the breeder's right extends to varieties that are essentially derived from the protected variety, where the protected variety is not itself an essentially derived variety. Finally, Article 22.1(a) of the protocol – on “Exception to Breeder's rights” – allows farmers to use protected material only for “private and non-commercial use.” As there is no further definition, it is unclear which acts are covered by this exception. Disturbingly, a similar exception has been defined by UPOV as prohibiting the regular exchange and sale of seeds or propagating material of protected varieties, even in small amounts, among farmers. Article 22(2) of the protocol allows, in certain circumstances, for farmers to save protected seed for propagating purposes on their holdings, but this appears to be subject to payment of royalties, which many smallholder farmers will not be able to afford.

It is such concerns about the Arusha Protocol and the non-transparent and non-inclusive process by which the protocol was adopted that led the UN Special Rapporteur on the right to food, Hilal Elver, to write a special “Open Letter”¹⁷⁹ to the Member States of ARIPO, expressing her concerns about the adoption of the Arusha Protocol in November 2016. The Arusha Protocol has not yet entered into force. It will do so once four states have ratified or acceded to it. It is said that because the ARIPO IP framework serves a harmonizing function, its protocols have a potentially less devastating effect as they might not be domesticated by the Member States.¹⁸⁰

Similar to OAPI, thirteen of ARIPO's twenty Member States are LDCs. With the benefit of hindsight, one would have thought that ARIPO would stick to the AU Model Law when developing its PVP regime. However, ARIPO did not, and that should not come as a surprise. Throughout Africa, to borrow from Hong Xue's words, the West Wind has been blowing.¹⁸¹ Xue, referring to poet Shelley's masterpiece “Ode to the West Wind,”¹⁸² argues that “in international political circles, anyone with basic knowledge of IP law knows that the West Wind is sweeping through the world. Namely, the developed countries are leading the trend toward greater IP protections and are aggressively pushing the developing countries to follow.” She worries that the developing countries are internally surrendering to the West Wind. Under the power of the West Wind, the developing countries are educated to believe that the West leads the way, by default, and that they should not only proceed along its prescribed path but should even go further than the West. As

¹⁷⁹ Hilal Elver, “Open Letter to the Member States of the African Regional Protocol for the Protection of New Varieties of Plants” (November 24, 2016), available at www.ohchr.org/Documents/Issues/Food/OpenLettertoARIPOMemberStates_24.11.2016.docx.

¹⁸⁰ Ncube, n 118, p. 422.

¹⁸¹ Hong Xue (2008), “What Direction Is the Wind Blowing? Protection of DRM in China,” in Neil Weinstock Netanel (ed.), *The Development Agenda: Global Intellectual Property and Developing Countries* (Oxford University Press).

¹⁸² Percy Bysshe Shelley (1880), “Ode to the West Wind,” in Harry Buxton Forman (ed.), *The Poetical Works of Percy Bysshe Shelley* (London: Reeves & Turner).

a result, the developing countries are losing, step by step, their internal capacity for normative innovation.

As demonstrated throughout the chapter, this seems to be the case in Africa. Besides OAPI and its Member States – who are all members of UPOV, currently Egypt, Ethiopia, Kenya, Morocco, Rwanda, South Africa, Tanzania, Tunisia, Zambia, and Zimbabwe all have national plant variety laws and offices.¹⁸³ Moreover, Ghana recently adopted a PVP law after its parliament approved the Plant Variety Protection Bill 2020.¹⁸⁴ The bill has, since December 29, 2020, received presidential assent. As of February 22, 2021, Ghana, Nigeria, Mauritius, and Zimbabwe are among the list of countries that have initiated procedures for acceding to the UPOV Convention.¹⁸⁵

Finally, it bears mentioning that in May 2014, the Southern African Development Community (SADC)¹⁸⁶ adopted a Protocol for the Protection of New Varieties of Plants, based primarily on the UPOV 1991.¹⁸⁷ According to Article 44 of the protocol, it will come into force thirty days after signature by two-thirds (ten) of the SADC Member States. On June 29, 2020, Botswana became the ninth Member State to sign the SADC Protocol. Once it comes into force, the protocol will provide a regional system for PVP rights in the signatory states. Each Member State will need to have a national PVP for the protection to be effective. South Africa, arguably one of the most developed economies in Africa, is not a member of either ARIPO or OAPI but is a member of SADC. It is also a party to the 1978 UPOV Convention. If the SADC Protocol comes into force, it will effectively upgrade South Africa to UPOV 1991.¹⁸⁸

E. CONCLUSION

By relying on TWAIL scholarship and doctrine, this chapter has looked critically at the role of technical assistance in the institution and implementation of international IP treaty obligations in Africa, using the protection of plant variety as an

¹⁸³ See CIOFORA, “Five Facts to Note about PBR Status Quo in Africa” (January 22, 2021).

¹⁸⁴ See www.parliament.gh/news?CO=97.

¹⁸⁵ See n 175.

¹⁸⁶ Southern African Development Community (SADC), established in 1992, is a Regional Economic Community comprising sixteen member states. Its goal is to further regional socio-economic cooperation and integration as well as political and security cooperation among its members. The SADC member states are Angola, Botswana, Comoros, Congo (DR), Eswatini, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Tanzania, Zambia, and Zimbabwe.

¹⁸⁷ Protocol for the Protection of New Varieties of Plants (Plant Breeders’ Rights) in the Southern African Development Community Region (May 6, 2014), available at <http://acbio.org.za/wp-content/uploads/2015/02/SADC-PVP-2014.pdf>.

¹⁸⁸ Štrba, n 107, p. 197.

illustrative example. I first examined the contribution of WIPO to the development of IP laws in Africa through the technical assistance program of that organization from the post-war period to the present, elaborating on the relationship that has evolved between WIPO and the two regional IP organizations – OAPI and ARIPO – in a way that sheds light on WIPO’s influence on IP law and administration in Africa (both regionally and nationally). Not only were the IP laws instituted post-independence unbecoming to the development needs, priorities, and situations of African countries, but the wave of economic liberalization processes that swept across the globe in the 1980s and 1990s – and the related mushrooming of the various IP and investment regimes addressed in this volume – have often forced African countries to agree to adopt UPOV 1991 compatible legislation, as well as occasional “UPOV-plus” protections, regardless of the implications.

In this regard, the TRIPS Agreement has been good for UPOV membership despite the flexibilities and the special and preferential treatments for LDCs included in it. Instead of advising countries – especially the LDCs – on how to utilize the flexibilities and transitional arrangement integral to the TRIPS Agreement for their economic and social development, the UPOV, WIPO, and developed nations (such as the European Union and the USA along with their seed industries saw an opportunity to get African countries to join the UPOV Act 1991. The WIPO and UPOV cooperated and spearheaded that move. Today, we have a system of PVP laws in Africa that can be described as TRIPS-plus or even UPOV-plus. As seen in the analysis of a few of the provisions of Annex X of the Bangui Agreement and the Arusha Protocol, these agreements have been criticized as unfavorable for the continent’s social and economic development because they are based on the 1991 Act of the UPOV Convention. The UPOV Convention is deemed inappropriate for Africa because it potentially facilitates biopiracy, does not support farmer’s rights, and includes PVP eligibility criteria that are ill-suited to the continent.

Despite opposition and criticism from WIPO and UPOV, the African Union adopted an African Model Law designed specifically to fit the African context by protecting the innovations, technologies, and practices of local communities, including farming communities and indigenous peoples who conserve and enhance biological diversity for the benefit of present and future generations –alongside commercial plant breeders who develop new plant varieties based on farmers’ varieties. Curiously, the African Model Law was overlooked by OAPI, ARIPO, and even SADC when designing their PVP laws. And while it may be difficult to rationalize the adoption by OAPI, ARIPO, and SADC of the UPOV Act 1991 when there is an alternative home-grown model, in a way this point substantiates the argument that in areas where the African countries might be poised to derive some benefits from improved and properly tailored IP protections, there are shortcomings

in the drafting of the rules, or their implementation efforts have been least effective. It also validates the notion that technical assistance can (and should) be seen as a vector of ideas and practices that have progressively led to the systemic integration of African countries into the global protection of IP beyond borders, as designed, nurtured, and developed by the Global North. This scenario has led to the curious case of African countries inadvertently neglecting the flexibilities inherent in the international IP system when formulating their national IP laws and policies.