

TOWARD AN EFFICIENT DOMESTIC LEGAL FRAMEWORK FOR IMPLEMENTING THE AfCFTA PROTOCOL ON INTELLECTUAL PROPERTY IN NIGERIA

FATIMA BELLO*

Abstract

In 2024, the State Parties to the African Continental Free Trade Area (AfCFTA) Agreement adopted the Protocol on Intellectual Property Rights. It seeks among others, support intra-Africa trade, promote African innovation and creativity and deepen intellectual property culture in Africa, promote coherent intellectual property rights policy in Africa; contribute to the promotion of science, industrialisation, services, investment, digital trade, technology, and technology transfer, and regional value chains; promote a harmonised system of intellectual property protection throughout the continent, support and promote creative and cultural industries, contribute to access to knowledge; and support public health needs and priorities of State Parties. The creative and tourism industries are ready to contribute and estimated \$100 billion and over 2 million jobs to the Nigerian economy, this is in addition to potential contributions of non-technological and technological innovations to the economy. If strategically aligned, intellectual property rights protection can foster innovation, expand production and increase the contribution of these industries and innovation to the Nigerian economy while increasing Nigeria's share of the AfCFTA market. Adopting a doctrinal approach, this paper reviews the AfCFTA Protocol on Intellectual Property Rights, analyses the legal framework within which the AfCFTA Agreement will be applied in Nigeria, identifies gaps that could impede implementation, and recommends options for alignment.

Keywords: *AfCFTA, Intellectual Property, innovation, creative industries, plant varieties, emerging technologies, genetic resources*

(h) INTRODUCTION

The AfCFTA Agreement, hailed as a ground-breaking agreement has the tripartite objectives of promoting intra-African trade, stimulating industrialisation by advancing trade in value added

production, and fostering inclusive and sustainable growth and development across the continent. It creates possibly the largest single market in the world of about 1.3 billion people, with a combined Gross Domestic Product (GDP) of approximately \$3.4 trillion.¹ It has the potential to lift 30 million people out of extreme poverty, and can boost income in Africa by \$450 billion by 2035- representing a gain of around 7%² However, realising the innumerable potentials of the agreement hinges on practical implementation at continental, regional, and national levels. Implementation at the national level requires aligning the domestic legal framework with the agreement. For Nigeria as a state party, this includes aligning our laws, policies, and regulations with the Agreement.

Regarding the Protocol on Intellectual Property Rights, implementation will require an enabling domestic legal framework that will support its alignment with domestic legal instruments in Nigeria. It is against this backdrop that this paper analyses the domestic legal implementation framework to determine its suitability and preparedness to align the Protocol with our national laws. It also bears in mind the fragmented nature of Nigeria's legislations covering intellectual property, this review contextually reviews the instruments to support coherent analysis of the legal framework. The paper identified some implementation gaps that will require closing to ensure the creation of the enabling implementation framework and make recommendations on how to close these gaps.

Following this introductory section, section 2 gives an overview of the protocol on intellectual property rights. Section 3 analysis the legal framework for implementing the Protocol, section four did some benchmarking while section five made some observations and recommendations on the way forward.

(i) THE AFCFTA PROTOCOL ON INTELLECTUAL PROPERTY RIGHTS

The AfCFTA Protocol on Intellectual Property Rights has 7 parts and 42 Articles. PART 1 covers definitions, objectives, and scope; PART II covers principles; PART III covers standards on

*Associate Professor, Nigerian Institute of Advanced Legal Studies; Deputy Lead for Trade, Enablement and Coordinator for Policies, Regulations and Law (PR&L), Nigeria AfCFTA Coordination Office. Email: fatimabello599@gmail.com.

¹. AfCFTA, Overview, <<https://au-afcfta.org/about/>> accessed 13 March 2025.

² Ibid

intellectual property rights; PART IV covers cooperation on intellectual property rights; PART V covers enforcement of intellectual property rights; PART VI covers institutional arrangements; PART VII covers final provisions. The Protocol applies to the entire spectrum of intellectual property covering protection for plant variety protection,³ which shall be done via a unique system of rules on farmers' rights, plant breeders' rights, as well as rules governing access to, and benefit sharing;⁴ geographical indications, marks,⁵ through additional legal protection such as certification marks, collective marks, or unfair competition laws;⁶ patents,⁷ through grants for inventions,⁸ removal of barriers to access to medicines, vaccines, diagnostics, therapeutics, healthcare essential inputs, ingredients and processes and essential tools from national patent laws;⁹

Establishing procedures to enable export of pharmaceutical products under compulsory license,¹⁰ provide exceptions to the patents rights to allow research, experimentation, and testing access information about the subject matter of a patented invention,¹¹ exception for development related and regulatory review use,¹² to permit acts done on a subject matter of patent solely for uses related to the development and submission of information for regulatory review purposes required under any law of the State Party or any other country that regulates the making, use, sale or import of the product; and encourage the protection of environmentally friendly innovations;¹³ utility models,¹⁴ through the provision of exceptions and limitations to the rights conferred by a utility model;¹⁵ industrial designs,¹⁶ requirement for state parties to protect new and original industrial designs,¹⁷ encourage protection of designs that contribute to the development of industries and value chains,¹⁸ encourage registration of environmentally friendly industrial designs,¹⁹ provision

³ Article 3, Protocol on Intellectual Property Rights (PIPR)

⁴ Article 8(1), PIPR

⁵ Article 3, PIPR

⁶ Article 9, PIPR

⁷ Article 3, PIPR

⁸ Article 12(1), PIPR

⁹ Article 12(3)(a), PIPR

¹⁰ Article 12(3)(b) PIPR

¹¹ Article 12(3)(d) PIPR

¹² Article 12(3)(e), PIPR

¹³ Article 12(3)(f), PIPR

¹⁴ Article 3, PIPR

¹⁵ Article 13(2), PIPR

¹⁶ Article 3, PIPR

¹⁷ Article 14(1)(a), PIPR

¹⁸ Article 14(1)(b), PIPR

¹⁹ Article 14(1)(c), PIPR

of protection through copyrights or patents,²⁰ ability to provide exceptions and limitations to rights conferred by industrial designs;²¹ undisclosed information including trade secrets, layout designs (topographies) of integrated circuits,²² provided the information is a secret,²³ has commercial value,²⁴ and reasonable steps have been taken to keep it a secret,²⁵ allows states to provide exceptions and limitations to this rights;²⁶ copyright and related rights,²⁷ through a balanced copyright and related rights framework that considers rapid technological developments and their disruptive and transformational nature on traditional models of production, dissemination, and use of copyrighted works, fair and adequate remuneration for authors and performers and facilitation of cross-border flows of educational and cultural materials,²⁸ ability of States to provide exceptions and limitations to the rights,²⁹ ability to provide exemptions and limitations for educational and research purposes,³⁰ and ability to provide exemptions and limitations to support cultural heritage;³¹

Traditional knowledge,³² by requiring applicants for this category of rights to provide source of the traditional knowledge,³³ proof of free and prior informed consent,³⁴ proof of fair and equitable benefit under relevant national law,³⁵ by taking measures to prevent and prohibit unauthorised utilisation of the traditional knowledge,³⁶ and by consulting relevant African and International instruments in developing governing rules;³⁷ traditional cultural expressions,³⁸ by requiring applicants to provide source of cultural expression or folklore,³⁹ proof of prior informed consent,

²⁰ Article 14(2) PIPR

²¹ Article 14(3), PIPR

²² Article 3, PIPR

²³ Article 15(1)(a) PIPR

²⁴ Article 15(1)(b) PIPR

²⁵ Article 15(1)(c) PIPR

²⁶ Article 15(2) PIPR

²⁷ Article 3, PIPR

²⁸ Article 11(2)(a)-(c), PIPR

²⁹ Article 11(3), PIPR

³⁰ Article 11(4), PIPR

³¹ Article 11(5), PIPR

³² Article 3, PIPR

³³ Article 18(2)(a), PIPR

³⁴ Article 18(2)(b), PIPR

³⁵ Article 18(2)(c), PIPR

³⁶ Article 18(3), PIPR

³⁷ Article 18(4), PIPR

³⁸ Article 3, PIPR

³⁹ Article 19(2)(a), PIPR

and proof of fair and equitable benefit sharing under relevant national regime,⁴⁰ requirement for States to take steps to prevent and prohibit unauthorised utilisation, and requirement to consult African and International instruments to develop governing rules;⁴¹ Genetic resources,⁴² by requiring applicants to provide information on source, proof of prior consent, and proof of equitable benefit sharing,⁴³ and taking steps to prevent unauthorised utilisation,⁴⁴ by States protect emerging technologies through existing categories of intellectual property rights or unique systems, adopting measures to promote access to new and emerging technologies, by supporting and encouraging the use of emerging technologies to enable industrialisation and value chains development, and promoting environmentally friendly use of emerging technologies and other emerging issues.⁴⁵

Article 7(1) however considers such intellectual property rights described above to be exhaustive where a property that enjoys intellectual rights protection is made available to the AfCFTA market either by the owner of the right, or by someone else with the consent of the owner. Pursuant to Article 7(2), conditions applicable to exhaustion of rights shall be described in the applicable annexes to the protocol which will be discussed further in subsequent part of this paper.

At the continental level for purposes of harmonisation and ensuring common rules, the protocol identified areas for collaboration to include information sharing,⁴⁶ identifying future issues that may require common rules,⁴⁷ the use of open-source licensing, research cooperation, and other collaborative models,⁴⁸ strengthening the means for securing fair share of the proceeds from adaptation, distribution, rental, communication, and other commercial use of work,⁴⁹ enhance the use of geographical indications, collective marks, and certification marks, traditional knowledge and genetic resources to enhance value addition on commercialisation of natural, agricultural,

⁴⁰ Article 19(2)(b)-(c), PIPR

⁴¹ Article 19(3)-(4), PIPR

⁴² Article 3, PIPR

⁴³ Article 20(1)(a)-(c), PIPR

⁴⁴ Article 20(2), PIPR

⁴⁵ Article 17(1)(a)-(d), PIPR

⁴⁶ Article 23(a), PIPR

⁴⁷ Article 23(b), PIPR

⁴⁸ Article 23(c), PIPR

⁴⁹ Article 23(d), PIPR

craft, industrial products, and other traditional cultural expressions,⁵⁰ facilitate the use of flexibilities under international instruments for the protection of public health, food security, agriculture, and nutrition,⁵¹ creation of mechanisms for collaboration among customs officials, judicial authorities, and other law enforcement agencies to resolve disputes relating to infringement of intellectual property rights, and the provision of technical assistance for investigation,⁵² initiate and undertake studies on intellectual property protection and enforcement-related issues,⁵³ promote public awareness intellectual property rights,⁵⁴ and facilitate registration of intellectual property rights on the continent.⁵⁵

The Protocol also made provision for the administration of intellectual property rights through automation and streamlining of intra-agency communication,⁵⁶ exchange of experience on registrable rights,⁵⁷ capacity building for intellectual property office to support technology transfer,⁵⁸ and support human resource development on intellectual property.⁵⁹ Also included in the protocol are provisions relating to enforcement of intellectual property rights which require States to provide holders of intellectual property rights access to legal mechanisms for enforcement of such rights,⁶⁰ consider balancing between the rights of holders and interest of consumers in devising enforcement procedures,⁶¹ and the procedure should also consider the administrative, technological and financial capacity of State parties.⁶²

Responsibilities have also been imposed on State Parties to enforce according to the Protocol, national law, and other treaty obligations, to build the capacity of representative organisations of intellectual property, build the capacity of rights holder's representative organisations, provide legal framework for dispute resolution through alternative dispute resolution (ADR), investigate

⁵⁰ Article 23(e), PIPR

⁵¹ Article 23(f), PIPR

⁵² Article 23(g), PIPR

⁵³ Article 23(h), PIPR

⁵⁴ Article 23(i), PIPR

⁵⁵ Article 23(j), PIPR

⁵⁶ Article 24(a), PIPR

⁵⁷ Article 24(b), PIPR

⁵⁸ Article 24(c), PIPR

⁵⁹ Article 24(d), PIPR

⁶⁰ Article 25(1), PIPR

⁶¹ Article 25(2), PIPR

⁶² Article 25(3), PIPR

and prosecute wilful trademark counterfeiting, copyright piracy crimes at a commercial scale including, unlawful disclosure or acquisition of trade secrets both in the physical and digital spaces, and develop and maintain accessible database of registered intellectual property rights and procedures.⁶³ The protocol interestingly provides judicial measures to protect and preserve the rights of holders. Article 27 requires State Parties to provide access to judicial injunction in disputes involving the infringement of intellectual property rights.

(j) LEGAL FRAMEWORK FOR INTELLECTUAL PROPERTY RIGHTS IN NIGERIA

The legal framework for intellectual property rights in Nigeria comprises the Copyright Act, 2022; Trademarks Act, Chapter T13 Laws of the Federation of Nigeria 2004; Trademark Malpractices (Miscellaneous Offences) Act, CAP T12 LFN, 2004; The Merchandise Marks Act, Cap M10 LFN, 2004; Patents and Designs Act, and Chapter P2 Laws of the Federation of Nigeria 2004, and the Plant Variety Protection ACT, 2021,.

3.1 COPYRIGHT ACT, 2022:

Copyright Act (CRsA), 2022 replaced the Copy Rights Act Chapter (Cap) C28 Laws of the Federation of Nigeria (LFN) 2004 and provides for the regulation, protection, and administration of copyrights and related matters in Nigeria.⁶⁴ In line with international practice, it was enacted to protect the rights of authors, ensure they get just rewards and recognition for their work, ensure compliance with international copyrights treaties and conventions, and enhance the regulatory capacity of the Nigerian Copyrights Commission, among others.⁶⁵ The creative works that are eligible for copyrights protection in Nigeria are literary works, musical works, artistic works, audio visual works, sound recordings, and broadcasts.⁶⁶ It however qualifies the literary, musical and artistic works that shall be eligible for protection by stating that the protection will be granted to these categories of works provided the authors expend efforts to give the work an original character and fixed in any medium of expression where it can be perceived, reproduced or communicated

⁶³ Article 26(1)-(5), PIPR

⁶⁴ CRsA, <https://placng.org/i/wp-content/uploads/2023/04/Copyright-Act-2022.pdf>

⁶⁵ S.1(a)-(d), CRsA

⁶⁶ S.2(1)(a)-(f), CRsA

directly or through a machine or device. Also excluded from protection are works which are intended as industrial designs at the time they made.⁶⁷

The Act also excludes ideas, procedures, processes, formats, systems, methods of operation, concepts, principles, discoveries or mere data; official texts of a legislative or administrative nature; and official state symbols and insignia, including flags, coat-of-arms, anthems, and banknote designs.⁶⁸ It eliminates the need for formality,⁶⁹ and confers eligibility on works with joint authorship where the work or substantial part of it is made by a Nigerian including juristic persons.⁷⁰ The Act confers exclusive right to reproduce, publish or perform the work in public, do same for any translation of the work, make any audiovisual work or a record of it, and distribute same to the public, for commercial purposes through sale or other transfer of ownership subject to meeting specified criteria, broadcast and communicate the work to the public, by wire or wireless means thereby making it accessible to the public, make any adaptation of the work, its translation, or any part thereof.⁷¹

The Act also defines the nature and scope of rights for all the categories of rights described therein. Also covered is the duration of protection conferred by the Copy Rights Act.⁷² Part II covers exceptions to copyrights, also covered in Part III are issues of ownership, transfers, and licences. On infringement, Part IV clearly defines what amounts to infringement and its legal consequences and copyright offences. Also covered are anti-piracy measures, performance rights, folklore, establishment of an institutional framework to regulate and administer the rights including the powers to make regulations. Overall, the Act, as anticipated by the protocol provides rights, limitations and exemptions, and other mechanisms to protect the copyrights of authors.

3.2 TRADEMARKS ACT CAP T13 LFN 2004:

The TradeMark Act 2004 replaced the Trademarks Act (TMA) No. 29 of 1965 which was repealed. Registration of proprietary rights confers exclusive rights to use of trade mark connected to

⁶⁷ S.2(6), CRsA

⁶⁸ S.3(a)-(e), CRsA

⁶⁹ S.4, CRsA

⁷⁰ S.5, CRsA

⁷¹ S.9, CRsA

⁷² S.19, CRsA

goods.⁷³ Such rights will be deemed infringed where a person, other than the proprietor uses the mark in the way it is permitted to be used, or uses a mark identical to the registered one or one closely resembling it so much so that it could likely cause deception or confusion, or gives the impression that it is a trade mark, or as importing a reference to some person having the right either as proprietor or as registered user.⁷⁴ The Act also subjects the rights issued upon registration to some limitations.⁷⁵ This applies to registration under part A of the Act.

Regarding registration under Part B, registration confers similar rights as those conferred by registration under Part A.⁷⁶ it also defined the criteria for registrability and conditions for validity of registration.⁷⁷ It prohibits deceptive and scandalous matters, names of chemical substances from being registrable, identical and resembling trademarks.⁷⁸ Also provided in the Act are the procedure, duration of registration, opposition to registration, procedure for challenging registration, appeal procedure, assignment and transmission, association of trademarks, removal from register, and use of trademarks in regarding goods for export. Also covered are rectification and correction of register, certification of trademarks, international arrangements, and powers to make regulations.

a. **MALPRACTICES (MISCELLANEOUS OFFENCES) ACT, CAP T12 LFN, 2004:**

This Act applies generally to trade malpractices. It creates certain offences relating to trade malpractices including false and misleading labels, packages, sells, offers for sale or advertisements that could be false, misleading and designed to create an incorrect impression about the quality, character, brand name, value, composition, merit or safety of a product.⁷⁹ It generally also covers the false and misleading use of weights and measures for commercial purposes and defines offences related therewith. it also makes it an offence to expose, offer for sale through misrepresentation or omission that is calculated to, or likely to as to its weight or measure or quantity to be sold or offered for sale.⁸⁰

⁷³ S.5(1), TMA

⁷⁴ S.5(2), TMA

⁷⁵ S.5(3), TMA

⁷⁶ S.6(1), TMA

⁷⁷ S.9, TMA

⁷⁸ S.11-13, TMA

⁷⁹ S.1 (a), Trade Malpractices (Miscellaneous Offences) Act (TMMOA)

⁸⁰ S.1 (g), TMMOA

b. MERCHANDISE MARKS ACT, CAP M10 LFN,2004:

The Act seeks to protect goods that have

been conferred with trademark, privilege or copyright protection from false trade description. It defines false description as

“a trade description which is false or misleading in a material respect as regards the goods to which it is applied, and includes every alteration of a trade description, whether by way of addition, effacement, or otherwise, where that alteration makes the description false or misleading in a material respect; and the fact that a trade description is a trade mark, or part of a trade mark, shall not prevent such trade description being a false trade description within the meaning of this Act”.

It applies to trade description covering number, quantity, measure, gauge, or weight of goods, standard of quality, fitness for purpose, strength, performance or behaviour, the place or country of production, mode of manufacturing or production, composition of material, or as to goods being under patent, privilege or copyright protection.⁸¹ The description also extends to the use of figure, word, or mark which in its common usage of trade is understood to be an indication of any of the above description.

It defines offences relating to trademarks and trade description to include forgery of trademarks, applying marks closely resembling a trademark with the intention to deceive, being in possession or making a die block machine or an instrument to forge a trademark. It is worth noting here that persons employed to make such instruments in the normal course of their business are exempted from liability for this category of offence, false description, or causes any of the described actions in this paragraph to be done.⁸² However, a person will not be guilty of an offence where lack of intention to defraud, reasonable precautions against committing an offence, no reason to suspect the genuine nature of the trademark or trade description, is established.⁸³ The Act explained the consequences of being found guilty of an offence, described in detail what amounts to the offences

⁸¹ S.2(1): trade description, (a)-(g), Merchandise Marks (MA)Act, Cap M10, LFN, 2004

⁸² S.3(1)-(e), MA

⁸³ S.3(2)(a)-(b), MA

described above. Overall, it further strengthens enforcement and protection of trademarks, patent and copyrights in Nigeria.

3.5 PATENTS AND DESIGNS ACT, CHAPTER P2 LAWS OF THE FEDERATION OF NIGERIA 2004:

Provides a legal framework for the registration and acquisition of proprietorship of patents and designs in Nigeria. it defines patentable inventions to include new inventions resulting from inventive activity and capable of industrial application, or new improvement on a patented invention.⁸⁴ It defines new inventions to mean inventions that do not form part of the state of the art, result from inventive activities not obviously flowing from the state of the art, being capable of industrial application if capable of being used in industry if capable of being manufactured.⁸⁵ The Act however excludes plant or animal varieties, the biological processes of their production, or inventions whose publication or exploitation will be considered contrary to public order or morality as a result of them being prohibited by law,⁸⁶ and principles and discoveries that are scientific in nature.⁸⁷ S.2(1) vests patent rights in the statutory inventor, meaning the first person to file for patent, or who justifiably claim foreign priority for patent application regarding a new invention.⁸⁸

The Act further entitles the true inventor to be named in a patent irrespective of such a person being the statutory inventor.⁸⁹ Interestingly, where a patent is applied for or obtained a patent without the consent of an inventor, the said patent shall be considered transferred to the inventor or the inventor's successor.⁹⁰ The Act clearly sets out the procedure for applying for patent and highlights the approval process. It defines the rights conferred by the issuance of a patent to include the preclusion of others from importing, selling or using the product, or stocking a product where the patent applies to goods, or applying a process to obtain a product where the patent is applicable to a process.⁹¹ Such rights are limited to acts concerning industrial and commercial purposes and

⁸⁴ S.1(1)(a)-(b), Patents and Designs Act (PDA)

⁸⁵ S.1(2)(a)-(b), PDA

⁸⁶ S.1(4)(a)-(b), PDA

⁸⁷ S.1(5), PDA

⁸⁸ S.2(1), PDA

⁸⁹ S.2(2), PDA

⁹⁰ S.3, PDA

⁹¹ S.6(1)(a)(b), PDA

does not extend to acts concerning a patented product that is lawfully sold in Nigeria.⁹² duration and lapse of patent, the time frame for expiration or lapse of a patent have also been provided for in the Act.

Regarding designs, S.12 defined industrial design to mean “Any combination of lines or colours or both, and any three-dimensional form, whether or not associated with colours...,” where it is intended for use as a model or pattern that yields technical results through multiplication. In this regard, the Act defines registrable designs to include new designs that are not contrary to public order or morality.⁹³ Also covered are rights to registration by statutory inventor, and detailed provisions on the registration process. Upon registration, the owner has the right to preclude others from reproducing the design, importing, selling or utilising same for commercial purposes, or holding it for utilisation for commercial purpose.⁹⁴ It defines infringement of industrial and design rights as situations where a person does or causes, an act that act which such a person has been prohibited from doing without licence from the owner of a patent.⁹⁵ Also covered are provisions for legal proceedings, and foreign priority.

3.6 PLANT VARIETY PROTECTION ACT, 2021:

This Act seeks to protect plant varieties, encourage investment in plant breeding and crop variety development, establish a protection office as the institutional framework which shall promote increased productivity for staple crops targeting smallholders. Its objectives include the promotion of increased productivity in staple crop production, increased mutual accountability in the seed sector, and the protection of new plant varieties.⁹⁶ It applies to breeder; and⁹⁷ plant genera and species. In terms of administration and regulation, the Act will be administered by the Plant Variety Protection Office,⁹⁸ whose functions include granting of breeder’s rights, maintenance of register,

⁹² S.6(3)(a)-(b), PDA

⁹³ S.13(1)(a)-(b), PDA

⁹⁴ S.19(1)(a)-(b), PDA

⁹⁵ S.25(1), PDA

⁹⁶ S.1(1)(a)-(c), Plant Variety Protection Act (PVPA)

⁹⁷ S.1(2)(a)-(b), PVPA

⁹⁸ S.3, PVPA

provision of information on breeder's rights, and facilitation of licensing, transfer of breeder's rights, and collaboration with local and international bodies among others ⁹⁹

The protection conferred by this Act applies to all general and species of plants,¹⁰⁰ and will be granted for new, distinct, uniform and stable variety; the variety is designated by a denomination as provided in the Act, and upon compliance with the requirement to pay prescribed fees.¹⁰¹ It defines the criteria for designating a variety as new to include a variety that has not been sold to anyone or has not been disposed of for purposes of exploitation with the consent of the breeder earlier than one year before application, four years outside the territory of Nigeria, and six years for trees and vines. It also provides procedure for application for Plant Variety Protection Rights.¹⁰² The application shall be considered and disposed of in accordance with Part V of the Act.

Upon conferment of the protection, the breeder becomes entitled to equitable remuneration from authorisation for use by others.¹⁰³ Such authorisation can be issued for production or reproduction, conditioning for propagation, offering for sale, export, import, and stocking.¹⁰⁴ The Act provides limitations and exceptions to a breeder's rights. The rights do not cover varieties that are for private and for non-commercial purposes, or those that are for experimental purposes among others.¹⁰⁵ Provisions also exist regarding nullity, cancellation, and surrender of breeder's rights,¹⁰⁶ and procedure for appeal against the decision taken pursuant to the act are also highlighted.¹⁰⁷

Also covered are provisions concerning the establishment of a development fund designed to utilise funds generated from this Act for the development and promotion, training of plant breeders on their rights, the establishment and maintenance of variety collection and database and activity relating to the administration of the Act.¹⁰⁸ Part X addresses offences and penalties. Offences are defined to include making false entry into the register of breeders, falsifying a copy of an entry in the register or a submitted document, producing or tendering false entry of copy as evidence,

⁹⁹ S.5(a)-(e), PVPA

¹⁰⁰ S.12, PVPA

¹⁰¹ S.13((1) &(2)(a)-(b), PVPA

¹⁰² Part IV, PVPA

¹⁰³ S.28, PVPA

¹⁰⁴ S.29(1)(a)-(g), PVPA

¹⁰⁵ S.30(1)(a)-(c), PVPA

¹⁰⁶ See Part VII, PVPA

¹⁰⁷ See Part VIII, PVPA

¹⁰⁸ S.44, and see generally Part IX, PVPA

submitting false documents, making false statements or representation to the Registrar, obstructing or hindering the Registrar carrying out of his functions, failing to appear at any proceedings under the Act, refusal to be sworn as a witness in a proceeding, produce document or answer questions, contravening obligation to use denomination, gives false information or make false statement in any application, and violating breeders right, among others.¹⁰⁹ Also covered is international collaboration and cooperation with provision empowering the minister to enter into agreements with foreign states, inter-governmental or non-governmental organisation to facilitate cooperation in testing.¹¹⁰

4. BENCHMARKING THE LEGAL FRAMEWORK WITH THE PROTOCOL

Having reviewed the AfCFTA Protocol on Intellectual Property Rights and the legal framework for implementation in Nigeria, this section analysis the legal framework alongside some key expectations of the Protocol.

4.1 IMPLEMENTING LAWS: As mentioned earlier, Part III of the protocol deals with Standards on Intellectual Property Rights and requires state parties to provide protection for New Plant Varieties, Geographical Indications, Marks, Copyright and Related Rights, Patents, Utility Models, Industrial Designs, Protection of Undisclosed Information, Layout Designs (Topographies) of Integrated Circuits, Emerging Technologies, Traditional Knowledge, Traditional Cultural Expressions and Folklore, and Genetic Resource

Article 8 requires State Parties to protect New Plant Varieties through a unique system that includes farmers' rights, plant breeders' rights, and rules on access and benefit sharing, as appropriate. At the domestic level, this is covered by the Plant Variety Protection Act 2021. It defines the scope and procedure for conferment of protection accordingly. This protection is given in addition to other measures put in place in compliance with obligations under various international treaties and conventions.

Article 9 Geographical Indications requires State Parties to protect geographical indications through a unique system. It further requires states to provide additional legal means including

¹⁰⁹ S.47(1)(a)-(l), PVPA

¹¹⁰ S.52, PVPA

certification marks, collective marks, or unfair competition laws to provide these additional protections. S.43 of the TradeMarks Act provides additional protection through certification trademarks. Although the Act does not provide for unfair competition, the Federal Competition and Consumer Protection (FCCP) Act 2018 provides protection against unfair business practices as it seeks to promote and maintain competitive markets in Nigeria.¹¹¹

Article 10 requires State Parties to provide for the protection for all categories of Marks and encourage protection that promotes sustainable industrial development through diversification and regional value chain development; and encourage registration for environmentally friendly goods and services. Although the Trademarks Act provides protection for marks,¹¹² it does not readily incorporate sustainability and environmental considerations. Therefore, the framework created by the Climate Change Act 2021 and other sectoral laws can be deployed to extend the protection to sustainability and environmentally considered marks.

Article 11 requires State Parties to provide for the protection for Copyright and Related Rights. Under the domestic legal framework, this is covered by the copyrights Act 2021 which aligns with Article 11(2)(a)-(c) of the Protocol. Article 12 requires State Parties to provide for the protection for Patents. This is covered under the domestic framework by the Patent and Designs Act. Although the Act covers some elements of technology, more need to be does not expand its scope to adapt to current technological developments. Article 13 requires State Parties to provide for the protection for Utility Models. Under the domestic legal framework, this is not covered by the Patents and Designs Act but has been provisionally provided for by a government Circular in 2021.¹¹³

Article 14 requires State Parties to provide for the protection for Industrial Designs. This is covered under the domestic legal framework by the Patent and Designs Act. Article 15 requires State Parties to provide for the protection of Undisclosed Information. The Trademarks Act require the registry to secure information provided by an applicant and protect the disclosure of such information to

¹¹¹ S.1, Federal Competition and Consumer Protection Act, 2018.

¹¹² See S.43(10), which provides that the provision of the First Schedule of the Act applies to registration of a mark, or registered marks, and the definition of Trademarks in S. 67, consequently, the Act applies to Marks.

¹¹³ European Commission, IP Country Fiche: Nigeria, https://intellectual-property-helpdesk.ec.europa.eu/system/files/2022-02/IP-Country-Fiche_NIGERIA.pdf

rivals. Article 16 requires State Parties to provide for the protection of Layout Designs (Topographies) of Integrated Circuits. These are protected under the domestic legal framework by the Patents and Design Act. Article 17 requires State Parties to provide for the protection Emerging Technologies. These are currently protected under the domestic legal framework by the instruments mentioned here. However, other sectoral and general laws can be deployed to develop a protective law for such technologies. Article 18 requires State Parties to provide protection for Traditional Knowledge, and Article 19 require protection for Traditional Cultural Expressions and Folklore, these are currently protected under the copyrights Act and TradeMarks Act respectively.

Article 20 requires State Parties to provide protection for Genetic Resources. Although under the domestic legal framework, there is no specific law enacted by the National Assembly in this regard, genetic resources are protected by the National Environmental (Access to Genetic Resources and Benefit Sharing) Regulations, 2009. Part II of the regulation covers access to genetic resources, while Part III covers benefit sharing. In this regulation, clause 25 defines genetic resources as “*genetic materials of actual or potential value*”. It further defines genetic materials as “any genetic material of plant, animal, microbial or other origin containing functional units of heredity”. The second schedule contains guidelines on form and contents of prior informed consent (PIC). Item 4 of the PIC entitled ‘Benefit’ requires the applicant to provide information on the kind of benefits that will result from the acquisition of access to such genetic material, importantly, applicant is also required to specify the benefit-sharing arrangements (both monetary and non-monetary) benefits arising from the access to genetic resources.

In addition to the above, intellectual property rights protection is also impacted by some general and sectoral laws such as the Companies and Allied Matters Act (CAMA) 2020,¹¹⁴ the National Office for Technology Acquisition and Promotion (NOTAP) Act,¹¹⁵ National Agency for Food and Drug Administration and Control (NAFDAC) Act,¹¹⁶ Federal Competition and Consumer

¹¹⁴ Which repealed the CAMA, Cap C20, LFN 2004.

¹¹⁵ Cap N62, LFN 2004

¹¹⁶ Cap N1, LFN 2004

Protection Commission Act, Cybercrimes (Prohibition, Prevention, etc.)(Amendment) Act 2024,¹¹⁷ and Standards Organization of Nigeria (SON) Act 2015,¹¹⁸ among others

4.2 BENEFIT-SHARING: The Article of the protocol highlighted in 4.1 above require applicants for the various rights protection to provide proof of equitable benefit sharing within the domestic legal framework. This implies that applicants are required to demonstrate, compliance with the benefit-sharing provisions of the applicable national law. For instance, National Environmental (Access to Genetic Resources and Benefit Sharing) Regulations, 2009 provide benefit-sharing procedure and a form for PIC to guide applicants in complying with the requirements of the regulation. It should be highlighted here that the key legal instruments described in 4.1 contain benefit-sharing requirement provisions. This aligns with the expectations and requirements of the Protocol.

4.3 COOPERATION: the protocol envisages cooperation with other state parties. The relevant instrument in 4.1 above also anticipate and encourage such cooperation to ensure efficient implementation.

4.4 COMPLIANCE WITH INTERNATIONAL TREATIES: the protocol envisages its implementation by State Parties to be done alongside implementation and compliance with other related international treaties. The instruments reviewed in 4.1 also makes room for compliance with international obligations under other treaties. Furthermore, Nigeria is a party to several intellectual property rights treaties which include Beijing Treaty on Audiovisual Performances, Berne Convention for the Protection of Literary and Artistic Works, Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled, Paris Convention for the Protection of Industrial Property, Patent Cooperation Treaty (PCT), Patent Law Treaty (PLT), Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement, WIPO Copyright Treaty (WCT), WIPO Performances and Phonograms Treaty (WPPT). These instruments are administered alongside the national instruments developed to address intellectual property.

¹¹⁷ Which repealed the Cybercrimes (Prohibition, Prevention, etc.) Act No. 17 2015

¹¹⁸ Which repealed the SON Act Cap S9, LFN 2004

5. CONCLUSION AND RECOMMENDATIONS

The above review and analysis indicate that Nigeria has a domestic legal framework for the implementation of the AfCFTA Protocol on Intellectual Property Rights Protection. Having said that, there are some observations which have been made about the framework, and which if addressed, could strengthen and make the intellectual property rights protection ecosystem more effective. Below are a few recommendations worthy of mention:

5.1 OBSERVATIONS:

1. A number of laws governing intellectual property rights protection in Nigeria are old and may not be suitable for addressing some contemporary developments. For instances, the Trade Marks Act is a 1965 legislation, the Patents Act is a 1970 legislation, and the National Environmental (Access to Genetic Resources and Benefit Sharing) Regulations is a 2009 regulation. While they provide protection, the extent to which they can address modern challenges is debatable.
2. Article 9 of the protocol requires states to provide additional protection against unfair competition. There is no provision in the Trade Marks Act providing such protection, although the FCCP Act provides some protection.
3. Article 10 encourages registration for environmentally friendly goods and services. However, the Trade Marks Act does not readily incorporate sustainability and environmental considerations.
4. Article 17 requires State Parties to provide for the protection for emerging technologies. The Patent Act covers some elements of technology.
5. Article 13 requires State Parties to provide for the protection for Utility Models as envisaged by Article 13 of the Protocol is not covered by the Patents and Designs Act, provisionally by a government Circular in 2021.¹¹⁹

¹¹⁹ European Commission, IP Country Fiche: Nigeria, https://intellectual-property-helpdesk.ec.europa.eu/system/files/2022-02/IP-Country-Fiche_NIGERIA.pdf

6. On the requirement to protect undisclosed information in Article 15, the provision in providing this protection in the Trade Marks Act appears to be limited.
7. As noted earlier, genetic resources are protected by a regulation, the National Environmental (Access to Genetic Resources and Benefit Sharing) Regulations. Furthermore, it is a 2009 instrument.

5.2 RECOMMENDATIONS:

1. There is a need to review obsolete intellectual property rights laws to either amend or repeal them, bringing them at par with latest development in intellectual property rights protection.
2. There is a need to review the mechanism for protection against unfair protection and develop a more responsive mechanism that aligns with the AfCFTA and other international obligations.
3. The framework created by the Climate Change Act 2021 and other sectoral laws can be deployed or adapted to extend the protection to sustainability and environmentally considered marks.
4. there is need to develop a robust framework for protecting emerging technologies either by updating the Patent Act or enact a new law to be administered alongside the Patent Act if need be. This could be done by adapting and deploying other sectoral and general laws to develop such protective mechanism.
5. protection for Utility Models as envisaged by Article 13 should be incorporated into the Patents and Designs Act through amendment.
6. The provisions of the Trade Marks Act regarding securing information provided by applicant should be reviewed and updated to adequately cover undisclosed information as envisaged by Article 15 of the protocol.
7. On the protection of genetic resources, as a way of strengthening the protection mechanism, the provisions of this regulation could be incorporated into a law which serve the purpose of both and updating the protection mechanism.

iv. CONCLUDING REMARKS

A key factor for the successful implementation of the AfCFTA Protocol on Intellectual Property is having an enabling legal framework in State Parties. This will help align the agreement with domestic implementation laws. Upon review of the protocol, this paper analysed the domestic legal framework for implementation of the protocol in Nigeria. It found that a domestic implementation framework comprising domestic and international instruments exists. However, some gaps have been identified that could prevent the protocol from realising its full potentials through effective alignment. To address that this paper made various recommendations on how to address the gaps. Addressing these gaps and implementing annexes to the protocol will provide an efficient protection mechanism. Presently, draft annexes on Copyright and related Rights, Industrial Designs, the AfCFTA Intellectual Property Office, Marks, Traditional Knowledge, Traditional Cultural Expression, Genetic Resources, New Plant Varieties, Utility Models, Patents, and Geographical Indications are being reviewed. Once adopted, it will further enhance domestic implementation of the Protocol. As we await the completion of the review process, Nigeria should place itself in the best position to leverage the protocol by enhancing its domestic legal framework.