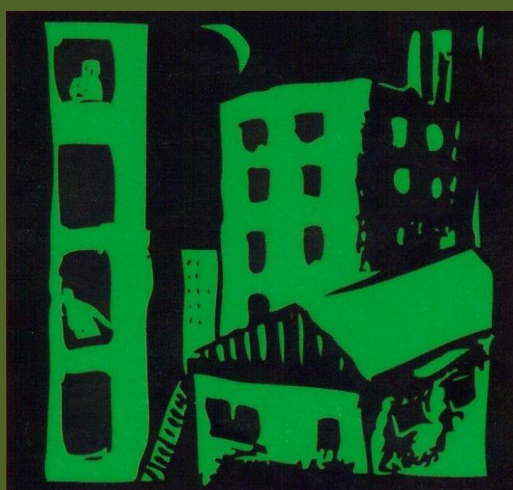


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**Regional integration
in the area of
intellectual
property: The case
for Southern African
Development
Community
involvement**

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1 INTRODUCTION

As the Southern African Development Community (SADC) seeks to position itself as a conduit to promote economies of scale and contribute to the development of its Member States, the importance of intellectual property (IP) as a driver for innovation, investment and thus economic activity should not be understated. While, admittedly, IP is not the most pressing priority for most African countries, it is of considerable importance to our trading partners and their constituent industries as demonstrated in multilateral forums such as the World Trade Organization (WTO), the World Intellectual Property Organization (WIPO) and at regional level as seen during the Economic Partnership Agreement (EPA)

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negotiations with the European Community (EC).¹

It is submitted that the benefits of regional integration in the field of IP are accentuated in developing countries, of which the SADC is exclusively composed. Limited capacity and resources can be pooled to avoid duplication and to draw on the wherewithal of regional partners;² while the augmentation of relatively small individual markets creates a greater incentive for investors to channel resources into the region.³ Despite the above, discussion on regional integration in the context of the SADC has traditionally centred on goods. Services have more recently entered the discussion.⁴ It was not until the onset of negotiations on the EPA that the debate on regional integration in the field of IP gained momentum in the SADC.⁵ However, the parties to the EPA ultimately decided to conclude a draft agreement that covers goods alone to the exclusion of services and IP, the so-called “new generation” issues.⁶

This article will look at the existing frameworks for regional IP integration in Africa, such as the African Regional Intellectual Property Organization (ARIPO) and the Organisation Africaine de la Propriété Intellectuelle (OAPI), assessing whether they are effective in mainstreaming integration of IP law in the SADC region, and to what extent, the SADC, as an institution, can remedy any shortcomings in the existing regime. In order to understand why there is a case for the SADC to play a role in terms of regional integration of IP laws, it is necessary to analyse the current regional IP frameworks. This will allow us to identify the benefits that have been derived and the factors which render the current regime inadequate in terms of mainstreaming integration. The article will also look at recent developments in the multilateral and regional arenas that render the consideration of regional integration of IP laws in the SADC as one that must assume prominence. Drawing on the factors mentioned above, the article will then conclude by examining whether there is in fact a case for mainstreaming regional integration of IP laws in the SADC.

¹The website of the European Commission explains that the improvement and enforcement of IP policy in third-world countries is a key objective of its trade policy and that bilateral trade agreements are an important tool in achieving this objective. See <http://ec.europa.eu/trade/policy/accessing-markets/intellectual-property/> (accessed May 2014).

² Simplification and reduction of IP office staff workloads are among the accepted benefits of integrating IP prosecution processes. See Mohanty N “The advantages and disadvantages of the harmonization of the patent system” at 58. Available at http://www.jpo.go.jp/torikumi_e/kokusai_e/pdf/ipcoop_asia-pacific_e/india02.pdf (accessed April 2014). It is submitted that these benefits can allow developing countries to refocus their limited resources from IP prosecution to more pressing concerns.

³ Hartzenberg T “Regional integration in Africa” (2011) at 2. Available at http://www.wto.org/english/res_e/reser_e/ersd201114_e.pdf (accessed May 2014).

⁴ The Department of Trade and Industry “Additional Note on the SADC Trade in Services Protocol” (2013). Available at <http://www.thedti.gov.za/parliament/SADC.pdf> (accessed May 2014).

⁵ Phiri D “Economic Partnership Agreements and intellectual property rights protection: Challenges for the SADC region” (2008). Available at <http://www.saiia.org.za/opinion-analysis/economic-partnership-agreements-and-intellectual-property-rights-protection-challenges-for-the-southern-african-development-community-sadc-region> (accessed May 2014).

⁶ The Department of Trade and Industry “SADC EPA Group - EC negotiations: Assessing the emerging Outcome” (2008) at 7. Available at <http://www.thedti.gov.za/parliament/EPAoutcomes.pdf> (accessed May 2014).

2 EXISTING AFRICAN FRAMEWORKS

Since the 19th century, the need for uniform standards of IP protection has been recognised globally. This gave rise to the adoption of international treaties and institutions to administer them.⁷ The 20th century saw the continuation of this push to internationalise IP standards with the creation of additional agreements and institutions to this end.⁸

During the 1960s and 1970s, most African countries were gaining independence from colonisation. It was during this period that these nations sought to establish institutions that would deal exclusively with the harmonisation of their IP laws in order to promote *inter alia*, economic development on the continent.⁹ These efforts led to the creation of institutions that are today known as the ARIPO and the OAPI. The purpose of looking at existing regional IP institutions in Africa is to identify where the involvement of the SADC can improve upon the status quo. Therefore, the discussion will focus more on the ARIPO than the OAPI since, as will be seen below, no SADC country is a member of the latter and the article explores how the SADC could better serve the ARIPO Member States, not the regional grouping's Francophile counterpart. OAPI will be discussed where relevant to draw comparisons with the ARIPO.

2.1 The ARIPO

The ARIPO headquarters are in Harare, Zimbabwe. The Organisation is governed by the Agreement on the Creation of the ARIPO, more commonly known as the Lusaka Agreement, in reference to the city in which the Treaty was adopted. Membership is open to all Member States of the United Nations Economic Commission for Africa (UNECA) or the African Union (AU).¹⁰ However, only English speaking nations have joined,¹¹ with their Francophone compatriots preferring the OAPI. The ARIPO Members are as follows: Botswana, Gambia, Ghana, Kenya, Lesotho, Liberia, Malawi, Mozambique, Namibia, Rwanda,¹² Sierra Leone, Somalia, Sudan, Swaziland, Tanzania, Uganda, Zambia, and Zimbabwe. A number of English speaking countries have not joined the ARIPO, the most notable among these being South Africa.¹³

⁷ The 19th century saw the creation of the Paris Convention for the Protection of Industrial Property 1883 (Paris Convention), the Berne Convention for the Protection of Literary and Artistic Works 1886 (Berne Convention) and the Bureaux Internationaux Reunis pour la Protection de la Propriete Intellectuelle (BIRPI) in 1893 which managed the aforementioned instruments.

⁸ BIRPI later relocated from Berne to Geneva and changed its name to the WIPO pursuant to the Convention Establishing the World Intellectual Property Organisation 1967. The pivotal development in the establishment of internationally uniform IP standards, however, occurred with the conclusion of the Uruguay Round of Multilateral Trade Negotiations and the establishment of the WTO which oversees the Agreement on Trade Related Aspects of Intellectual Property Rights 1994 (TRIPS).

⁹ See Art III of the Lusaka Agreement on the Creation of the African Regional Intellectual Property Organization (ARIPO) 1976 and the Preamble of the Bangui Agreement Relating to the Creation of the African Intellectual Property Organization, Constituting a Revision of the Agreement Relating to the Creation of an African and Malagasy Office of Industrial Property, 1977 (Bangui Agreement).

¹⁰ Art IV of the Lusaka Agreement.

¹¹ Lusophone Mozambique is an exception to this.

¹² Rwanda is the most recent country to become a Member, having joined in September 2011.

¹³ While South Africa has 11 official languages, English is the prevailing business language.

While the Lusaka Agreement governs institutional matters, two other instruments deal with substantive issues. They are the Harare Protocol on Patents and Industrial Designs within the Framework of the African Regional Industrial Property Organisation of 1982 (Harare Protocol) and the Banjul Protocol on Marks of 1993. The Harare Protocol governs the substantive law of patents, industrial designs and utility models,¹⁴ while the Banjul Protocol deals with marks (trademarks and service marks).¹⁵

In the case of the Harare Protocol, 17 of the 18 ARIPO Members are signatories.¹⁶ This means, for example, that a patent applicant can file an application at the ARIPO or the IP office of any Member country which must then transmit the application to the ARIPO headquarters for normal processing, designating any number of the other 16 signatories to the Protocol as territories in which protection is sought.¹⁷ The ARIPO then examines the application and if it is deemed to have fulfilled the prescribed requirements, the designated Member States are informed.¹⁸ Designated countries are given six months to declare that the application shall have no effect in their territories due to inconsistency with either the provisions of the Protocol or domestic law; otherwise the patent shall be effective in the applicable territories.¹⁹

Therefore, a patent granted by the ARIPO office shall, in each designated State, have the same effect as one registered, granted or otherwise having effect under the national law of the applicable designated country.²⁰ However, the grant of the patent is subject to conformity with the applicable domestic law. In addition, a patent granted by the ARIPO shall in each designated State be subject to the provisions of the applicable domestic law on compulsory licences, forfeiture or the use of patented inventions in the public interest.²¹ The implication is that domestic IP patent offices retain substantive autonomy notwithstanding the operation of a supranational regional registry. In the case of the Banjul Protocol, only nine ARIPO members are signatories.²² Every application for the registration of a mark shall be examined in accordance with the national laws of a designated State.²³ Hence, the registration of a mark shall have the same effect in each designated state as if it were filed and registered under the national law of each such State.²⁴ If a mark is registered by the ARIPO, each designated country may declare that the registration has no effect in its territory on the basis of any grounds.²⁵ At its eighth session in 2002, the Council of Ministers decided to expand the

¹⁴ This substantive area was added by a 2001 amendment to the Protocol.

¹⁵ Kongolo T "The African Intellectual Property Organizations: The necessity of adopting one uniform system for all Africa" (2000) 3(5) *Journal of World Intellectual Property* 717.

¹⁶ Somalia is the only member of the ARIPO which has not acceded to the Harare Protocol.

¹⁷ Kongolo (2000) at 719.

¹⁸ S 3(1)(c) of the Harare Protocol.

¹⁹ S 2 of the Harare Protocol.

²⁰ S 2 of the Harare Protocol.

²¹ S 3 (10) of the Harare Protocol.

²² These countries are: Botswana, Lesotho, Liberia, Malawi, Namibia, Swaziland, Uganda, Tanzania and Zimbabwe.

²³ S 6(1) of the Banjul Protocol.

²⁴ S 8(1) of the Banjul Protocol.

²⁵ S 6(2) of the Banjul Protocol.

Organisation's mandate to include copyright and related rights.²⁶ Efforts to give effect to this mandate are ongoing.

2.2 The OAPI

The OAPI is governed by the Agreement Relating to the Creation of an African Intellectual Property Organization. This Treaty is more commonly known as the Bangui Agreement, in reference to the city in which it was signed by the parties. The Bangui Agreement provides that any African state which is party to the Convention Establishing the WIPO, the Paris Convention, the Berne Convention and/or the Universal Copyright Convention may apply to join the OAPI.²⁷

Despite its inclusive membership criteria, only 17, all French speaking (with the exception of Lusophone Guinea Bissau), sub-Saharan nations have joined the OAPI.²⁸ The Bangui Agreement encompasses nine Annexes which cover the following substantive topics: patents; utility models; trademarks and service marks; industrial designs; trade names and protection against unfair competition; appellations of origin; and copyright and the cultural heritage.²⁹ The key factor differentiating the OAPI from its Anglophone counterpart is that signatories to the Bangui Agreement have adopted a uniform IP system in which the OAPI acts as a national IP office for its Members;³⁰ whereas, under the regime created by the Lusaka Agreement, national institutions prevail.³¹ If meaningful regional integration of IP laws is to be attained in Anglophone Africa, the following shortcomings must be addressed.

The groupings are composed on the basis of language as opposed to more economically efficient factors, such as, geography or common economic interests. This is an unfortunate legacy of the colonial era.³² SADC immediately springs to mind as a grouping which is constituted by Members with close geographical, cultural, political and economic links. Still on membership, South Africa is the leading investment destination on the African continent.³³ Therefore, logic suggests that South Africa's absence from the ARIPO reduces the regional body's appeal from the perspective of investors.

A key drawback of protecting one's IP using the ARIPO is that the institution facilitates a fragmentation of rights. The large discrepancies between membership of the Lusaka Agreement, and the Banjul and Harare Protocols mean that the ARIPO rights holders are faced with a complicated setup when it comes to understanding which

²⁶ See <http://www.aripo.org/index.php/aripo-mandate> (accessed May 2014).

²⁷ Art 22(2) of the Bangui Agreement.

²⁸ Benin, Burkina Faso, Cameroon, Central Africa, Congo, Cote d'Ivoire, Equatorial Guinea, Gabon, Guinea, Guinea Bissau, Mali, Mauritania, Niger, Senegal, Chad, Togo are the constituent countries.

²⁹ This can be contrasted with the relatively narrow scope of the ARIPO which only caters for the four substantive areas mentioned above.

³⁰ Arts 2(1) and 2(2) of the Bangui Agreement.

³¹ See for example s 3(6) of the Harare Protocol and s 6(1) of the Banjul Protocol.

³² Kongolo (2000) at 717.

³³ UNCTAD "World Investment Report" (2013) at 22. Available at http://unctad.org/en/PublicationsLibrary/wir2013_en.pdf (accessed May 2014).

regimes are applicable in the various jurisdictions. This could be avoided by the ARIPO adopting the “single undertaking” approach, used so effectively by the WTO.³⁴

Furthermore, rights granted by the ARIPO, in effect, are always subject to the national laws of each individual Member. This, coupled with the fact that there are no provisions regarding the enforcement of rights or remedies for infringement under the ARIPO, renders the filing of applications under the institution somewhat of a fruitless exercise as the applications would need to be supplemented by national ones in order to be enforceable. Again, the OAPI has adopted a different approach, providing both civil and criminal remedies in the case of infringement.³⁵

Admittedly, adhering to the principle of territoriality has the benefit of upholding national sovereignty, an ideal which is tremendously valued in post-colonial Africa.³⁶ However, clinging slavishly to sovereignty, in the context of IP, is done at the expense of considerable practical, economic and even cultural benefits. It is submitted that an approach more akin to that adopted by the OAPI would yield great benefit if implemented by Southern African countries. The entry into force of the SADC Free Trade Agreement (SADC FTA) in 2008 has demonstrated that there are considerable gains to be made by partially ceding national sovereignty in the interests of economic integration.³⁷ The next section will discuss the desirability of using the SADC as an institution to promote regional integration of IP laws. This will be done by addressing the shortcomings identified in the current section and highlighting certain factors that render the SADC a more suitable forum in its own right.

3 THE SADC INSTITUTION AS A FORUM

This section deals specifically with the merits of the SADC playing a greater role in the regional integration of IP laws in Southern Africa. The discussion will look at where IP regulation can fit into existing efforts on the part of the SADC to create a common Southern African market as well as at various international developments that add to the case for the greater involvement by the SADC.

3.1 A brief introduction to SADC

Before delving into the intricacies, it is important to give a brief introduction to the SADC in order to create a good understanding of the potential role that the institution can play in the harmonisation of IP laws.

The SADC in its current form was established in 1992 by The Declaration and Treaty of SADC (SADC Treaty). The bloc’s predecessor, the Southern African

³⁴ According to the “single undertaking” principle, when a territory signs the WTO Agreement, it agrees to all Annexes including the General Agreement on Tariffs and Trade (GATT), the General Agreement on Trade in Services (GATS), TRIPS etc.

³⁵ Annex 1 to the Bangui Agreement.

³⁶ The territoriality principle is the doctrine whereby an IP right granted in a particular country is only effective and enforceable in that country in accordance with domestic law. The principle is enshrined in Art 4 *bis* (1) of the Paris Convention.

³⁷ This concept will be expanded upon in Part 3.2 below from paragraph 5.

Development Co-ordination Conference (SADCC) had existed since 1980 and included much of the current membership.³⁸ The objectives of the current institution are, *inter alia*, to achieve development and economic growth; to evolve common political values, systems and institutions; and to achieve complementarity between national and regional strategies and programs.³⁹ The main SADC policymaking institutions are the Summit of Heads of State (Summit) and the Council of Ministers (Council).⁴⁰ These principal bodies are supported by various sector specific committees, contact points, a secretariat and a Tribunal.⁴¹ There is also scope for additional institutions to be created within the SADC framework.⁴²

3.2 Existing efforts at harmonisation

The role of IP in cross-border trade cannot be overstated. Companies seeking to trade their goods internationally require assurances that their IP will be protected in foreign territories. Hence, IP, together with factors, such as, the size of a market, infrastructure, as well as political and economic stability, constitute important variables in deciding whether to invest in a particular territory. On the importance of IP to US investors, Ron Kirk, the United States Trade Representative (USTR) said the following:

Let's be clear: IP theft in overseas markets is a job killer, and it's an export killer. USTR will work with a broad range of stakeholders to vigorously pursue changes to the policies of trading partners that put us at such a disadvantage. We will use all the trade policy tools we have at our disposal.⁴³

Therefore, it would be remiss to exclude IP when discussing efforts to promote regional integration of economic laws within the SADC region. Intellectual property has largely been seen as a trade issue by industrialised countries as they have traditionally enjoyed a comparative advantage in the export of innovative products.⁴⁴ This explains the

³⁸ Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Tanzania, Zambia, and Zimbabwe.

³⁹ Art 5 of the SADC Treaty.

⁴⁰ The Summit is the principal policymaking institution of the SADC and is made up of Heads of State and/or Government; while the Council is responsible for overseeing the functioning and development of the SADC and ensuring that the policies are properly implemented, it consists of ministers from each member state, usually those responsible for their country's economic planning or finance. See Saurombe A "The role of SADC institutions in implementing SADC treaty provisions dealing with regional integration" (2012) 29 *PER* 458.

⁴¹ Chapter 5 of the SADC Treaty.

⁴² Article 9 (2) of the SADC Treaty.

⁴³ REMARKS BY AMBASSADOR RON KIRK ON WORLD INTELLECTUAL PROPERTY DAY. AVAILABLE AT [HTTP://WWW.USTR.GOV/ABOUT-US/PRESS-OFFICE/SPEECHES/TRANSCRIPTS/2010/APRIL/REMARKS-AMBASSADOR-RON-KIRK-WORLD-INTELLECTUAL](http://www.ustr.gov/about-us/press-office/speeches/transcripts/2010/april/remarks-ambassador-ron-kirk-world-intellectual) (ACCESSED FEBRUARY 2011).

⁴⁴ Abbott F "Protecting First World assets in the Third World: Intellectual property negotiations in the GATT multilateral framework" (1989) 22 *Vanderbilt Journal of Transnational Law* 689. This trend leads to technology transfer and diffusion of technology in developing countries. See World Energy Council "Energy sector environmental innovation: Understanding the roles of technology diffusion, intellectual property rights and sound environmental policy for climate change" (2012) at 7. Available at http://www.worldenergy.org/documents/wec_rules_of_trade_ipp_paper.pdf (accessed May 2014). See also Maskus K and Fink C "Intellectual property and development: Lessons from economic research"

insistence of, for example, the EU and the US, for the inclusion of IP protection in bilateral and multilateral trade instruments to which developing countries are party.⁴⁵

Currently, the most meaningful effort to mainstream regional integration of economic laws within the SADC is the Protocol on Trade. The Protocol forms part of the legal basis for implementation of the Regional Indicative Strategic Development Plan (RISDP).⁴⁶ The starting point of the RISDP is the SADC FTA.⁴⁷ The FTA incorporates 12 of the 15 SADC Member States,⁴⁸ creating a regional market worth US\$360 billion with a total population of 170 million. Angola and the Democratic Republic of Congo (DRC) are expected to join in future, adding a further US\$71 billion and 77 million people to the SADC market.⁴⁹

Parties to the FTA have agreed to progressively eliminate all tariffs and non-tariff barriers to trade between them. Currently, about 85% of all trade in goods among parties is duty free. However, the IP rights vested in the goods, with the exception of copyright, are subject to the principle of territoriality. This is undesirable from the perspective of industrial property holders as protection must be sought in each individual country where the goods will be traded. This significantly increases costs and may prevent international firms from entering markets where protection is unavailable.⁵⁰

It is equally burdensome for the bureaucracies in some of the SADC countries as many of them simply do not have the human or financial resources to effectively conduct the prosecution or enforcement of IP rights. It has rightly been stated that IP is not high on the list of priorities of most African countries.⁵¹ This is particularly true in the southern African region where challenges, such as, HIV/AIDS, tuberculosis, and unequal distribution of economic resources exacerbated by the global economic recession and climate change, to name a few, occupy the time of policy makers. It is submitted that this is all the more reason why regional integration of IP law must be considered. Shifting the forum from individual countries to the SADC institution would improve matters.

In addition, it should be noted that exposing the same goods to differing treatment throughout the region with respect to IP runs counter to the uniformity and

(2005) at 41. Available at <http://siteresources.worldbank.org/INTRANETTRADE/Resources/Pubs/IPRs-book.pdf> (accessed May 2014).

⁴⁵ See footnote 1 above on EU policy and Ambassador Ron Kirk on US policy at footnote 43 above.

⁴⁶ SADC "Regional Indicative Strategic Development Plan." Available at <http://www.sadc.int/about-sadc/overview/strategic-pl/regional-indicative-strategic-development-plan/> (accessed May 2014).

⁴⁷ Besides the FTA, the RISDP sets other ambitious objectives, such as, the completion of negotiations on a common market by 2015, a monetary union and central bank by 2016, and culminating in a regional currency by 2018.

⁴⁸ The 12 Member States that are parties to the SADC FTA are: Botswana, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe.

⁴⁹ SADC "Towards a common future." Available at <https://saso.sadc.int/french/regional-integration/tifi/sadc-free-trade-area/fta-leaflet/> (accessed July 2014).

⁵⁰ See the discussion on the territoriality principle in footnote 36 above.

⁵¹ Abbott (1989). See also Maister B, De Jonge B & Napier G *Harnessing intellectual property rights for development objectives - The double role of IPRs in the context of facilitating MDGs Nos. 1 and 6* (Nijmegen, Netherlands, Wolf Legal Publishers 2011) at 269.

predictability that encourage intra - regional trade, and would undermine the ambitious objectives of the FTA and the RISDP. The SADC has noted the important role that IP plays in trade and investment in the region by including it in Chapter 6 of the SADC Protocol on Trade. However, the instrument does not provide its own norms on IP.⁵² The only provision that covers IP merely directs Members to conform to the TRIPS Agreement.

If the Summit were to agree on deepening the IP provisions of the SADC Trade Protocol and create a committee comprising IP experts from throughout the region to administer the extended framework, this would allow Members of the bloc to pool resources. The countries with relatively advanced IP systems could take the lead in terms of drafting and implementing the instrument while the other Members recognise and translate the decisions taken by their better established counterparts. Where ambiguities or conflicts in the implementation of the new IP framework arise, the SADC Tribunal could be called upon to render advisory opinions or provide adjudicative assistance.⁵³

As mentioned above, the SADC Treaty expressly provides for the creation of new institutions as necessary. Such an exercise would be in line with the SADC objectives of achieving complementarity between national and regional strategies and programs as well as eliminating obstacles to trade identified in the SADC Treaty and Trade Protocol. Moreover, this would result in better service delivery for IP rights holders and would allow the countries that have not prioritised IP to focus their resources on the more pressing issues.

By way of example, South Africa has computerised databases for trademarks; whereas Namibia is still paper based. This is due to human capacity and financial restrictions that have persisted despite technical assistance from institutions like the WIPO. The result is that despite the two countries having very similar substantive trademark laws, an application for a simple mark can be accepted within a few months in South Africa, whereas in Namibia the very same trademark can remain pending for years or even indefinitely, which is completely undesirable for all parties concerned. Surely it would be more efficient for all stakeholders if the trademark could be registered under a common framework whereby Namibian officials could simply recognise the decisions of their South African colleagues.

4 INTERNATIONAL DEVELOPMENTS

Aside from the above, the WTO discussions on IP and access to medicines and the WIPO discussions on protecting traditional knowledge have highlighted that southern African

⁵² Art 24 of the SADC Protocol on Trade is the only provision among the SADC instruments that deals with IP rights, it provides as follows: " Member States shall adopt policies and implement measures within the Community for the protection of Intellectual Property Rights, in accordance with the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights".

⁵³ Here it is necessary to acknowledge that the Tribunal has serious institutional issues which led to its current state of suspension. These will need to be resolved before the body can realistically perform such a role.

countries stand to gain, in terms of their international policy objectives, from adopting an integrated approach to IP laws in the region.

4.1 WTO discussions on IP and access to medicines

The TRIPS Agreement has been much maligned as promoting the interests of the more developed WTO Members over those of their counterparts from the developing world.⁵⁴ However, the WTO Decision on Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health⁵⁵ (August 30 Decision) contains aspects that without question are specifically designed to serve the interests of development in lower income countries.

Of particular relevance to the SADC and its approach to IP is Paragraph 6 of the August 30 Decision. The provision creates a special regional waiver of Article 31(f) of the TRIPS Agreement. Article 31(f) made it a violation of the TRIPS Agreement for a country with pharmaceutical manufacturing capacity to issue a compulsory licence to manufacture a patented medicine for the sole purpose of export to a country with limited to no manufacturing capacity in the pharmaceutical sector. The result is that low income countries have been unable to meet their demand for cheaper versions of patented medicines via import.

In order to be eligible for the said waiver, the country must be a party to a Regional Trade Agreement (RTA),⁵⁶ within the meaning of Article XXIV of the GATT 1994 and the Decision of 28 November 1979 on Differential and More Favorable Treatment Reciprocity and Fuller Participation of Developing Countries (Enabling Clause),⁵⁷ of whose membership at least 50 per cent consists of Least Developed Countries (LDCs). The waiver was negotiated for the express purpose of assisting eligible countries in “harnessing economies of scale for the purposes of enhancing purchasing power for, and facilitating the local production of pharmaceutical products.”⁵⁸

The eligibility criteria for the Paragraph 6 waiver ensure that it will be of exclusive benefit to regional groupings in sub-Saharan Africa where public health problems, such as, HIV/AIDS, tuberculosis and malaria are particularly acute.⁵⁹ The eligible regional groupings are the SADC and the Common Market for East and Southern Africa (COMESA).⁶⁰

⁵⁴ See discussion on the SADC FTA in footnote 48 above.

⁵⁵ WT/L/540 (Decision of the General Council of 30 August 2003).

⁵⁶ While Art XXIV of the GATT does not expressly define an RTA, it is commonly accepted in WTO parlance as an economic trade agreement to reduce tariffs and restrictions on trade between two or more nations within a certain region.

⁵⁷ Differential and more favourable treatment reciprocity and fuller participation of developing countries- Decision of 28 November 1979 (L/4903).

⁵⁸ Nkomo M “Rwanda’s new intellectual property law and compulsory licensing for export under the WTO: Not quite a panacea” (2013) 21(2) *African Journal of International and Comparative Law* 279 at 281.

⁵⁹ Nkomo (2013) at 282.

⁶⁰ Two-thirds (63%) of all adults and children with HIV globally live in sub-Saharan Africa, with its epicenter in southern Africa. One-third (32%) of all people with HIV globally live in southern Africa and 34% of all deaths due to AIDS in 2006. Of the estimated one million malaria deaths that occur annually in

The Paragraph 6 waiver allows countries which are party to eligible RTAs to further export products, which have been produced or imported under compulsory licence, to other Members of the regional grouping. Hence the waiver promotes economies of scale and bulk procurement of pharmaceutical products.⁶¹ Paragraph 6 also facilitates the importation of component materials, formulation into finished products, and export within Members of the RTA.⁶² The waiver can help deal with the problem of many territorial markets in southern Africa that are too small to support viable production or importation.⁶³ However, the principle of territoriality constitutes a barrier.⁶⁴ According to this principle, patent rights, related exceptions and compulsory licences are territorial; thus they can only apply to a patent that exists in the territory of the country granting the licence and cannot have any effect on a patent granted in another country (even within the same regional grouping). Hence SADC countries can only take advantage of the opportunities created by the Paragraph 6 waiver by harmonising their IP legislation. This could be done through the expansion of Article 24 of the SADC Trade Protocol as mooted above.

Another potential obstacle is lack of technical expertise to incorporate and implement this opportunity into national law and policy.⁶⁵ To this end, developed country Members undertook to provide technical co-operation in accordance with Article 67 of the TRIPS Agreement in conjunction with other relevant intergovernmental organisations.⁶⁶ However, the technical assistance that has traditionally come from these sources has been criticised for being more concerned with compliance than the application of flexibilities within the multilateral framework to promote and protect the interests of developing countries.⁶⁷ This is one of the factors that led Brazil and Argentina, in 2004, to initiate the current efforts to implement a Development Agenda within the WIPO.⁶⁸

the world, 90% occur in Africa at http://data.unaids.org/pub/EPISlides/2007/2007_epiupdate_en.pdf (accessed April 2014).

⁶¹ Vandoren P & Eeckhaute J "The WTO decision on Paragraph 6 of the Doha Declaration on the TRIPS Agreement and public health" (2003) 6(6) *Journal of World Intellectual Property* 791.

⁶² Abbott F & Van Puymbroek R "Compulsory Licensing for public health: A guide and model documents for implementation of the Doha Declaration Paragraph 6 decision" *World Bank Working Paper* No.61 (2005) at 11.

⁶³ Musungu S, Villanueva S & Blasetti R "Utilizing TRIPS flexibilities for public health Protection through South-South regional frameworks." Available at <http://www.iprsonline.org/resources/docs/trips-health-southcentre2004.pdf>, (accessed July 2013).

⁶⁴ See the discussion on the territoriality principle in footnote 36 above.

⁶⁵ August 30 Decision.

⁶⁶ See para 6 (ii) of the August 30 Decision.

⁶⁷ Abbott (1989).

⁶⁸ In the Brazil-Argentina document proposing the establishment of the development agenda, it is suggested that WIPO technical assistance should become more development oriented. See Menescal A "Changing WIPO's ways? The 2004 Development Agenda in historical perspective" (2005) 8(6) *Journal of World Intellectual Property* 761. This proposal was supported by 12 Member States and set in motion a sequence of events that resulted in the 2007 adoption of the WIPO Development Agenda and its 45 recommendations as well as the proposal on the establishment of the Committee on Development and Intellectual Property (CDIP) which was subsequently adopted by the General Assembly in 2008. The workings of the CDIP and developments within that forum are not of relevance to the current discussion but interested readers are referred to the following link: <http://www.wipo.int/policy/en/cdip/>.

One solution to this obstacle would be to draw upon the expertise and experience available within the region. For example, South Africa has a wealth of experience implementing the policy space provided by the TRIPS Agreement after having to defend the country's implementation of the Treaty during the controversial case in 1998 when 41 international pharmaceutical companies brought an action against the South African government claiming that section 15C of the 1965 Medicines and Related Substances Control Act was in breach of Article 31 of the TRIPS Agreement.⁶⁹ Hence, the Republic would be ideally suited to take the lead in terms of ensuring that implementation of the Paragraph 6 waiver by the SADC is done in a manner that is consistent with the region's developmental interests, while at the same time conforming to the TRIPS Agreement.

4.2 The WIPO discussions on protecting traditional knowledge

At the outset, one should mention that the WIPO discussions have suggested dealing with "traditional knowledge" and "traditional cultural expressions or folklore" as two separate concepts with distinct legal definitions, and that no consensus as to the approach or definitions has been reached.⁷⁰ For the purposes of this article, the term "traditional knowledge" (TK) will be deemed to encompass both concepts and shall be defined as "knowledge that is unique to a given culture or society".

Commercialisation of TK by those outside of the respective traditional communities has become a heated topic over the last few decades. Developing countries have treated the issue as one of particular interest and have therefore utilised considerable political capital to have it placed firmly on the agenda of intergovernmental organisations.⁷¹ Currently, the most important forum for the discussion is the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC). Since October 2000, the IGC has sought to reconcile TK with the conventional IP system.

The IGC, which held its 28th session in July 2014 is currently conducting text based negotiations aimed at securing an effective means to protect TK.⁷² Members were for a long time deadlocked as to the manner of protection for TK.⁷³ Developed countries preferred to pursue the protection of TK through means outside the IP system, a so

⁶⁹ Section 31 of the TRIPS Agreement is the provision which deals with compulsory licensing. For more information about the case, see Notice of Motion in the High Court of South Africa (Transvaal Provincial Division) Case No. 4183/98 at <http://www.cptech.org/ip/health/sa/pharmasuit> (accessed June 2013) and Kongolo T "Public interest versus the pharmaceutical industry's monopoly in South Africa" (2001) 4(5) *Journal of World Intellectual Property* 616.

⁷⁰ "Traditional cultural expressions/expressions of folklore-legal and policy options", IGC Sixth Session, Geneva, 15 – 19 March 2004, WIPO/GRTK/IC/6/3, at 11-12.

⁷¹ The Convention on Biological Diversity (CBD), the Food and Agricultural Organization (FAO). The United Nations Environmental Programme (UNEP), WTO and WIPO have all served as a forum for the discussion.

⁷² See <http://www.wipo.int/tk/en/igc/snapshot.html> (accessed May 2014).

⁷³ Nkomo M "South Africa's proposed intellectual property law: The need for improved regional cooperation" (2013) 66(2) *Comparative and International Law Journal of Southern Africa* 257.

called *sui generis* approach.⁷⁴ Developing countries, on the other hand, favored using the conventional IP system. The impasse led to a number of countries making changes to their domestic IP laws in order to address the concerns that WIPO was struggling to resolve, one such country is South Africa.⁷⁵

The South African legislature recently passed the Intellectual Property Laws Amendment Act,⁷⁶ although the law is still awaiting implementing regulations and entry into force. The Act amends the laws affecting a number of IP rights such as performer's rights, copyright, designs and trademarks, the legislation dealing with patents having been amended in 2005.⁷⁷ The Act seeks to amend relevant IP laws to provide protection for "indigenous knowledge".⁷⁸ The purpose of the current discussion is not to analyse the substantive provisions of the Act, and it is certainly not to comment as to whether a *sui generis* approach or the conventional IP system is the best model for the protection of TK, as either topic would require its own separate article. The current discussion will suggest that a regional approach is better suited to the protection and commercialisation of TK in southern Africa than a national one.

Here, it is worth remembering that the national borders that apply in southern Africa were created in colonial times with little regard to the relevant traditional groupings, in terms of where they resided or their movement patterns.⁷⁹ For example, the Ndebele, Khoi San, and Shangaan were not only based in South Africa but also resided respectively in what are now Zimbabwe, Namibia and Mozambique. Numerous other examples exist.⁸⁰ Drafters of the Intellectual Property Laws Amendment Act to their credit did recognise this reality by way of the definition of "indigenous community."⁸¹ However, the institutions operating under the existing laws and those to be created by the Act are of a national nature. A regional approach is required if indigenous communities living throughout Southern Africa are to benefit.⁸² Again, SADC could serve as a suitable forum to this end.

On 9 August 2010, an ARIPO diplomatic conference adopted the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore within the Framework of ARIPO (Swakopmund Protocol). The purpose of the ARIPO's latest instrument is to "protect traditional knowledge holders against any infringement of

⁷⁴ Nkomo (2013) at 259.

⁷⁵ Nkomo (2013) at 260.

⁷⁶ Act No 28 of 2013.

⁷⁷ Nkomo (2013) at 267.

⁷⁸ See the Preamble to the Intellectual Property Laws Amendment Act.

⁷⁹ Nkomo (2013) at 269.

⁸⁰ Nkomo (2013) at 269.

⁸¹ The Act defines "indigenous community" as "Any recognisable community of people originated in or historically settled in a geographic area or areas located within the borders of the Republic, as such borders existed at the date of commencement of the Intellectual Property Laws Amendment Act, 2013, characterised by social, cultural and economic conditions which distinguish them from other sections of the national community, and who identify themselves and are recognised by other groups as a distinct collective". This definition is important as the legislation may give indigenous communities or their authorized agents the sole right to apply for the protection provided.

⁸² Nkomo (2013) at 270.

their rights”;⁸³ and “to protect expressions of folklore against misappropriation, misuse and unlawful exploitation beyond their traditional context”.⁸⁴

One very positive aspect of the Swakopmund Protocol is that it expressly calls for a regional approach to the protection of TK. The relevant section of the Protocol mandates that “eligible foreign holders of TK shall enjoy benefits of protection to the same level as holders of traditional knowledge and expressions of folklore who are nationals of the country of protection”.⁸⁵ The provision goes on to suggest that the ARIPO be entrusted with the settlement of any disputes arising from concurrent claims by communities of different countries with regard to TK.⁸⁶ While this initiative is a positive step, there are certain features of the ARIPO and its latest instrument that render it questionable whether the Swakopmund Protocol in its current form can successfully create a regional approach to the protection of TK.

First, as seen with the previous Protocols to the Lusaka Agreement, that a country is a party to the Treaty does not result in any obligation to comply with its substantive Protocols. Empirically, we have seen that only nine out of the 18 ARIPO Members are signatories to the Banjul Protocol. It remains to be seen whether the Swakopmund Protocol will even gain enough signatories to enter into force.⁸⁷ Extending the IP provision of the SADC Trade Protocol, of which 13 out of 15 SADC countries are Members with others in the process of joining, to expressly cover TK protection could assist in this context.

Secondly, another point alluded to above is that the ARIPO membership composition is based on colonial linguistics as opposed to geographical proximity or cultural ties. For example, Lesotho and Gambia are both ARIPO Members but share no common culture or tradition. This can be starkly contrasted with the situation among SADC Member States. Finally, the Protocol states that where two or more communities in different countries share the same traditional knowledge, ARIPO shall be responsible for dispute resolution. However, there is no mandate or infrastructure within the ARIPO framework for this to occur. The SADC, on the other hand, has a Tribunal which has operated since 1992. Although the Tribunal is currently beset with serious institutional challenges, it could serve as an adjudicative forum for TK related disputes once resuscitated.

It has been suggested by the AU that a regional approach to protecting TK through IP can be achieved using the medium of a Pan African Intellectual Property Organization (PAIPO).⁸⁸ This approach is unlikely to succeed as harmonising IP laws throughout a continent as vast and diverse as Africa is unrealistic. For example, no

⁸³ Ss 1.1 (a) and 7 of the Swakopmund Protocol.

⁸⁴ S 1.1 (b) of the Swakopmund Protocol.

⁸⁵ S 24.1 of the Swakopmund Protocol.

⁸⁶ S 24.2 of the Swakopmund Protocol.

⁸⁷ S 27 of the Swakopmund Protocol provides that the instrument shall only come into force three months after six states have deposited their instruments of ratification or accession.

⁸⁸ See “Establishing a Pan African intellectual property organization: A concept paper” EXT/AU/EXP/ST/8(II) and Ncube C “A New intellectual property organization for Africa?” (2013) 8(2) *Journal of Intellectual Property Law & Practice* 114.

North African State has joined either the ARIPO or the OAPI to date, and those countries are expected to form their own organization dealing with IP in future.

In conclusion, the membership composition of the SADC as well as the close geographical, economic, and cultural ties between the Members, weigh in favour of increased economic integration. These, together with the already existing institutional and legal infrastructure and developments at the WTO and the WIPO, make the SADC an excellent platform for an integrated approach to IP that would contribute to economic development in the region.

5 HOW FAR SHOULD THE INTEGRATION GO?

Assuming that the Summit and Council are amenable to creating a regional IP framework for the SADC, the question of whether it should cover purely administrative and procedural aspects or extend to substantive law arises. The WIPO efforts to create common international substantive norms through the Substantive Patent Law Treaty (SPLT) have received both praise and criticism.⁸⁹

In the main, those in favour of substantive harmonisation have pointed out that the SPLT would result in simplification of the process of obtaining a patent; reduction of workload for patent offices; diminished costs for all parties concerned; as well as increased predictability and legal certainty.⁹⁰

Critics have argued that harmonised standards would leave little room for developing countries to adapt their patent laws to local conditions and needs because harmonisation would take place at the highest level of protection i.e. based on standards currently applied by developed countries.⁹¹ The process of harmonisation, it is argued, would thereby exert an upward force on national laws and policies in developing countries resulting in stronger and more expansive IP rights with the corresponding narrowing of limitations and exceptions.⁹²

Similar criticism was levelled at the OAPI for implementing substantive standards that are beyond what is required in the TRIPS Agreement (TRIPS-plus), in that they do not take into account the transition periods available to LDC WTO Members under the TRIPS regime.⁹³ According to the extended transition periods, LDCs did not

⁸⁹ Correa C & Musungu S "The WIPO patent agenda: The risks for developing countries" T.R.A.D.E Working Papers 12 (2002), South Centre, Geneva; Dutfield G "Does one size fit all? The international patent regime" (2004) Harvard International Review at <http://www.entrepreneur.com/tradejournals/article/120184959.html> last visited on 01-03-2008 (accessed April 2014); Dutfield G & Suthersanen U "Harmonisation or differentiation in intellectual property protection? Lessons from history" (2005) 23(2) *Prometheus* 131; Reichman J & Dreyfuss R "Harmonization without consensus: Critical reflections on drafting a substantive patent law treaty" (2007) 57(85) *Duke Law Journal* 85. See also Mohanty & (2007-2008).

⁹⁰ Mohanty (2007-2008).

⁹¹ Reichman & Dreyfuss (2007) at 85.

⁹² Reichman & Dreyfuss (2007) at 87.

⁹³ Intellectual Property and Development: Report of the Commission on Intellectual Property Rights (2002) Chapter 1. Available at http://www.iprcommission.org/papers/pdfs/final_report/Ch1final.pdf (accessed April 2014).

have to implement the TRIPS Agreement until 2013 and need not provide patent protection for pharmaceutical products until 2016.⁹⁴ The former period was extended further in July 2013, meaning that LDCs will not have to grant IP protection for at least a further eight years.⁹⁵ The arguments for and against substantive harmonisation have been tabled at WIPO SPLT discussions, and as a result, agreement on a final treaty is still far off. These arguments, as well as the abovementioned criticism of the OAPI, are likely to be played out at the SADC should the bloc decide to create an IP framework.

In the final analysis, overall harmonisation of IP laws at the substantive level in accordance with the principle of uniformity as implemented by the OAPI may prove a bridge too far for the SADC. The difficulties faced at the WIPO level in the SPLT discussions lend credence to this prognosis. Nevertheless, an operational institution should be created to allow expertise throughout the region to be drawn upon in the grant, administration and enforcement of IP rights as fragmentation of rights and obligations throughout the region is inefficient in that it requires IP rights holders and domestic IP institutions to spend more time and incur greater cost in the prosecution and enforcement of IP rights. The implication for the SADC countries is that FDI and intra-regional trade are hampered while their limited resources are inefficiently utilised. The regional IP institution contemplated would serve as the first point of reference but provision should be made for deviation if a compelling local reality is raised by a domestic authority. Hence, departure from the regional position would constitute an exception rather than a norm as in the case of the ARIPO.

6 CONCLUSION

Since the 18th century, efforts have been made to harmonise IP laws on a global scale. The international institutions charged with doing so, however, have not been able to cater for the specific requirements of African countries. While existing regional IP organisations in Africa have made some strides in addressing these needs, institutional and territorial restrictions have resulted in some shortcomings. Integrating meaningful IP provisions within the current SADC framework would go a long way towards mainstreaming economic integration within the region, thereby providing a catalyst for development. The following reasons are pertinent.

Most importantly, unlike the ARIPO, the SADC is an internationally recognised trading bloc that is progressively working towards elimination of intra-regional trade barriers and a common market. This elimination of commercial encumbrances is based on the eradication of duties in the first instance and will shortly move toward the promotion of uniform, predictable laws and regulations. Therefore, it makes scant sense for goods moving freely throughout the region under progressively uniform regulations

⁹⁴ Decision of the Council for TRIPS on the Extension of the Transition Period under Article 66.1 of the TRIPS Agreement for Least-Developed Country Members for Certain Obligations with Respect to Pharmaceutical Products, (IP/C/25 of 27 June 2002) and Decision of the Council for TRIPS on the Extension of the Transition Period under Article 66.1 of the TRIPS Agreement," (17 June 2005, WTO document IP/C/35).

⁹⁵WTO Secretariat "Responding to least developed countries' special needs in intellectual property." Available at http://www.wto.org/english/tratop_e/trips_e/ldc_e.htm (accessed April 2014).

to be subject to differing rules in the case of IP. Regarding membership, the SADC countries are bound by common historic, cultural, geographical, political and economic interests, unlike the ARIPO Members which have collaborated based on language alone. Surely in the current era of globalisation and multilingualism, we should look further than language as a basis for commercial ties.

There are three further benefits of the SADC in comparison to the ARIPO. Also with regard to membership, the region's largest economy is a member of the SADC, which allows the bloc to capitalise on South Africa's attractiveness from an investment perspective as well as her vast experience and resources in terms of IP. These benefits are not available to the ARIPO. When restored, the SADC Tribunal can be called upon to issue advisory opinions or clarify disputes where necessary. No such mechanism is available to the ARIPO. Further, the political clout enjoyed by the SADC has not been unquestioned; nevertheless, it significantly outweighs that which the ARIPO possesses given that SADC decisions are made at a presidential and ministerial level. While the ARIPO deals with IP alone, the SADC can incorporate this important trade related issue into a large institutional infrastructure developed by cooperating on a number of economic aspects.

SADC members can only enjoy the benefits of the policy space that was painstakingly negotiated at the WTO if implemented via the regional bloc, and the SADC is a more logical vehicle to realise developing country objectives tabled at the IGC.

While there is certainly a case for mainstreaming integration of IP laws within the region, it is unlikely that SADC will be able to trail-blaze in this area due to concerns regarding substantive harmonisation in the IP sphere; the body might succeed, however, in introducing a single administrative machinery which creates a rebuttable presumption of regionally applicable rights.