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Beyond Protection: Reconciling Intellectual Property Law and Technology Transfer for African Industrial Development

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ABSTRACT

Intellectual property (IP) law occupies an uneasy position in Africa's development trajectory. It is simultaneously the legal instrument through which African innovators might capture the value of indigenous knowledge and technology, and the doctrinal apparatus through which foreign right-holders restrict African access to patented medicines, agricultural inputs, and digital technologies. This article examines the legal architecture governing technology transfer to Africa the World Trade Organization's TRIPS Agreement, the continent's two regional IP offices (ARIPO and OAPI), and the emerging African Continental Free Trade Area (AfCFTA) Protocol on Intellectual Property Rights and argues that the persistent underperformance of Article 66.2's technology-transfer obligation, together with fragmented regional patent examination capacity, has left African states without the legal or institutional tools needed to convert IP protection into genuine technological absorption. Drawing on the 2001 South African medicines litigation and the 2022 WTO COVID-19 vaccine waiver as illustrative episodes, the article proposes a development-oriented reform agenda centred on continental technology-transfer accountability, regional patent-office consolidation, and TRIPS-flexibility-literate national legislation...

1. INTRODUCTION

Intellectual property (IP) law is often presented to developing economies as a bargain: accept the protective standards demanded by the world's principal exporters of technology, and receive in exchange access to the technology itself. For Africa, that bargains was formalized in 1994 when the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) entered into force as Annex 1C to the Marrakesh Agreement establishing the World Trade Organization (WTO). Three decades on, the technology-transfer half of the bargain remains largely unrealised. Africa's share of global patent registrations stands at approximately 0.5 per cent (AfCFTA Secretariat, 2026), a figure that has moved little despite near-universal African accession to TRIPS-consistent IP regimes.

This article examines the legal architecture that was meant to convert IP protection into technology transfer for the African continent, and asks why it has fallen short. Section 2 revisits the TRIPS Agreement's technology -transfer provisions, particularly Article 66.2, and the WTO's own monitoring data on their implementation. Section 3 turns to Africa's internal IP architecture the two regional patent offices, ARIPO and OAPI and the continent's most significant recent legal development, the AfCFTA Protocol on Intellectual Property Rights. Section 4 examines two flashpoint episodes, the 2001 South African medicines litigation and the 2022 WTO COVID-19 vaccine waiver, in which the tension between IP protection and technological access became explicit. Section 5 draws these threads together into a development-oriented reform agenda. The article's central claim is that Africa's difficulty has never been a shortage of TRIPS flexibilities on paper; it has been the absence of the institutional capacity, continental coordination, and legislative literacy required to convert those flexibilities into technology on the ground….

2. THE TRIPS AGREEMENT AND THE TECHNOLOGY-TRANSFER DEFICIT

The TRIPS Agreement's preambular objectives were never confined to protection alone. Article 7 states that IP protection and enforcement should contribute to 'the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge… and to a balance of rights and obligations' (TRIPS Agreement, 1994, art. 7). Article 8.2 permits members to prevent anti-competitive licensing practices that impede technology transfer, and Article 40.1 recognises that certain licensing conditions can themselves restrain the diffusion of technology. The operative obligation, however, is Article 66.2, which requires developed-country members to 'provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base' (TRIPS Agreement, 1994, art. 66.2).

Unlike most TRIPS obligations, Article 66.2 uses the mandatory 'shall' and carries no expiry date (Lescure, 2018). Twenty of Africa's fifty-four states are classified as least-developed countries and are the intended beneficiaries. Yet the obligation has always been drafted as an obligation of incentive rather than of result: developed-country members must encourage their own firms to transfer technology, not guarantee that transfer occurs (Lescure, 2018). The WTO's monitoring mechanism, established by the TRIPS Council's 2003 Decision on Implementation of Article 66.2, requires developed members to report annually on their incentive programmes (WTO, 2003). The most recent comprehensive review, covering 2018–2020, records 818 reported programmes from nine developed-country members, concentrated in information and communication technology, environment and climate change, public health, and agriculture (WTO, 2023). The distribution among beneficiaries is markedly uneven: Uganda, Tanzania and Rwanda were the leading recipients, while several LDCs — including Comoros and Somalia — recorded no ICT transfer programmes at all across the review period (WTO, 2023). The reporting exercise itself has been incomplete: of the roughly thirty-six developed-country members bound by Article 66.2, only eight jurisdictions have reported with any consistency since 2003 (Lescure, 2018).

Two structural features explain this deficit. First, because Article 66.2 obliges states to incentivise their own private enterprises rather than to transfer technology directly, its fulfilment depends on commercial calculations by firms that face no independent legal duty to Africa. Second, the reporting mechanism generates data but not accountability: no dispute-settlement consequence attaches to a developed member's failure to report, still less to a paucity of transfer. For a continent whose comparative disadvantage lies precisely in technological absorptive capacity, an incentive-based, non-justiciable obligation was always a fragile foundation on which to build industrial policy.

3. AFRICA'S REGIONAL IP ARCHITECTURE: ARIPO, OAPI, AND THE AFCFTA PROTOCOL

If the international obligation to transfer technology to Africa has proved weak, the continent's own institutional capacity to absorb and administer technology has been correspondingly fragmented. Since the late 1970s, African IP administration has been split between two regional offices organised along colonial-linguistic lines. The African Regional Intellectual Property Organization (ARIPO), established under the 1976 Lusaka Agreement, serves nineteen predominantly Anglophone member states and grants patents under the Harare Protocol on Patents and Industrial Designs (adopted 1982, most recently amended 2024), alongside the Banjul Protocol on trademarks (WIPO Lex, 2024). The Organisation Africaine de la Propriété Intellectuelle (OAPI), created by the 1977 Bangui Agreement (revised 1999 and 2015), serves seventeen Francophone and Lusophone states (OAPI, 2023).

The two systems differ in ways that matter for technology transfer, not merely in nomenclature. Under OAPI, the Bangui Agreement operates directly as national law in every member state, and a single OAPI grant automatically covers all seventeen members, with no option to designate only some of them; OAPI, moreover, still conducts only formal rather than substantive examination of patent applications, pending ratification of the revised Bangui Agreement's substantive-examination provisions by the required twelve member states — only seven had ratified at the time of the most recent review (Kisch IP, n.d.). ARIPO applicants, by contrast, designate individual contracting states, and those states retain their own national IP legislation operating alongside the Harare Protocol, producing a dual-track system in which a single invention may be subject to both regional and national validity requirements (Kisch IP, n.d.). Neither office is resourced to examine applications for genuine technological contribution in a manner that would detect low-quality or purely defensive filings by non-African applicants precisely the filings most likely to obstruct, rather than assist, local technology absorption.

Since 2017, ARIPO and OAPI have pursued a formal cooperation agenda aimed at harmonising examination criteria and eventually offering a combined filing route, a process reaffirmed as recently as November 2025 when the two offices'

Directors-General committed to a ‘harmonised mechanism facilitating the granting of intellectual property rights between their systems’ (OAPI, 2025). That process now runs alongside a more consequential development: the African Continental Free Trade Area (AfCFTA) Protocol on Intellectual Property Rights, adopted in principle by the African Union Assembly and substantially advanced with the adoption of a set of Annexes covering copyright, patents, marks, industrial designs, and the proposed AfCFTA Intellectual Property Office at the Assembly's 39th Ordinary Session in February 2026 (AfCFTA Secretariat, 2026). Annexes on plant variety protection, geographical indications, and traditional knowledge remain under negotiation. The AfCFTA Secretary-General has explicitly framed the Protocol's relevance to ‘pharmaceuticals and vaccine manufacturing’, where a single continental IP regime is intended to reduce the regulatory fragmentation that has historically deterred local production licensing (AfCFTA Secretariat, 2025). Whether a continental IP office can succeed where two regional ones have not will depend on whether its design internalises the lesson of Article 66.2: that legal entitlement to technology, without institutional capacity to examine, license and absorb it, delivers little.

4. FLASHPOINTS: ACCESS TO MEDICINES AND THE COVID-19 WAIVER

Two episodes, two decades apart, expose the practical stakes of this architecture more clearly than any monitoring report.

In 1997, South Africa enacted section 15C of the Medicines and Related Substances Control Amendment Act, authorising the Minister of Health to permit parallel importation and, in defined circumstances, compulsory licensing of patented medicines during a health emergency. Thirty-nine multinational pharmaceutical companies, acting through the Pharmaceutical Manufacturers' Association of South Africa, sued to have the provision struck down, arguing that it exceeded South Africa's TRIPS obligations (CPTech.org, 2001). At a time when an estimated 4.7 million South Africans were living with HIV, the litigation drew sustained international criticism including from former President Nelson Mandela and the Treatment Action Campaign, admitted as amicus curiae in March 2001 and the companies withdrew their case on 19 April 2001 without a substantive judgment (New Scientist, 2001). The episode did not change TRIPS law, but it catalysed change: it fed directly into the Doha Declaration on the TRIPS Agreement and Public Health, adopted by WTO ministers in November 2001, which affirmed that TRIPS ‘does not and should not prevent members from taking measures to protect public health’ and reaffirmed the Article 66.2 commitment in its own text (WTO, 2001).

Twenty-one years later, the same tension resurfaced globally. On 17 June 2022, at its Twelfth Ministerial Conference, the WTO adopted a Ministerial Decision waiving, for five years, several Article 31 requirements that ordinarily constrain compulsory licensing of COVID-19 vaccine patents: eligible developing-country members no longer needed to first seek the patent-holder's authorisation, and could export vaccines produced under compulsory licence to other eligible members rather than supplying only their domestic market (WTO, 2022). The waiver was narrower than the TRIPS waiver African and Indian negotiators had originally proposed in October 2020, and remained confined to vaccines, with an extension to diagnostics and therapeutics left for further negotiation that has not since been concluded. For African vaccine manufacturers a handful of facilities in South Africa, Senegal, Rwanda and Egypt with capacity built up substantially during the pandemic itself the waiver's practical value lay less in the compulsory-licence mechanism, rarely invoked in practice, than in the signal it sent to the WTO membership that manufacturing capacity, not merely legal entitlement, should now organise technology-transfer policy. Both episodes illustrate the same structural point: African access to patented technology has repeatedly been secured through public pressure on individual disputes, not through the routine operation of Article 66.2 or any comparable continental mechanism.

5. TOWARD A DEVELOPMENT-ORIENTED INTELLECTUAL PROPERTY FRAMEWORK FOR AFRICA

Three reforms follow from this analysis, each addressed to a different level of the architecture examined above.

First, at the multilateral level, African states individually and through the African Group at the WTO should press to convert Article 66.2 from an obligation of incentive into one with measurable output indicators. The existing reporting mechanism records the number and sector of technology-transfer programmes but not their uptake by African recipients, licensing terms, or technological outcomes. A revised reporting template requiring developed members to disclose the terms on which technology was actually transferred licence fees, exclusivity, and whether transfer included the underlying know-how or only finished products would convert Article 66.2 from a transparency exercise into a genuine accountability instrument, without requiring formal amendment of the TRIPS Agreement itself.

Second, at the regional level, the ARIPO–OAPI harmonisation process should be treated as a precursor to substantive examination capacity-building rather than an end in itself. A harmonised filing route that still terminates in formal-only examination at OAPI, or in duplicative national-plus-regional examination at ARIPO, will not by itself improve the quality or local relevance of granted patents. Pooling examiner training, adopting shared prior-art databases, and as the revised Bangui Agreement already contemplates moving OAPI to substantive examination would allow both offices to identify and reject low-value defensive filings by non-African applicants, freeing examination capacity for patents genuinely tied to local manufacturing or research.

Third, the AfCFTA Protocol on Intellectual Property Rights offers a narrow but real window to design a continental IP office differently from its predecessors. Its stated relevance to pharmaceutical and vaccine manufacturing suggests the Secretariat is alert to the access-to-medicines lesson of 2001 and 2022. The Protocol's remaining negotiations particularly the outstanding annexes on geographical indications and traditional knowledge should be paired with an explicit technology-transfer chapter obliging AfCFTA state parties to condition preferential market access, where legally available under WTO rules, on demonstrable local licensing or manufacturing commitments by patent holders operating within the continental market. This would relocate the technology-transfer bargain from a voluntary developed-country incentive scheme, administered from Geneva with limited African leverage, to a continental market-access instrument that African states control directly.

Finally, national legislatures across the continent require sustained capacity-building in TRIPS-flexibility-literate drafting. South Africa's 1997 amendment survived its immediate legal challenge but took a WTO Ministerial Declaration and international public pressure to become normatively secure; many African patent statutes still lack clearly drafted compulsory-licensing and Bolar-exception provisions calibrated to the post-2022 waiver precedent. Legal education institutions, including African law faculties, have a direct role here: training a generation of drafters and patent examiners fluent in TRIPS flexibilities is itself a form of technology transfer the transfer of legal, rather than technical, capacity and one that Article 66.2's own list of technology categories (education and social sciences) already recognises as a legitimate beneficiary sector (WTO, 2023).

6. CONCLUSION

Intellectual property law has structured Africa's relationship with technology transfer for three decades without resolving it. The TRIPS Agreement supplied an obligation Article 66.2 that developed states have implemented inconsistently and that no dispute-settlement mechanism has ever tested. Africa's own regional patent offices, split along colonial-linguistic lines since the 1970s, have administered IP protection with only limited capacity to convert it into local absorption. And the continent's most significant instances of genuine technological access the 2001 withdrawal of the South African medicines litigation and the 2022 WTO vaccine waiver were secured through crisis and public pressure rather than through the routine operation of the legal architecture designed for exactly that purpose. The AfCFTA Protocol on Intellectual Property Rights, still being finalised as this article goes to press, represents the first opportunity in a generation to design that architecture differently: as a continental instrument that African states control, rather than a set of incentives administered elsewhere. Whether it succeeds will depend on whether technology-transfer accountability, not merely protection, is written into its remaining annexes.

Declaration of Generative AI Use

The author used a generative AI tool (Chatgpt) during manuscript preparation to assist with structuring the argument, drafting prose, and synthesizing literature identified by the authors. All analytical claims, the comparative framework, and the conclusions are the author's own; the authors reviewed, verified, and take full responsibility for the content of this manuscript, including the accuracy of all citations...

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