

# REIMAGINING HARMONISATION: A ROADMAP TO IP INTEGRATION UNDER THE AfCFTA

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## ABSTRACT

Africa is rising to the occasion of global economic relevance, flying the vision of the African renaissance. The continent potentially hosts the largest free trade area (FTA) in the world, striving to create a common market across 54 of the 55 countries of the African Union (AU). Although healing from the burns of colonial exploitations, Africa has impressively risen to the occasion of IP development, mapping a blueprint for her transformation — Agenda 2063. This paper studies the vision for, and aspirations of, Agenda 2063. It discusses regional integration strategies, with a focus on harmonisation, and seeks to determine the AU's vision for IP integration. Adopting a doctrinal approach, the paper addresses the questions — 'what is the AU's intention for integration under the AfCFTA', 'what integration strategy supports an effective regional IP system under the AfCFTA' and 'how can the AU achieve workable harmonisation' to achieve Agenda 2063. In addressing these, this paper conducts a historical trace of the AU's journey to Agenda 2063 and the AfCFTA, and underscores the strengths and weaknesses of IP integration models, particularly harmonisation. Recommendations for workable harmonisation and IP integration under the AfCFTA are proffered, a hybrid model of IP integration is suggested alongside a 'ten for ten' roadmap to achieve this workable harmonisation.

KEYWORDS: IP integration, Agenda 2063, workable harmonisation

## 1. INTRODUCTION

Increased globalisation, for the most part, creates an interconnected global market through digitalisation. This connection, in turn, increased regional integration and the many legal, political and economic discourses that followed.<sup>1</sup>

Regional integration results from increased cooperation among nations to achieve a closer alignment of economic and legal policies for economic expansion and greater efficiency.<sup>2</sup> The pursuit of regional integration is driven by several factors, including the expansion of markets, better resource allocation across the region and acceleration of economic growth. A major

\* This paper is an improved excerpt of the author's on-going PhD thesis at the Queen Mary University of London (QMUL) titled 'Performer's rights: The "missing rib" in the AfCFTA IP Protocol'.

1 F Söderbaum & T Brolin 'Support to regional cooperation and integration in Africa – what works and why?' (*African Development Bank Group*, 2016), available at: [https://idev.afdb.org/sites/default/files/documents/files/Support\\_toRegional\\_Cooperation201601-SODERBAUM.pdf](https://idev.afdb.org/sites/default/files/documents/files/Support_toRegional_Cooperation201601-SODERBAUM.pdf) (accessed on 4 March 2025).

2 K Ludger 'The global proliferation of region-building' *European Union - The Second Founding: The Changing Rationale of European Integration* 1 ed (2008) 335, available at: <http://www.jstor.org/stable/j.ctv941vm5.11> (accessed on 7 October 2025).

driver of regional integration in Africa is the fragmentation of economies and consequent underdevelopment of the continent, with over 350 million inhabitants surviving on less than 1 USD per day (below the line of abject poverty).<sup>3</sup> Where there is the fragmentation of economies, regional integration can expand markets and input sources beyond national boundaries, leading to higher economic growth and improved welfare, reduction of income inequality between countries, and sharing of risks.<sup>4</sup> Regional integration, where it involves freedom of movement, also opens up markets by ensuring easy movement of goods, services, information, technologies and people across borders.<sup>5</sup>

There are successful regional cooperation efforts around the globe with regional economic communities (RECs) such as the European Union (EU),<sup>6</sup> and sub-regional economic communities such as the Organisation pour l'Harmonisation du Droit des Affaires en Afrique (OHADA)<sup>7</sup> on business law, the Southern African Development Community (SADC)<sup>8</sup> promoting economic and political cooperation among Southern African countries and the Association of Southeast Asian Nations (ASEAN) promoting economic and security cooperation among Southeast Asian Nations.<sup>9</sup> RECs are groupings of states whose purpose is to facilitate economic integration among their member states with coordinated policies, the reduction of trade barriers, harmonisation of laws and standards, and promoting economic cooperation and development.<sup>10</sup> They often serve as building blocks for broader continental integration efforts.

The AU's Agenda 2063, themed 'The Africa We Want', is a product of the pan-African aspiration that, in 2013, prompted African countries, under the leadership of the AU, to embark on the development of what was tagged a 'strategic framework for the socio-economic transformation of the continent' over a period of 50 years.<sup>11</sup> According to the AU, Agenda 2063 is not intended to stand alone or begin from scratch. It is rather designed to

3 Ibid.

4 Asian Development Bank *Regional Cooperation and Integration in a Changing World* (Asian Development Bank 2013), available at: <https://www.adb.org/sites/default/files/publication/30224/regional-cooperation-changing-world.pdf> (accessed on 20 March 2025).

5 Islamic Development Bank 'Regional Cooperation and Integration Policy: Achieving sustainable and inter-dependent growth through mutual cooperation' (2019), available at: <https://www.isdb.org/publications/isdb-regional-cooperation-and-integration-policy-achieving-sustainable-and-inter-dependent-growth-through-mutual-cooperation> (accessed on 10 March 2025).

6 K Ludger 'The global proliferation of region-building' *European Union - The Second Founding: The Changing Rationale of European Integration* 1 ed (2008) 316, available at: <http://www.jstor.org/stable/j.ctv941vm5.11> (accessed on 7 October 2025).

7 B Fagbayibo 'Towards the harmonisation of laws in Africa' *The Comparative and International Law Journal of Southern Africa* (2009) 42(3) 313–317, available at: <https://www.jstor.org/stable/23253105> (accessed on 22 October 2025).

8 T Hartzenberg 'Regional integration in Africa' WTO Economic Research and Statistics Division Working Paper ERS-2011-14 *WTO* (2011) 5–6, available at: [https://www.wto.org/english/res\\_e/reser\\_e/ersd201114\\_e.pdf](https://www.wto.org/english/res_e/reser_e/ersd201114_e.pdf) (accessed on 10 October 2025).

9 Ludger (n6) 320, 342–345.

10 CB Ncube *Intellectual Property Law in Africa: Harmonising Administration and Policy* 2 ed (2023) 77.

11 J Mbaku 'Constitutionalism and Africa's Agenda 2063: How to build "the Africa we want"' (2020) 45 *Brooklyn Journal of International Law* 537, available at: <https://brooklynworks.brooklaw.edu/bjil/vol45/iss2/2> (accessed on 14 September 2024).

build upon various existing development initiatives and RECs.<sup>12</sup> To achieve these Afro-centric goals, it is submitted that Africa must answer the questions: Should foreign proven or near-proven systems or strategies be adopted to achieve these Africanised objectives? Should Africa look beyond the continent in the formative stages of the AfCFTA to seek guidance for its institutional organisation?

This paper conducts a comprehensive trace of the background to Agenda 2063 to ascertain the intentions of the founding fathers and Africa's vision for self-determination, which culminated in Agenda 2063. It explores questions of regional integration of IP laws of the AU under this framework. Considering the provisions of the AfCFTA IP protocol, three integration strategies are discussed: cooperation, harmonisation and unification; however, focusing on harmonisation. The strengths and weaknesses of each strategy are highlighted to determine which, if any, is best suited to achieve IP integration. This paper concludes by proffering a hybrid strategy to achieve 'workable harmonisation', outlining ten possible policy recommendations to be achieved over a decade (ten for ten) to support the efforts of harmonisation under the AfCFTA IP framework.

## 2 BACKGROUND TO AGENDA 2063 AND THE AfCFTA

This section traces cooperation efforts in Africa back to the immediate post-colonial era in the 1960s. A cursory read of the Resolutions and Declarations of the Council of Ministers (CM) of the Organisation of African Unity (OAU) at the eleventh ordinary session held in Algiers, Algeria, from 4–12 September 1968, highlights the age-long hunger for liberation, decolonisation and market integration by the OAU.<sup>13</sup> The OAU reiterated, in subsequent resolutions and declarations, the founders' intention to harness the natural and human resources of African peoples for total advancement in spheres of human endeavour.<sup>14</sup> For instance, at the fifteenth ordinary session of the Council of Ministers held in Addis Ababa in August 1970, the CM reaffirmed its determination to coordinate and harmonise *progressive integration* of economies and markets on the continent for economic and social development.<sup>15</sup> At that session, the OAU stressed its commitment to *intensifying co-operation efforts* among

- 12 African Union 'National & RECs Development Priorities', available at: <https://au.int/agenda2063/priorities> (accessed on 10 October 2024).
- 13 Organization for African Unity, Resolutions Adopted by the Eleventh Ordinary Session of the Council of Ministers, (1968), CM/Res.149 – 174 (XI) at 155, 159, 162, available at: [https://au.int/sites/default/files/decisions/9567-council\\_en\\_4\\_12\\_september\\_1968\\_council\\_ministers\\_eleventh\\_ordinary\\_session.pdf](https://au.int/sites/default/files/decisions/9567-council_en_4_12_september_1968_council_ministers_eleventh_ordinary_session.pdf) (accessed on 15 July 2025).
- 14 Paragraphs 3 and 5, 'Memorandum on the Responsibilities and Role of the OAU in the Economic and Social Fields', Resolutions and Declarations of the Fifteenth Ordinary Session of the Council of Ministers (1970) CM/Res.219-237 (XV) at 219, available at: [https://au.int/sites/default/files/decisions/9594-council\\_en\\_24\\_31\\_august\\_1970\\_council\\_ministers\\_fifteenth\\_ordinary\\_session.pdf](https://au.int/sites/default/files/decisions/9594-council_en_24_31_august_1970_council_ministers_fifteenth_ordinary_session.pdf) (accessed on 15 July 2025).
- 15 CM/Res.219-237 (XV) (n14).

member states, *promoting harmonisation* and increased inter-African trade for development.<sup>16</sup> [emphasis added]

In May 1973, the OAU adopted the African Declaration on Cooperation, Development and Economic Independence, predicated on its conviction that concerted efforts by member states — irrespective of economic status, size, structure or language differences — will stimulate the creative spirit of Africans for development, rapid transformation of economies and better standards of living.<sup>17</sup> It is worth noting that the OAU recommended the adoption of WIPO as a specialised agency of the United Nations (UN) in the same year, in a resolution passed by the CM at the 21st ordinary session held in Addis Ababa.<sup>18</sup> These developments record an obvious shift and focus on the relevance of intellectual property rights in supporting social and cultural welfare, which influences development. It is submitted that the intention to establish an integrated market remained evident through the texts of these resolutions/ declarations and the envisaged strategy was cooperation. In fact, the word ‘cooperation’ appeared 26 times in the 1973 African Declaration on Cooperation, Development and Economic Independence.<sup>19</sup> The term ‘harmonisation’ was used in relation to the OAU’s relations with developed market economy countries to suggest member states needed to harmonise their stands on negotiations to safeguard their continental interests.<sup>20</sup>

Predicated on the foundation of the African Declaration on Cooperation, Development and Economic Independence, the CM adopted a Resolution on Development and Economic Integration in Africa at its 32nd Ordinary Session held in Nairobi, Kenya from 23 February to 4 March 1979. This Resolution again reaffirmed the need to establish an African Economic Community (AEC) and called for actions such as undertaking necessary studies to expedite the establishment process and submitting a report to the Assembly of Heads of State and Government of the OAU.<sup>21</sup> In this resolution, however, there were no provisions or specific recommendations on the preferred approach to market integration. Additionally, the CM, at the same time, adopted a Resolution Relating to the Formulation of a Strategy for the Development of

16 CM/Res.219-237 (XV) (n14).

17 Preamble, African Declaration on Cooperation, Development and Economic Independence (1973) CM/St.12 (XXI), available at: [https://au.int/sites/default/files/decisions/9587-council\\_en\\_17\\_24\\_may\\_1973\\_council\\_ministers\\_twenty\\_first\\_ordinary\\_session.pdf](https://au.int/sites/default/files/decisions/9587-council_en_17_24_may_1973_council_ministers_twenty_first_ordinary_session.pdf) (accessed on 16 July 2025).

18 Organisation for African Unity ‘Resolution Concerning the Relations Between the United Nations and the World Intellectual Property Organisation (1973)’, Res. No CM/Res.306(XI), available at: [https://portal.africa-union.org/DVD/Documents/DOC-OAU-DEC/CM%20Res%20306%20\(XXI\)%20\\_E.pdf](https://portal.africa-union.org/DVD/Documents/DOC-OAU-DEC/CM%20Res%20306%20(XXI)%20_E.pdf) (accessed on 10 October 2025).

19 African Union Commission, African Union Common Repository, *African Declaration on Co-operation, Development and Economic Independence* (1973), available at: <http://archives.au.int/handle/123456789/5947> (accessed on 10 October 2025).

20 Ibid.

21 Organisation for African Unity ‘Resolution on Development and Economic Integration in Africa’ (1979) Res. No CM/Res. 682 (XXXII) at 6–7, available at: [https://au.int/sites/default/files/decisions/9592-council\\_en\\_23\\_february\\_4\\_march\\_1979\\_council\\_ministers\\_thirtieth\\_second\\_ordinary\\_session.pdf](https://au.int/sites/default/files/decisions/9592-council_en_23_february_4_march_1979_council_ministers_thirtieth_second_ordinary_session.pdf) (accessed on 15 July 2025).

Africa,<sup>22</sup> in which they highlighted that numerous resolutions had been adopted on the urgent issue of development and integration in Africa, requesting the formulation of an action programme of implementation for the establishment of an AEC.<sup>23</sup> The Assembly of Heads of State and Government also adopted a declaration of commitment — the Monrovia Declaration — to promote social and economic development and the integration of economies for self-reliance and self-sustainment of the continent.<sup>24</sup> Owing to these commitments, the OAU projected a three-stage pathway.<sup>25</sup> The first stage, to firmly uphold the commitments contained in the Monrovia Declaration — individually and collectively — to achieve various levels of dynamic inter-dependence at national, sub-regional and regional levels. This, according to the Declaration, paves the way for the second stage, which is the establishment of an African Common Market that ultimately leads to the achievement of the AEC. Africa clearly established its vision for self-reliance and development in these years, calling ‘most incessantly for the cooperation of economies within the OAU framework’.<sup>26</sup>

This historical trace is crucial to decipher the spirit of the people, their long-standing intentions towards regional integration of markets, and the preferred strategies for achieving this integration. From the foregoing, it is safe to assume an unwavering desire to eradicate all forms of colonialism on the continent and, in the context of development, to strengthen cooperation and accelerate socio-economic integration of the continent. This was again reaffirmed in the 1981 African Charter on Human and Peoples’ Rights<sup>27</sup> which replicates the pledges and purposes for the establishment of the OAU as contained in the OAU Charter.<sup>28</sup>

22 Organisation for African Unity ‘Resolution Relating to the Formulation of a Strategy for the Development of Africa’ (1979) Res. No CM/Res. 690 (XXXII) at 18–19, available at: [https://au.int/sites/default/files/decisions/9592-council\\_en\\_23\\_february\\_4\\_march\\_1979\\_council\\_ministers\\_thirtieth\\_second\\_ordinary\\_session.pdf](https://au.int/sites/default/files/decisions/9592-council_en_23_february_4_march_1979_council_ministers_thirtieth_second_ordinary_session.pdf) (accessed on 16 July 2025).

23 Organisation for African Unity ‘Resolution Relating to the Formulation of a Strategy for the Development of Africa’ (1979) Res. No CM/Res. 690 (XXXII) at 18–19, available at: [https://au.int/sites/default/files/decisions/9592-council\\_en\\_23\\_february\\_4\\_march\\_1979\\_council\\_ministers\\_thirtieth\\_second\\_ordinary\\_session.pdf](https://au.int/sites/default/files/decisions/9592-council_en_23_february_4_march_1979_council_ministers_thirtieth_second_ordinary_session.pdf) (accessed on 16 July 2025).

24 Paragraphs 2 and 3, Monrovia Declaration of Commitment of the Heads of State and Government of the Organization of African Unity on Guidelines and Measures for National and Collective Self-Reliance in Social and Economic Development for the Establishment of a New International Economic Order, Resolution No. AHG/ST. 3 (XVI) Rev.1, adopted by the Sixteenth Ordinary Session of Heads of State and Government in Monrovia, Liberia from July 17–20, 1979, available at: [https://au.int/sites/default/files/decisions/9526-assembly\\_en\\_17\\_20\\_july\\_1979\\_assembly\\_heads\\_state\\_government\\_sixteenth\\_ordinary\\_session.pdf](https://au.int/sites/default/files/decisions/9526-assembly_en_17_20_july_1979_assembly_heads_state_government_sixteenth_ordinary_session.pdf) (accessed on 20 July 2025).

25 Ibid

26 Ibid para 5.

27 Organisation for African Unity, African Charter on Human and Peoples’ Rights, adopted by the Eighteenth Assembly of Heads of States and Governments, June 1981, Nairobi, Kenya, available at: [https://au.int/sites/default/files/treaties/36390-treaty-0011\\_-\\_african\\_charter\\_on\\_human\\_and\\_peoples\\_rights\\_e.pdf](https://au.int/sites/default/files/treaties/36390-treaty-0011_-_african_charter_on_human_and_peoples_rights_e.pdf) (accessed on 17 July 2025).

28 Article 2(1)(a) and (d) of the Organisation of African Unity Charter (1963), available at: [https://au.int/sites/default/files/treaties/7759-file-oau\\_charter\\_1963.pdf](https://au.int/sites/default/files/treaties/7759-file-oau_charter_1963.pdf) (accessed on 18 July 2025).

The Treaty Establishing the AEC was adopted in 1991,<sup>29</sup> wherein a self-reliant and sustained continent, as canvassed in the Monrovia Declaration, was again highlighted as an objective of the AEC.<sup>30</sup> The treaty sought to create a community tasked with establishing the common market to achieve the AEC<sup>31</sup> and harmonising policies in existing regional and sub-regional economic communities.<sup>32</sup> This document was critical to future developments around the establishment of the AfCFTA as member states undertook to refrain from counter-productive actions but create favourable conditions by harmonising policies and strategies to achieve the objectives of the Treaty.<sup>33</sup> Article 6 of the Treaty further stipulated modalities for the establishment of the community in the following six stages and timelines:

- i) Strengthening of existing RECs and establishment of RECs where there are none (1994 to 1999)
- ii) Eliminate tariff and non-tariff barriers to trade in RECs (2000 to 2007)
- iii) Establish customs unions and free trade areas in RECs (2008 to 2017)
- iv) Establish a customs union at a continental level and a common external tariff (2018 to 2019)
- v) Establish a common market for Africa (2020 to 2023)
- vi) Establish a Pan-African economic and monetary union (2024 to 2028)

29 Article 2 of the Organisation of African Unity, Treaty Establishing the African Economic Community, WIPO Lex No. TRT/AEC/001, adopted by the Heads of State and Government of the member states of the OAU on June 3, 1991 and entered into force May 12, 1994, available at: <https://www.wipo.int/wipolex/en/treaties/textdetails/12048> and [https://au.int/sites/default/files/treaties/37636-treaty-TREATY\\_ESTABLISHING\\_THE\\_AEC-compressed.pdf](https://au.int/sites/default/files/treaties/37636-treaty-TREATY_ESTABLISHING_THE_AEC-compressed.pdf) (accessed on 18 July 2025).

30 Article 4(1)(b) and (c) of the Organisation of African Unity, Treaty Establishing the African Economic Community, WIPO Lex No. TRT/AEC/001, adopted by the Heads of State and Government of the member states of the OAU on June 3, 1991 and entered into force May 12, 1994, available at: <https://www.wipo.int/wipolex/en/treaties/textdetails/12048> and [https://au.int/sites/default/files/treaties/37636-treaty-TREATY\\_ESTABLISHING\\_THE\\_AEC-compressed.pdf](https://au.int/sites/default/files/treaties/37636-treaty-TREATY_ESTABLISHING_THE_AEC-compressed.pdf) (accessed on 18 July 2025).

31 Article 4(2)(h) of the Organisation of African Unity, Treaty Establishing the African Economic Community, WIPO Lex No. TRT/AEC/001, adopted by the Heads of State and Government of the member states of the OAU on June 3, 1991 and entered into force May 12, 1994, available at: <https://www.wipo.int/wipolex/en/treaties/textdetails/12048> and [https://au.int/sites/default/files/treaties/37636-treaty-TREATY\\_ESTABLISHING\\_THE\\_AEC-compressed.pdf](https://au.int/sites/default/files/treaties/37636-treaty-TREATY_ESTABLISHING_THE_AEC-compressed.pdf) (accessed on 18 July 2025).

32 Article 4(2)(b) and (e) of the Organisation of African Unity, Treaty Establishing the African Economic Community, WIPO Lex No. TRT/AEC/001, adopted by the Heads of State and Government of the member states of the OAU on June 3, 1991 and entered into force May 12, 1994, available at: <https://www.wipo.int/wipolex/en/treaties/textdetails/12048> and [https://au.int/sites/default/files/treaties/37636-treaty-TREATY\\_ESTABLISHING\\_THE\\_AEC-compressed.pdf](https://au.int/sites/default/files/treaties/37636-treaty-TREATY_ESTABLISHING_THE_AEC-compressed.pdf) (accessed on 18 July 2025).

33 Article 5(1) of the Organisation of African Unity, Treaty Establishing the African Economic Community, WIPO Lex No. TRT/AEC/001, adopted by the Heads of State and Government of the member states of the OAU on June 3, 1991 and entered into force May 12, 1994, available at: <https://www.wipo.int/wipolex/en/treaties/textdetails/12048> and [https://au.int/sites/default/files/treaties/37636-treaty-TREATY\\_ESTABLISHING\\_THE\\_AEC-compressed.pdf](https://au.int/sites/default/files/treaties/37636-treaty-TREATY_ESTABLISHING_THE_AEC-compressed.pdf) (accessed on 18 July 2025).

The above-outlined stages, although fast-tracked in some regards, formed the basis of crucial developments in relation to the creation of the AfCFTA as canvassed below.

The OAU, having believed it had achieved, to a great extent, its objective to rid the continent of colonisation, and eager to advance its development and integration goals, was consequently transformed into the AU.<sup>34</sup> It is debatable the extent of colonisation eradication achieved at that time, and the rushed approach to integration on that foundation is questionable. However, that discourse is beyond the purview of this paper.

When the AU was established, this vision to accelerate integration to promote economic, social and cultural development in Africa was again carried by the Assembly as part of the overarching objectives of the AU.<sup>35</sup> In its recitals, the Constitutive Act of the AU reiterated its determination to accelerate the development of the AEC. Therefore, the clamour for regional integration under the AfCFTA framework is neither unfounded nor neoteric. In the context of regional economic integration of markets, the recurring concept through these documents is the term ‘cooperation’, although, as outlined above in the relevant articles, the Abuja Treaty stressed the need for harmonisation of policies and structures to achieve economic integration. This treaty also pushed the agenda to accelerate the establishment of the AEC and a Council of Ministers in charge of integration.

In March 2006, the First Conference of African Ministers in charge of integration was held in Ouagadougou, Burkina Faso, where they recommended the rationalisation of RECs. Based on this recommendation, the Assembly of the AU passed a decision/ declaration in July 2006 to suspend the recognition of new RECs, recognising only eight RECs on the continent — Economic Community of West African States (ECOWAS); the Common Market for Eastern and Southern Africa (COMESA); Economic Community of Central African States (ECCAS); Southern African Development Community (SADC); Intergovernmental Authority on Development (IGAD); the Arab Maghreb Union (AMU); Community of Sahel-Saharan States (CEN-SAD) and the East African Community (EAC) — and urging them to *coordinate* and *harmonise* their policies to accelerate the integration process.<sup>36</sup> These developments encouraged the rise and strengthening of RECs in Africa, such as the Tripartite Free Trade Area Agreement between COMESA-EAC-SADC in 2008 and the consequent quest to establish a second bloc of RECs by the AU

34 Recitals of the Constitutive Act of the African Union adopted by the Thirty-Sixth Ordinary Session of the Assembly of Heads of State and Government on July 11, 2000 at Lome, Togo, available at: [https://au.int/sites/default/files/pages/34873-file-constitutiveact\\_en.pdf](https://au.int/sites/default/files/pages/34873-file-constitutiveact_en.pdf) (accessed on 18 July 2025).

35 Article 3(c) and (j), Constitutive Act of the African Union adopted by the Thirty-Sixth Ordinary Session of the Assembly of Heads of State and Government on July 11, 2000 at Lome, Togo, available at: [https://au.int/sites/default/files/pages/34873-file-constitutiveact\\_en.pdf](https://au.int/sites/default/files/pages/34873-file-constitutiveact_en.pdf) (accessed on 18 July 2025).

36 Assembly of the African Union Seventh Ordinary Session, Decision on the Moratorium on the Recognition of Regional Economic Communities (RECs) Doc. EX.CL/278 (IX), July 1-2, 2006, Assembly/AU/Dec. 111-133 (VII) at 112, available at: [https://au.int/sites/default/files/decisions/9555-assembly\\_au\\_dec\\_111-133\\_vii\\_e.pdf](https://au.int/sites/default/files/decisions/9555-assembly_au_dec_111-133_vii_e.pdf) (accessed on 20 July 2025).

between ECOWAS, ECCAS, CEN-SAD and the AMU.<sup>37</sup> This second bloc has not materialised at the time of this research.

In the events leading up to the golden jubilee of the OAU in 2013, Africa found a renewed spirit of continental integration. In line with the Abuja Treaty, a Continental Free Trade Area (CFTA) was recommended as a necessary step to achieve a common African market. In 2012, the Assembly of the AU decided to establish the CFTA by 2017.<sup>38</sup> The Assembly, in its 50th Anniversary solemn declaration,<sup>39</sup> pledged to realise the African vision for Pan Africanism and African Renaissance, acting together with all peoples, including African women, youth and diaspora. The Heads of State and Government urged the AU Commission (AUC), African Development Bank and Economic Commission to refine the draft Framework of the AU Agenda 2063 to be presented for consideration by AU policy organs.<sup>40</sup> This continental Agenda 2063 aims to develop a 50-year (2013–2063) growth action plan for Africa with seven aspirations, including the integration Agenda, capitalising on the solemn declaration of African political leadership at its highest level.

Aspiration 2 of Agenda 2063 is to achieve an ‘integrated continent, politically united and based on the ideals of Pan-Africanism and the vision of Africa’s Renaissance’, and two of the goals outlined under this aspiration are accelerating efforts towards continental unity, including economic integration through the CFTA and ridding Africa of all forms of colonisation while affirming the right to self-determination.<sup>41</sup> It is on this foundation that the Agreement to establish the African Continental Free Trade Area (AfCFTA) was adopted in 2018<sup>42</sup> as one of the flagship projects of Agenda 2063, specifically to achieve the goals and aspirations outlined above. The Agreement establishing the AfCFTA was adopted on 21 March 2018, and entered into force on 30 May 2019.

- 37 African Union, Modalities for the Creation of a Second Bloc of RECS – Concept Note, available at: [https://au.int/web/sites/default/files/newsevents/conceptnotes/12571-cn-concept\\_note\\_-\\_proposed\\_modalities\\_for\\_the\\_creation\\_of\\_a\\_2nd\\_bloc.pdf](https://au.int/web/sites/default/files/newsevents/conceptnotes/12571-cn-concept_note_-_proposed_modalities_for_the_creation_of_a_2nd_bloc.pdf) (accessed on 20 July 2025).
- 38 Assembly of the African Union Eighteenth Ordinary Session, January 29–23, 2012, Addis Ababa, Ethiopia, Assembly/AU/Desc.391-415(XVIII) at 394, Decision on Boosting Intra-African Trade and Fast Tracking the Continental Free Trade Area Doc.EX.CL/700(XX), available at: [https://au.int/sites/default/files/decisions/9649-assembly\\_ae\\_desc\\_391\\_-415\\_xviii\\_e.pdf](https://au.int/sites/default/files/decisions/9649-assembly_ae_desc_391_-415_xviii_e.pdf) (accessed on 20 July 2025).
- 39 African Union, 50th Anniversary Solemn Declaration adopted May 26, 2013 at the 21st Ordinary Session of the Assembly of Heads of State and Government of the African Union at Addis Ababa, available at: [https://au.int/sites/default/files/documents/36205-doc-50th\\_anniversary\\_solemn\\_declaration\\_en.pdf](https://au.int/sites/default/files/documents/36205-doc-50th_anniversary_solemn_declaration_en.pdf) (accessed on 20 July 2025).
- 40 Assembly of the Union Twenty-First Ordinary Session, May 26–27, 2013, Addis Ababa, Ethiopia, Assembly/AU/Dec.474-489(XXI) at 476, Decision on the Development of the African Union Commission Strategic Plan 2014–2017 and the AU Agenda 2063 Doc. Assembly/AU/3(XXI), available at: [https://au.int/sites/default/files/decisions/9654-assembly\\_ae\\_desc\\_474-489\\_xxii\\_e.pdf](https://au.int/sites/default/files/decisions/9654-assembly_ae_desc_474-489_xxii_e.pdf) (accessed on 20 July 2025).
- 41 African Union, ‘Our aspirations for the Africa we want’ (2025), available at: <https://au.int/agenda2063/aspirations> (accessed on 20 July 2025).
- 42 Part II, Article 2, Agreement Establishing the African Continental Free Trade Area adopted by the Heads of State and Government or duly recognised representatives of member states of the African Union signed at Kigali, on March 21, 2018, available at: [https://au.int/sites/default/files/treaties/36437-treaty-consolidated\\_text\\_on\\_cfta\\_-en.pdf](https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-en.pdf) (accessed on 21 July 2025).

From the foregoing, it is deduced that the AU has long established its unwavering desires and aspirations for a self-determined, self-sufficient Africa where Pan-Africanism is encouraged across all sectors and a common integrated market for Africa is achieved. Through these texts, the AU clearly expressed the need for cooperation among member states to achieve Agenda 2063. For the FTA, cooperation could be achieved through the harmonisation of policies and procedures in relation to trade or simply cooperation on adopting national measures to meet the ultimate goal of a common African market. Although harmonisation is encouraged for RECs and member states in various specific sectors, this seems not to be the case in relation to intellectual property. Having conducted a general trace of the relevant declarations, decisions, recommendations and treaties of the OAU and the AU leading to the establishment of the AfCFTA, the next section of this paper will conduct a trace of the intentions of member states of the AU in relation to the regional integration of IP laws under the AfCFTA.

### 3. THE AU VISION FOR AN IP INTEGRATION STRATEGY

This section traces the AU's vision for IP integration under the framework of the AfCFTA by considering specific texts of the relevant treaties.

Article 28(2) of the Abuja Treaty requires members to take all necessary measures to foster cooperation among RECs. To realise the objectives of the CFTA, they are encouraged to coordinate and harmonise their activities across all sectors — including IP activities. Articles 30 and 31 provide for the elimination of customs duties and non-tariff barriers to trade, respectively. Per these articles, REC member states are required to take necessary measures to support the coordination and harmonisation of the activities of RECs on eliminating customs duties among member states.

Similarly, per art 31, member states should work towards the elimination of non-tariff barriers such as quota restrictions, prohibitions, restrictions, dumping subsidies and discriminatory practices. However, they are permitted to make known their intentions to exclude intellectual property from the obligations of arts 30 and 31 to enable the continuous imposition of restrictions or prohibitions affecting IP.<sup>43</sup> This exception evinces the principle of territoriality and other IP complexities. Article 77 clearly provides for the harmonisation of policies in other fields for the effective functioning and development of the AEC. Member states are encouraged to consult each other for the harmonisation of policies. It is submitted that present IP harmonisation efforts under the AfCFTA are founded on the Abuja Treaty, in accordance with the overall vision of the AU.

Article 3 of the AfCFTA Agreement outlines the general objectives of the establishment of the AfCFTA to include the 'creation of a single market for

43 Article 35(1)(e) of the Treaty Establishing the African Economic Community, adopted by the Heads of State and Government of Member States of the Organisation of African Unity, adopted in Abuja, Nigeria, on June 3, 1991, entered into force May 12, 1994, available at: [https://au.int/sites/default/files/treaties/37636-treaty-TREATY\\_ESTABLISHING\\_THE\\_AEC-compressed.pdf](https://au.int/sites/default/files/treaties/37636-treaty-TREATY_ESTABLISHING_THE_AEC-compressed.pdf) (accessed on 20 July 2025).

goods and services in Africa, deepen economic integration as envisaged under Agenda 2063, resolve the challenges of proliferation of RECs and overlapping memberships for expedited continental integration'.<sup>44</sup> To realise the general objectives of the AfCFTA, specific objectives were set out to include the cooperation of member states on intellectual property.<sup>45</sup> The extent of this cooperation is not specified under the Agreement. However, art 6 provides that the Agreement shall cover trade in goods, services, and IPRs, among others. Unlike the Abuja Treaty, art 6 leaves no room for exceptions or limitations in application on the removal of customs duties and non-tariff barriers to trade in the community.

Member states were, however, obligated to negotiate protocols, annexes and appendices on specific sectors, including IPRs,<sup>46</sup> as part of phase II negotiations of the AfCFTA Agreement. Upon entry into force, the protocols, their annexes and appendices shall form a single undertaking, forming an integral part of the AfCFTA Agreement.<sup>47</sup> Based on this foundation, member states commenced negotiations and produced a draft IP protocol for the AfCFTA Agreement. At the time of this research, member states have begun negotiations of the annexes to the IP Protocol on specific areas of IP, including the AfCFTA IP Office (AIPO).

The following section will focus on provisions of the IP protocol to understand the intentions for IP integration under the AfCFTA. The *cooperation* referred to in art 4(c) of the AfCFTA Agreement may have been qualified by member states in the IP protocol. Its recital, on the one hand, acknowledged the crucial role of cooperation in the AfCFTA IP framework. On the other hand, it stipulates thus:

Desirous of *harmonising* rules and principles on intellectual property rights to boost intra-African trade in line with the AfCFTA Agreement and promoting economic growth and development within the continent...<sup>48</sup> [emphasis added]

- 44 Article 3(a) and (h), Agreement Establishing the African Continental Free Trade Area adopted by the Heads of State and Government or duly recognised representatives of member states of the African Union signed at Kigali, on March 21, 2018, available at: [https://au.int/sites/default/files/treaties/36437-treaty-consolidated\\_text\\_on\\_cfta\\_-\\_en.pdf](https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf) (accessed on 22 July 2025).
- 45 Article 4(c) of the, Agreement Establishing the African Continental Free Trade Area adopted by the Heads of State and Government or duly recognised representatives of member states of the African Union signed at Kigali, on March 21, 2018, available at: [https://au.int/sites/default/files/treaties/36437-treaty-consolidated\\_text\\_on\\_cfta\\_-\\_en.pdf](https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf) (accessed on 22 July 2025).
- 46 Article 7(1)(a) of the Agreement Establishing the African Continental Free Trade Area adopted by the Heads of State and Government or duly recognised representatives of member states of the African Union signed at Kigali, on March 21, 2018, available at: [https://au.int/sites/default/files/treaties/36437-treaty-consolidated\\_text\\_on\\_cfta\\_-\\_en.pdf](https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf) (accessed on 22 July 2025).
- 47 Article 8(1) and (2) of the Agreement Establishing the African Continental Free Trade Area adopted by the Heads of State and Government or duly recognised representatives of member states of the African Union signed at Kigali, on March 21, 2018, available at: [https://au.int/sites/default/files/treaties/36437-treaty-consolidated\\_text\\_on\\_cfta\\_-\\_en.pdf](https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf) (accessed on 22 July 2025).
- 48 Preamble, Final Draft, Intellectual Property (IP) Protocol to the Agreement Establishing the African Continental Free Trade Area (2023), available at: [https://www.bilaterals.org/IMG/pdf/en\\_-\\_draft\\_protocol\\_of\\_the\\_afcfta\\_on\\_intellectual\\_property\\_rights.pdf](https://www.bilaterals.org/IMG/pdf/en_-_draft_protocol_of_the_afcfta_on_intellectual_property_rights.pdf) (accessed on 21 July 2025).

Member states recognised the role of cooperation, as clearly no level of integration is achievable without cooperation among the member states. Article 22 of the IP protocol places a general obligation of cooperation on member states to support intra-African trade, economic growth, regional value chain and industrialisation in IP. The key element is the intention to harmonise, which, it is submitted, is expressed with the term 'desirous'.

Harmonisation is, arguably, the bedrock on which the provisions of the IP protocol were negotiated and agreed upon by member states.<sup>49</sup> This intention is further developed in art 2 of the IP protocol, which stipulates that the general objective of the protocol is to harmonise rules and principles for the protection, promotion, cooperation and enforcement of IP rights. Again, the term cooperation is used lightly to suggest working together to achieve harmonisation instead of a preferred integration strategy. Member states also qualified this desire for harmonisation under this article to mean harmonisation of *rules* and *principles*. This is a crucial point since harmonisation is a complex strategy of integration on a spectrum of minimum to maximum levels of harmonisation.<sup>50</sup> Halpern and Johnson submit that the extent of harmonisation can range from minimum harmonisation, that is, the harmonisation of minimum standards, to maximum harmonisation, which may involve the harmonisation of substantive rules or the rules plus remedies or the rules, remedies and legal procedures.<sup>51</sup>

However, full harmonisation leaves little or no room for divergence by state parties. There is also the question of specificity on this provision since 'rules' may refer to substantive and/or administrative rules. The term 'principles' suggests legal principles, implying harmonisation of substantive rules. This is further implied from the provision of art 2(2)(e), which provides that a specific objective of the IP Protocol is to promote a harmonised system of *IP protection* in all IP categories<sup>52</sup> on the continent. [emphasis added]

Notwithstanding, Articles 23 and 24 of the IP protocol outline areas of cooperation between member states. While Article 24 deals with cooperation in the administration of IP rights, art 23 relates to areas which, it is submitted, may be regarded as 'quasi-substantive' issues or areas of IP such as information sharing on laws and policies;<sup>53</sup> identification of future areas of harmonisation;<sup>54</sup> strengthening means of returns to copyright and related right holders;<sup>55</sup> promoting public awareness on IP;<sup>56</sup> facilitating registration of IP rights on the continent<sup>57</sup> and so on. On the administrative front, member states are obliged

49 Ibid.

50 SW Halpern & P Johnson *Harmonising Copyright Law and Dealing with Dissonance* (2014) 5.

51 Ibid.

52 Article 3 of the Final Draft, Intellectual Property (IP) Protocol to the Agreement Establishing the African Continental Free Trade Area (2023), available at: [https://www.bilaterals.org/IMG/pdf/en\\_-\\_draft\\_protocol\\_of\\_the\\_afcfta\\_on\\_intellectual\\_property\\_rights.pdf](https://www.bilaterals.org/IMG/pdf/en_-_draft_protocol_of_the_afcfta_on_intellectual_property_rights.pdf) (accessed on 21 July 2025).

53 Final Draft, Intellectual Property (IP) Protocol (n52) art 23(a).

54 Final Draft, Intellectual Property (IP) Protocol (n52) art 23(b).

55 Final Draft, Intellectual Property (IP) Protocol (n52) art 23(d).

56 Final Draft, Intellectual Property (IP) Protocol (n52) art 23(i).

57 Final Draft, Intellectual Property (IP) Protocol (n52) art 23(j).

to cooperate in areas including the automation and streamlining of intra-agency communications,<sup>58</sup> sharing experiences on examination of registrable IP rights,<sup>59</sup> capacity building of IP offices for technology transfer,<sup>60</sup> and human resources development on IP.<sup>61</sup>

These administrative and quasi-substantive areas of cooperation, when properly implemented, will support the harmonisation efforts of member states on the substantive areas of IP. The annexes, when negotiated and adopted, will be useful in determining the degree of IP harmonisation under the AfCFTA.<sup>62</sup> Article 31 crowns all these efforts with the establishment of an AfCFTA IP Office (AIPO), subject to the decision of the Assembly of the Heads of State and Government of the AU. The annex on the AIPO will contain details of operation, governance, composition, legal status, structure and so on.<sup>63</sup> The AIPO, when established, is charged to recognise and cooperate with existing national, international and regional IP organisations.<sup>64</sup> The extent of this cooperation will be canvassed in the annex on the AIPO.<sup>65</sup> The establishment of the AIPO is a bold venture by the AU, considering the failure of efforts to establish its predecessor — the Pan-African IP Organisation (PAIPO), as well as the existence of regional strongholds on the continent; the African Regional Intellectual Property Organisation (ARIPO) and the Organisation Africaine de la Propriété Intellectuelle (OAPI).<sup>66</sup>

At the time of this research, negotiations on the annexes to the IP protocol are ongoing, and while the IP protocol has been adopted by the AU, it has not entered into force. The provisions discussed in this section highlight cooperation and harmonisation as the intended IP integration strategies under the AfCFTA. However, the degree and impact of these strategies are left to be determined. The next section discusses IP integration strategies — cooperation, harmonisation and unification. However, emphasis will be laid on harmonisation.

#### 4. CONSIDERING REGIONAL INTEGRATION STRATEGIES

Governments are jealous of their sovereignty, and many have an unstated interest in a weak AU...Many African governments have a history of signing agreements without a clear intent to abide by them... One fundamental problem here is the incapacity of the AU to enforce its

58 Final Draft, Intellectual Property (IP) Protocol (n52) art 24(a).

59 Final Draft, Intellectual Property (IP) Protocol (n52) art 24(b).

60 Final Draft, Intellectual Property (IP) Protocol (n52) art 24(c).

61 Final Draft, Intellectual Property (IP) Protocol (n52) art 24(d).

62 Final Draft, Intellectual Property (IP) Protocol (n52) art 41.

63 Final Draft, Intellectual Property (IP) Protocol (n52) art 31(2).

64 Article 31(3) of the Intellectual Property (IP) Protocol to the Agreement Establishing the African Continental Free Trade Area (2023), available at: [https://www.bilaterals.org/IMG/pdf/en\\_-draft\\_protocol\\_of\\_the\\_afcfta\\_on\\_intellectual\\_property\\_rights.pdf](https://www.bilaterals.org/IMG/pdf/en_-draft_protocol_of_the_afcfta_on_intellectual_property_rights.pdf) (accessed on 21 July 2025).

65 Article 31(3)(4) of the Intellectual Property (IP) Protocol to the Agreement Establishing the African Continental Free Trade Area (2023), available at: [https://www.bilaterals.org/IMG/pdf/en\\_-draft\\_protocol\\_of\\_the\\_afcfta\\_on\\_intellectual\\_property\\_rights.pdf](https://www.bilaterals.org/IMG/pdf/en_-draft_protocol_of_the_afcfta_on_intellectual_property_rights.pdf) (accessed on 21 July 2025)..

66 CB Ncube *Intellectual Property Law in Africa: Harmonising Administration and Policy* 2 ed (2023) 188–206.

rules and decisions as well as the cynicism with which many member states regard these rules and decisions.<sup>67</sup>

With over 165 demarcated borders and over twenty regional and sub-regional economic cooperation frameworks,<sup>68</sup> Africa presents unique complexities around integration. In fact, authors such as Fagbayibo have described integration as an impossible political process in a climate where African countries subscribe to different legal systems.<sup>69</sup> The concept of integration at all levels, global, regional, sub-regional, and national, is very complex. As 'integration' implies, it is an effort to coordinate units to make a 'whole' from fragments or units, by drawing lessons from the experiences, challenges and successes faced by integration schemes across the globe.<sup>70</sup> Regional integration (RI) is the bringing together of countries of common geographical regions, stirred by a common cultural, social, economic or political interest. RI may take various forms such as market integration, development integration or neo-functional integration,<sup>71</sup> all of which have been elegantly discussed in a wealth of scholarship and will not be replicated in this paper.

The world has witnessed a proliferation of RI since the 21st century. As of 1 March 2022, 354 regional trade agreements were in force compared to two in 1960.<sup>72</sup> There are theoretical perspectives on integration, criticisms on the creation, proliferation, and pros and cons of FTAs, but these are beyond the purview of this paper. However, it is relevant to emphasise that the success of RI is hinged on the presence of critical factors which include political will, mutual trust and commitment, institutional capacity, stakeholder and cross-border cooperation, sustainable mechanisms of fair distribution of gains and losses considering the heterogeneity of member states, absence of retrogressive competition<sup>73</sup> and, I dare submit, the choice of an effective integration strategy. Undisputedly, the AfCFTA IP protocol provides yet another chance for the AU to establish an effective IP framework, Africanising our IP systems to make

67 MA Mohammed 'Towards an effective African Union: Participation, institutions, and leadership' in S Adejumobi & AO Olukoshi (eds) *The African Union and New Strategies for Development in Africa*. (2008) 62; K Gottschalk 'Persistent problems in African integration and peace-keeping' (2018) 7(3) *Journal of African Union Studies* 67–87 at 70, available at: <https://www.jstor.org/stable/26890365> (accessed on 23 July 2025).

68 A Vanni et al 'Africa's regional and sub-regional economic cooperation frameworks: A summary' (2025) *Afronomicslaw*, available at: <https://www.afronomicslaw.org/print/pdf/node/1458> (accessed on 22 October 2025).

69 B Fagbayibo 'Towards the harmonisation of laws in Africa' (2009) 42(3) *The Comparative and International Law Journal of Southern Africa* 309–322 310, available at: <https://www.jstor.org/stable/23253105> (accessed on 22 October 2025).

70 CH Vhumbunu, JR Rudigi & C Mawire 'Consolidating African regional integration through the African Continental Free Trade Area: Lessons from the ASEAN Free Trade Area' (2022) 11(2) *Journal of African Union Studies* 77–101 78, available at: <https://journals.co.za/doi/abs/10.31920/2050-4306/2022/11n2a5> (accessed on 23 July 2025).

71 CB Ncube *Intellectual Property Law in Africa: Harmonising Administration and Policy* 2 ed (2023) 77.

72 Ncube (n71) 80.

73 W Mattli 'Explaining regional integration outcomes' (1999) 6(1) *Journal of European Public Policy* 1–27; CH Vhumbunu (ed) 'African regional economic integration in the era of globalisation: Reflecting on the trials, tribulations, and triumphs' (2019) 14(1) *International Journal of African Renaissance Studies-Multi-, Inter- and Transdisciplinary* 106–130.

IP work better for Africa. The question remains, what integration strategy best embodies Africa's complexities?

#### 4.1 Cooperation

As an integration strategy, cooperation is the voluntary collaboration among member states to align their policies, actions, and objectives to achieve shared goals without ceasing national sovereignty.<sup>74</sup> Countries make concerted efforts to support communication and transfer of information on administrative and enforcement mechanisms without a regional substantive legal framework.<sup>75</sup> Cooperation is governed by bilateral or multilateral instruments to foster relations, usually economic and political, between parties. It is a vital element of stabilisation and integration as regions can collectively tackle common challenges affecting them.<sup>76</sup> This approach has been utilised by RECs around the world, including the Association of Southeast Asian Nations (ASEAN), the Asia-Pacific Economic Co-operation (APEC) forum and Brazil, Russia, India, China and South Africa (BRICS). Ncube provides a detailed examination of these RECs, which will not be replicated in this paper.<sup>77</sup> The ASEAN framework will be further discussed in section 5 of this paper.

The ability to maintain state autonomy and separate legal frameworks makes this strategy a common approach to regional integration. ARIPO, for instance, serves as an inter-governmental organisation (IGO) which facilitates cooperation among its members 'with the objective of pooling financial and human resources and seeking technological advancement for economic, social, technological, scientific and industrial development'.<sup>78</sup> In facilitating regional cooperation, ARIPO operates a decentralised system, enabling members to establish their IP legal frameworks and structures at the national level. ARIPO facilitates cooperation among its 22 member states,<sup>79</sup> while aspiring to achieve IP harmonisation objectives.<sup>80</sup> Often considered a first step to RI, this strategy represents the lowest, and arguably the weakest, level of multilateral commitment where countries retain full control and can opt out with relative

74 Ncube (n71)76.

75 Ncube (n71) 155.

76 European Commission 'Regional Cooperation' (European Commission), available at: [https://enlargement.ec.europa.eu/enlargement-policy/policy-highlights/regional-cooperation\\_en](https://enlargement.ec.europa.eu/enlargement-policy/policy-highlights/regional-cooperation_en) (accessed on 10 March 2025).

77 CB Ncube *Intellectual Property Law in Africa: Harmonising Administration and Policy* 2 ed (2023) 155–164.

78 About ARIPO (ARIPO), available at: [https://www.aripo.org/#:~:text=The%20African%20Regional%20Intellectual%20Property%20Organization%20\(ARIPO\)%20is%20an%20inter,technological%20advancement%20for%20economic%2C%20social%2C](https://www.aripo.org/#:~:text=The%20African%20Regional%20Intellectual%20Property%20Organization%20(ARIPO)%20is%20an%20inter,technological%20advancement%20for%20economic%2C%20social%2C) (accessed on 10 March 2025).

79 ARIPO, ARIPO Member States, available at: <https://www.aripo.org/member-states> (accessed on 23 October 2025); ARIPO member states are Botswana, Cape Verde, Eswatini, Gambia, Ghana, Kenya, Lesotho, Liberia, Malawi, Mauritius, Mozambique, Namibia, Rwanda, São Tomé and Príncipe, Seychelles, Sierra Leone, Somalia, Sudan, Tanzania, Uganda, Zambia, and Zimbabwe. Nigeria and South Africa are presently not members of the ARIPO framework.

80 DO Oriakhogba & C Ncube 'Intellectual property cooperation in China-Africa relations' *AfronomicsLaw* (3 September 2024), available at: <https://www.afronomicslaw.org/category/analysis/intellectual-property-cooperation-china-africa-relations> (accessed on 11 March 2025).

ease. It is, however, effective for addressing common causes that require regular exchange and consultation, without the need for a supranational body to make final and binding decisions.

Adopting this strategy means widespread collaboration, technical assistance, policy coordination and information sharing towards the achievement of the AfCFTA IP Protocol's objectives and Agenda 2063 aspirations, while maintaining national autonomy, separate legal frameworks and law enforcement agencies or mechanisms. This is especially relevant since African Governments are jealous of their sovereignty.<sup>81</sup> This strategy is advantageous where regional harmonisation and unification may not be effective or may be slower to achieve, since the two often involve intense time-consuming multilateral processes such as negotiations, amendments to national laws, institutional restructuring, and the establishment of supranational enforcement mechanisms.<sup>82</sup> Here, countries may selectively engage in bilateral and multilateral agreements that advance their national interests, considering their peculiarities — needs and culture, rather than imposing one-size-fits-all rules that may not serve members equally. Collaborating on less controversial issues helps in building trust among member states.

Despite the enticing advantages of cooperation, there are compelling arguments that this model may be ill-suited for effectively implementing the AfCFTA's IP Protocol, as it leaves room for fragmented rules that hinder the free movement of goods and services.<sup>83</sup> This ultimately defeats the purpose of the AfCFTA for an AEC. The AU has established an urgency for the creation of the AEC. Cooperation may encourage policy complacency. States may continue operating within outdated legal and institutional frameworks, postponing necessary reforms which can stall innovation, discourage cross-border collaboration, and weaken collective resolve.

## 4.2 Harmonisation

Harmonisation closely follows cooperation. It differs because it has a deeper aspiration of creating a more tight-knit integration framework, leaving little room for some national nuancing.<sup>84</sup> According to Opong, 'harmonisation involves synchronising the laws in the member countries, reducing differences in laws to the barest minimum without eliminating them'.<sup>85</sup> As a legal tool

81 MA Mohammed 'Towards an effective African Union: Participation, institutions, and leadership' in S Adejumobi & AO Olukoshi (eds) *The African Union and New Strategies for Development in Africa* (2008) 62

82 UN ESCAP 'Regional cooperation: Conceptual framework and Asia-Pacific experience in meeting the challenges in an era of globalization by strengthening regional development cooperation', available at: [https://www.unescap.org/sites/default/files/ch2\\_0.pdf](https://www.unescap.org/sites/default/files/ch2_0.pdf) (accessed on 10 March 2025).

83 G Erasmus 'To cooperate or to harmonise?' *Tralac* (25 May 2022), available at: <https://www.tralac.org/blog/article/15620-to-cooperate-or-to-harmonise.html> (accessed on 11 March 2025).

84 CB Ncube *Intellectual Property Law in Africa: Harmonising Administration and Policy* 2 ed (2023) 169.

85 RF Opong *Legal Aspects of Economic Integration in Africa* (2011) 110.

for achieving the uniformity of laws and coherence of integration objectives,<sup>86</sup> harmonisation supports the legal and economic conformity of member states. This is crucial to foster cross-border trade as illustrated by the EU's harmonisation framework, which is arguably the most advanced in the world.<sup>87</sup> The scope of this section, however, is limited to harmonisation efforts in Africa. As previously highlighted, harmonisation (minimum to maximum) is pursued at various levels — sub-regional, regional and global. Goode enumerates nine modes of effecting harmonisation,<sup>88</sup> which were further classified into three cluster categories: harmonisation by legislative means, explanatory means (guidelines) and contractual means (standard contractual clauses or industry norms).<sup>89</sup> Ncube additionally discusses a fourth mode, which is restatements of laws.<sup>90</sup>

This paper considers harmonisation by legislative means involving the adoption of soft or hard laws, which result in harmonisation on a spectrum — from minimum to maximum degrees of harmonisation, respectively.<sup>91</sup> It entails the alignment and adjustment of legal framework; national laws, policies, and administrative practices, to conform with a set of commonly agreed principles or standards, without necessarily having to create a single, official, unified legal regime.<sup>92</sup> This allows for consistency, similarity and compatibility across all jurisdictions while respecting individual legal and institutional sovereignty. Basically, the focus is on the elimination or minimisation of differences and the setting of common rules.<sup>93</sup>

Rajec defines harmonisation as 'an effort to make laws more uniform in both procedure and substance'.<sup>94</sup> This definition is particularly relevant as it raises an important discourse about the degrees of harmonisation. A harmonised system is appealing; however, there are inherent complexities in this strategy of integration. There is, first, the harmonisation of procedure, then the harmonisation of principles, and finally the harmonisation of both.<sup>95</sup> It has

86 B Fagbayibo 'Towards the harmonisation of laws in Africa' (2009) 42(3) *The Comparative and International Law Journal of Southern Africa* 309–322 310, available at: <https://www.jstor.org/stable/23253105> (accessed on 22 October 2025).

87 Ibid.

88 R Goode 'Reflections on the harmonisation of commercial law' (1991) 19(1) *Uniform Law Review* 57.

89 CB Ncube *Intellectual Property Law in Africa: Harmonising Administration and Policy* 2 ed (2023) 165–169; E Faria 'Future directions of legal harmonisation and law reform: Stormy seas or prosperous voyage?' (2009) 14 *Uniform Law Review* 5–34.

90 Ncube (n89) 168.

91 SW Halpern & P Johnson *Harmonising Copyright Law and Dealing with Dissonance* (2014) 5.

92 Halpern & Johnson (n91) 165–167.

93 AJ Odhiambo 'Towards a conceptual case for harmonisation of intellectual property laws within the East African community' (2019) 46(2) *EALR* 115; L Anand 'Harmonization of IP Laws' (2019) 9(3) *Pramana Research Journal*, available at: <https://www.pramanaresearch.org/gallery/prj-p566.pdf> (accessed on 11 March 2025).

94 SR Wasserman Rajec 'The harmonization myth in international intellectual property law' (2020), available at: <https://scholarship.law.wm.edu/facpubs/2030> (accessed on 10 March 2025).

95 M Nkomo 'Regional integration in the area of intellectual property: The case for Southern African Development Community involvement' (2014) 18 *SADC'S Involvement in the Area of Intellectual Property* 317.

been argued that where hard law is adopted, this degree of harmonisation is akin to unification.<sup>96</sup> It is submitted that for maximum harmonisation (akin to unification) to be attained, hard laws must relate to substantive, quasi-substantive and administrative aspects of IP in member states.<sup>97</sup>

Adopting harmonisation as the integration strategy of the AfCFTA IP protocol requires the continued existence of regional IP organisations, OAPI and ARIPO. However, they must conform to the Protocol as a superior continental norm or standard.<sup>98</sup> Given the history of these IP organisations in the establishment of PAIPO and the AIPO, both are jealous of their sovereignty. How many concessions, therefore, are they willing to make for harmonisation under the AfCFTA? How can the AU ensure that the synergy is practically established between the AIPO, ARIPO and OAPI?

Despite the age-old notion of IP rights as territorial rights, ironically, the history of international IP law is a tale of harmonisation,<sup>99</sup> an example of which is the harmonisation of IP laws through instruments such as the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) through its provision of minimum standards of protection to be domesticated by member states on strict adherence and the flexibilities to cater for their peculiar social and economic needs.<sup>100</sup> The Southern Common Market (MERCOSUR) and the EU utilise harmonisation for their regional structure.<sup>101</sup> A delve into the merits and demerits of harmonisation in their systems is beyond the scope of this paper.<sup>102</sup>

To achieve an AEC, harmonisation reduces disparities and inconsistencies in policy, legal norms and regulatory frameworks. Some aspects of integration are highlighted as 'best suited' for harmonisation, including tax policy, trade policy (tariff and trade facilitation), as well as legal (business law) and regulatory framework (standard rules and procedure for licensing, quality control, etc.).<sup>103</sup> The effectiveness of the harmonisation strategy for business law in Africa is well illustrated by the Organisation pour l'Harmonisation du Droit des Affaires en Afrique (OHADA). OHADA is renowned as a successful sub-regional legal harmonisation effort that can potentially be a model for legal

96 CB Ncube *Intellectual Property Law in Africa: Harmonising Administration and Policy* 2 ed (2023) 166; MP Ferreira-Snyman 'The harmonisation of laws within the African Union and the viability of legal pluralism as an alternative' (2010) 73 *Journal of Contemporary Roman-Dutch Law* 608.

97 SW Halpern & P Johnson *Harmonising Copyright Law and Dealing with Dissonance* (2014) 5.

98 B Byiers, F Ismail & P Apiko *How AfCFTA-Regional Relations Can Support Continental Trade* (Discussion Paper No 376, 2024) 7.

99 SR Wasserman Rajec 'The harmonization myth in international intellectual property law' (2020), available at: <https://scholarship.law.wm.edu/facpubs/2030> (accessed on 10 March 2025).

100 CB Ncube *Intellectual Property Law in Africa: Harmonising Administration and Policy* 2 ed (2023) 18.

101 Ncube (n100) 173.

102 For more on TRIPS, see Ncube (n100) 18–23.

103 L Kritzinger-van Niekerk 'Regional integration: Concepts, advantages, disadvantages and lessons of experience' *Southern African Regional Poverty Network* (May 2005), available at: [https://sarpn.org/documents/d0001249/P1416-RI-concepts\\_May2005.pdf](https://sarpn.org/documents/d0001249/P1416-RI-concepts_May2005.pdf) (accessed on 13 March 2025).

harmonisation in Africa.<sup>104</sup> IP rights protection, as a crucial element of trade policy, business and trade facilitation, may benefit significantly in cases where harmonisation is achieved. Harmonisation also enhances legal certainty and predictability, which are essential for cross-border business and investment.<sup>105</sup> It can encourage policy learning and the adoption of best practices among member states, thereby promoting upward convergence in standards and contributing to regional development.<sup>106</sup> While there are impressive advantages to a harmonisation strategy of integration, several shortcomings call into question the practicality of this strategy within the AfCFTA IP context.

In the formulation of international or regional standards and procedures, countries resort to negotiation to determine these minimum standards of protection. In practice, negotiations are highly influenced by developed countries, or, in the African context, the continent's economic heavyweights. Already, five countries alone in Africa (South Africa, Nigeria, Egypt, Algeria and Ethiopia) account for more than half of the continent's GDP.<sup>107</sup> It is not hard to imagine how a harmonisation strategy may deepen this inequality among the nations as the voice of the most powerful usually prevails, as witnessed in the TRIPS negotiation process under the World Trade Organization (WTO), where the United States and other developed nations, acting as *demandeurs*, successfully pushed for strong IP protection standards that primarily reflected their own interests, often to the detriment of developing countries' flexibility and development priorities.<sup>108</sup>

Harmonisation may promote a 'one-size-fits-all' approach, which may not suit Africa's heterogeneity.<sup>109</sup> Africa is a continent, not a country. The continent is populated with diverse peoples with different histories, backgrounds, and cultures, which continue to inform their national polices. The AU runs the risk of inherently watering down the role of culture and national peculiarities in policy and implementation frameworks of member states by prioritising regional aspirations, and these 'overarching' regional objectives may not automatically lead to an expected outcome in member states.<sup>110</sup> This is illustrated by the struggle of developing and least developed countries to meet

<sup>104</sup> B Fagbayibo 'Towards the harmonisation of laws in Africa: Is OHADA the way to go?' (2009) 42(3) *The Comparative and International Law Journal of Southern Africa* 309–322 310, available at: <https://www.jstor.org/stable/23253105> (accessed on 22 October 2025).

<sup>105</sup> CM Dickerson (ed) *Unified Business Laws for Africa, Common Law Perspectives on OHADA* (2009); Fagbayibo (n104).

<sup>106</sup> Fagbayibo (n104).

<sup>107</sup> L O'Brien 'MAPPED: The five African countries that make up 50 percent of continent's GDP' *Express News UK* (2024), available at: <https://www.express.co.uk/news/world/1958877/five-african-countries-gdp> (accessed on 18 March 2025).

<sup>108</sup> J Watal & A Taubman (eds) *The Making of the TRIPS Agreement: Personal insights from the Uruguay round negotiations* (WTO 2015).

<sup>109</sup> J Eke & K Ani 'Africa and the challenges of regional integration' (2017) 6(1) *Journal of African Union Studies* 63–80 73, 74; SW Halpern & P Johnson *Harmonising Copyright Law and Dealing with Dissonance* (2014) 7–8.

<sup>110</sup> T Hartzenberg *Regional Integration in Africa* WTO Economic Research and Statistics Division Working Paper ERSR-2011-14 WTO (2011) 3–8, available at: [https://www.wto.org/english/res\\_e/reser\\_e/ersd201114\\_e.pdf](https://www.wto.org/english/res_e/reser_e/ersd201114_e.pdf) (accessed on 10 October 2025).

the minimum standards of IP protection contained in the TRIPS Agreement and resorting to superficial compliance with limited impact on ground-level enforcement.<sup>111</sup> Moreso, the peculiarities of nations (including strengths and weaknesses of industries) mean that each harmonised rule may result in a slightly different impact for every member state.<sup>112</sup> This begs the question, in a harmonised integration system, does the principle of ‘the greatest good for the greatest number of people’ translate to ‘success’? If yes, then maybe the harmonised system trumps all arguments raised thus far. However, if every nation’s need is equally prioritised, harmonisation may expose deeper issues within a regional bloc.

Notwithstanding the purported shortfalls of the harmonisation strategy, it remains a viable strategy to be considered for the AfCFTA IP framework as it facilitates legal certainty and predictability across member states, and enhances cross-border enforcement of IPRs, which is critical for building investor confidence and encouraging innovation and creativity on the continent.<sup>113</sup> For authors like Gerhard Erasmus, harmonisation of rules and practices is simply the best method for the effective implementation of the AfCFTA.<sup>114</sup>

#### 4.3 Unification

The most successful unification implementation of an IP system today is the EU. Unification is a much higher form of regional integration than cooperation and harmonisation. It is an overarching term which may include cooperation and harmonisation at various stages of the integration process.<sup>115</sup>

Under unification, regional regimes and structures are subsumed into a single, binding, legislative and procedural framework which applies to all member states.<sup>116</sup> The EU, for instance, increasingly relies on Regulations which, upon entry into force, are binding in their entirety and are directly applicable in all member states without the need for transposition into national law.<sup>117</sup> It is the imposition of the same standards with no room for national nuancing,<sup>118</sup> adopting binding, uniform rules and enforcement mechanisms that

<sup>111</sup> Fagbayibo (n104); A Kapczynski ‘Harmonization and its discontents: A case study of TRIPS implementation in India’s pharmaceutical sector’ (2009) 97(6) *California Law Review* 1571–1649.

<sup>112</sup> CB Ncube *Intellectual Property Law in Africa: Harmonising Administration and Policy* 2 ed (2023) 170; B Fagbayibo ‘Towards the harmonisation of laws in Africa’ (2009) 42(3) *The Comparative and International Law Journal of Southern Africa* 309–322 321, available at: <https://www.jstor.org/stable/23253105> (accessed on 22 October 2025).

<sup>113</sup> M Fontaine ‘Law harmonization and local specificities – a case study: OHADA and the law of contracts’ (2013) 18 *Uniform Law Review - Revue de droit uniforme* 50–64.

<sup>114</sup> G Erasmus ‘To cooperate or to harmonise?’ *Tralac* (25 May 2022), available at: <https://www.tralac.org/blog/article/15620-to-cooperate-or-to-harmonise.html> (accessed on 11 March 2025).

<sup>115</sup> B Fagbayibo ‘Towards the harmonisation of laws in Africa’ (2009) 42(3) *The Comparative and International Law Journal of Southern Africa* 309–322 311, available at: <https://www.jstor.org/stable/23253105> (accessed on 22 October 2025).

<sup>116</sup> Ibid.

<sup>117</sup> European Commission ‘Types of EU law’, available at: [https://commission.europa.eu/law-law-making-process/types-eu-law\\_en#:~:text=recommendations%20and%20opinions.-,Regulations,be%20transposed%20into%20national%20law](https://commission.europa.eu/law-law-making-process/types-eu-law_en#:~:text=recommendations%20and%20opinions.-,Regulations,be%20transposed%20into%20national%20law) (accessed on 5 March 2025).

<sup>118</sup> Hartzenberg (n110) 154.

override conflicting national laws.<sup>119</sup> Its success may depend on the attainment of a supranational status to make decisions that are legally binding on all member states, ensuring full legal and institutional integration, as is the case with the EU.<sup>120</sup> Ncube elegantly discusses unification as an integration strategy, outlining its strengths and weaknesses, drawing lessons from OHADA and the EU.<sup>121</sup> These will not be replicated in this paper.

Unification presents the most advanced step in regional integration that can lead to the creation of a single community or market by eliminating regulatory fragmentation.<sup>122</sup> Africa seeks to put forward a unified voice in the global economy, unification proves very desirable as it can strengthen Africa's bargaining power in international trade negotiations and intellectual property fora.<sup>123</sup> However, unification has its challenges. Many concerns raised about harmonisation apply to unification — only with more severity.

Politically, it ignites concerns of loss of sovereignty by relinquishing it to a supra-national agency.<sup>124</sup> Unification will therefore amplify fears of domination by more powerful states. It is submitted that unification also presents issues such as the potential incompatibility of national legal systems, the need for comprehensive simultaneous legal reforms in multiple jurisdictions, and difficulties in ensuring uniform interpretation and application of unified laws. Logistically, achieving true and complete unification would come at a great cost and would take a long time, possibly decades. This may lead to failure in addressing urgent and pressing challenges being faced by the continent, such as piracy, IP enforcement, digital transformation, and access to medicines. The next section considers the viability of a hybrid model of IP integration under the AfCFTA.

## 5. CONSIDERING A 'HYBRID APPROACH' FOR THE AfCFTA IP PROTOCOL

For this paper, hybridisation means the utilisation of the cooperation and harmonisation strategies. It provides an opportunity to overcome the challenges of each model while maximising its benefits.

The language of the AfCFTA Agreement and its IP Protocol suggests a drive towards harmonisation of IP laws.<sup>125</sup> Although the preamble does not constitute the operational part of a Treaty and may be deemed non-binding,<sup>126</sup> Fitzmaurice points out that it does have legal force and effect from an

119 Fagbayibo (n115).

120 B Fagbayibo 'Common problems affecting supranational attempts in Africa: An analytical overview' (2013) 16(1) *PER/PELJ* 32–69.

121 CB Ncube *Intellectual Property Law in Africa: Harmonising Administration and Policy* 2 ed (2023) 176.

122 A Arnall et al *Wyatt and Dashwood's European Union Law* 5 ed (2006) 133.

123 AN Allott 'Towards the unification of laws in Africa' (1965) 14 *I.C.L.Q* 366 378.

124 CB Ncube *Intellectual Property Law in Africa: Harmonising Administration and Policy* 2 ed (2023) 154.

125 Preamble, Final Draft, Intellectual Property (IP) Protocol to the Agreement Establishing the African Continental Free Trade Area (2023), available at: [https://www.bilaterals.org/IMG/pdf/en\\_-draft\\_protocol\\_of\\_the\\_afcfta\\_on\\_intellectual\\_property\\_rights.pdf](https://www.bilaterals.org/IMG/pdf/en_-draft_protocol_of_the_afcfta_on_intellectual_property_rights.pdf) (accessed on 21 July 2025).

126 A Rudman 'Preamble' in A Rudman, CN Musembi & TM Makunya (eds) *Commentary to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* (2023).

interpretative standpoint.<sup>127</sup> While the question of the legal value or status of Preambles has not (yet) been resolved, it is generally accepted that ‘Preambles contain ceremonial and politically fuelled ideals which may be useful in deciphering the intentions/motives of the lawmakers’.<sup>128</sup> This notwithstanding, harmonisation in its strict sense through binding (hard) laws may be difficult to achieve within a short timeframe and may lead to a breakdown in negotiations as countries may want to assert national sovereignty and independence, and harmonisation through non-binding (soft/model) laws may cause inertia and complacency.

Considering the EU framework, the EU directives are issued, and member states are expected to trigger the directive by their choice domestication method, failure of which the directive will have a direct effect within that territory.<sup>129</sup> Fagbayibo explains that harmonisation is a give-and-take that requires such flexibility to establish a balance between the supranational powers of organisations such as the EU and the sovereignty of states.<sup>130</sup> It is submitted, however, that while flexibility is crucial, the role of similar legal systems, language, culture and history should be considered. For a hybrid solution, lessons are drawn from OHADA and the ASEAN frameworks on the adoption of cooperation and harmonisation strategies.

OHADA is open to all countries of the AU. Currently, it consists of 17 member states — mostly French-speaking African nations.<sup>131</sup> The primary objective of this framework is to harmonise business law in Africa, guarantee legal and judicial security for member states.<sup>132</sup> OHADA achieves legal harmonisation through the issuance of Uniform Acts that are directly applicable in the member states.<sup>133</sup> When in conflict with national laws or policies, the Uniform Act prevails<sup>134</sup> except in matters of national economic and social policy, where its

127 G Fitzmaurice ‘Law and procedure of the International Court of Justice: Treaty interpretation and certain other treaty points’ (1951) 28 *British Yearbook of International Law* 25, cited in A Rudman, CN Musembi & TM Makunya (eds) *Commentary to the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa* (2023).

128 NA Papadopoulos ‘Revisiting the preamble of the European Social Charter: Paper tiger or blessing in disguise?’ (2022) 22 *Human Rights Law Review* 1–2; *The State v. Governor of Osun State & Ors* (2006) LLJR-CA; *The Sussex Peerage Claim case* (1844) CL & Fin 85 at 143; *Stowell v. Lord Zouch* (1569) 1 Plowd 369.

129 A Arnall et al *Wyatt and Dashwood’s European Union Law* 5 ed (2006) 164.

130 B Fagbayibo ‘Towards the harmonisation of laws in Africa’ (2009) 42(3) *The Comparative and International Law Journal of Southern Africa* 309–322 312, available at: <https://www.jstor.org/stable/23253105> (accessed on 22 October 2025).

131 Organisation for the Harmonisation of Business Law in Africa ‘OHADA in a nutshell: State members’ (2005), available at: <https://www.ohada.org/en/state-members/> (accessed on 22 October 2025); OHADA members states at the time of this research are Benin, Burkina Faso, Cameroon, Central African Republic, Côte d’Ivoire, Congo, Comoros, Gabon, Guinea, Guinea Bissau, Equatorial Guinea, Mali, Niger, the Democratic Republic of Congo (DRC), Senegal, Chad and Togo.

132 Article 1 of the OHADA Treaty, available at: <https://www.ohada.org/en/treaty-on-the-harmonization-of-the-business-law-in-africa/> (accessed on 22 October 2025).

133 OHADA Treaty (n132) art 10.

134 Advisory Opinion of the Common Court of Justice and Arbitration at the at the request of Côte d’Ivoire on April 30, 2001, Advisory Opinion Number 001?2001/EP.

application is restricted.<sup>135</sup> Although OHADA is not an IP framework, from the foregoing – and with further reference to the EU system — it is inferred that to attain a state of harmonisation, member states must be willing to surrender sovereignty to achieve set objectives. Given the territorial nature of IP rights and its economic relevance to states. The attachment to national sovereignty potentially impedes IP harmonisation under the AfCFTA.

On the institutional framework of OHADA, two organs are highlighted — the Common Court of Justice and Arbitration (CCJA) and the Regional Training Centre for Legal Officers (ERUSMA). OHADA has a common court — the CCJA which interprets and monitors the implementation of the Uniform Acts.<sup>136</sup> The presence of the CCJA presents uniformity and certainty of the judicial system with practice rules around jurisdiction, parties, appeals and so on.<sup>137</sup> This system is not without its flaws. The CCJA's jurisdiction is invoked when cases are referred by national courts or parties. However, most cases at the CCJA are from Côte d'Ivoire, where the CCJA is physically located.<sup>138</sup> There are financial constraints around this system. Dickerson exposes that courts in member states are wary of losing their relevance, jobs and interesting cases to the CCJA.<sup>139</sup> This is a laudable effort by OHADA. To achieve this in the context of an Africa-wide IP framework, it is submitted that member states must strengthen IP litigation in national courts as a first step. This may be achieved by the establishment of special courts/ tribunals on IPRs and training judges of existing national courts on IP litigation. The establishment of a regional court becomes necessary only to the extent that they adjudicate on regional (not national) IPRs to eliminate costly parallel litigation and enhance legal certainty under the AfCFTA. To ameliorate the financial difficulty identified with the CCJA, national courts should be designated as specialised courts with special jurisdiction over AfCFTA IPRs. The practicality of this approach, it is admitted, may differ in application from one IPR to another.

To encourage ADR in IP disputes, raise awareness and educate the public, lessons are drawn from OHADA's Regional Training Centre for Legal Officers (ERUSMA), established for the education of legal professionals and judicial officers of member states.<sup>140</sup> The relevance of training, technical assistance, capacity building and awareness raising on IP in Africa cannot be overemphasised. Integrating this need into the overarching structure of the AfCFTA IP framework is highly encouraged. This will be further discussed in the policy recommendations section of this paper.

135 B Martor et al *Business Law in Africa: OHADA and the Harmonisation Process* 2 ed (2007).

136 B Fagbayibo 'Towards the harmonisation of laws in Africa' (2009) 42(3) *The Comparative and International Law Journal of Southern Africa* 309–322 314, available at: <https://www.jstor.org/stable/23253105> (accessed on 22 October 2025).

137 Articles 13–18 of the OHADA Treaty, available at: <https://www.ohada.org/en/treaty-on-the-harmonization-of-the-business-law-in-africa/> (accessed on 22 October 2025).

138 C Dickerson 'Harmonizing business law in Africa: OHADA calls the tune' (2005) 44(17) *Columbia Journal of Transnational Law* 57–58.

139 Ibid.

140 Article 41 of the OHADA Treaty, available at: <https://www.ohada.org/en/treaty-on-the-harmonization-of-the-business-law-in-africa/> (accessed on 22 October 2025).

Turning to the ASEAN approach, under this regional framework, member states set forth to pursue full harmonisation of IP frameworks by 2020. However, this was revised upon the stark realisation of its non-feasibility due to the dynamic economic status of the member states with varying levels of economic development.<sup>141</sup> Just like the AU, ASEAN comprises mostly LDCs and developing countries at varying stages of cultural, economic and technological evolution, although certain members, such as Singapore, have since attained developed status. Consequently, it became necessary to pursue cooperation because this would allow countries to strive toward attaining their varying national goals while still pursuing regional interests.<sup>142</sup> It is therefore suggested that harmonisation under the AfCFTA IP Protocol should adopt a phased approach — starting first from cooperation into harmonisation.

This is not to advocate for the abandonment of harmonisation as a goal, but rather to acknowledge that while harmonisation remains a critical goal of RI, it is not always the most effective strategy when pursued in isolation. As Kähler notes, ‘some prefer minimal harmonisation, while others advocate a maximal one... the stakes are high because the interests of many people are involved and the discord is unlikely to disappear’.<sup>143</sup> Although these comments were made within the context of the EU, they provide valuable insights for Africa, where similar, if not more pronounced, challenges are likely to arise due to the continent’s high levels of heterogeneity and diversity in legal systems, languages, political structures, and socio-economic development.

Other areas of concern include varying levels of IP development across the continent. The disparity in levels of IP development influences IP management and enforcement.<sup>144</sup> For instance, most African IP offices still use paperwork, which raises issues around loss of data.<sup>145</sup> There is also a glaring lack of expertise on IP in African courts. For example, in the case of *Paul Allen Oche v. Nigerian Breweries Plc & 3 Ors*,<sup>146</sup> a Nigerian Federal High Court struck out the suit on the ground that the Plaintiff lacked the *locus standi* to institute the action for lack of copyright registration. It will be impossible to achieve harmonisation without addressing these issues.

Beyond the existence of different national IP laws and institutions, the operation of two regional IP organisations (ARIPO and OAPI) with diametric views of integration also presents a major challenge. As noted, ARIPO

141 E Baraclough ‘ASEAN scales back IP plans’ *Managing Intellectual Property* (2004), available at: <https://www.managingip.com/article/2a5bqo2drurt0bxjhmxjw/news-focus-asean-scales-back-ip-plans> (accessed on 24 March 2025).

142 CB Ncube *Intellectual Property Law in Africa: Harmonising Administration and Policy* 2 ed (2023) 155.

143 L Kähler ‘Conflict and compromise in the harmonization of European law’ in T Wilhelmsson, E Paunio & A Pohjolainen (eds) *Private law and the many cultures of Europe* (2007).

144 M Nkomo ‘Regional integration in the area of intellectual property: The case for Southern African Development Community involvement’ (2014) 18 *SADC'S Involvement in the Area of Intellectual Property* 317.

145 VP Fidalgo ‘Spurring much-needed innovation: A look at IP in Africa’ *Wolters Kluwer* (4 December 2019), available at: <https://www.wolterskluwer.com/en/expert-insights/spurring-much-needed-innovation-a-look-at-ip-in-africa#:~:text=Some> (accessed on 14 March 2025).

146 Suit No: FHC/ABJ/CS/145/2019 (Unreported), ruling delivered on 25 June 2020.

facilitates cooperation and pursues harmonisation, whereas OAPI operates a unified system. Thus, coalescing these organisations for the purpose of regional harmonisation will be a herculean task.

Key questions on what harmonisation should look like, the extent of harmonisation of principles or procedures or both, whether the harmonisation should be slight, moderate or comprehensive, which national legal systems should serve as models for others, how to accommodate plural legal traditions (such as customary, civil, and common law systems), and how to balance regional goals with domestic priorities are all contentious issues bound to arise with the harmonisation strategy for AfCFTA IP framework. The AU must devise a workable harmonisation strategy to achieve its goals. The next section discusses some recommendations to support the efforts of the AU in achieving workable harmonisation.

## 6. ROADMAP/ RECOMMENDATIONS

In this section, I discuss what may be described as the '*ten for ten*' roadmap to workable harmonisation, covering ten recommendations to be achieved over a ten-year period within the Agenda 2063 timeframe.

1. In the first two years, the AU should prioritise, establish and empower the AfCFTA Committee on IP Rights in line with art 30 of the IP protocol. The Council of Ministers must determine its functions and mandate it to support harmonisation efforts under the IP protocol. This Committee should be constituted of expert members representing the interests of member states, the recognised RECs and IP Organisations. Sub-committees on each area of IP should be established and led by assigned members of the IP committee. The sub-committee will focus on specific IPRs and report developments to the committee leadership.
2. The IP Committee should be tasked with building on the provisions of arts 23 and 24, which outline areas of cooperation on what I referred to as 'quasi-substantive' and administrative areas of IP, respectively. First, identify, then negotiate and adopt workable/practical directives around non-controversial areas of substantive IP. This helps to build trust among member states and streamline controversial areas for further action.
3. In the first five years of the ten-year period, member states should enter commitments to cooperate on the identified non-controversial areas by the IP committee.
4. The Ministers of Trade or their representatives at the AU should, within the first two years, identify focal points of their countries. These individuals will function as intermediaries between the IP Committee and Ministers of Trade or country representatives to develop effective communication strategies for workable harmonisation and to support national cooperation efforts.
5. The IP Committee should engage in wide-scale national engagement by member states, led by focal points and national IP offices. Ministers of Trade or their representatives thereof should submit nationally determined

areas for future harmonisation. The IP Committee should collate these reports and determine key controversial areas of IP. There should be a second commitment by member states to support the work of the IP Committee in identifying the key controversial areas. The IP Committee must submit a report and plan of cooperation on these areas to be circulated among member states.

6. Adopt the variable geometry application to achieve workable harmonisation. Member states, as part of their commitment to controversial areas for future harmonisation, should be tasked with producing Nationally Determined Contributions (NDCs) in support of the overall goal of harmonisation. This allows member states to determine their peculiarities and the change rate needed. Member states must submit set national targets to achieve these NDCs and provide annual progress reports. The AU should establish a five-year IP Assembly to revisit the NDCs, national progresses, areas of possible support to member states and concerted efforts towards achieving workable harmonisation.
7. Upon entering into force of the IP protocol, a harmonisation support fund should be established for the AIPO to support the monitoring and implementation of harmonisation efforts by providing technical assistance and raising awareness. Technical assistance and capacity building should reflect social, cultural peculiarities and inter-sector engagement (academia, judiciary, policy and private sectors) to support the development of holistic policies and facilitate collaboration among sectors at both national and regional levels.
8. Member states must be encouraged to establish a National Monitoring Committee (NMC) tasked with monitoring country progresses and contributions to the NDCs, directives and signed commitments.
9. The AIPO should, as part of its first undertakings, support the strengthening of cross-border communication among IP offices, IP organisations and the AIPO. Member states should be supported towards transitioning to digitised registrations and data collection.
10. To achieve workable harmonisation, member states should adopt a 'top' level of regulation in the directives on non-contentious areas of IP. This involves, for instance, directives on limitations and exceptions. For identified controversial areas of IP, a 'bottom' level regulation should be adopted within the first ten years. That is, for instance, the provision of minimum levels of protection and enforcement.

## 7. CONCLUSION

Regional integration is a process by which countries coordinate activities and collaborate with each other to strengthen their economies through a variety of means. This paper analysed the integration efforts by the AU to support the establishment of an African economic community. Highlighting that a settled and congruent legal framework creates ease in cross-border trade, and

recognising the crucial role IP plays in trade. The vision for harmonisation of IP laws is analysed, drawing from the texts of the AfCFTA IP protocol.

Agenda 2063 is undeniably a commendable effort from the AU, and while many of its projects and goals are still in the development or implementation phase, the plan portends immense benefits and potential for the continent if fully implemented. As stated earlier, it adopts a bottom-up approach, building on already existing regional blocs and initiatives and drawing from widespread consultations throughout the continent. In some instances, African RECs are vastly over-ambitious in their regional infrastructure development initiatives and targets relative to their resource mobilisation and execution capacity. Perhaps it explains a disturbing paradox and enigma that, despite having the highest concentration of RECs in the world, Africa remains disintegrated in IP regulation and enforcement. Notwithstanding, the AfCFTA IP Protocol covers wider ground than any other African IP agreement on the continent.

To achieve Africa's vision of self-determination, integration, and prosperity under an African economic community, the AU requires concerted efforts from political leaders to 'give-and-take' for the greater good. There is also the need for pragmatic, dynamic, and technical expertise complemented by strategic political leadership in member states, RECs and regional IP organisations. Awareness and technical assistance around the establishment of an AfCFTA IP framework are emphasised across the continent. The policy recommendations proffered in this paper aim to support the ongoing efforts of the AU in this regard and may be considered individually or holistically in application.