

REGULATION OF PATENTS IN MAINLAND TANZANIA: POLICY, LEGAL AND INSTITUTIONAL CHALLENGES

*Donatus N.N. Nditi**

Abstract

This article explores the policy, legal and institutional challenges facing regulation of patents in Mainland Tanzania. It addresses the problem of delay in reviewing the Act for a very long time which defeats the fact that the patent law needs constant review if it is to keep up with the ever changing nature of patents. It analyzes the policy, legal and institutional frameworks pointing out the challenges and prospects. The challenges addressed are: One, lack of a comprehensive policy that addresses intellectual property generally and patents specifically. Two, the Act is largely compliant with TRIPs though it needs some reforms. Three, there are serious challenges facing the administrative and enforcement organs in terms of, *inter alia*, limited infrastructural and expertise base. It recommends that a comprehensive intellectual property policy be put in place, the Patents Act be repealed and be replaced with one industrial property law. There should also be established an autonomous industrial property office.

Key words: *Patent, Invention, Intellectual Property, Industrial Property, Law, Policy, Tanzania.*

* LL.B (Hons.), LL.M, Ph.D Candidate at the University of Dar-es-Salaam. Assistant Lecturer in Law, Catholic University College Mbeya.

1. INTRODUCTION

Patent law in Tanzania is a remnant of the colonial legislation which applied in Tanganyika in 1922 through the Order in Council of 1920.¹ Although the colonial Patents (Registration) Ordinance was repealed and replaced by the Patents (Registration) Act² currently in force, still the Act retains, by and large, strings attached to the repealed Ordinance. Since its enactment, the Act was amended only once in 1991 with trivial changes.³ Moreso, since the Act was enacted and lastly amended, the World Trade Organisation (WTO) to which Tanzania is a Member⁴ was not yet established and therefore the Agreement on Trade Related Aspects of Intellectual Property (TRIPs Agreement)⁵ had not yet come into force. Because of this background, the Patent Act has not captured contemporary developments in this area.

Apart from the above, Tanzania does not have one comprehensive policy addressing intellectual property issues. Instead, there are peripheral policy statements scattered in various sectoral policy documents some touching specific forms of intellectual property⁶ and some addressing IP generally⁷

1 <https://wipolex.wipo.int/en/text/216619> accessed on 3 March 2021.

2 Cap 217 [R.E 2002]

3 Through the Penal Reforms (Miscellaneous Penalties Amendment) Act No. 13 of 1991, which amended section 69(1) of the Patents Act and the Finance Act No. 18 of 1991, which at Part XIV made amendments to sections 42 and 43 of the then Patents Act.

4 https://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm. Accessed on 30 April 2020. Tanzania became a member of WTO in 1995 after becoming a member of the WTO Agreement.

5 Annex 1C of the Marrakesh Agreement Establishing the WTO, signed in Marrakesh, Morocco on 15 April 1994.

6 The Tanzania Industrial Development Policy, 19996-2020 recognizes presence of intellectual property laws and specifically mentions patents at p. 21, item 3.4.6(b) second paragraph

7 The National Policy on Science and Technology, 1996 which emphasises on the establishment of an appropriate legal framework for the development and transfer of technology including intellectual property rights at p. 64, paragraph 137.

hence posing challenges in the smooth administration of the Act but also vitiating ability to use the legal options and flexibilities available in the TRIPs.

Regarding the institutional framework, the patent office faces a number of challenges that need serious government intervention. These include lack of qualified patent personnel leading to failure to effectively carry out important functions pivotal to processing of patent applications received by the office such as substantive examination.⁸ Also, since the office is under BRELA and BRELA has its apex, Ministerial Advisory Body (MAB) whose role is just advisory then its powers to make substantive decisions is highly limited.

2. THE RELATIONSHIP BETWEEN INVENTION AND PATENT

The term patent is often used synonymously with invention; however, the two terms are not synonymous.⁹ It is thus important to differentiate the two terms with a view to having clarity of focus. While invention means a solution to a specific problem in the field of technology and may relate to a product or process¹⁰ a patent refers to a right granted to exclude all others from exploiting a functional scientific concept or fundamental idea.¹¹ This right does not grant an automatic right to exploit the invention.¹² Indeed, this is what is referred to as a negative right.¹³

⁸ Information given by the officer in the patents office at BRELA during an interview conducted on 2 October 2020.

⁹ Harms, L., *The Enforcement of Property Rights: A Casebook*, (3rd Edn.), Geneva: WIPO 2012, at p. 244.

¹⁰ See s. 7(1) of the Patents (Registration) Act Cap 27 [R.E 2002]

¹¹ This can be inferred from ss. 36(a)(i)(ii) and (b)(i)(ii) of the Patents (Registration) Act [Cap 27 R.E 2002] which provides for the rights of the patent owner.

¹² *Panduit Corp v. Stablin Bros* 575 f. 2d 1152 [USA]. Also see Harms, L., *Id*, p. 247 and Poltorak, A., “On Patent Trolls and Other Patent Myths,” p. 2 Retrieved from <http://www.generalpatent.com/files/On%20Patent%20Trolls%20and%20Other%20Patent%20Myths%20chapter%20AP.pdf>. Accessed on 11th September 2017.

¹³ A patent does not give the patentee the right to use the invention but only to prevent others from using it. It may be possible that while you are able to obtain a patent

A patent is an exclusive right granted by the State for an invention to protect various ideas which can be in the form of a product or process. The idea in a product or process that meets conditions prescribed by the law is what is called an invention.¹⁴

Patent is granted for invention. It is the invention which is the subject matter of a patent.¹⁵ In order to be patentable, an invention must have a patentable subject matter. This requirement is spelt out in Trade-Related Aspects of Intellectual Property Rights (TRIPS), which provides that patents must be available for any inventions whether product or process, in all fields of technology, provided that they are novel (new), involve an inventive step (non-obviousness) and are capable of industrial application (useful).¹⁶ Patent rights are enjoyable without discrimination as to the place of invention, the field of technology and whether the products are imported or produced locally.

The term patent can also be used in two other senses. One is the document that is called a patent or letters patent and the other is the protection that a patent offers. The first sense of the term entails the entire package constituting an application to the State, which, *inter alia*, discloses all the essential information about the invention and that he is the owner of the patent.

for your invention, there may be existing patents that could prevent you from using your invention. Accordingly, when bringing a new product to market, even one for which you may have a patent, it is important to assess your risk by requesting a patent clearance search and getting a freedom to practice opinion from a patent attorney. Also see *Panduit Corp. v. Stablin Bros* 575 F2d 1152 USA and Harms, L., *Id*, pp 247 - 8.

¹⁴ See for instance Art. 27(1) of the Trade Related Intellectual Property Agreement (TRIPs) and s. 8 of the Patents (Registration) Act Cap 27 [R.E 2002].

¹⁵ Harms, L., *Ibid*.

¹⁶ Art. 27 (1) the TRIPs. Also see s. 8 of the Patents (Registration) Act Cap 27 [R.E 2002].

The second sense of the term relates to protection. In this sense, anyone who desires to exploit the disclosed invention must obtain the authorization from the owner of the patent. Anyone who exploits the invention disclosed in the patent without such authorization, commits patent infringement and is liable to legal action and may be condemned to pay damages to the proprietor of the patent.¹⁷

This exclusive right is granted to anyone who invents any new and useful process, or any improvement of a prior art.¹⁸ By virtue of being granted an exclusive right by the government, a patent involves a contractual relationship between the patentee and the government. The consideration furnished by the patentee is to disclose the technical information about the invention and the government accepts the offer in exchange for a guarantee to protect the invention. Such protection takes the form of granting exclusive right, i.e., right *in rem*, to the inventor against the entire world. This protection is for a given period of time after which the right to use the invention becomes available to the public.

The exclusionary right granted to the patentee is a negative one.¹⁹ This means a patent is not a right to practice or use the invention, rather, a right to exclude others from making, using, selling, offering for sale or importing the patented invention for the term of the grant of the patent, usually 20 years from the filing date.²⁰

¹⁷ Subbaram N.R., *Patent Law, Practices and Procedure*, (2nd edn.), New Delhi: LexisNexis India, 2007, at p.11.

¹⁸ Prior art is defined under s. 9(2) of the Patents (Registration) Act Cap 27 [R.E 2002] to mean everything made available to the public anywhere in the world by means of written disclosure (including drawings and other illustrations) or by oral disclosure, use, exhibition or other non-written means shall be considered prior art provided that such making available occurred before the date of the filing of the application, or priority is claimed, before the priority date, validly claimed in respect thereof.

¹⁹ See s. 12 of the Patents (Registration) Act Cap 27 [R.E 2002]. See also Harms., *Ibid.*

²⁰ See ss. 39(1) – (4) of the Patents (Registration) Act Cap 27 [R.E 2002].

Unlike copyright protections which may arise automatically on creation of a work, patents are only granted after an applicant satisfies the requirements of registration.²¹ The registration process imposes a number of limits and safeguards on the types of inventions that are patented, the scope of exclusivity granted and the nature of information that is disclosed in the patent. During the currency of a patent the owner of such a patent can prevent any other person from using the patented invention.

3. A BRIEF HISTORY OF PATENT AND PATENTS LAW

3.1 History of Patent and Patents Law in Continental Europe and England

A patent has a long chequered history with its origin remaining debatable because different authors have differently traced it.²² Those tracing it from Italy draw reference to Filippo Brunelleschi of Florence. He invented a new kind of a boat in which heavy loads could be effectively hauled over the river. As a result of this invention, the Gentlemen of the Works requested from the Lords of the Council of Florence an exclusive privilege for Filippo to make and use his invention on the waters of Florence for three years.²³ The Gentlemen of the Works gave an exclusive privilege to Filippo as a reward. They contended that they had among themselves men of great genius who

²¹ Section 8 of the Patents (Registration) Act Cap 27 [R.E 2002].

²² Charles, A., *A., Classical Dictionary*, Harper & Bros, 1841, p. 1273. Retrieved from https://en.wikipedia.org/wiki/History_of_patent_law. Accessed on 2nd June 2017. This dictionary contains an account of the principal proper names mentioned in ancient authors and intended to elucidate all the important points connected with the geography, history, biography, mythology and fine arts of the Greeks and Romans together with an account of coins, weights and measures with tabular values of the same. Devaiah, V., *A History of Patent Law*. Retrieved from <http://altlawforum.org/publications/a-history-of-patent-law/> at p. 1. Accessed on 10th June 2017. Stobbs, G.A., *Software Patents*, Aspen Publishers, 2000, p. 3.

²³ MacLeod, M., *Inventing the Industrial Revolution: The English Patent legal System, 1660-1800*, Cambridge University Press, London, 2002, at p. 11.

would invent and discover ingenious devices; and in fact more of such men came to their city everyday due to its grandeur.²⁴ So, their argument was that if provisions were made for the works and devices discovered by such persons more men would then apply their genius to make discoveries and, therefore, build devices of great utility and benefit to their commonwealth.²⁵ Convinced by the arguments, the Council of Florence declared:

Be it enacted that, by the authority of this Council, every person who shall build any **new** and ingenious device in this City, not previously made in our Commonwealth, shall give notice of it to the office of our General Welfare Board when it has been **reduced to perfection so that it can be used and operated.**²⁶ (Emphasis supplied)

From this declaration, the principal elements and conditions precedent for the grant of patent started emerging. The elements included novelty, i.e., building devices not previously made, inventive steps, i.e., reduced to perfection, and industrial application, i.e., used and operated.²⁷ These have developed over years to the present context.

From this background followed English experience which brought in the concept of patent monopoly that had conditions attached to them regarding renewal of queen's grants. The Patent monopoly attracted a good number of foreigners who kept on renewing their patents. Discretionary royal grants were

²⁴ Zorina, B.K., and Sokoloff, K.L., *History Lessons: The Early Development of Intellectual Property Institutions in the US*, in *Economics Perspective Journal*, vol. 15, No. 3, 2001, p. 243.

²⁵ *Ibid.*

²⁶ *Id.*, p. 245.

²⁷ These elements are contained in the Patents (Registration) Act under s. 8 which provides that an invention is patentable if it is new, involves an inventive step and is industrially applicable.

sometimes abused and this way, disputes started emerging.²⁸ The disputes led to complaints which culminated into enactment of the Statute of Monopolies which provided that patents would be granted for a specific period of time.²⁹

After the Statute of Monopolies was adopted in England, a systematic use of monopoly privileges for the inventors gradually spread to other countries and by the end of the twentieth century several of the present developed, developing and underdeveloped countries including Tanzania established their own national patent laws to encourage and reward invention of new technologies provided that established criteria are met.

3.2 History of Patent and Patents Law in Tanzania

The history of patent and patent law in Tanzania is associated with colonialism. The first patents legislation in Tanzania was the Patents (Registration) Ordinance³⁰ which was brought and applied by the British in the then Tanganyika in 1922 through the Tanganyika Order in Council of 1920.³¹ From 1922 the Ordinance remained in force until 1987 when it was repealed and replaced by the Patents (Registration) Act.³²

The Patents Ordinance did not give much incentive to local experts to develop new industrial ideas. Under the Ordinance there was no grant of new patents in Tanganyika. Instead, the law provided for re-registration of patents that had been granted in the UK. Following this situation, it was considered necessary to have a piece of legislation on patents that was relevant to the changing trends. It was thought important to have patents granted and

²⁸ See *Darcy v. Allein* (1602) 1W.P.C 1; Noy. 173; Moore K.B. 671; 11 Co. Rep. 84b.

²⁹ Edward, C.W., *To Promote the Progress of Useful Art: American Patent Law and Administration (1787 – 1836)*, in Patent and Trademark Office Journal, Part 2, 1998, p. 11.

³⁰ Cap. 217 [R.E 2002].

³¹ <https://wipo.lex.wipo.int/en/text/216619> accessed on 3 March 2021.

³² Cap. 217 [R.E. 2002]

registered in Tanzania. There was thus passed the Patents (Registration) Act³³ whose preamble states that the Act is for making better provisions for the promotion of inventivity and innovation for the facilitation of the acquisition of technology on fair terms through the grant and regulation of patents, utility certificates and innovation certificates. It repealed and replaced the Patents Ordinance.

The other reason for the enactment of the Patents (Registration) Act is that at the time the Act was enacted there was a wave of change in economic policies largely influenced by external forces. Tanzania was driven into the Structural Adjustment Programmes (SAP's) which required that doors be opened for liberalization and privatization. Opening the doors for all these adjustments necessitated putting in place a conducive environment which, among other things, called for changes in various legal frameworks including those which are related to patents.

4. POLICY, LEGAL AND INSTITUTIONAL CHALLENGES OF PATENTS IN TANZANIA

4.1 The Policy Challenges

Although there have been efforts to put in place a single policy document on intellectual property in Tanzania still the efforts have not yielded fruits.³⁴ Because of the absence of a national intellectual property policy there only exist various sectoral policies with various policy statements that reflect the

³³ *Ibid.*

³⁴ See Mwakaje, S.J., *National Study on Intellectual Property and Small and Medium Sized Enterprises in Tanzania: WIPO Development Agenda Project*, in World Intellectual Property Organization (WIPO), 2011, pp. 25 – 26. Retrieved from https://www.wipo.int/edocs/pubdocs/en/wipo_natstudy_sme_tanzania.pdf. Accessed on 6th November 2019. He says that the moment the process is underway to amalgamate the industrial property laws so as to have a single legislation to be known as the Industrial Property Act.

policy framework for intellectual property administration and enforcement. Some of these policy statements include;

4.1.1 *The National Research and Development Policy, 2010*

It states that it aims at increasing the contribution of research to the development of the country by identifying intellectual property as a focal area for articulation.³⁵ In doing so, it addresses as an issue the question of inadequate mechanisms to ensure that researchers adhere to research ethics and uphold intellectual property rights.³⁶ In this issue, it sets an objective to foster equitable sharing of research resources and benefits/IPR, particularly with local researchers/institutions/research communities. It states, as a policy statement in this respect, the need to strengthen local capacity to monitor compliance with national intellectual property rights in Tanzania including patents, and legislations which include the Patents Act.³⁷

4.1.2 *The National Policy on Science and Technology, 1996*³⁸

The policy recognizes and provides for the need to establish corresponding means which would enable a person to generate new knowledge, improve on the existing knowledge and create means by which such knowledge would be applied for advancement of science and technology. To achieve the rationale for which it exists, the policy requires the government to increase the capacity for transfer of technology and research and development. The government is also urged to create a conducive environment for unleashing the creative and innovative potential of the people.³⁹ It places emphasis on the establishment of an appropriate legal framework for the development and transfer of technology including intellectual property rights.⁴⁰ The policy

³⁵ P. 11.

³⁶ P. 22.

³⁷ P. 23.

³⁸ Available at http://www.ist-africa.org/home/files/Tanzania_STPolicy.pdf. Accessed on 6 November 2019.

³⁹ Para 13 at pp. 5-6.

⁴⁰ Para 137 at p.64.

places emphasis on the establishment of an appropriate legal framework for the development and transfer of technology including intellectual property rights.⁴¹

These areas have unarguably been at the centre of the objectives for TRIPs. In defining its objectives, TRIPs has declared that the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and transfer and dissemination of technology.⁴²

The theme on patents, and even on IP generally, in those policies appear to be peripheral to the main theme of the said policies hence resulting in making such statements overlapping, contradictory and confusing.⁴³ In the midst of such a situation, emerges a challenge to coordinate these patent related statements available in various sectoral policies. The challenge can be seen at two levels. The first one is with regard to the co-ordination of different concerned patent expertise and institutions at a national level. The second one relates to coordination between national and international organisations and agencies.⁴⁴ This is a serious anomaly that explains why an extensive intellectual property policy document should be put in place.

4.2 The Legal Framework

The patents legal framework is describable at two levels. The first level describes the core pieces of legislation which play the primary role of patent regulation, i.e., receiving and processing applications and consequent grant or refusal of such applications. These pieces of legislation include the

⁴¹ Para 137 at p.64.

⁴² See art. 7.

⁴³ Mwakaje, S.J., *Id.* p. 30.

⁴⁴ See Blakeney, M., *The Process of National IP Policy Making: Theory, Practice and Policy Lessons*, in Stockholm Network, 2006, Pg. 3.

Constitution of the United Republic of Tanzania,⁴⁵ the Patents Act⁴⁶ and Regulations made under it.⁴⁷ The second level involves facilitative pieces of legislation which play a supporting role in the framework within which patents are regulated. This article only focuses on the first level because it is core to the issue and drives the whole purpose for the patent regulation while the second remains facilitative to the core functions the first level has to play.

4.2.1 *The Constitution of the United Republic of Tanzania, 1977*

The Constitution is the supreme law that every other law must conform with, and so is the Patents Act. According to the Constitution, every person has a constitutional right to own property and have his property protected as long as such property has been legally and lawfully earned.⁴⁸ It provides for substantive property guarantees which are not, by necessary implication, limited to real property. The Constitution does not express provisions on technological innovations, cultural innovation and intellectual property protection. Nevertheless, all the aforementioned being property ought to enjoy express constitutional recognition and protection.

For that reason, it is important that express Constitution guarantees on intangible properties should be given like other Countries have done.⁴⁹ One of the ways such Constitutional guarantees could be achieved would be by way of inserting a broadened definition of property to include, *inter alia*, intangible properties. The Constitution could also oblige the State to specifically support, promote and protect intellectual property rights of the people of Tanzania without contravening the TRIPs obligation of non-discrimination.⁵⁰ Here, the wording of Article 1 Clause 8 Section 8 of the

⁴⁵ Cap. 2 [R.E 2002].

⁴⁶ Cap. 217 [R.E 2002].

⁴⁷ GN. No. 490 of 1995 made under s. 79 of the Patents (Registration) Act.

⁴⁸ See Art. 24 of the Constitution of the United Republic of Tanzania.

⁴⁹ See, for instance, Art. 260(c) of the Kenyan Constitution, 2010; See also Art.1 Cl. 8 S.8 of the 1778 United States Constitution.

⁵⁰ Articles 3 and 4 of the TRIPs.

1778 US Constitution⁵¹ may serve as the best example of such intellectual property inclusion in the Constitution.

To reiterate the concern at hand, it is important that the Constitution expressly provides for guarantees on intellectual property rights, including patents for that matter, because they are the key contributors to development of science and technology in various spheres and more so for the economy that aspires to be industrially driven.

4.2.2 *The Patents (Registration) Act*⁵²

Although the Act provides for and complies with a number of minimum standards as required by the TRIPs, it yet falls short of compliance with some TRIPs obligations as shall be seen below, which enjoins its Members to give effect to its provisions.⁵³ However, Member States have some flexibility and so are at liberty to implement in their law more extensive protection than minimum required by the TRIPs, provided that such extended protection does not contravene its provisions.⁵⁴ Again, the Agreement gives flexibility and liberty to Member States to determine the appropriate methods of implementing its provisions within their own legal systems and practices.⁵⁵ There are areas in which the Act falls short of compliance with the TRIPs. These include:

4.2.2.1 *Non-discriminatory Treatment*

The TRIPs mandatorily require Member States not to discriminate against nationals of other countries.⁵⁶ The Patents Act neither makes reference nor

⁵¹ The article provides: “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”

⁵² Cap 217 [R.E 2002].

⁵³ Article 1 of the TRIPs.

⁵⁴ See article. 1 of the TRIPs.

⁵⁵ *Ibid.*

⁵⁶ Articles 1(3), 3 and 4 of the TRIPs.

legislates this obligation. The Act also does not provide for what should be respected in a situation where other people, including the government or third parties authorised by the government, use patentee's right without his or her authorization.⁵⁷ Although there is no evidence to prove that nationals of other countries have been discriminated against, it suffices to note that lack of such evidence does not warrant the Act to not, in its provisions, comply with the obligation the TRIPs provides. Moreso, it is legally courteous to explicitly provide for this obligation because, among other things, it gives tangible comfort that if they invest on certain inventions in Tanzania then the law would protect them from discrimination against both acquisition and exploitation of their inventions and innovations. This way, the statutory assurance of non-discrimination may attract foreign technology through foreign direct investment, among other ways, which would come with many more benefits.

4.2.2.2 *Undisclosed Information*

The TRIPs Agreement requires its members to protect undisclosed information with the aim of ensuring effective protection against unfair competition.⁵⁸ The undisclosed information is all about the information which is secret and has commercial value because it is secret. Undisclosed information, or 'trade secrets', is protected in the TRIPs under the framework or discipline of unfair competition.⁵⁹ Basically, it obligates both natural and artificial persons to have the possibility of preventing information lawfully within their control from being disclosed to, acquired by or used by others without their consent in a manner contrary to honest commercial practices⁶⁰ so long as such information:

⁵⁷ See art. 31(a) to (l) of the TRIPs.

⁵⁸ Art. 39(1) of the TRIPs.

⁵⁹ Article 39 of the TRIPs.

⁶⁰ For the purpose of this provision, "a manner contrary to honest commercial practices" means at least practices such as breach of contract, breach of confidence and inducement to breach, and includes the acquisition of

- (i) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;
- (ii) has commercial value because it is secret; and
- (ii) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.⁶¹

The TRIPs⁶² and the Doha Declaration⁶³ as implemented by a TRIPS Council Decision of June 2002 exempted Least Developed Countries (LDC), Tanzania being one, from providing for the protection of undisclosed information. That exemption, however, has expired and there is no evidence of further extension sought.⁶⁴ Therefore, the Patents Act, as the situation stands now, is found to fall short of compliance with the TRIPs.⁶⁵ The Act is supposed to incorporate the 2016 extension in order to, *inter alia*, take advantage of the flexibilities provided by TRIPs Agreement.⁶⁶

Failure to incorporate such extension brings more imminent challenges for patent infringement as shall be seen in part 4.2.2.4(b) and (c) below.

undisclosed information by third parties who knew, or were grossly negligent in failing to know, that such practices were involved in the acquisition.

⁶¹ Article 39(2)(a) - (c) of the TRIPs.

⁶² Articles 65(1) and 66(1) of the TRIPs.

⁶³ Paragraph 7.

⁶⁴ Article 66(1) of the TRIPs.

⁶⁵ An exemption was provided until 1 January 2016. See WIPO “Methodology for the Development of National Intellectual Property Strategies” Tool 3: Benchmarking Indicators, Geneva, Switzerland, 2016, p. 18. (improper citation). See also Article 39 of the TRIPs.

⁶⁶ WIPO, *Methodology for Development of National Intellectual Property Strategies, Tool 3: Benchmarking Indicators*, Geneva, Switzerland, 2016, p. 19.

4.2.2.3 *Repression of Unfair Competition*

It is well recognized that licensing practices or conditions pertaining to patent rights that restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology.⁶⁷ Consequently, the TRIPs allows WTO members to specify in their legislation the specific licensing practices or conditions that may constitute an abuse of patents and have an adverse effect on competition in the relevant market. They may also adopt appropriate measures to prevent or control such anti-competitive practices. Countries that use this provision appropriately can ensure adequate and healthy competition in the pharmaceutical market, improving pricing and availability of needed products.⁶⁸

(a) *Protection*

Protection against unfair competition has been recognized as forming part of industrial property protection since the year 1900, at the Brussels Diplomatic Conference for the Revision of the Paris Convention.⁶⁹ This recognition was first manifested by the insertion of Article 10^{bis} in the Convention. As a result of the subsequent revision conferences, the article now requires all the countries of the Union to assure nationals of such countries effective protection against unfair competition. The articles further provides that any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition and for that reason prohibits the following in particular:

- (a) all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor;

⁶⁷ See Under Article 40 of the TRIPs.

⁶⁸ UNAIDS, *Doha+10 Trips Flexibilities and Access to Antiretroviral Therapy: Lessons from the Past, Opportunities for the Future*, A Technical Brief, Geneva 27 Switzerland, 2011, p 10. Available at <https://docplayer.net/20867747-Doha-10-trips-flexibilities-and-access-to-antiretroviral-therapy-lessons-from-the-past-opportunities-for-the-future.html>. Accessed on 14 October 2020.

⁶⁹ The Paris Convention for the Protection of Industrial Property, 1883

- (i) false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor;
- (ii) indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods.

The TRIPs also has required its Members to provide in their legislation for the control of anti-competitive practices in contractual licences.⁷⁰ The Act has well complied with this obligation. However, more relating to unfair competition wants given the development that Tanzania has made post enactment of the Patents Act.

(b) Need for Protection and Broadening the Scope of Protection

There is therefore a need for leveraging protection against unfair competition in the Patents Act with a view to establishing linking pins with the competition regime, which has been put in place by the Fair Competition Act. The Patent Act is expected to tell, apart from the things to do with contractual licences, what if committed would amount to anti-competitive practices.

Since Tanzania has the market economy systems in operation, such systems allow free competition between industrial and commercial enterprises within certain limits defined by law.⁷¹ Fair competition laws are designed to ensure that competition is carried out in an honest manner. They are aimed at ensuring that a country benefits from the protection of patent rights by providing a balance between the rights of the inventors and the benefits to the country.

⁷⁰ Part II, Section 8 and Article 40 of the TRIPs.

⁷¹ Tanzania has the Fair Competition Act, Cap 285 [R.E 2019]

Therefore, it is very important that harmonisation is assured at the point of intersection between the competition and patent laws. This assurance is imperative because too high or too low protection of both patents and competition may lead to trade distortions. A balance has thus to be found between competition policy and patent rights. This balance must achieve the goal of preventing abuses of patent rights, without annulling the reward provided for by the patent system when appropriately used. The search for this balance between patents and competition policy objectives should be reflected both within the patent law as well as in respect of its relationship with competition law, which the Patents Act does not do.

Within the patent system, the core principles of the system have been framed precisely with a view to ensuring that it simultaneously fosters innovation and remains consistent with fair market rules. Therefore, safeguards and boundaries should be built within the patent system to allow it to generate patents only for those inventions which are most likely to serve the public interest, but should prevent patents for those inventions that would appear not to benefit society. In particular, such safeguards and boundaries include the fact that the patent system, in fact most systems protect only inventions, not discoveries, the limitation of patent rights as to their contents and their duration, the availability of exceptions to the rights conferred, and the conditions of patentability which prevent grant of patents for obvious and non-novel creations.

On the other hand, competition law has as its objective to prevent undesired market behaviour and, in particular, abuses of a dominant market position.⁷² In relation to patent rights, such behaviour would cover activities going beyond the objectives and boundaries set by the patent system. Such situations may occur, for example, where an exclusive licence totally excludes other competitors from market entry, through restrictive selling practices or

⁷² See section 10 of the Fair Competition Act, Cap 285 [R.E 2019]

where patent rights are used to create horizontal agreements for fixing price levels. Against this backdrop, competition policies and laws can be an important complimentary instrument to regulate potential abuses of patent rights and to complement patent inherent boundaries set by the patent law itself.

(c) Legal Basis for Protection

Tanzania draws the legal basis for the protection against unfair competition from both local and international levels. At the local level, national legislation such as the Fair Competition Act⁷³ creates a legal basis for protection. At the international level, the legal basis can well be drawn from the Paris Convention. Article 1(2) of the Convention mentions the repression of unfair competition along with the industrial property protection. Furthermore, Article 10^{bis} contains an express provision on the repression of unfair competition.

The Patents Act has not adequately and explicitly established linking pins with the fair competition regime. Although there is a separate framework for competition regime in Tanzania, yet the Act is expected, since there is no strict obligation, to legislate or draw some reference to or establish any relevant connection to the Fair Competition Act on control of anti-competitive practices apart from issues to do with contractual licences which have well been legislated. This is important because there may exist some practices or rights which restrain or restrict competition with the consequence of adverse effects on trade hence impeding the transfer and dissemination of technology with the effect of impairing the whole purpose of the Patents Act.

Therefore, since there is nothing in the Paris Convention neither TRIPs that prevents Member States from specifying in their legislation licensing

⁷³ *Ibid.*

practices or conditions that may in particular cases constitute an abusive exercise of patent rights having an adverse effect on competition in the relevant market then the Act would well adopt, consistently with the other provisions of the Convention and the TRIPs, appropriate measures to prevent or control such practices.

4.2.2.4 *The TRIPs Flexibilities*

(a) Compulsory Licences (CLs)

The Act extensively incorporates this flexibility in the whole of Part XI, which contains eight sections.⁷⁴ This flexibility is a mechanism used by public authorities to authorise the use of a protected patent right. It is mostly provided for patents by the government or third parties without the consent of the patent right holder. The holder has the right to receive adequate compensation, usually in the form of a royalty. As clarified in the Doha Declaration on the use of patented inventions,⁷⁵ the grounds on which

⁷⁴ See (ss. 53 – 60) of the Patents (Registration) Act, Cap 217 [R.E 2002].

⁷⁵ Attempts to settle the concerns around public health protections led to the Doha Declaration in 2001, followed by the Implementation of the Paragraph 6 Decision in 2003. Combined, the two declarations provide clarifications on the need for, and provisions available, to access generic medicines. One of the most important results was a waiver of Art. 31(f) of the TRIPS agreement which states that a compulsory licence can only be issued for primarily domestic use. This paragraph precluded generic drug production for export to countries without their own domestic capabilities, leaving the poorest countries without access to generic medicines. The waiver allowed a country to issue a compulsory licence for either domestic use or export, on the basis of public health need. The Declaration states “[the] TRIPS Agreement *does not* and *should not* prevent members from taking measures to protect public health... [and it] should be interpreted and implemented in a manner supportive of WTO members' right to protect public health and, in particular, to promote access to medicines for all". Furthermore, the Declaration specifically reaffirms member countries' rights to determine the grounds on which compulsory licences may be issued, to determine what constitutes a national emergency or circumstance of extreme urgency, and to determine their own regime for the exhaustion of intellectual property rights.

compulsory licences may be granted are clearly provided for in the TRIPs;⁷⁶ therefore, WTO Members are free to avail themselves of this flexibility.

Tanzania, as a WTO Member, has continued availing herself of this flexibility. In fact the flexibility was incorporated into the Act even before the birth of WTO. It is a common feature of the patent law and may be issued on various grounds of non-exploitation,⁷⁷ interdependence of patents⁷⁸ and general public interest, such as public health.⁷⁹ The Act also sets conditions for grant of CL. The first is the application to the satisfaction of the High Court (HC) that the applicant has negotiated for the voluntary licence (VL) from the right owner but failed to get it on reasonable terms and within a reasonable time.⁸⁰ The second is that the applicant for the CL must guarantee to the satisfaction of the HC that s/he will exploit the CL in a way sufficiently addressing the deficiencies or needs that led to the request for the grant of the CL in question.⁸¹ The Act also provides for cancellation of CL and variation of CL terms.⁸² To say the least, the Act has sufficiently taken advantage of this flexibility.

(b) Parallel importation

Parallel importation begins with the concept of exhaustion of rights. Exhaustion of rights refers to the point at which the right holder loses legal control over a protected product by virtue of selling or otherwise releasing it into the channels of commerce. The rules on exhaustion determine whether the patent holder can prevent a third party from importing a product where the patent holder or his licensee may have sold the product into another country where they also have a patent. A number of countries allow such

⁷⁶ See article 31 of the TRIPs.

⁷⁷ Section 53 of the Patents (Registration) Act Cap 217 [R.E 2002]

⁷⁸ Section 54 of the Patents (Registration) Act Cap 217 [R.E 2002]

⁷⁹ Section 55 of the Patents (Registration) Act Cap 217 [R.E 2002]

⁸⁰ Section 56(a) of the Patents (Registration) Act Cap 217 [R.E 2002]

⁸¹ Section 56(b) of the Patents (Registration) Act Cap 217 [R.E 2002]

⁸² Generally see section 59 and 60 Patents (Registration) Act Cap 217 [R.E 2002]

imports, which are commonly known as parallel imports. These rules therefore address what is commonly referred to as parallel importation.⁸³

In simple terms, the patent owners exhaust their property rights in the product at the time such protected product is sold. For instance, companies often charge lower prices for a medicine in one country than in another, taking into account a range of market factors. This means that a country with limited resources can sometimes afford to buy more of a patented medicine abroad by purchasing it there at a lower price and importing it than would be the case if it bought the medicine in the domestic market at a higher price. Some patent laws provide that once the patent owner sells their goods in any country, they lose the right to control the resale of such goods.⁸⁴ This is what is referred to as the regime of international exhaustion.⁸⁵

In legal terms, this means that the patent owner has exhausted their property rights in the product that has been sold but maintains the exclusive right in respect of manufacturing the product. For example, an intermediary could buy a patented medicine in one country at the lower price set by the selling company and then resell the medicine in another country at a higher price but nevertheless undercut what the manufacturer is charging for its patented medicine in that country.⁸⁶ This is called parallel importation.

In the Patents Act, there is neither definition of parallel imports nor reference to such a term in any of its provisions. The legal position on parallel imports in Tanzania can be imputed from section 38(2) of the Act, which limits extension of the exercise of patent rights by the right holder in respect of articles which have been put on the market in the United Republic by the owner of the patent or with his express consent.

⁸³ This flexibility is provided for under article 6 of the TRIPs.

⁸⁴ WIPO, *Id.*, p. 18.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

This provision has the effect of exhausting the patents rights and consequently, parallel importation becomes impracticable in Tanzania. However, parallel importation is maintained by the Tanzania Medicines and Medical Devices Act.⁸⁷ Notwithstanding, the practicability of parallel importation under the TMDA Act is doubtful because general as it appears and with the absence of the rules to operationalize it, the provision may fail to ensure parallel importation of drugs is done.⁸⁸ More so, the TMDA Act restricts parallel importation by making it subject to a permit whose issuance is permissible in emergence cases and where it is so deemed by, and appear necessary to, the TMDA officials.⁸⁹

(c) *Regulatory (Bolar) Exceptions*

These are exceptions to patent rights and they refer to certain acts done during the patent term for obtaining regulatory approval for the marketing of products after patent expiry. They permit the use of a patented invention without authorization from the patent owner, in order to obtain marketing approval for a generic product before the legal term of protection of the patent expires. They originate from the case of *Roche Products Inc. v. Bolar Pharmaceuticals Co. Inc.*⁹⁰ and are provided for under article 30 of the TRIPs.

The basic rationale is to maintain the balance in the patent system between patent holders and users (general public) by allowing a generic product to enter the market more quickly after patent expiry, which in turn facilitates

⁸⁷ Cap 219 [R.E 2021]

⁸⁸ Mchomvu, F., *Compulsory Licensing and Parallel Imports under the Patent Legal Regime and Their Implications on Access to Medicine in Tanzania*, in LST Law Review, Vol.2, Issue 1, 2017. P.54.

⁸⁹ See section 73(3) of the Patents (Registration) Act Cap 217 [R.E 2002]; Also see Kazoba, G., *Protection of Consumers and a Guard against Counterfeit and Substandard Pharmaceuticals in Tanzania: Examining National, Regional and International Legal and Institutional Frameworks*, DUP, Dar-es-Salaam, 2013, pp. 134-135.

⁹⁰ 733 F.2d 858 (1984).

access to cheaper products like medicines.⁹¹ By implication section 38(2) of the Patents Act seems to exclude these because it provides a blanket patent protection against acts done for industrial and commercial purposes while excluding acts done for scientific research.⁹² This may imply therefore that those manufacturing generic drugs are prohibited from using patented data for products and processes for the purpose of generating their own data for presentation of bioequivalence, which is necessary before the drug authority can authorise the manufacturing and consequent marketing of generic drugs.⁹³ This is so because one of the driving motives for generic drugs manufacturing is not only for scientific research *per se* but largely for commercial purposes as well and this is why market approvals are sought.⁹⁴

The fact is that pharmaceutical patents applications are lodged and patents in respect of patent products are granted in Tanzania in spite of not incorporating this flexibility in the Patents Act and there is no any government circular that has been issued to address the issues.⁹⁵ This means to this extent the grant of such protection is inconsistent with the TRIPs and that it is without legal basis. This was confirmed, according to Kazoba,⁹⁶ by the Head of IP Department of BRELA that they receive applications for patent protection which they register in appropriate cases in respect of pharmaceutical products and processes. She says it was further confirmed that the trend has been increasing in recent years and such protections are granted despite the TRIPs flexibilities.

4.2.2.5 *Dispute Management and Settlement*

The Act stipulates acts constituting infringement.⁹⁷ It has also devised

⁹¹ WIPO, *ibid.*

⁹² *Ibid.*

⁹³ Kazoba, G., *Id.*, p.132.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ Kazoba, G., *Id.*, pp. 132-3.

⁹⁷ Section 66 of the Patents (Registration) Act 217 [R.E 2002].

mechanisms for dealing with such disputes. The Registrar is made part of the mechanism by being charged with the duty to preside over the opposition proceedings on, *inter alia*, patents.

It generally provides that any act performed by a person other than the owner of the patent and without the authorization constitutes infringement. These acts are categorised in situations where a patent has been granted either for a product or process. When the patent has been granted in respect of a product then the following constitute an act of infringement:

- (i) Making, importing, offering for sale, selling and using the product;
- (ii) Stocking such products for the purposes of offering for sale, selling or using.⁹⁸

When the patent has been granted in respect of a process then the following constitute an act of infringement:

- (i) using the process; or
- (ii) Doing any of the acts referred to in respect of a product obtained directly by means of the process.⁹⁹

Therefore, the Act is expected to provide sound enforcement provisions to deal with such infringements.

The TRIPs requires its Members to ensure that enforcement procedures specified in its Part III are available under their laws so as to permit effective action against any act of infringement of a patent including expeditious remedies to prevent infringements and remedies which constitute deterrence to further infringements.¹⁰⁰ However, these procedures must be applied in

⁹⁸ Section 36(a)(i) and (ii) of the Patents (Registration) Act 217 [R.E 2002].

⁹⁹ Section 36(b) (i) and (ii) of the Patents (Registration) Act 217 [R.E 2002].

¹⁰⁰ Article 41(1) of the TRIPs.

such a manner as to avoid barriers to legitimate trade and to provide for safeguards against their abuse.

Depending on the nature of the dispute, patent enforcement may involve civil and administrative procedures and/ or criminal prosecutions. The former includes corrective measures such as injunctions, damages and disposal of the infringing goods; while the latter includes deterrent criminal sanctions such as fine, imprisonment or both. The TRIPs provides a comprehensive set of minimum standards and flexibilities relating to the enforcement of patent rights to be implemented by the WTO Member States.¹⁰¹

Practice shows that the provisions relating to the enforcement of patent rights may either be consolidated into one piece of legislation or be covered in various legal texts.¹⁰² In addition, relevant legal provisions can, in some cases, be found in other, non-patent, legal texts.¹⁰³ In Tanzania, enforcement provisions are incorporated in various laws.

Whatever the case, enforcement provisions must be evaluated in order to establish whether adequately and effectively comply with Part III of the TRIPs.¹⁰⁴ In this regard, the benchmark indicators are very important in assessing enforcement mechanism as suggested by WIPO:¹⁰⁵

4.3 Institutional Framework

In Mainland Tanzania, patent – related issues are primarily administered and managed by the patent office at the Business Registration and Licensing Agency (BRELA), which is a semi-autonomous Government Executive

¹⁰¹ Part III of the TRIPs.

¹⁰² WIPO, *Id.*, p. 70.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

¹⁰⁵ WIPO, *Id.*, p. 71.

Agency established under the Government Executive Agencies (GEA) Act.¹⁰⁶

The GEA Act does not by itself establish the Agency but it only makes provisions to enable the establishment and operation of semi-autonomous Executive Agencies within the ambit of Government Ministries for the purpose of providing public services in selected areas in a more efficient and effective manner. Thus, the Minister is given authority, where s/he is of the opinion that it is appropriate to establish an Executive Agency for the purpose of carrying out the functions of a department of his Ministry he may, after obtaining appropriate authority, by Order published in the Gazette, establish such an Agency.¹⁰⁷ It is on this basis that BRELA was established.¹⁰⁸

The agency is placed under the Ministry of Industry, Trade and Investment (MITI). It has, at its apex, the Ministerial Advisory Board (MAB) charged with advisory functions. This body channels its advice to the Ministry concerned related to functions that the Agency has to perform in order that such advice is considered for decisions. This, to an extent, is a limitation for an independent functioning of the Agency.

The main responsibility of the Agency is to ensure that businesses operate in accordance with the laid down regulations and sound commercial principles. Its key functions are registration of companies, both local and foreign; registration of business names; registration of trade and service marks; granting of patents and issuing of industrial licensing. To meet a specific aim related to patent rights, the agency has the intellectual property department which deals with patents and trademarks. The legal basis for the patent office can be obtained from sect. 3 of the Patents Act.

¹⁰⁶ Cap 245 [R.E 2002]

¹⁰⁷ See sections. 3(1) and 21 of the Patents (Registration) Act 217 [R.E 2002].

¹⁰⁸ Government Notice No. 294 in the year 1996.

The office is led by the Registrar of Patents who may be appointed by the President of the United Republic of Tanzania by notice in the Gazette.¹⁰⁹ Responsibilities of the Registrar include the administration of the Patents Act. He is also vested with the duty to preside over the opposition proceedings on trade and service marks and patents. The Minister¹¹⁰ is empowered to appoint Deputy Registrars of Patents.¹¹¹ In addition, the Minister has the mandate to appoint examiners and other officers to carry out functions of the patents office.¹¹²

Regarding the functions, traditionally, the national patent office normally focuses on granting and protection of patent rights. Today, however, many offices are re-examining their roles, and expanding the scope of their operations. Some experts argue that a modern national patent office should be the focal point for the administration and management of all IP issues.¹¹³ In Tanzania the office's functions are provided for under section 5 of the Act. Section 5 (f) opens room for the office to perform other modern functions of the patent office which are not mentioned in the Act. The other function suggested would include;

1. To advise on and coordinate the formulation of an explicit national policy on all fields of science and technology;
2. To assist in the promotion and development of indigenous science and technology through—
 - (a) preparation of science and technology plans;
 - (b) organisation of training science and technology (S&T) manpower;

¹⁰⁹ See section 4(1) of the Patents (Registration) Act, Cap 217 [R.E 2002].

¹¹⁰ Section 2 of the Patents Act defines the Minister to mean the Minister responsible for trade and industries.

¹¹¹ See section. 4 (2) of the Patents (Registration) Act, Cap 217 [R.E 2002].

¹¹² See section 4(3) of the Patents (Registration) Act, Cap 217 [R.E 2002].

¹¹³ WIPO, *Id.*, p. 12.

- (c) carrying out scientific and technological research and development (R&D);
 - (d) technology transfer and adaptation;
 - (e) utilisation of natural resources and local manpower;
 - (f) establishment of research and experimental development institutions, scientific and technological documentation and information services, pilot plants and other testing grounds and standardisation and quality control centres; and
 - (g) encouragement of local innovations by providing more rapid and less costly incentives and programming integrated and coordinated science and technology activities;
3. To assist in the rationalisation of the use of foreign science and technology;
- (a) to act as a clearinghouse for information on research and experimental development taking place in scientific institutions, centres and other enterprises and on the potential application of their results;
 - (b) to protect industrial property through appropriate patent laws and to operate a national patent office;
 - (c) to disseminate research and development findings through seminars, workshops, publication of journals or any other means of publication of research findings;
 - (d) to recognize and honour scientists and technologists through awards or presentations for outstanding achievements in science and technology;
 - (e) to work in close cooperation with and coordinate all scientific and technological activities of persons, institutions, sectors and organisations;
 - (f) to draw up estimates for the implementation of the national science and technology policy and plans on disbursements to the agencies concerned;

- (g) to review generally and advise on programmes and budgets for the promotion of science and technology;
- (h) to carry out any other function that may be incidental or conducive to the above functions, or as the Minister may assign to it.

Notwithstanding the statutory functions, the patent office in Tanzania is not autonomous. It is a section in a department of the Agency but also the indicators of autonomy do not feature in the office. The degree of autonomy exercised by the national patent office is normally demonstrated by the extent of the value that the country places on the promotion of patents.¹¹⁴ It is suggested that Tanzania would learn from, among others, the Korean Intellectual Property Office (KIPO) and Kenya Industrial Property Institute (KIPI), which provide good examples of an autonomous patent related, and generally intellectual property, office because of their entire office structures.¹¹⁵

Concerning automation of the daily functions, most offices including Tanzanian national patent office started out with manual systems. Studies have shown that the offices that still retain these systems face a number of shortcomings.¹¹⁶ These shortcomings result in long processing times and backlogs resulting in low level of efficiency.¹¹⁷ Tanzania has automated its BRELA offices since April 2018 when the Online Registration System (ORS) started operating officially.

In spite of some few system deficiencies, processes and procedures have brought some improvement in terms of enhancing communication between

¹¹⁴ WIPO, *ibid.*

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

¹¹⁷ WIPO, *Id.*, p. 14

the applicants and the patents office.¹¹⁸ It was further informed that applications made through ORS are channelled to the Intellectual Property Automation System (IPAS) for further processes of the system which existed prior to the ORS. However, it appears ORS has contributed to the increased number of applications especially in a year after ORS began operating. This is evidenced by the number of total resident and non-resident applications lodged and applications granted before and after 2018 as shown below.

Albeit the progress made in automation, until the year 2020 the patent office in Tanzania had only one staff that carries out only patent formal examinations.¹¹⁹ The office does not conduct substantive examinations because of lack of capacity; there is no single expert to conduct such examinations.¹²⁰ It was commented that there is unprecedented dearth of experts in the country to conduct substantive examination and this indeed impairs a great deal of the quality of patents granted.¹²¹

Inadequate availability of suitably qualified experts is a key challenge not only for Tanzania but also for most national patent offices in developing countries.¹²² As a result, substantive examinations of applications are preferred to ARIPO and WIPO. Optimistic as one may be that as awareness of patent grows, and as the need for patent services expands, so also will the requirement to expand the range of services offered by national patent offices. Additional qualified staff able to conduct both formal and substantive examinations in various fields of technology will be required. Moreover, the successful implementation of any national patent strategy will necessitate having the requisite human resources available. As a result,

¹¹⁸ This was said by the officer in the patents office at BRELA during the interview conducted on 2 October 2020.

¹¹⁹ Information given by the officer in the patents office at BRELA during an interview conducted on 2 October 2020.

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

¹²² WIPO, *Id.*, p. 12.

strategies to build and retain the requisite human resources must be part and parcel of any national patent strategy.

5. CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

Based on the above, one may conclude that there is no single policy document in place but scattered policy statements in various sectoral policies. Regarding institutional framework, challenges are not far fetched and a lot such as inefficiency of qualified personnel expertise necessary to effective implementation of the roles vest on them by the Patents Act. The legal framework, nevertheless, exists with requisite TRIPs minimum Standards. However, there are certain obligations posed by the TRIPs which are not complied by the Act. Also, flexibilities offered by the TRIPs have not taken advantage of, save for compulsory licences. It has been seen that lack of taking such advantage without taking heed of the extension given may lead to some eventualities such as infringing some patented products when it comes to, for instance, parallel importation and taking advantage of research and other non-commercial advantages. This conclusion now leads us to the following recommendations.

5.2 Recommendations

After having seen the challenges facing the policy, legal and institutional frameworks; four recommendations are herewith made. First, the Constitution of the United Republic of Tanzania be amended with a view to expanding the meaning of property to include intellectual property rights and to which explicit constitutional guarantees should be given. Secondly, there should be tailored according to the needs, circumstances and environment a comprehensive policy on intellectual property indifferent to the existing peripherally scattered policy statements available in various policy documents. This will create a conducive environment for effective implementation of intellectual property laws including the patents related law.

The third recommendation is about repealing the current Patents (Registration) Act and enacting a new Industrial Property Act whose coverage should include all industrial property rights, the TRIPs flexibilities, explicit provision on repression of unfair competition, dispute prevention and settlement, cross border measures, categorical and explicit reference to the Harare Protocol and other relevant instruments, enforcement issues among other important aspect that the industrial property law should contain.

Fourthly, it is recommended to establish an independent and autonomous industrial property office with a legal personality and its own management and Board of Directors and with expanded roles. The recommended office is better positioned to adequately and effectively hire and train its own human resources as it deems appropriate. The recommended office is again better placed to address the problem of lack of capacity to carry out substantive examination that currently faces the patent office at BRELA which carries formal examination only. It lacks the technical skills required to carry out substantive examination of patent applications and therefore has become overly reliant on ARIPO to provide this service and consequently, the time required to grant or reject patent applications increases.