

AN ASSESSMENT OF KENYA'S COMPLIANCE WITH REGIONAL
INTELLECTUAL PROPERTY LEGAL FRAMEWORK

BY

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ABSTRACT

This thesis analyses the level of pervasiveness of intellectual property in Kenya's line ministries, parastatals, private sector and industry; level of conformity with the existing regional legal framework and proposed amendments where applicable. It also presents arguments for an enhanced role of private sector and industry in engagement with the government in regional intellectual property treaty formulation and ratification. Questionnaires and interview were used as research instruments. The study showed that intellectual property is well grounded in Kenya's relevant institutions and the applicable law is in harmony with the regional law. The study presents and defends that private sector and industry is an engine of growth and development especially at this time when the government has invested heavily towards the realization of Vision 2030. The study recommends the inclusion of private sector and industry representatives in regional intellectual property meetings as part of government delegations. Finally, it is also recommended that Kenya ratifies all the existing regional intellectual property legal instruments.

DECLARATION

This research project is my original work except where sources have been acknowledged. The work has never been submitted, nor will it ever be, to another University in the awarding of a Masters degree.

STUDENT: ... 
Signature

DATE: 8/4/2014

SUPERVISOR:

DATE:

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DEDICATION

This research is dedicated to my wife Maryline Hope Shikanda Inganga and my daughter ‘Abiola’ Amanda Esther Banda and my son Basilio Rading Outa

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LIST OF ABBREVIATIONS

AMCOST: African Ministerial Council on Science and Technology

ARIPO: African Regional Intellectual Property Organization

BOIP: Benelux Office for Intellectual Property (BOIP)

EPO: European Patent Office

EAPO: Eurasian Patent Organization

GCC: Gulf Cooperation Council

GDP: Gross Domestic Product

IGOs: Inter Governmental Organizations

IPA 2001: Industrial Property Act 2001

KECOBO: Kenya Copyright Board

KEPHIS: Kenya Plant Health Inspectorate Services

KEPSA: Kenya Private Sector Alliance

KIPI: Kenya Industrial Property Institute

OAPI: Organisation Africaine de la Propriété Intellectuelle

OHIM: Office for the Harmonization in the Internal Market

PAIPO: Pan-African Intellectual Property Organization

PCT: Patent Co-operation Treaty

PSDS: Private Sector Development Strategy

WIPO: World Intellectual Property Organization

TK: Traditional Knowledge

CHAPTER 1

INTRODUCTION

1.1 Background to the Study

World Intellectual Property Organization (WIPO) Handbook on Intellectual Property (2004) defines “intellectual property as legal rights which results from intellectual activity in the industrial, scientific, literary and artistic fields. Intellectual property law aims at safeguarding creators and other methodologies of intellectual goods and services by granting them certain time-limited rights to control the use made of those productions and is traditionally divided into two branches industrial property and copyright”.

Understanding Industrial Property (WIPO Publication No. 895, 2012(E) states precisely “industrial property takes a range of forms and include patents to protect inventions; and industrial designs, which are aesthetic creations determining the appearance of industrial products. Industrial property also covers trademarks, service marks, layout designs of integrated circuits, commercial names and designations as well as geographical indications, and protection against unfair competition. Protection is directed against unauthorized use of such signs likely to mislead consumers and against misleading practices in general”.

Understanding Copyright and Related Rights (WIPO Publication No. 909, 2012 (E) asserts “copyright relates to artistic creations, such as books, music, paintings and sculptures, films and technology based works such as computer programs and electronic databases. The expression copyright refers to the main act which, in respect of literary and artistic creations, may be made only by the author or with his authorization, the act of making copies of the work. The author has certain specific rights in his creation which only he can exercise (such as the right to prevent distorted reproduction). Other rights (such as the right to make copies) can be exercised by other persons through licensing”.

Hugo J. Hahn (1965) writes “Inter-Governmental Organizations (IGO) is a collective entity established by treaty or other international act and pursuing common interests of its members. Its organs have such functions, powers and duties as the law of the organization may provide. To the extent that those functions are to meet lasting needs of the member states, their continuity must be ensured beyond changes in the objectives, jurisdiction, institutional structure or even extinction of the organization originally entrusted with those tasks”.

1.2 Statement of the Problem

The study aims to examine if the Industrial Property Act (No. 3 of 2001) hereinafter referred to as IPA 2001 conforms to the Harare Protocol on Patents and Industrial Designs. The focus will be on filing, processing, transmittal procedures, granting, registration procedures and being harmonious with the regional system.

Kenya Vision 2030, the Popular Version (2007) ambitiously aims to increase annual Gross Domestic Product (GDP) growth rates to an average of 10 % for the country to achieve a newly industrializing, middle income country providing a high quality life to all its citizens by the year 2030. However, Kenya has not ratified two of the existing African Regional Intellectual Property Organization (ARIPO) Protocols which are relevant to economic growth. This study will investigate the underlying reasons and propose a paradigm shift in light of Kenya's monist constitution.

The engine of growth and prosperity is commerce and the role that exists for Kenya's private sector in encouraging the government to accede to the existing regional intellectual property framework will be proposed and how the private sector can engage with government.

1.3 Purpose of the Study

The research will assess how far the provisions of the Harare Protocol on Patents and Industrial Designs hereinafter referred to as the Harare Protocol have been incorporated into the IPA 2001. This is in light of the fact that procedures and compliance are crucial during the filing and registration processes.

The study will propose the necessary amendments if any to the national law so as to align it with the regional legal framework. It has to be borne in mind that the ARIPO system is supplementary to the national route but that does not rule out uniformity and harmonization of legislation.

As a new corridor to the involvement of the robust Kenyan private sector, the study will encourage the private sector to play a pro-active role in observing the government's preparatory, formulation and adherence to the regional intellectual property framework. This is bearing in mind that Kenyan multinationals are increasingly investing in the region and taking advantage of intellectual property rights.

1.4 Objectives of the Study

The following are the objectives of the research:-

- To assess the intellectual property pervasiveness in Kenya's line ministries, parastatals, private sector and industry.
- To analyze the national legislation to ascertain conformity with the existing regional legal framework.
- To recommend amendments to the national legislation where necessary.
- To find out the criteria for the country in adoption and ratification of treaties relevant to intellectual property and the underlying reasons if any.
- To provide modalities for the private sector engagement with the government on regional intellectual property matters.

1.5 Research Questions

- What is the intellectual property pervasiveness in Kenya's line ministries, parastatals, private sector and industry?
- What is the level of conformity with the existing regional legal framework?
- Which amendments are required in the national legislation to bring it in line with the regional intellectual property legal framework?
- What are the criteria for Kenya's adoption and ratification of treaties relevant to intellectual property?
- What are the modalities for the private sector engagement with the government on regional intellectual property matters?

1.6 Significance of the Study

The study will be of benefit to patent & trademark agents, industry executives, policy makers, students of international law, government ministries, national intellectual property offices, regional intellectual property organizations and the general public. This is due to the reasoning that the recommendations can suffice as action plans for effective implementation when it comes to national intellectual property strategy.

Intellectual property issues involve a large number of stakeholders and for effective policy formulation, the study argues that the private sector should be actively involved in the decision making process and effectively take part in high level strategic objectives so as not only to build capacity but have a stake in the outcomes

1.7 Scope of Study

This study is restricted to the regional intellectual property legal instruments that Kenya is a signatory and have been ratified. As much as it is appreciated that we have four regional agreements in place, Kenya is a signatory to the Lusaka Agreement which set up ARIPO and obligated to pay their annual contributions; facilitate the exchange and

dissemination of information and to provide training, research facilities and personnel for the purpose of the organization.

As Kenya is a contracting state under the Harare Protocol the study is restricted to the filing and transmittal procedures, granting, adherence to timelines and rulings by the Board of Appeal.

The Banjul Protocol on Marks and Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore will not form the basis of this particular study but will only be partially mentioned as Kenya has not ratified the former while the latter has not yet entered into force by the time of conducting the research.

1.8 Limitation of Study

Due to the urgency and framed period, the researcher being a full time employee of the national government meaning that time constraints will set in when it comes to data collection and interviews which will have to be scheduled for the weekend or Fridays afternoon when the researcher is off duty.

The preparation and distribution of questionnaires involves substantial expenditures like mass photocopies and transport which have not been budgeted for. The researcher will

have to dig deep into his pockets to offset the costs and personal savings come in handy at this time of need.

Many of the business sector organizations, parastatals and government ministries have staff confidentiality clauses that may restrict the free flow of information but it will be overcome by using the letter of introduction issued by Africa University and personal assurances that the data is strictly for research purposes and the results will be shared by the informant's institution so as to build a synergy.

1.9 Outline of Study

Chapter one discusses the background to the study, objectives of the study and the significance. Chapter two is a detailed literature review and conceptual framework that guides the study. Chapter three provides the research design, sampling technique and data collection methods. Chapter four comprises the data presentation, analysis and interpretation. Lastly, chapter five presents the conclusions and recommendations.

CHAPTER 2

LITERATURE REVIEW

2.1 Introduction

Chapter 11 gives a global perspective of regional intellectual property organizations and zeroes down to ARIPO including but not limited to the legal instruments, protocols administered by ARIPO, domesticating under the Kenyan law and the much celebrated Sanitam Services (EA) Limited. The Industrial Property Tribunal established under the IPA 2001, ruled that it has no jurisdiction to hear applications to revoke patents granted by ARIPO indicating that the provisions of national law are important and the ARIPO system is of benefit as it might not be easy to revoke rights.

In the same breath, the Kenya private sector has over the years substantially contributed to the country's economic development process. The former Ministry of Trade and Industry under the NARC regime operated the Private Sector Development Strategy (PSDS), after extensive consultations with a wide range of stakeholders that provide a mechanism through which the Government leveraged and catalysed the implementation of strategic actions to enhance private sector growth and competitiveness. The overriding objective of the PSDS is to enhance private sector growth.

2.2 The Role of Regional Organizations in the Protection of Intellectual Property Rights

Mr. Gift Sibanda (2008) explains the advantages of regional intellectual property organizations as streamlined and simplified application procedures which are cheap, faster and user friendly; single application for patent protection in several designated states; provides supplementary route to the existing national routes for international patent filing; centralized filing in many countries; single representation on all designated states and centralized renewal fees payment.

What is frequently left out by commentators is that fees generated by the Protocols including application fees, designation fees, annual maintenance fees are shared between the ARIPO and member states. Funds due to member states are held in trust accounts and released on request leading to a situation where most member states no longer pay any annual contributions as these are offset from their dues.

2.3 African Regional Intellectual Property Organization (ARIPO)

The history of ARIPO goes back to the early seventies when a Regional Seminar on patents and copyright for English- speaking Africa was held in Nairobi. That seminar

recommended that a regional industrial property organization be set up. In 1973 the United Nations Economic Commission for Africa (UNECA) and the World Intellectual Property Organization (WIPO) responded to a request by these English speaking countries for assistance in pooling their resources together in industrial property matters by establishing a regional organization. Following a number of meetings at ECA headquarters in Addis Ababa and WIPO in Geneva, a draft Agreement on the Creation of the Industrial Property Organization for English Speaking Africa (ESARIPO) was prepared. This agreement, now known as the Lusaka Agreement, was adopted by a Diplomatic Conference held in Lusaka, Zambia on December 9, 1976. (www.aripo.org)

ARIPO was mainly established to pool the resources of its member countries in industrial property matters together in order to avoid duplication of financial and human resources. Thus the preamble to the Lusaka Agreement clearly states that member states are “aware of the advantage to be derived by them from the effective and continuous exchange of information and harmonization and co-ordination of their laws and activities in industrial property matters”. Member states also recognize that the “creation of an African regional industrial property organization for the study and promotion of and co-operation in industrial property matters would best serve that purpose.

2.4 Objectives of ARIPO

The objectives of the Organization, as enshrined in Article III of the Lusaka Agreement, show that, “cooperation in industrial property is intended to achieve technological advancement for economic and industrial development of the member states. This cooperation is reflected in the objectives of the Organization which are to promote the harmonization and development of the industrial property laws, and matters related thereto, appropriate to the needs of its members and of the region as a whole; to foster the establishment of a close relationship between its members in matters relating to industrial property; to establish such common services or organs as may be necessary or desirable for the co-ordination, harmonization and development of the industrial property activities affecting its members; to establish schemes for the training of staff in the administration of industrial property law; to organize conferences, seminars and other meetings on industrial property matters; to promote the exchange of ideas and experience, research and studies relating to industrial property matters; to promote and evolve a common view and approach of its members on industrial property matters and to assist its members, as appropriate, in the acquisition and development of technology relating to industrial property matters”.

2.5 Organisation Africaine de la Propriété Intellectuelle (OAPI)

Adewopo (2011) “Up till 1962, French Laws governed patent rights in majority of the francophone Africa. The French National Patent Rights Institute (INPI) was the National

Authority of each of these states. On becoming independent, most of these states felt the need for a common body for their territory with regard to patent rights”.

L’Office Africaine et Malgache de la Propriété Intellectuelle (OAMPI) was formed by the Libreville Agreement of September 13, 1962 with the mandate to handle all intellectual property matters on behalf of its member states. The pillars of the Libreville Agreement was based on uniform legislation with common administrative structures and procedures, and intellectual property rights protection, mechanism; creation of centralized authority which would serve as a national industrial property office of each of the member states and centralization of patent protection procedure thus making it possible that a single title issued would secure protection in all member countries. (www.oapi.int)

The withdrawal of Malagasy prompted the revision of the Libreville Agreement and led to the signing of the Bangui Agreement of March 22, 1977 establishing the Organisation Africaine de la Propriété Intellectuelle (OAPI) which replaced OAMPI and created a uniform law on intellectual property with a common industrial property office in Yaounde, Cameroon. These laws were modeled after the French Laws of 1844, 1857 and 1909. In each member state, OAPI serves as both the national office of industrial property and the central agency for documentation and information regarding intellectual property as well as training and participation in the development of policies for its member states. OAPI is based in Yaoundé, Cameroon, with 17 member states

with over 150 million inhabitants and deals with IP matters in the mainly French-speaking countries of Central and West Africa. (www.adamsadams.com)

The Bangui Agreement of 1977 was signed and adopted in Bangui, Central African Republic. It entered into force on February 8, 1982. The Agreement was last revised on February 24, 1999 to bring it in compliance with the Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS) administered by the World Trade Organization. It is divided into 10 annexes that comprise various intellectual property rights. According to its Article 43, the Agreement Revising the Bangui Agreement of 1999 (hereafter the Agreement of 1999) entered into force two months after the deposit of instruments of ratification by at least two-thirds of the Member States. The Agreement of 1999, together with Annexes I to IX came into force on February 28, 2002 for all Member States. The Annex X came into force on January 1, 2006. The Bangui Agreement acts as a common Code of Intellectual Property as the principles and provisions of the Agreement have the force of national laws in each Member State. The intellectual property rights set forth in the Bangui Agreement are independent national rights, subject to the legislation of each Member State. No domestic legislation is issued to give effect to the Bangui Agreement as it constitutes the national law in each Member State. Also, should there be any conflicts between an International Convention and the Agreement, the International Convention shall prevail. (www.wipo.int)



Figure 1: OAPI Member States

In July 2011, OAPI's Director General Dr. Paulin Edou Edou was named by the respected Managing IP Magazine as Top 50 individuals shaping the intellectual property industry worldwide, the only African to receive this recognition as for multinational companies, Africa is a key strategic market for the next ten years and Dr. Edou was said to be central to make sure Intellectual property concerns do not hold back growth that could lift millions out of poverty.

2.6 Pan-African Intellectual Property Organization (PAIPO)

Ncube and Laltaika (2013) write "The creation of PAIPO began in 2006 with the publication of a concept paper by the African Union's (AU) African Ministerial Council on Science and Technology (AMCOST). AMCOST was established in November 2003 under the auspices of the New Partnership for Africa's Development (NEPAD) and the

AU ‘as a high-level platform for developing policies and setting priorities on science, technology and innovation for African development’; its key mandate is oversight of ‘the implementation of Africa’s Science and Technology Consolidated Plan of Action (CPA)’. In January 2007, at its general assembly, the AU voted in favour of the establishment of PAIPO. Following this decision, the AU’s Scientific, Technical and Research Commission (AU-STRC) was mandated to draft the PAIPO statute, which it reports to have done ‘in consultation with stakeholders in AU Member States, ARIPO, OAPI and Collective Management Organizations with the support of the [World Intellectual Property Organization] WIPO’

Catherine Saez (2010) states that “at its fourth conference, held in Cairo in March 2010, AMCOST decided to create a panel of IP experts to evaluate and thoroughly consider the existing PAIPO documents and submit them to the next Bureau Meeting in a bid to expedite the implementation of the AU Assembly decision on PAIPO. No further disclosure has been made about the AU-STRU consultations or the work of the IP Expert Panel. However, the Draft Statute has been finalized and published on the AU-STRC website”.

2.7 Analysis

Ncube et al (2013) “The draft PAIPO statute consists of a preamble and 26 articles. The articles provide for the following: establishment of PAIPO (Art 2), status (Art 3), privileges and immunities (Art 4), PAIPO objectives (Art 5), functions (Art 6), organs (Art 7), Council of Ministers (Art 8), Committee of Experts (Art 9), Board of Appeal (Art 10), Director General’s Office (DGO) (Art 11), DGO functions (Art 12), PAIPO membership and obligations (Arts 13–14), observers (Art 15), relationship with other institutions, co-operating states and organizations (Art 16), Headquarters (Art 17), finances (Art 18), sanctions (Art 19), entry into force of statute (Art 20), amendments (Art 21), the prohibition of reservations (Art 22), withdrawal (Art 23), dissolution (Art 24), settlement of disputes (Art 25) and deposit (Art 26)”.

Kongolo (2013) opines that “although ARIPO and OAPI have been serving their members fairly well, it has been repeatedly argued that having two separate intellectual property organizations is not to the advantage of Africa’s quest for greater integration and unification. On the political landscape, PAIPO is seen as a step closer to greater co-operation and singularity of position in key international IP affairs.

John Mugabe (2007) writes “the conspicuous absence of Africa’s leading economies, particularly South Africa and Nigeria, from the membership of the two regional bodies has long been lamented. It formed the basis of some calls for attempts to establish an all-inclusive (truly) pan-African Organization to enhance integration in the continent which

was perceived as being necessary in order to increase the ‘economies of scale’ to marshal scientific and technological resources for development”.

2.8 Practical significance

The preamble emphasizes that the AU appreciates and respects the autonomy of ARIPO and OAPI and Article 16(i) of the Draft Statute provides that PAIPO will ‘establish and maintain close and continuous working relationship’ with these organizations. This raises the question of how exactly these working relationships with ARIPO and OAPI will be negotiated, established and maintained.

Michael Blakeney and Getachew Mengiste (2011) note that “ARIPO and OAPI initially opposed the creation of PAIPO as they had not been consulted by the AU and because they believed that PAIPO was not feasible. There are also concerns about how it may be counterproductive to use substantial resources in creating yet another African IP organization rather than spending those resources on strengthening existing ones or advancing the African cause at WIPO and other international forums. However, there are clear roles which could be set aside for the regional organizations to ensure their continued relevance. For example, PAIPO could meet every two years and in the intervening year African states could meet in their regional blocks to consolidate views to be presented at the continental PAIPO meeting”.

Laltaika et al (2013) says “the emergence of PAIPO will have a marked impact on IP policy approach dynamics both within Africa and internationally. Depending on how co-operative African states are, this impact will either be positive or negative. For example, PAIPO may lead to the revitalization of ARIPO and OAPI if their role in the new continental dispensation is clearly demarcated as suggested above. It is hoped that there will be co-operation and meaningful strides towards a development-friendly united approach which will lead to a positive impact. The first step towards this would be the postponement of the adoption of the draft statute as it stands, until a wider consultative process is conducted.

2.9 European Patent Office (EPO)

The European Patent Organization is an intergovernmental organization set up on 7th October 1977 on the basis of the European Patent Convention (EPC) signed in Munich in 1973. The organization currently has 38 member states, comprising all the member states of the European Union together with Albania, Croatia, the former Yugoslav Republic of Macedonia, Iceland, Liechtenstein, Monaco, Norway, San Marino, Serbia, Switzerland and Turkey. Its mission is to grant European patents in accordance with the EPC with the headquarters in Munich, Germany and branch offices in the Hague and sub-offices in Berlin and Vienna. The EPO has legal personality represented by the

President who heads the management committee. The Administrative Council made up of representatives of the contracting states, exercises legislative powers on behalf of the organization and is responsible for policy issues and supervises the office's activities. As a rule, the council meets four times a year with the working languages being English, French and German. (www.epo.org)

The EPO grants European patents for the contracting states to the EPC and provides a single patent grant procedure. Besides granting European Patents, the EPO is also in charge of establishing search reports for national patent applications on behalf of the patent offices of some member states.

2.10 Office for Harmonization in the Internal Market (OHIM)

The Office for Harmonization in the Internal Market is the trademark and designs registry for the internal market of the European Union and is based in Alicante, Spain. The task of OHIM is to promote and manage Community Trade Marks and Community Designs within the European Union. It carries out registration procedures for titles to EU industrial property and keeps public registers of these titles. It shares with the courts in Member States of the European Union the task of pronouncing judgment on requests for invalidation of registered titles. (www.oami.europa.eu)

The Office is a public establishment which enjoys legal, administrative and financial independence. The Office was created under European Union law and is an EU agency with its own legal personality. Its activities are subject to EU law. The Court of Justice of the European Union is responsible for overseeing the legality of the Office's decisions. The Office is responsible for balancing its budget from its own revenue, which is derived mainly from registration fees and fees for the renewal of trade mark protection. (www.guichet.public.lu)

2.11 Benelux Office for Intellectual Property (BOIP)

The Benelux Office for Intellectual Property (BOIP) is the official body in the Benelux region responsible for the registration of trademarks and industrial designs. BOIP is part of the Benelux Organisation for Intellectual Property, an international organisation that has been established by the Benelux Convention on Intellectual Property and is monitored by its Executive Board. This Board is manned by representatives from all three Benelux countries. The Organisation has been assigned the following tasks and duties: to execute the Convention and the implementing regulations; to promote the protection of trademarks and designs in the Benelux countries; to carry out additional tasks in other fields of intellectual property law, as directed by the Executive Board; continual evaluation and, if necessary, amendment of the Benelux

legislation on trademarks and designs, in the light of international, Community and other developments. The headquarters are in The Hague, The Netherlands with national offices in Belgium and Luxembourg. (www.boip.int)

2.12 Gulf Cooperation Council (GCC)

A regional office for the Gulf Cooperation Council, which comprises the States of United Arab Emirates, Kingdom of Bahrain, Kingdom of Saudi Arabia, Sultanate of Oman, State of Qatar, and State of Kuwait. Certificates of Patents granted by the GCC Patent Office secure legal protection of the inventor's rights in all Member States. A patent shall be promptly validated in the Member States as of the date of grant. At the moment, national patent offices are in operation in a number of GCC States. These national offices grant patent protection in their respective countries, and the applicant may file as many applications as he wishes with any national office whether such office is already in operation or still in the process of establishment. The applicant may also file an application with the regional office if he so wishes. The GCC Patent Regulation and the Statute of the GCC Patent Office have been granted approval by the Supreme Council during the 13th summit meeting of the heads of Member States, which was held in Abu Dhabi 21-22 September 1992. As of October 3, 1998, the GCC Patent Office started receiving applications. (www.gccpo.org)

The Office objectives are not limited to the granting of patents, but extend to the following: Encouragement of scientific and technical research, facilitating movement of technology, and boosting economic growth in the region. Inciting individuals to invest their ideas in the fields of production. Activating trade and industry market by introducing quality products. Contribution to the industrial and agronomic growth in the region publishing creative, innovative, and inventive ideas and securing their protection. Attracting foreign investment to the region by offering property right protection for foreign investors. The Board of Directors of the Office consists of a competent representative from each Member State with a rank not less than a Deputy Minister. Chairmanship of the Board rotates among Members for one-year term. The headquarters of the GCC Secretariat General is Riyadh, Saudi Arabia. (<http://agip.com/>)

2.13 Eurasian Patent Organization (EAPO)

The main function of the EAPO is to receive applications and to grant Eurasian patents valid on the territory of member states of the Eurasian Patent Convention. EAPO receives Eurasian applications for inventions filed directly or under the Patent Cooperation Treaty (PCT) procedure; carries out search, examination and other procedures related to applications. After substantive examination EAPO grants patents, considers appeals against patent grant under opposition procedures, adopts resolutions and publishes information relating to appeal procedure. (www.eapo.org)

2.14 History of the Eurasian patent organization

Due to the termination of the Union of Soviet Socialist Republics by the Resolution of the USSR State Council of November 14, 1991, the ministries and other bodies of the state management, including the USSR Gospatent, were abolished. The USSR Gospatent stopped performing its functions from December 1, 1991, due to which an uncertain situation was created in the field of industrial property protection both in the Russian Federation and in the other states - Republics of the former USSR. One of the main reasons for that uncertainty was the termination, in the Commonwealth of Independent States (CIS) States, the legislative acts of the former USSR and, in particular, those on the legal protection of inventions, industrial designs and trademarks.

By that time the single patent space was broken. In the territory of the independent States (subjects of the former USSR) an unfavorable situation was formed in respect of the invention activity, the creation of new kinds of equipment, goods, the implementation of new technologies, both domestic and foreign ones. The main lines for going out of the emerged crisis in the field of industrial property protection were the establishment of an interstate system for the protection of industrial property; establishment of national patent systems in the CIS States and other States - subjects of

the former USSR alongside with setting-up of the respective Patent Offices and adoption of their own laws in this field.

2.15 Establishment of an Interstate System for the Protection of Industrial Property

Bearing in mind that after the disintegration of the USSR the single patent space in the territory of the newly born states would be broken and that it would be impossible to stop the political process, the only reasonable way out was to maintain a central body for the industrial property protection alongside with Patent Offices which may be established by the independent Republics, which would grant the single patent in the single patent space.

The management of the USSR Gospatent addressed, before its liquidation, the proposal to start negotiations on the matters of establishing an interstate system for the industrial property protection and preparing a patent convention to the Governments of the former USSR Republics.

That proposal evoked a warm response and understanding on the side of a number of Republics, since, in their striving for independence, all the Republics remained linked by a thousand of ties, and the economic, scientific, technical and ecological relations which appeared during decades, with the other Republics. In those conditions, establishment of

an interstate system would be a good prerequisite for protecting industrial property and putting forward modern technologies, forming conditions for setting up joint venture companies and promoting activities of foreign investors in the field of economy.

The principles of EAPO based were that the Contracting States would establish a single patent system providing that the legal protection of industrial property in the territory of those States should be effected on the basis of a single application which would be considered by a single Patent Office; the patent granted by the Patent Office in the framework of such a single patent system would be valid in the territory of all the Contracting States, i.e., such a patent may be granted, assigned or canceled in the territory of all the Contracting States with due regard to the invention patentability criteria provided for in the USSR legislation; the Contracting States would recognize the validity, in their territory, of the earlier titles of protection issued in the USSR for inventions, industrial designs and trademarks; the Interstate Patent Council should be formed for the purpose of working out a coordinated policy of the Contracting States in the patent field; the Patent Office, including the organizations subordinate at that time to the USSR Gospatent, would be the executive body of the single patent system, which would be authorized to grant titles of protection for industrial property.

To perform administrative tasks relating to functioning of the Eurasian patent system and grant of Eurasian patents, the Eurasian Patent Convention (EAPC) established the Eurasian Patent Organization with the Eurasian Patent Office (EAPO) acting as its

executive body. All Contracting States are members of the Organization. The Eurasian Patent Organization has two bodies, the Eurasian Patent Office and the Administrative Council. The Eurasian Office is headed by the President who is the highest official in the Organization and is its representative. The location of the headquarters of the Organization is Moscow, the Russian Federation. The official language of the Organization is Russian. (2012 Annual Report of the Eurasian Patent Organization available at <http://www.eapo.org/ru/publications>)

2.16 ARIPO's Legal Instruments and Mandate

The Agreement and Protocols being administered by ARIPO are:

- The Lusaka Agreement on the creation of the African Regional Intellectual Property Organization
- The Harare Protocol and Implementing Regulations
- The Banjul Protocol and Implementing Regulations
- The Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore

2.17 Lusaka Agreement on the creation of the African Regional Intellectual Property Organization

It was adopted on December 9, 1976 at Lusaka and was last amended on August 13, 2004. The preamble states that member states are aware of the advantage to be derived by them from the effective and continuous exchange of information and harmonization and co-ordination of their laws and activities in industrial property matters and recognizing that the creation of an African regional intellectual property organization for the study and promotion of and co-operation in intellectual property matters in collaboration with the Economic Commission for Africa, the World Intellectual Property Organization and other appropriate organizations that would best serve this purpose.

ARIPO Organs include the Council of Ministers which is the supreme organ, composed of Ministers responsible for intellectual property matters in the respective member states and meets after every two years to decide on all necessary measures to develop the organization's activities, review the implementation of those activities, resolve problems which, because of their nature cannot be resolved by the Administrative Council determine which states not members, organizations and institutions shall be admitted to its meetings as observers.

The Administrative Council meets at least once a year in ordinary session and consists of heads of intellectual property offices of the members states and interalia appoints the

director general, formulates the policy, approves the programme of activities, annual report, budget and accounts and to give directions to the Secretariat concerning its work, including seminars and other meetings.

The secretariat is led by the director general who is the principal executive officer and appointed for a fixed term of four years and may be eligible for re-appointment for a further term of four years. The secretariat examines ways in which the objectives of ARIPO may be achieved, undertakes work and studies and performs functions assigned to it by the Administrative Council.

Other subsidiary organs have been established by the Administrative Council and includes the Finance Committee which reviews the programme of activities and the budget, Board of Appeal, a quasi judicial and independent body, which deals with appeals against administrative decisions and the Staff Affairs Committee composed of members from member state IP offices and which deals with personnel and welfare matters of the staff members.

2.18 Member States of ARIPO

According to Article IV of the Lusaka Agreement that created ARIPO, membership to the Organization is open to states members of the United Nations Economic

Commission for Africa or the African Union (AU). There are currently eighteen states which are party to the Lusaka Agreement and therefore members of ARIPO. These are: Botswana, the Gambia, Ghana, Kenya, Lesotho, Malawi, Mozambique, Namibia, Sierra Leone, Liberia, Rwanda, Somalia, Sudan, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe (Total: 18 Member States).



Figure 2: ARIPO Member States

Article VI also mandate the Organization to cooperate with non member states. In line with this provision, ARIPO has cooperated with the following potential member states who have observer status in the meetings of its main organs: Angola, Algeria, Burundi, Egypt, Eritrea, Ethiopia, Libya, Mauritius, Nigeria, Seychelles, South Africa and Tunisia (Total: 12 Potential Member states). (www.aripo.org/members)

2.19 Advantages of ARIPO to Member States

Membership to the Organization brings several advantages to Member States. As the Organization was formed to pool resources together to avoid duplication of both human and financial resources, Member States have advantage of economies of scale. This in turn releases scarce resources for the Member States to spend on more pressing needs of their citizens.

The ARIPO regional industrial property system covers a total area of nearly 7 million square kilometres with a population of over 200 million inhabitants. Membership to ARIPO therefore opens up new markets for its member states while at the same time improving their investment climate and encourages access to technical information particularly that contained in patent documents.

The ARIPO regional system compliments the national industrial property system of its Member States. The sovereignty of Member States is therefore preserved but applicants are given more choice as to the route of filing their applications and where to obtain protection.

2.20 The Harare Protocol on Patents and Industrial Designs Within the Framework of the African Regional Intellectual Property Organization

In December 1982, in Harare, Zimbabwe, the Administrative Council of ARIPO adopted the Harare Protocol. The Protocol empowers the ARIPO Office to receive and process patent and industrial design applications on behalf of states party to the Protocol. The Protocol entered into force in 1984 and now as the following member states as contracting parties: Botswana, The Gambia, Ghana, Kenya, Lesotho, Liberia, Malawi, Mozambique, Namibia, Rwanda, Sierra Leone, Sudan, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe (Total: 17 states).

Under the Protocol an applicant for the grant of a patent or the registration of an industrial design can, by filing only one application, designate any of the Contracting States in which he wishes his invention or industrial design to be accorded protection. The Protocol requires the filing of the application to be made with either one of the Contracting States or directly with the ARIPO Office.

The ARIPO Office, on receipt of the patent application, carries out the substantive examination to ensure that the invention which is the subject of the application is patentable (in other words, that it is new, involves an inventive step and is capable of being applied in industry). When the application complies with the substantive requirements, copies thereof are sent to each designated contracting states who may,

within six months, indicate to the ARIPO Office that, according to grounds specified in the Protocol, should ARIPO grant the patent that grant will not have effect in its territory.

The substantive examination of ARIPO applications makes an ARIPO patent a particularly a strong one as the examination substantially raises its presumption of validity.

For industrial design applications, only a formality examination is performed. If the application fulfils the formal requirements, the ARIPO Office registers the industrial design which has effect in the designated states. However, the same right to communicate to the ARIPO Office within 6 months that the registration may not have effect in the designated states concerned is reserved.

The Administrative Council, at its Second Extra- ordinary session held in April 1994 adopted amendments to the Harare Protocol and its Implementing Regulations to create a link between the Protocol and the Patent Cooperation Treaty (PCT). This link took effect on July 1, 1994 and has the effect that any applicant filing a PCT application may designate ARIPO which in turn means a designation of all states party to both the Harare Protocol and the PCT; the ARIPO Office shall act as a receiving office under the PCT for such states; and the ARIPO Office may be elected in any PCT application. The following countries are party to both the Harare Protocol and the PCT: Botswana, The Gambia, Ghana, Kenya, Lesotho, Liberia, Malawi, Mozambique, Namibia, Rwanda,

Sierra Leone, Sudan, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe (Total: 17 states).

In 1999, the Administrative Council amended the Harare Protocol to make provision for patent applications involving micro-organisms in accordance with the Budapest Treaty on the International Recognition of the Deposit of Micro-organisms for the Purposes of Patent Procedures. In November 1999, the Council further adopted amendments to provide for choice of office of filing applications, period of protection for patents and industrial designs and protection for utility models.

(<http://www.aripo.org/index.php/about-aripo/legal-framework>)

2.21 The Banjul Protocol on Marks Within the Framework of the African Regional Intellectual Property Organization

The Banjul Protocol on Marks was adopted by the member countries of ARIPO in November 1993, with the provision that the Protocol would enter into force three months following the date on which it was ratified by at least three countries. States currently party to the Protocol are Botswana, Lesotho, Liberia, Malawi, Namibia, Swaziland, Tanzania, Uganda and Zimbabwe. As Kenya is not a party, It will not be subject of analysis in this study.

The Banjul Protocol provides for a centralized trademark registration procedure. Applications for trademark registrations may be submitted either to the ARIPO Office or to the Industrial Property Office of a member state, and must designate the member state(s) where registration is sought. Applicants for registration of a trademark may claim priority in accordance with Article 4 of the Paris Convention within six months from the date of their earliest application in another Paris Convention country. A single trademark application may be filed in respect of multiple classes of goods and/or services, in accordance with the International Classification system, although a member state that does not recognize multiple-class registrations may treat the same as separate registrations for each class, provided that each registration refers to the other.

In addition, the ultimate enforcement of registered rights will be in accordance with national laws so that, for example, an ARIPO registration covering services will not be enforceable in a member state that does not recognize service mark protection. Provided that an application complies with formal requirements, the application will be forwarded by the ARIPO Office to the designated member state(s), which are granted a 12-month period to examine and reject the application on the basis of either non-conformity with national laws, or the nature of the mark. After the 12-month period expires, an application will be registered with effect in those states which have no objections. If refused, an applicant may request within a 3-month period that the application be processed under the national laws of a member state. Trademark registrations are

granted for a period of 10 years and may be renewed for further 10-year periods within 12 months prior to the expiration date, or within 6 months from the expiration date upon payment of an additional fee. Assignments and licenses may be recorded in national Trademark Offices or, where there is no provision for such recordal under the national laws, with the ARIPO Office. (<http://www.aripo.org/index.php/about-aripo/legal-framework>)

2.22 Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore Within the Framework of the African Regional Intellectual Property Organization

The Swakopmund Protocol on the protection of traditional knowledge and expressions of folklore was adopted on 9 August 2010 by the Member States of (ARIPO) during a Diplomatic Conference held at the coastal town of Swakopmund in Namibia. It was signed by nine States and will enter into force when ratified by six. Kenya was among the first countries to sign but has not yet ratified thereby it will not be a subject of this research.

The protocol aims to empower the custodians and holders of Traditional Knowledge (TK) and expressions of folklore to utilize their knowledge for socio-economic development and wealth creation; curtail biopiracy; and enable the ARIPO Office to

register traditional knowledge and expressions of folklore that are transboundary and multicultural in nature.

In the protocol's preamble it is emphasized that "legal protection must be tailored to the specific characteristics of traditional knowledge and expressions of folklore, including their collective or community context, the intergenerational nature of their development, preservation and transmission, their link to a community's cultural and social identity, integrity, beliefs, spirituality and values, and their constantly evolving character within the community concerned." It is recognized that "protection must reflect the need to maintain an equitable balance between the rights and interests of those who develop, preserve and maintain traditional knowledge and expressions of folklore, and those who use and benefit from such knowledge and expressions of folklore."

Mr. Emmanuel Sackey (2012) TK protection shall not be subject to any formality; however, national competent authorities and the ARIPO Office "may maintain registers or other records ... where appropriate and subject to relevant policies, laws and procedures, and the needs and aspirations of the traditional knowledge holders concerned." Such registers may be associated with specific forms of protection and shall not compromise the status of undisclosed TK. The owners of the rights shall be the TK holders, namely the local and traditional communities, and recognized individuals within such communities, who create, preserve and transmit knowledge in a traditional and intergenerational context. These rights owners are conferred the exclusive right to

authorize the exploitation of their TK; prevent anyone from exploiting their TK without their prior informed consent; and institute legal proceedings against infringement of their rights. It is noted that TK owners shall have the right to assign and conclude licensing agreements; however, TK belonging to a local or traditional community may not be assigned. Where the holder of rights in traditional knowledge refuses to grant licences subject to reasonable commercial terms and conditions, a Contracting State may, in the interests of public security or public health, grant a compulsory licence in order to fulfill national needs.”

The protocol contains, among others, sections on assignment and licensing, equitable benefit-sharing, and the recognition of knowledge holders. It specifies that, “any person using traditional knowledge beyond its traditional context shall acknowledge its holders, indicate its source and, where possible, its origin, and use such knowledge in a manner that respects the cultural values of its holders.”

It describes the application of exceptions and limitations to the protection of traditional knowledge, and one section on compulsory licenses explains that, “Where protected traditional knowledge is not being sufficiently exploited by the rights holder, or where the holder of rights in traditional knowledge refuses to grant licenses subject to reasonable commercial terms and conditions, a Contracting State may, in the interests of public security or public health, grant a compulsory license in order to fulfill national needs. In the absence of an agreement between the parties, an appropriate amount of compensation for the compulsory license shall be fixed by a court of competent

jurisdiction.” This follows international rules on IP rights and trade. A clause of note in the draft protocol states: “Where traditional knowledge belongs exclusively to an individual, protection shall last for 25 years following the exploitation of knowledge beyond its traditional context by the individual.” (www.cultureindevelopment.nl)

2.23 Domesticating ARIPO Protocols under Kenyan Law

Kenya has enacted the IPA 2001, which preamble states that it is an Act of Parliament to provide for the promotion of inventive and innovative activities, to facilitate the acquisition of technology through the grant and regulation of patents, utility models, technovations and industrial designs, to provide for the establishment, powers and functions of the Kenya Industrial Property Institute and for purposes incidental thereto and connected therewith.

Section 3 of the Act establishes the Kenya Industrial Property Institute (KIPI). The Board of Directors of the institute has representatives from other stakeholders including representatives of the Kenya Industrial Research Development Institute (KIRDI), Kenya Association of Manufacturers (KAM), the Law Society of Kenya (LSK), Kenya Medical Research Institute (KEMRI), the public universities, Institution of Kenya Engineers (ISK) and Jua Kali Association. The Managing Director is the chief executive officer and secretary to the board.

This is the main implementation and administration agency. It liaises with other national, regional and transnational intellectual property offices, patent offices and international organizations that are involved in intellectual property protection. KIPi's mandate includes: considering applications for and granting industrial property rights; screening technology transfer agreements and licenses; providing to the public, industrial property information for technological and economic development; and promoting inventiveness and innovativeness in Kenya.

Section 2(1) of the Harare Protocol provides that applications for the grant of patents or the registration of utility models and industrial designs shall be filed by the authorized representative of the applicant or by the applicant with either ARIPO or, where the law of a contracting state so permits, the industrial property office of a contracting state.

Section 59 of the IPA 2001, states that a patent, in respect of which Kenya is a designated state, granted by ARIPO by virtue of the ARIPO Protocol shall have the same effect in Kenya as a patent granted under this Act except where the Managing Director communicates to ARIPO, in respect of the application thereof, a decision in accordance with the provisions of the Protocol that if a patent is granted by ARIPO, that patent shall have no effect in Kenya.

Part VI of the IPA 2001, contains provisions on International Applications and defines that they are international applications filed in accordance with the PCT and the regulations established there under; and goes further to assign meanings of receiving office, designation office as have been respectively assigned to them in the PCT.

Upon receipt of the application documents, ARIPO conducts a formality check to ascertain whether the application substantially satisfy the prescribed formality in terms of nature, form and content as prescribed in the Harare Protocol before granting an appropriate filing date. It will proceed to notify the designated states that a patent application has been filed which complies with the prescribed formal requirements.

2.24 Substantive Examination

Where a patent or utility model application complies with formal requirements, it will proceed to the substantive examination resulting in each examination report being produced. The purpose is to determine whether the invention satisfies the substantive requirements for granting of patents as prescribed by the Harare Protocol which lists the three requirements of patentability as novelty, inventive step and industrial applicability. For utility models, the application must meet inventive step and applicability; For industrial designs, the novelty requirement must be met.

Under section 22 of the IPA 2001, an invention is patentable if it is new, involves an inventive step, is industrially applicable and novelty is described as not anticipated by prior art. For the purpose of Kenyan law, 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 disclosure occurred before the priority date validly claimed in respect thereof.

Section 24 of the IPA 2001 states that an invention shall be considered as involving an inventive step if, having regard to the prior art relevant to the application claiming the invention, it would not have been obvious to a person skilled in the art in which the invention pertains on the date of the filing of the application or, if priority is claimed, on the priority date validly claimed in respect thereof.

On industrial applicability, section 25 of the IPA 2001 explains that an invention should be considered industrially applicable if, according to its nature, it can be made or used in any kind of industry including agriculture, medicine, fishery and other services.

The Harare Protocol leaves the determination of non-patentable subject matters to national laws. In compliance with Article 27 of the TRIPS Agreement on patentability subject matter, section 21(3) of the IPA 2001 provides what shall not be regarded as inventions and shall be excluded from patent protection. They include discoveries,

scientific theories and mathematical methods; schemes, rules or methods for doing business, performing purely mental acts or playing games; methods for treatment of the human or animal body by surgery or therapy, as well as diagnostic methods practiced in relation thereto, except products for use in any such methods; mere presentation of information; and public health related methods of use or uses of any molecule or other substance whatsoever used for the prevention or treatment of any disease which the Minister responsible for matters relating to Health may designate as a serious health hazard or as a life threatening disease.

Non-patentable inventions include plant varieties s provided for in the Seeds and Plant Varieties Act, but not parts thereof or products of biotechnological processes and inventions contrary to public order, morality, public health and safety, principles of humanity and environmental conservation.

Section 27 (1) of the IPA 2001 provides that where an application for a patent is filed with KIPIT under this Act or under any international convention to which Kenya is a party, and it appears to the Managing Director that the application contains information of a description notified to him by the Minister responsible for Defence or the concerned Minister as being information the publication of which might be prejudicial to the defence of Kenya, the Managing Director may give directions prohibiting or restricting the publication of that information or its communication to any specified person or persons.

Under Section 27 (2) If it appears to the Managing Director that any application so filed contains information the publication of which might be prejudicial to the safety of the public, he may give directions prohibiting or restricting the publication of that information or its communication to any specified person or persons until the end of a period not exceeding three months from the end of the period prescribed for the purposes of publication as soon as possible after the expiration of eighteen months from the filing date or where priority is claimed, the date of priority.

The more elaborate terms provided in section 27 (3) include that where directions under this section are in force with respect to any application—(a) if the application is made under this Act, it may be processed to the stage where it is in order for the grant of a patent, but shall not be published and any information relating thereto shall not be communicated and no patent shall be granted in pursuance of the application; (b) if it is an application for an ARIPO patent, it shall not be sent to the ARIPO Office; and (c) if it is an international application for a patent, a copy thereof it shall not be sent to the International Bureau or to any international searching authority appointed under the PCT.

2.25 Registration, Duration and Effect

On the account of the search and examination report, ARIPO may notify the applicant and the industrial property office of the designated states of its intention using Form 21 whereas Form 20 is for complete refusal by ARIPO and within six months of the issuance of Form 21, the refusal must be submitted in writing on Form 22 and only applies to that state.

After expiry of the notification period and on payment of the requisite fees, ARIPO will grant the patent with respect to all those designated states which did not communicate their refusal. The patent or utility model will be granted, recorded in the registers, published in the journal, certificate of registration issued and copies transmitted to the designated states for recording in their national patent registers and published in their journals. The same applies to industrial designs save that substantive examination is to be done by the designated national office within six months or else ARIPO will proceed to register the design.

ARIPO patents last for twenty years from the date of registration; industrial designs and utility models for ten years as long as maintenance fees are paid within the prescribed time frames. Non payment of maintenance fees presumes that the patent, industrial design or utility model has been abandoned or withdrawn and it is at the discretion of the Director General to accept late payment of renewal fees for excusable reasons.

2.26 International Applications Under the PCT

Section 3 bis of the Harare Protocol provides the procedure for the International Application under the PCT with ARIPO Office mandated to be a designated office and is empowered to receive the publication.

Part VI of the IPA 2001, contains comprehensive provisions on international applications with KIPI being a receiving office and functions performed in accordance with the provisions of PCT and the regulations provided and in case of conflict, the provisions of the administrative instructions issued shall apply. The Managing Director of KIPI may refuse to grant a patent upon the application if it is apparent from an international search report that an invention claimed in an international application does not fulfill the requirements of novelty, unless the applicant either satisfies him that the requirements have been fulfilled or amends the claims in such a way that fulfills the requirements to receive, file, establish, search and examination reports and process international applications. The ARIPO office may act as a receiving, designated or elected office.

2.27 Utility Models

Section 3 ter (1) of the Harare Protocol defines utility models as any form any form, configuration or disposition of elements of some appliance, working tools and implements as articles of everyday use, electrical and electronic circuitry, instrument, handicraft, mechanism or other object or any part thereof in so far as they are capable of contributing some benefit or new effect or saving in time, energy and labour or allowing a better or different functioning, use, processing or manufacture of the subject matter or that gives utility advantages, environmental benefit, and includes micro-organism or other self-replicable material, products of genetic resources, herbal as well as nutritional formulations which give new effects. A utility model shall be protected under the Protocol if it is new and industrially applicable. An application for registration of a utility model shall identify the applicant; contain, as prescribed, a description of the utility model, a claim or claims, a drawing or drawings or a model, and an abstract; designate the Contracting States for which the utility model is requested to be registered; be subject to payment of the prescribed fees. ARIPO examines whether the formal requirements for applications have been complied with and shall accord the appropriate filing date to the application.

Part XII of the IPA 2001, replicates the definition of Utility Model in exact terms the definition given under the Harare Protocol and an invention qualifies for a utility model certificate if it is new and industrially applicable and at any time before the grant or refusal of a patent, an applicant for a patent may upon payment of the prescribed fee convert his application into an application for utility model, which shall be accorded the

filing date of the initial application and vice versa that an application for utility model can be converted into a patent but may not be converted more than once.

2.28 Industrial Designs

Section 4 of the Harare Protocol provides for the registration of an industrial design upon compliance with the prescribed formal requirements and designated states may make written communication to ARIPO that if registered, that registration shall have no effect in its territory for the reason that it is not new, because of the nature of the industrial design, it cannot be registered or a registration has no effect under that national law and in the case of a textile design, it is the subject of a special register.

Section 84 of the IPA 2001 defines industrial design as any composition of lines or colours or any three dimensional form, whether or not associated with lines or colours provided that such composition or form gives a special appearance to a product of industry or handicraft and can serve as a pattern for a product of industry or handicraft and the protection shall not extend to anything in an industrial design which serves solely to obtain a technical result.

2.29 Board of Appeal

Section 4 bis establishes a Board of Appeal referred to as the Board consisting of five members experienced in intellectual property matters with two examiners and at least one examiner present in the Board sittings. The functions of the Board include inter alia to consider and decide on any appeal lodged by the applicant in instances where ARIPO refuses any application and within the prescribed period, requests ARIPO to reconsider the application but still the application is refused; review any final administrative decision of ARIPO in relation to the implementation of the provisions of Harare Protocol, Banjul Protocol or any other protocol within the framework of ARIPO and to decide on any other matter related to or incidental. Three members form a quorum with the Board's decision being final.

2.30 In the matter of Patent Grant No. AP 773 entitled “Foot Operated Sanitary/Litter Bin” in the name of Sanitam Services (EA) Limited

In a judgement dated 30 August 2007 at Harare, Zimbabwe, this was an appeal brought by Sanitam services (EA) Limited (to be referred to as the appellant) a Kenyan company. The appeal was brought against the decision of the ARIPO office (hereinafter referred to as the Respondent) removing the appellant's patent No. AP 773 entitled "Foot

Operated Sanitary/Litter Bin" from the register due to non- payment of annual maintenance fees.

A patent application through the ARIPO office was made by the appellant on the 14th day of September 1998 pursuant to the Harare Protocol (hereinafter called the Protocol) seeking protection for its invention in the following states, Botswana, Uganda, Zambia and Zimbabwe. Later Kenya was added to the list of designated states. The patent was granted on 15th October 1999. The applicant was by e-mail of November 2nd, 2000 informed the appellant that the due date for the anniversary maintenance fees for its application is determined by the filing date, which is 4th September of each subsequent years starting 1999. According to a notification on ARIPO form (annex viii(a) to the response by ARIPO to the appeal) dated 9th December 2000 the validity of the patent in respect of the five (5) states was maintained to 4 September 2001, though paid late.

The applicant was all along paying fees every year as shown by a table attached to the letter of 11th January 2007 from the Kenya Industrial Property Institute, however, was always being told that there was a late fee or surcharge that needed to be paid. Therefore, the fees paid by the appellant were applied to the preceding shortfalls. Further the applicant was advised to engage a representative agent who would remind the applicant whenever the fees fell due. ARIPO said that it was lenient in accepting late fees as such lenience was necessary in view of the objectives for which ARIPO was created, which included encouragement of indigenous inventors and innovators.

The above information showed the lenience shown by the ARIPO office and according to Mr. Christopher Kiige, who represented ARIPO at the hearing of the appeal; the Director General of ARIPO has discretion to extend the periods of payment of fees. Mr. Kiige also relied on the ARIPO (internal) Administrative Instruction No. 13 (1) which stated that; "The times or periods prescribed by the Regulations and these Administrative Instructions for doing any act or taking any proceeding thereunder may be extended by the Director General if he thinks fit, upon such terms as he may direct, and such extension may be granted although the time or period for doing such act or taking such proceeding has already expired".

Mr. Othieno, the learned counsel for the appellant, generally accepted as facts the statements of Mr. Kiige and abandoned what he had prepared as grounds of appeal, which denied that the patent registration had lapsed for failure to pay the necessary fees for its maintenance. He agreed that the appeal was with regard to the patent as applied to Kenya and Uganda thereby admitting that with regard to Botswana, Zambia and Zimbabwe, definitely the registration had long lapsed for not paying the maintenance fees in respect of the three designated states. He relied on the plea for the Appeal Board's discretion, buttressing his plea that if the appellant defaulted in the payment of fees, the respondent was contributory to that because it gave the appellant the impression that the fees had been paid, or that such fees could be paid any time irrespective of the legal period within which one is to pay.

He cited the fact that the fees were being accepted by the respondents when they were late and referred to some letters written on behalf of the respondent which gave the impression that the patent was still in force. In particular he referred to a letter addressed by Mr. Kiige to the appellant dated May 26th 2005, which informed the appellant that the patent had been renewed in respect of Kenya and Uganda. He complained that whereas the respondent claims that the patent had lapsed in 2002, it continued to receive and accept fees subsequently until 2005.

The Board considered the appeal and the submissions in support from Mr. Othieno and thanked him for the honesty he displayed in conceding that indeed the patent had lapsed due to non-payment of annual maintenance fees, and his resort to an equitable alternative prayer namely that the Board could use its discretion to order a reinstatement of the patent onto the register.

The Board also considered the defense made by the ARIPO Office and formed an opinion that ARIPO did not follow strictly the provisions of the Harare Protocol and the Rules there under and gave the example of the table of payments of fees and surcharges in the ARIPO statement. The Board held that notwithstanding the need to be lenient to the nationals of member states of ARIPO, lenience ought to be exercised in moderation. The Board looked at the Administrative Instructions of the Office of ARIPO, in particular, Instruction 13 (1) and agreed that the Director General must have discretion

to exercise and make the Rules of the Organization easy to administer. But the Board was of the opinion that discretion should not be overstretched to absurdity by, for instance, allowing extension in the period of payment of annual maintenance fees from seven (7) months to thirty-one (31) months as alleged in the Respondent's table of payments.

The Board held that whereas extensions are necessary, they must be reasonable and such laxity was bound to lead to non compliance by a patentee in obeying the Rules, as was in the case in the procedure followed by the appellant. The Board held that it was not a result of the Director General's discretion which was strengthened by the fact that the patentee was not always warned about the discretion that was going to be applied. This was because Instruction 13 (1) stipulated that the Director General in exercising his discretion should give the terms to be followed by the patentee or whoever else he is instructing. There was no such a notice to the appellant and the discretion should be exercised transparently.

The Board held that both parties were to blame for the delays in the payments. The patentee had always been late in paying the annual maintenance fees. It was significant that the appellant paid maintenance fees in 2005 in addition to surcharge being levied for the lateness in remitting the fees. The fees were accepted by the respondent in spite of the fact that the Respondent claimed that the maintenance fee was outstanding as far

back as 2002. From 2003, the appellant was paying maintenance fees for two countries namely, Kenya and Uganda.

The Respondent by its letter of May 26th, 2005 advised the appellant that their patent had been renewed in respect of Kenya and Uganda. The Respondent advised the appellant that it was not possible to issue a certificate of renewal for the two countries unless the appellant completely withdrew its patent in respect of the remaining countries. In the Boards opinion, a patent could lapse in a designated state due to non-payment of maintenance fees in respect of that designated state. But it could also lapse if the patentee decides to expressly withdraw it, in this case the patentee was not obliged to "completely" withdraw the patent over the other three countries since they lapsed due to non-payment of maintenance fees as set out in section 3 (10) of the Protocol.

The Board observed that the irregular payments of the renewal fees by the appellant was mainly as a consequence of the failure by the Respondent to comply with Rule 21 (3) of the Regulations of the Protocol which stated that the "the ARIPO Office shall, at least one month prior to the date on which the annual maintenance fee shall fall due, issue a reminder to the applicant or the owner of the patent" and noted that the Respondent instead of complying with this requirement asked the appellant to appoint an agent to be reminding him whenever the maintenance fees are due and this was certainly wrong. The respondent was under legal obligation to issue a reminder whenever the annual maintenance fees were due. The Board was of the view that this piece of legislation is

there for a purpose and in particular to avoid what has happened in the present case. The Respondent had shown a willingness to maintain the patent if the Board of Appeal ordered so. In this regard, the Board referred to the Respondent's letter dated March 14th, 2007 and which was repeated by the Respondent during the hearing of the appeal.

The Respondent never gave the appellant notice of its intention to remove the patent from the register due to non-payment of annual maintenance fees. Instead, the appellant was advised by letter dated 8th January 2007 that in fact his patent lapsed in 2002 and had been published in the October 2006 issue of the ARIPO Journal. Under the rules of natural justice the appellant was entitled to the notice.

Having read the grounds of appeal, and having listened to both parties, the Board was of the view that the Respondent unfairly removed the patent from the register. In view of the Respondent's information to the appellant that its patent had been renewed in respect of Kenya and Uganda, and also the Respondent having given the impression that it was willing to maintain it, and the failure by the Respondent to give the appellant notice of the intention to remove the patent from the register before publication. The Board also took into consideration the Respondent's failure to comply with Rule 21 (3) of the Protocol.

In the circumstances, the Board issued an order that the patent be reinstated onto the register in respect of Kenya and Uganda subject to payment of all the fees and

surcharges that may have fallen due excluding the surcharges for the period when it had been removed from the register. The fees and the surcharges due had to be paid within a period of three (3) months from the date of the order.

In conclusion, the Board urged the ARIPO office to strictly observe the Protocol and in particular adherence to time limits, information delivery, procedure and processing of application, procedure on appeals and rules of natural justice.

2.31 Court of Appeal, Nairobi, Civil Appeal No. 228 of 2004 Sanitam Services (E.A) Ltd Vs Rentokil (K) and Kentainers (K)

This was an appeal from the judgment and order of the High court of Kenya at Nairobi dated 22nd May, 2002 where the High Court held that there was no patent infringement and declined to award any damages as a result.

In brief, the facts of this case are that On 21st January, 1999, M/S. Sanitam Services (E.A) Ltd (Sanitam) filed suit before the High court against two defendants: M/S. Rentokil (K) Ltd, which had lawfully changed its name in 1998 to Rentokil Initial Kenya Ltd (Rentokil), and Kentainers (k) Ltd. Rentokil in Kenya is one of the 38 or so companies operating in the world under the parent multinational company Rentokil Initial PLC. It offers various services including pest control, hygiene and health care.

Under its health care division it provides sanitary disposal services and offers a wide range of sanitary disposal units. These include a step-on unit or foot operated bin for executive washrooms and hotels. Kentainers on the other hand were in the business of manufacturing a wide range of bins and containers of different sizes and shapes in accordance with instructions and moulds received from their customers. Rentokil was their customer and they manufactured the outer shell of a foot-operated bin christened "SANITACT".

Sanitam claimed in its suit, through its Managing Director, that it designed and invented a foot-operated litter/sanitary disposal bin in 1997 for use in the hygienic storage and disposal of sanitary towels, tampons, surgical dressings, serviettes and other waste material. It resolved that it would register a patent for the invention since it was a novelty in the local market. On 4th September, 1997 it submitted an application for registration to the then Kenya Industrial Property Office (KIPO) and the application was acknowledged by that office on 7th November 1997. It was advised to continue working on the invention and to make similar applications to other countries. By the time the suit was heard and determined, KIPO had not processed the application for issuance of the patent. But Sanitam had also made an application for registration with ARIPO on 4th September, 1998 and a year later, on 25th October, 1999 they were notified by ARIPO that a patent No. AP773 had been granted on 15th October, 1999 to have effect in Botswana, Kenya, Uganda, Zambia and Zimbabwe.

Rentokil in its defense denied that the foot-operated bin was a patentable invention and averred that it had been in the market for many years before Sanitam claimed its invention. Indeed, they pleaded, its sister company in Malaysia (Rentokil Singapore PTE Ltd) had in February 1995 obtained a patent for the same device in the UK and Malaysia and it was the device imported by Rentokil to combine with the shell manufactured by Kentainers in order to make and supply foot-operated bins in Kenya. If any patent was granted to Sanitam therefore, it was erroneous and Rentokil had applied to KIPi for its revocation. Rentokil sought in a counterclaim that an injunction be issued to stop Sanitam from manufacturing or using the foot-operated sanitary bin. That counterclaim was however withdrawn shortly before the hearing of the suit and it was further clarified that the Malaysia company (above), had obtained a "Certificate of Registration of a design" and not a patent, for the pedal-bin which was the part imported by Rentokil from Malaysia. The top section of the bin or flap was also imported.

For their part Kentainers maintained that there was nothing new in the foot-operated bin claimed as an invention since foot-operated bins had been in the market for over two decades and it was not patentable. It denied the manufacture, supply or sale of any bins contrary to any patent held by Sanitam and sought the dismissal of the suit.

Upon hearing all the parties, the superior court, found that Sanitam was the holder of a patent No. AP 773 and it was registered by ARIPO on 15th October, 1999. It was not for the court to question the validity of the patent once granted unless an aggrieved party

challenges its issuance through the technical bodies, KIPO and ARIPO, which are charged with the duty of investigating the invention and certifying its qualification for patent registration. The learned Judge further considered whether there was infringement of the said patent by Rentokil and Kentainers or either of them and found there was not. The suit was dismissed with costs. Nevertheless, the Judge made findings, on the quantum of damages, if any, awardable if he had found that there was infringement of the patent. He found there was insufficient evidence to prove any loss and therefore no basis for making any finding on the monetary loss awardable in the matter. He could only award Shs.1,000/= in general damages in the circumstances.

Sanitam was aggrieved by those findings and so filed an appeal to the Court of Appeal. The Court of Appeal in its judgment partially agreed with the High Court. Firstly it stated that no infringement could have occurred before grant of patent and that the onus of proof of infringement squarely lay on the party who claims that his industrial property has been infringed. That was the law as provided by statute.

Secondly, with regard to the patent granted by ARIPO, the Court of Appeal stated that there was no cross-appeal on the finding made by the superior court that the appellant had obtained a valid patent from ARIPO in October 1999. The grant of the patent was, however, neither brought to the attention of the respondents nor pleaded until 16th December 1999 after leave of the Court was obtained. In their view the judges of the Court of Appeal stated that the appellant would have been entitled to a temporary

injunction to protect the patent until the determination of the suit but which was refused by the High court at that stage. However, the fact that ultimately the court found for the appellant on that issue it was only logical that injunctory relief which the appellant sought in the statement of claim should have been given. The Court of Appeal therefore granted an injunction to last the life of the patent with effect from 16th December 1999. However, it hastened to add that if there was any infringement of the appellant's patent, then it could only have occurred after 16th December 1999 but that the appellant, who has the sole onus of proof, failed to place evidence before the High court to establish the infringement and so the High Court Judge could not be held at fault.

In addition, the Court of Appeal made it clear damages for infringement of industrial property must be strictly proven if any substantial award is to be made. The Court restated the long standing principle on damages in intellectual property matters that the most natural relief against infringement of a lawful patent is an injunction. In addition, the owner of the patent ought in his pleading, to make an election as to the nature of damages he desires to obtain. It is improper to seek damages and at the same time for an account of the profits made by the person in breach.

2.32 Kenya Vision 2030

Kenya Vision 2030 is the country's new development blue print covering the period 2008 to 2030. It aims to transform Kenya into a newly industrializing "middle income country providing a high quality life to all its citizens by the year 2030." The Vision has been developed through an all inclusive participatory stakeholder consultation process, involving Kenyans from all parts of the country and benefitting from suggestions by some of the local and international experts on how the newly industrializing countries around the world have made the leap from poverty to widely shared prosperity and equity. The pillar is based on three pillars: the economic, the social and the political.

The economic pillar aims to improve the prosperity of all Kenyans through an economic development programme, covering all the regions of Kenya, and aiming to achieve an average Gross Domestic Product (GDP) growth rate of 10 % per annum beginning in 2012. The social pillar seeks to build a just and cohesive society with social equity in a clean and secure environment. The political pillar aims to realize a democratic political system founded on issue based politics that respects the rule of law, and protects the rights and freedoms of every individual in Kenyan society.

2.33 Foundations for Kenya Vision 2030

The economic, social and political pillars of Kenya Vision 2030 are anchored on macroeconomic stability; continuity in governance reforms; enhanced equity and wealth

creation opportunities for the poor; infrastructure; energy; science, technology and innovation (STI); land reform; human resources development; security as well as public sector reforms. Of this, it is in macroeconomic stability, governance reforms, STI and human resources development where intellectual property has the most definite role.

2.34 Macroeconomic Stability for Long-Term Development

Macroeconomic stability has played a pivotal role in Kenya's economic recovery and resumption of rapid growth by the Kenyan economy since 2003. This is evident in the low levels of underlying inflation, limited public sector deficits, a stable exchange rate and low interest rates over that period. For this reason, Kenya Vision 2030 places the highest premium on the stable macroeconomic environment the country enjoys as this is the only way in which confidence among investors and ordinary Kenyans can be maintained.

2.35 Governance Reforms

Continuing government reforms should be deepened and accelerated in order to create a better environment for doing business and full enjoyment of individual rights that Kenyans are entitled to under the Constitution 2010. This will include judicial, legal reforms and the role civil society plays in an open democratic society.

Article 11(2)(c) of the Constitution provides that the state shall promote the intellectual property rights of the people of Kenya and parliament shall enact legislation to ensure that communities receive compensation or royalties for the use of their cultures and cultural heritage; recognize and protect the ownership of indigenous seeds and plant varieties, their genetic and diverse characteristics and their use by the communities of Kenya. In mandatory terms, article 40 (5) explains that the state shall support, promote and protect intellectual property rights of the people of Kenya. Article 69 (1) (c) mandates the state to protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities. In the Kenyan Constitution 2010, property includes any vested or contingent right to, or interest in or arising from intellectual property which in the fourth schedule that provides for distribution of functions between the national government and the county governments, intellectual property is the preserve of the national government.

2.36 Science, Technology and Innovation (STI)

Vision 2030 proposes intensified application of STI to raise productivity and efficiency levels across the three pillars. It recognizes the critical role played by research and development (R&D) in accelerating economic development in industrialized countries. The government intends to create and implement an STI policy framework to support

Vision 2030 with more resources devoted to scientific research, technical capabilities of the workforce, and in raising the quality of taking mathematics, science and technology in schools, polytechnics and universities.

2.37 Human Resources Development

Kenya intends to create a globally competitive and adaptive human resource base to meet the requirements of a rapidly industrializing economy. This is to be done through training and education. Steps are to be taken to raise labour productivity to international levels. Other steps include the establishment of new technical training institutes as well as the enhancement of closer collaboration between industry and training institutions.

2.38 The Private Sector in Kenya

Kenya's private sector accounts for approximately 80% of the GDP and provides more than half of the wage employment. The private sector can be classified into three broad categories: the agriculture, industry and service sectors. In 2005, agriculture and forestry contributed 24.2% to the GDP, while manufacturing and trade contributed 10.5% and 10.8% respectively. The private sector is dualistic in nature, with a small proportion of large enterprises and a large proportion of medium, small and micro-enterprises that

operate parallel to each other, with limited linkages. The Micro enterprises are largely informal, operating outside the realm of legal and institutional support infrastructure.

Many of the large firms function as subsidiaries of multinational corporations. These firms network among themselves, are active in business associations and lobby the Government strongly for reforms specific to their interests. The Small enterprises are, on the other hand, largely self-employment activities that operate informally to avoid the costs of compliance with government regulations. They account for approximately two thirds of all non-agricultural jobs and account for as much as 20% of Kenya's GDP. Their operations are constrained by limited access to credit, poor basic infrastructure and organizational difficulties. Many of the firms, though concentrated in cities and urban centers, are also spread all over rural Kenya.

2.39 Private Sector as the Engine of Growth

A growing Private Sector allows new investments that increase the flow of goods and services, creates employment and increases incomes. The flow of goods and services is important for improving the quality of life, while more employment and higher incomes reduce poverty. New investment also encourages people to inject capital in education and skills, so that they can take advantage of better jobs arising within the Private Sector.

Private enterprise is the epitome of development. Responding to the profit motive, entrepreneurs invest in facilities and ideas and open up opportunities for people to employ their talent and improve their general well-being. Firms also provide goods and services that are necessary for sustaining and improving standards of living. Furthermore, firms and their workers are the main sources of tax revenue used in financing health and education. The contribution by firms to tax revenue depends on factors that shape opportunities and incentives to invest productively, expand operation and create employment. All these factors cumulatively define the investment climate. By shaping the structure of incentives and opportunities, the business climate becomes a crucial building block for economic growth, development and overall prosperity.

Although domestic markets are important channels for the flow of goods and services that support welfare, expansion of business requires greater participation in export markets to remove limitations posed by a small domestic market. Exports concentrate investment in those activities with highest comparative advantage, thereby forcing firms to adopt international best practices in order to remain competitive, and generate learning-by-doing benefits. These are powerful tools for reducing poverty and encouraging economic growth. Micro, small and medium scale enterprises (MSMEs) are central to the link between the Private Sector and poverty reduction. They are more labour-intensive and promote equitable distribution of income since they are owned by poorer entrepreneurs, a significant proportion of whom are women. They are therefore

important instruments for both income distribution and equitable gender participation. When effectively facilitated, MSMEs could graduate into medium and large corporations with an influence that transcends national boundaries.

2.40 Justification for the Private Sector Development Strategy

Kenya does not derive all the benefits that it should from its Private Sector, due to the absence of a clear strategic direction for the Sector. It is not a competitive origin of products and services. Furthermore, there are numerous policies and donor programmes addressing specific Private Sector concerns, but they are poorly coordinated and lack developmental synergy. Kenya needs to participate more actively in the global economy. As a producer, Kenya needs to diversify more beyond commodity supplies to manufactured goods and services. As a consumer, the country has to be more open to inflows of goods and services, capital and technology. Increasing production for the global market will aid in expanding employment and raising productivity, both of which are key goals of this PSDS. This can be achieved by increasing openness, applying measures that limit the Government's economic activities to public goods, and pursuit of market-friendly policies. In addition, the Government has to deliver on its public responsibilities such as provision of infrastructure, security, transparency and a conducive, legal and regulatory environment.

The PSDS provides a clear strategic and institutional framework for the Government that will enable better coordination of Private-Sector development efforts. It also makes the roles of the Government and the Private Sector complementary rather than competitive, and further allows businesses to respond to a clearly defined set of incentives. So far, the Private Sector has been shaped by uncertainty, globalization, imperfections in factor markets and uncoordinated policies. The Private Sector has therefore been reactive rather than purposefully directed. This PSDS will help to catalyze Private Sector development efforts by the Government of Kenya (with its partners) so that these efforts can have maximum impact on the development of the Sector.

2.41 Urgent Actions on Constraints to Private Sector Development

The private sector has made notable economic contributions over the years, as demonstrated by its contributions to GDP, employment and export earnings. These contributions need to be strengthened and safeguarded. The sector has also proved its resilience to external shocks, which require strengthening. Overtime, the country has been able to build a strong private sector, which has in turn contributed significantly to the creation of a diversified economy, as evidenced by the broad range of private sector activities that take place under the monetary economy. For example, a strong and diversified regional financial center has developed over the years, enabling the banking

sector to be well capitalized with an estimated average risk weighted capital adequacy ratio of 17.2%, well above the 12% minimum national requirement. Also, a strong stock market has evolved in the country, enabling Kenya to be rated as having the second largest stock market in Africa, The country has been able to build a large and strong manufacturing sector, which on average contributes 13% of the GDP, and which enabled the country to quickly turn around after the economic liberalization of early 1990, from reliance on the traditional EU market to the regional COMESA market.

Apart from the economic contributions and the need to safeguard the growth sectors, there is also need to improve on the investment climate for the sector's operations, which has been eroded over the years, especially during the 1980s and 90s, a result of which was a steady decline in the rate of private investment relative to the GDP, from 18% in 1996 to 12% in 2002, and further to 10% in 2003. This has also led to deterioration in investor perceptions of Kenya as a good investment location, reflected in the sharp decline in Foreign Direct Investment inflows during the last two decades, from \$ 57 million in 1990 to \$ 14 million in 1999; or about 30% of GDP in 1970s to less than 14% in 2002.

2.42 Kenya Private Sector Alliance (KEPSA)

KEPSA is the national apex body of the private sector in Kenya. It was incorporated in 2003 as a Company Limited by Guarantee under the Companies Act Cap 486 of the Laws of Kenya. KEPSA's membership comprises more than 60 Business Membership Organizations and in excess of 180 corporate organizations. KEPSA provides a unified voice for the private sector to engage and influence policy formulation and implementation through the public-private partnership model.

KEPSA seeks integration of the private sector to be recognized as the economic pillar and engine of growth in national development. In this regard, it engages government in dialogue for the purpose of creating an enabling business environment. It also mobilizes its members, made up primarily of Business Membership Organizations (Associations) from the different sectors of the economy, big and small to articulate issues of common interest, creating synergy among them.

KEPSA consolidates and amplifies the voice of the private sector in Kenya; enabling the members to drive economic growth through collective effort, in order to attain impact on wealth creation and socio-economic development. As a world class national apex private sector body, KEPSA links with other like-minded entities creating alliances locally, in the region and globally.

2.43 KEPSA's Objectives

KEPSA is a national apex body of the private sector stakeholders that promotes the creation of and maintenance of an enabling business environment. The primary role of KEPSA is high level advocacy through strategic interventions that promote economic growth and development.

KEPSA's unifying objectives include to strengthen the role of private sector as the pillar and engine of economic growth, employment and wealth creation; to ensure the formulation and implementation of pro-growth policies that promote Kenya's competitiveness, encourage domestic and foreign investment, pursue regional, continental and international economic opportunities; to promote values of good business ethics and practices, innovation, hard work, goodwill and collective responsibility; to promote action-based best practices, corporate social responsibility, conservation, protection and prudent use of Kenya's natural resources; ensuring dignified living conditions, quality life, socio-cultural wealth, human development, growth and sustainable development for posterity; to promote, coordinate, monitor and evaluate private sector activities in pursuit of an enabling business environment and to facilitate harmonized private sector approaches on cross-sectoral issues;

2.44 Governance and Management Structure

The Governing Council of KEPSA comprises the chairpersons of the sector federations/associations and Boards. The cross-cutting focus of KEPSA informs the representation of the Governing Council. The Council elects ten representatives to the Board of Directors every two years, mandating them to provide leadership and oversee the day-to-day work of the Secretariat. The Chief Executive Officer of KEPSA is appointed by the Board, and is responsible for the day to day running and execution of the policies of the organization.

2.45 KEPSA's Key Milestones and Achievements

- KEPSA was instrumental in the formation of the Kenya Healthcare Federation (KHF), where healthcare providers; insurers and manufacturers have come together under one organization.
- The Kenya Private Sector Alliance (KEPSA) and the Kenya Information and Communications Technology Federation (KIF) have played a very prominent role in promoting IT as well as the information and communications technology (ICT) policy in Kenya.
- KEPSA has played a key role in the MSE (Micro and Small Enterprises) sector both in the development of the MSE Federation and the drafting of the MSE Bill.

- In the post election crisis (2007) KEPSA played a key role in brokering peace and engagement of the Principals to foster stability. Its role and approaches used in this process enhanced the goodwill with the government enhancing confidence and trust among its members.

2.46 Private Sector Engagement

KEPSA has established mechanisms of engagement with the Executive Arm of government through three main fora: The Presidential-Private Sector Working Forum, and Sector Working Groups, the Prime Minister's Round Table meetings and the Ministerial Stakeholders Forum. It also engages with the Legislative Arm through the Speakers Round Table and Parliamentary Committees. It is seeking to establish an appropriate platform for engagement with the Judiciary.

The Presidential Private Sector Working Forum was formed in April 2009, with two meetings in that year. The Prime Minister's Round Table meetings are held quarterly to address cross-cutting national policies and strategies clustered into thematic areas. The inaugural meeting of the Speaker's Round Table was held in August 2009 and will be an annual programme of meetings with the respective Parliamentary Committees. KEPSA facilitates dialogue at a critical stage in the decision making process, in order to influence changes in the formulation of Bills and Acts of Parliament.

KEPSA also engages with the Public Sector through a variety of sector wide reform programmes. These currently include Public Sector Reforms; Governance, Justice, Law and Order Sector (GJLOS); Private Sector Development Strategy (PSDS); Strategy for Revitalizing Agriculture (SRA); Local Government Reforms; and Public Financial Management Reforms (PFMR). Within these reform programmes KEPSA seeks to influence policy formulation, implementation, monitoring and evaluation.

At the Regional level KEPSA engages with the East African Business Council through which it is able to escalate business issues in the region.

2.47 High Level Advocacy and Lobbying

KEPSA, as the apex private sector organization, has developed several mechanisms for public-private dialogue through engagement at the highest levels of government – in order to advocate and lobby on cross cutting issues. Advocacy is mainly through existing government channels which include the Presidential-Private Sector Working Forum, Prime Minister's Round Table, Sector Working Groups, MTP Sectors, Ministerial Stakeholder Forums, Parliamentary Committees and the Speaker's Round Table. Where there is need to amplify the voice of the private sector on sectoral issues, KEPSA intervenes by engaging the relevant authority within the sector concerned.

In the initial stages greater effort has been put on coordination both within the sector and with corresponding government organs and fora. KEPSA also engages with the Public Sector through a variety of sector wide reform programmes e.g. GJLOS. In the future, KEPSA will consolidate its experience in this area and focus beyond the activities around coordination of meetings to the outcomes of its efforts and initiatives.

It is envisaged that with a new constitution in place, KEPSA will put in place mechanisms that embrace the engagement process without losing the gains that have been acquired. In this regard KEPSA will need to develop appropriate mechanisms that facilitate effective engagement with government structures.

Whereas the mandate of KEPSA focuses on sector wide issues, it is recognized that there are sectors where there are no BMOs to take the lead on issues. There are also sectors with several associations that are not federated and therefore need to be facilitated on common positions, and lastly cases where KEPSA's support to a particular sector may be required to scale up issues. KEPSA enhances and fast track the engagement of the private sector with the appropriate government structures and public sector reform programs.

2.48 The Rationale for Private Sector involvement in Inter Governmental Organizations (IGOs)

The expansion of ARIPO membership with some states engaged as observers, together with the changes in the world economy require operational changes so as to take advantage of the Kenyan private sector. One complaint from business membership organizations is that consultations with IGOs have consisted primarily of publicizing and explaining policies, rather than allowing the input of private sector. The end product has been almost lop sided agendas with lack of involvement thereby sidelining industry and business which stand to gain out of this process thereby segregating intellectual property to the periphery and near oblivion in the eyes of the executives.

KEPSA as we have seen above plays an important role but when it comes to intellectual property matters, there is notable absence from the usual high flying lobbying and the process of influencing the contents of international treaties that the country is scheduled to accede and ratify. While ARIPO protocols are meant for the co-ordination, harmonization and development of the intellectual property activities affecting its members, private sector involvement has been through participating in workshops organized by parastatals being KIPi, KECOBO and the much hyped KEPHIS. With no formal debating or drafting strategies, the private sector is reduced to mere observers with diminishing interests. This is part of the reason why the National Intellectual Property Policy for Kenya has been on the pipeline for seven years, with others under

the false illusion that the country has such a policy in place. Given KEPSA's high level interaction with the organs of the state, the National Intellectual Policy for Kenya can be easily realized within minimal time frame as opposed to gathering dust in the Ministries shelves.

Along the same thoughts, ARIPO being composed of member countries with primarily government mandarins in Council of Ministers and Administrative Council effectively excludes the business sector from its decision-making bodies. Although Africa has evolved since the establishment of ESARIPO, the structures of governance have not kept pace with the changes. This means that business and industry have little influence on some of the decisions that can improve business and legislation in member states. The much celebrated thinker, Joseph Stiglitz, former Chief Economist at the World Bank, emphasizes that the behavior of an organization is affected by the interests of those to whom the organization is accountable.

Joseph Nye (2003) notes it is extremely important to increase transparency in IGOs with a more open process allowing business and industry to know what is happening. This includes transparency in what decisions have been taken, how those decisions have been made, and for what purpose. Greater openness and clarity about own policies, the advice it gives to member states and policy recommendations will necessitate the IGOs to become transparent and more accessible to the general public thereby the business community taking advantage of the services offered. ARIPO has taken a number of steps

to provide more information on its own role and operations and what remains for KEPSA is the usual zeal to push the government into action. KEPSA already has a strong voice and works to facilitate effective advocacy and promotion of members' interests by influencing public policy through policy formulation and following up on the implementation part through monitoring and evaluation.

Robert Dahl (1999) argues that "IGOs are a bargaining forum for states to advance their interests whereas I am of the opinion that business and industry play a major role in pushing agendas in governments. They exert power on national governments, which in turn abide by the regional legislative framework as most business and industry are transnational by nature operating across borders". It is noteworthy that major Kenyan businesses operate in East Africa Community and COMESA member countries.

James N Rosenau (2003) notes that "voluntary business and industry associations have crowded onto the global stage, coming up together to concert their efforts on behalf of shared needs and goals". In Kenya alone, KEPSA's individual and business membership employees are in excess of 800, 000 persons making it one of the most powerful associations after the Central Organization of Trade Union (COTU). Participation by business and industry in IGOs leads to better enforcement decisions by the member states.

P.J Simmons and Chantal de Jonge Oudaat (2001) opine that “business and industry have greater freedom in framing issues and garnering support through partnerships, high-profile spokespeople, and the use of effective timing. In contrast, governments are hindered by political processes and bureaucracies. While business and industry are able to generate self-sufficiency, government agencies lack such efficiency because of a political agenda that is intended to win voters”.

In the 37th session of the Administrative Council and 14th session of the Council of Ministers held on 25 to 29 November 2013, Kampala, Uganda, intellectual property practitioners and patent agents were represented and it is expected that business and industry will follow suit. It is understood that creating more influential and technically competent business membership organizations is difficult and time consuming and at times although impartial and non-political, a vocal grouping can be abrasive thus misunderstood as adversarial, if not subversive by national governments which form the delegation to IGOs meetings.

Jane Collier (2000) writes that “business and industry are gaining a louder voice, making them active participants in the international arena and further explain that it is now rare to find a United Nations programme without some form of active participation of the business community, and this would have been rare fifteen years ago”. Given the massive KEPSA membership and resources to pursue their objectives, with previous experience in being a partner in regulations, externalizing costs and lobbying to achieve

members' interests gives the organization a double voice and poises it to be the best to from intellectual property matters and the implementations of the regulations therein.

John Braithwaite and Peter Drahos (2000) outlines that "US multinationals have huge resources to set up influential business membership organizations like the Intellectual Property Committee (IPC), to do both the analytical work and lobbying. It is understood that business has always sought to play a key role in setting up the rules by which it plays, and seeks to gain maximum advantage, whether it be the historical role of Lloyds of London in setting up global insurance contract law or the efforts of the International Chamber of Commerce in the 1920s to unify overall international commercial law".

CHAPTER 3

RESEARCH METHODOLOGY

3.1 Introduction

As already implicit in the study, the researcher seeks interalia to find out the criteria for Kenya in adopting and ratification of treaties relevant to intellectual property and the modalities for private sector engagement with the government, the signatory of the treaties. This chapter discusses the methodology employed to gather relevant data and valuable information. The population sample, method employed and sample size is described. The chapter therefore presents in detail each of the instruments that were used during the field work.

3.2 Research Design

Survey design will be utilized as the study is investigatory in nature. The survey will enable the researcher to collect data from samples which by nature is a balanced representation of the target group. The essence is that the researcher targets people who are familiar with the intellectual property world, business membership organizations,

parastatals, government and regulatory machinery as they already have a clear understanding of the relevant issues and is most convenient.

3.3 Ethical Considerations

The researcher will endeavour to obtain permission for recording the respondents and issues to do with distribution of the recording and copyright related issues will be addressed at the start to avoid situation where respondents feel that they have been shortchanged. Confidentiality of information will be guaranteed so as to lead to free exchange and interaction as opposed to the respondent being under the false illusion that he or she will be victimized. The identity of the respondents who choose to remain anonymous will be maintained bearing in mind that most persons assume that they are not authorized to give information without a proper chain of command from the top. When dealing with a research like these which involves cross sectional players, there might be the strong likelihood of respondents attempting a blame game, name calling or mudslinging, such practices are discouraged by the researcher and will not be tolerated as the study aims to make recommendations and offer possible solutions.

3.4 Population and Sampling Technique

In this study, the sample is composed of officials from ARIPO, KIPi, KECOBO, KEPHIS, patent attorneys, Ministries of Industrialization and Enterprise Development, Attorney General and Department of Justice, Science and Technology, Higher Education, Kenya Law Reform Commission, business membership organizations, professional society and research institutions.

The sample size consists of management staff as they are the policy and decision makers in their respective organizations and will have a definite role in shaping intellectual property issues.

3.5 Methods of Data Collection

The researcher used primary and secondary data to collect information. The primary data was obtained directly from questionnaire and in-depth interview while the secondary data are from journals, newsletters, magazines and internet sources for the study.

3.6 In-depth Interview

Telephone and face to face interview was employed to elicit information from the respondent. Unstructured interview was used with several persons at different times

bearing in mind the researcher's time schedule and prior appointments as the respondents are senior officials with varying priorities, commitments and timings.

The interview was advantageous in the sense that the researcher was able to seek clarifications, observe the body language of the respondent and most importantly, struck a rapport in an amiable manner thereby encouraging free flow of information and more insights which would rather have been difficult to obtain.

3.7 Questionnaires

The questionnaires were drawn and distributed to the target group for their responses with periodic follow ups being done. It was fairly easy since all the respondents are literate and had time to think over their responses. The researcher was available by email for clarification whenever need be. Open ended questions where the respondents were not restricted to any particular answers were employed by the researcher. The advantage of the open ended questions was that they were not limiting in any way, with no restrictions to the choice of answers one would want to put.

3.8 Methods of Data Analysis

The study used both qualitative and quantitative methods of analysis. The data was analyzed through the use of Statistical Package for Social Science (SPSS) which presented the tables and the frequency, the number of times a particular variable occurred in a set of data and the percentage gave a proportion per 100. The information obtained from in-depth interview was analyzed in a narrative form capturing all the insights.

3.9 Summary

This chapter highlighted the main issues of the study explaining the methodology used in data collection being face to face interviews and administering questionnaires. The exploratory method was chosen and the researcher went ahead to explain the sampling techniques, sample size and targeted population for the study. Data analysis will form the basis of the next chapter.

CHAPTER 4

DATA PRESENTATION AND ANALYSIS

4.1 Introduction

The aim of this chapter is to present, analyze and interpret the data collected. The researcher distributed 32 questionnaires and 24 were returned. The 24 questionnaires form the basis of this chapter and the in-depth interview with the Treaties and Agreement Department of the Office of Attorney General and Department of Justice in the Republic of Kenya.

No	Questionnaires	Responses
1.	Distributed	32
2.	Returned	24
3.	Returned Rate	75%
4.	Unreturned Rate	25%

Table 1: Number of Questionnaires issued, Returned and the Responses

The high returned rate is attributed to 3 factors; Firstly, the researcher is a national government employee in the Department of Registrar General attached to the Companies Registry. As part of the daily duties, the researcher interacts with private companies.

Secondly, most of the respondents would want to maintain networks with such officials to serve as a contact point and assist them in company compliance issues. Thirdly, the researcher was appointed as the Legal Counsel to the Taskforce on Rejuvenation of the Kenya National Chamber of Commerce and Industry (KNCCI) a business membership organization; the taskforce is shepherded by the Ministry of Commerce, Tourism and East Africa Community and KEPSA. Work was eased by the fact that most of the respondents were familiar with intellectual property world.

Age	Number of Respondents	Percentage
21-30 years	4	17%
31-40 years	11	46%
41-50 years	7	29%
51-60 years	2	8%
Total	24	100%

Table 2: Distribution of Respondents Age Group

Table 2 shows that 2 respondents which represent 8% are of the age group 21-30 years, while 11 respondents representing 46% are of the age group of 31-40 years. 7 respondents which represent 29% are of the age group 41-50 years. It is clear that majority of the respondents were within the age group of 31-40 years.

Qualifications	Number of Respondents	Percentage
High School Certificate	0	0%
Diploma Holder	0	0%
Degree Holder	10	42%
Masters Degree	14	58%
Doctorate	0	0%
Total	24	100%

Table 3: Level of Education of Respondents

58% of the respondents are holders of Masters Degree. In the Kenyan context, majority of organizations require MBAs for career progression and comfort zone for the executives whereas in government and parastatals, a masters level education is a prerequisite for promotion. Nevertheless, university level education from a recognized institution is an entry point for most professionals which explain why 42% hold the qualification. None of the respondent was a secondary school certificate holder or Diploma holder from a tertiary institution. Like in most jurisdictions, doctorate level education is a preserve of academicians which explains why none of the respondent holds that qualification.

Place of Work	Number of Respondents	Percentage
Government Ministry	8	33%
Parastatal	4	17%
Private Sector & Industry	8	33%
Research Institution	4	17%
ARIPO/OAPI/PAIPO	0	0%
Total	24	100%

Table 4: Respondents Work Station

This research mainly analyses how business and industry can liaise with the government in regional intellectual property matters. There was even distribution among various players. 33% of the respondents constituted government ministry officials while another 33% was made up of people from private sector and industry. Parastatal workers constituted 17%, the same as in academic and research institutions. Whereas questionnaires were sent to the regional intellectual property organizations, none was received by the stated deadline. With no contact persons in those organizations, the researcher forwarded reminders to the enquiry contacts listed in the organizations website but to no avail. The researcher wonders if at all those email addresses are active in the first instance. As the other respondents are based in the country, the researcher was able to physically follow up by personal visits, email and telephone follow up which did not help matters as none of the regional institutions is based in Kenya or has liaison offices.

Years	Number of Respondents	Percentage
1-5 years	3	12%
6-10 years	3	12%
11-15 years	9	38%
16-20 years	5	21%
21 years and above	4	17%
Total	24	100%

Table 5: Length of Work Period

38% of the respondents have been at their workplace for 11-15 years. This gives the impression that majority have risen through the ranks of their respective organization hierarchy structure. 21% have served for 16-20 years while 17% have served for 21 years and above. Majority of them were from government perhaps because of the structure of government where one has to serve in a substantive post for three years before promotion and when it reaches a certain level, further advances can only be through filling of vacancies through transfers, resignation and natural attrition factors. 12% of the respondents had served for 6-10 years. Cumulatively, the entire respondents are competent to answer the questionnaire because of the working experience in their workplace.

Cadre	Number of Respondents	Percentage Frequency
Captain of Industry	5	20%
Legal Background	10	40%
Policy and Managerial	14	60%
Support Staff (Project Officer)	5	20%
Technical	10	40%

Table 6: Cadre of Employment

60% of the respondents which is 14 listed that they are in policy and managerial positions. At this juncture, it is imperative to note that some of the persons in this

category, also classified themselves as technical while others legal background. The researcher deliberately did not indicate that the respondents should fill in only one category as he wanted to know the percentage of people with technical skills in the scientific, mechanical, engineering and biotechnology field.

40% of the respondents representing 10 have technical backgrounds, the same as those with legal background. It cannot be ruled out some respondents hold dual capabilities in technical and legal fields. 20% of the respondents which represents 5, classified themselves as captains of industry. The researcher used this classification for persons who are business leaders and whose means of amassing personal fortune contributes positively to the country in one way or another through increased productivity, expansion of markets and providing jobs. 20% of the respondents were project officers meaning that they provided administrative support in those organizations where they have been employed. What is important from the table is that all cadres of personnel took part in this survey.

Tool	Number of Respondent	Percentage Frequency
Copyright	22	90%
Industrial Design	10	40%
Integrated Circuit	5	20%
Geographical Indication	10	40%
Patents	17	70%
Trademarks	20	80%

Table 7: Understanding of Intellectual Property Tools

The researcher as a way of testing familiarity with the tools left the question open for the respondents to write down all what they could. Copyright and related rights was mentioned by 22 respondents representing 90%, 20 respondents representing trademarks, 17 respondents representing patents, 10 respondents 40% for industrial design and geographical indications 40% with 5 respondents representing 20% replied with integrated circuits.

A possible explanation for copyright and related rights featuring 90% is because it is the most visible and most persons in the country are familiar with rights that accrue in musical, literary and artistic works.

Trademarks and patents also featured highly at 80% and 70% respectively as they are most relevant with the private sector and industry. Industrial designs featured 40% while a geographical indication which is most relevant for Kenya's agriculture and handicraft featured 40%. Integrated circuits, which is a set of electronic circuits on a chip is used in virtually all electronic equipments and are found in computer, mobile phone and digital house appliances. The integrated circuit layout designs are usually the result of enormous investments in expertise and finances. There is possibility of copying by photographing each layer then mass producing the equipments. The research revealed that most Kenyans are not familiar with it.

Regional Organization	Number of Respondents	Percentage Frequency
ARIPO	17	70%
OAPI	7	30%
PAIPO	10	40%

Table 8: Existence of Regional Intellectual Property Organizations in Africa

70% of the respondents representing 17 people mentioned ARIPO. This would be attributed to the fact that Kenya is a member and in the past when the organization was known as ESARIPO, it had headquarters in Nairobi, Kenya. Some of the respondents have taken part in its training activities and seminar. Most importantly in the year 2012, the Kenyan government campaigned vigorously for a Kenyan candidate to head ARIPO thereby increasing its profile in the country as newspapers carried the news.

30% of the respondents representing 7 people mentioned OAPI. This can be attributed to the fact that most persons familiar with ARIPO have at one time or another heard of OAPI which is the Francophone Africa equivalent of ARIPO. 40% of the respondents which is 10 people mentioned PAIPO which gained prominence in government circles after it was promoted by Kenya's then Ministry of Science and Technology alongside the intellectual property related parastatals which gave PAIPO an approval. In the formative years, a Kenyan intellectual served as a consultant to the AMCOST and was widely believed to be the director general if the concept would bear fruit.

Activity	Number of Respondents	Percentage Frequency
Close Working Relationship	16	70%
Organizing Conferences	7	40%
Provide Common Ground for IP matters	16	70%
Promote Exchange of Ideas and Experiences	8	30%
Training	12	50%
Uniformity of Laws	14	60%

Table 9: Activities carried out by the Regional intellectual Property Organizations

The researcher did not limit the respondents in any way and allowed them to provide multiple answers upon which he was able to sum up the responses. 16 people which represents 70% of the respondents mentioned close working relationship which is the highest, 7 respondents representing 40% mentioned organizing conferences, 16 respondents representing 70% mentioned providing common ground for intellectual property matters, 8 respondents representing 30% wrote down the promotion of exchange of ideas and experiences, half of the respondents which is 50% being 12 respondents listed training while 14 respondents which is 60% gave uniformity of laws. What is clear is that most respondents are familiar with the objectives of the regional intellectual property organizations. Some of the responses were generalized but still fell in the ambit of the activities. Indeed, some of the respondents have participated in such events including training and exchange programmes.

Legal Instrument	Number of Respondents	Percentage Frequency
Banjul Protocol	12	40%
Harare Protocol	14	60%
Lusaka Agreement	8	20%
Swakopmund Protocol	10	30%

Table 10: Regional Intellectual Property Legal Instruments in Existence

The researcher also at this point allowed multiple answers as he also wanted to establish the respondents' knowledge of all the legal instruments. Lusaka Agreement was least mentioned at 20% by 8 respondents. This can be attributed to, that apart from setting up ARIPO, the objectives and process of membership, there is nothing much as it basically serves as the charter of the organization and no substantial changes have taken place. The Harare Protocol was the most mentioned by 14 respondents which is 60%. This could be attributed to the fact that the Protocol has been in existence for many years, severally amended, mentioned prominently and the court cases arising out of the Board of Appeal is well known to most persons in the Kenyan intellectual property field. The Harare Protocol empowers ARIPO to grant patents as well as to register utility models, industrial designs and manage them on behalf of state party.

Banjul Protocol was mentioned by 12 people which is 50% of the respondents. Most of the persons familiar with the operations of the Harare Protocol have come across it even as a matter of passing concern as Kenya is not a member. According to both the Harare

and Banjul Protocols, parties can act in person when applying for protection or seek the services of an authorized representative who is an attorney and a duly recognized legal practitioner. 8 people representing 40% of the respondents mentioned the Swakopmund Protocol which is not yet in force. The respondents are familiar with the TK issues as this is an area where Africa is perceived to be in a position to take advantage and enjoy gains. The researcher notes that Access to Benefit Sharing (ABS) procedures should be put in place so that traditional communities can derive economic gains otherwise, Kenya in particular will lag behind.

Usefulness	Number of Respondents	Percentage
Beneficial	19	79%
Not Beneficial	3	13%
I Don't Know	2	8%
Total	24	100%

Table 11: Benefits of the Legal Instruments in relation to the Economic Blueprint of Vision 2030

19 respondents representing 79% of the respondents stated that the legal instruments were beneficial to Kenya. This is because they understand the objectives of the instruments and Kenya's economic blueprint of Vision 2030. In their opinion, whatever would aid the achievement of Vision 2030, definitely is beneficial to the country. Secondly, the government has adopted an 'Afro centric' foreign policy with the aim of

improving trade ties across the region. The Afro centricity deals primarily with self determination and African agency and is a Pan-African ideology in culture, philosophy and history. 3 of the respondents which is 13% were of the opinion that the legal instruments were not beneficial to Kenya. This is due to the reason that Kenya has ratified many treaties in various international spheres, but the fruits have not been felt. The respondents were also of the opinion that there is duplicity and multiplicity of regional and international treaties, with various responsibilities and they were draining the country in terms of compliance. 2 respondents representing 8 % of the total respondents said they do not know as they are not very familiar with the provision and legal demands of the instruments and are not therefore in a position to pass judgement. Nevertheless, they were the minority.

Level	Number of Respondents	Percentage
Excellent	3	12%
Very Good	10	42%
Good	6	25%
Average	4	17%
Below Average	1	4%
Total	24	100%

Table 12: Level of Compliance with the Existing Regional Legal Framework

To sum up, 3 respondents representing 12% of the respondents said the level of compliance was excellent while the vast majority, 10 respondents representing 42% gave the level as very good. 6 respondents representing 25% stated that the level was good. 4 respondents representing 17% said the level of compliance was average and 1 respondent representing 4% felt that it was below average. The researcher was mainly interested with the general overview of what the respondents thought. Currently, there is good relationship between the private sector and government explaining why the vast respondents felt the level was very good.

Ministry	Number of Respondents	Percentage
Industrialization and Enterprise Development	17	80%
Office of Attorney General	7	20%
Total	24	100%

Table 13: The Parent (supervising) Ministry for Intellectual Property in Kenya

From the table, 17 respondents representing 80% stated the Ministry of Industrialization and Enterprise Development. It is not difficult to see the reason as the mandate and function of the ministry is spelt out in the Executive Order No. 2 of May, 2013 on the organization of the Government of the Republic of Kenya. The mandate of the Ministry is to promote and facilitate industrialization in the country with the vision of transforming Kenya into a globally competitive, regional industrial hub in line with

Kenya Vision 2030. It has a total of nine parastatals among them KIPi, Kenya Industrial Estates (KIE), Kenya Industrial Research & Development Institute (KIRDI), Kenya Bureau of Standards (KEBS), Kenya Industrial Estates (KIE) and the Anti-Counterfeit Agency (ACA). 7 respondents representing 20% gave the response as the Office of the Attorney General. It is part of the executive in Chapter 9 of the Constitution, 2010 under article 156 with three principle functions as being the principal legal adviser to the government; represent the national government in court or any other legal proceedings which the national government is a party other than criminal proceedings and to perform any other function conferred on the office by an Act of Parliament or by the President. The Copyright Act, 2001 lists the Attorney General Chambers as the supervising ministry. At this point it is important to mention that at one point before the IPA, 2001 KIPi was a section in the Department of Registrar General which is under the Attorney General and the office still maintains registration services for most government institutions.

Parastatal	Number of Respondents	Percentage
Kenya Industrial Property Institute	20	80%
Kenya Copyright Board	2	10%
Kenya Plant Health Inspectorate Service	2	10%
Total	24	100%

Table 14: Coordinating Parastatals for Intellectual Property in Kenya

From the table, 20 of the respondents representing 80% named KIPi as the coordinating agency. That would not be unusual as majority of the respondents have a background in government, private sector and industry. KIPi is established under section 3 of the IPA, 2001 as a body corporate with perpetual succession and the functions are to consider applications for and grant industrial property rights; screen technology transfer agreements and licences; provide to the public, industrial property information for technological and economic development and to promote innovativeness in Kenya. 2 of the respondents representing 10% stated the Kenya Copyright Board (KECOBO), a state corporation established under section 3 of the Copyright Act, 2001 tasked with the administration and enforcement of copyright and related rights. It is responsible for organizing legislation on copyright and related rights; conducting training programmes; enlightening and informing the public on matters related to copyright ; licensing and supervising the activities of collective management organizations as provided for under the Act. The other 2 respondents representing 10% named the Kenya Plant Health Inspectorate Services (KEPHIS) which was formed by dint of Service Order, 1996 and administers the Seeds and Plant Varieties Act. It grants proprietary rights to persons breeding or discovering new varieties of plants.

Laws	Number of Respondents	Percentage
IPA 2001	16	67%
Copyright Act 2001	4	17%
Trade Marks Act	2	8%
Seeds & Plant Varieties Act	2	8%
Total	24	100%

Table 15: Laws that Regulate Intellectual Property in Kenya

According to the table, the vast majority being 16 respondents representing 67% named the IPA, 2001 which is a statute to provide for the promotion of inventive and innovative activities, to facilitate the acquisition of technology through the grant and regulation of patents, utility models, technovations and industrial designs, to provide for the establishment, powers and functions of KIPi and for incidental purposes. 4 of the respondents representing 17% stated Copyright Act 2001 that is a statute to make provision for copyright in literary, musical and artistic works, audio-visual works, sound recordings, broadcasts and for connected purposes. 2 of the respondents representing 8% gave the answer as Trade Marks Act which a statute relating to the registration of trademarks, provide for the registration of service marks and for matters connected therewith. The remaining 2 respondents which is 8% named the Seeds & Plant Varieties Act which is a statute to confer power to regulate transactions in seeds, including provision for the testing and certification of seeds; for the establishment of an index of names of plant varieties; to empower the imposition of restriction on the introduction of

new varieties; to control the importation of seeds; to authorize measures to prevent injurious cross pollination; to provide for the grant of proprietary rights to persons breeding or discovering new varieties; to establish a tribunal to hear appeals and other proceedings and for connected purposes. It suffices to say that Kenya is a member of the International Union for the Protection of New Plant Varieties (UPOV), 1978 Convention.

Proposed Amendments	Number of Respondents	Percentage
Yes	20	83%
No	4	17%
Total	24	100%

Table 16: Would you Propose Amendments to the Laws? Give One Reason

From the table, 20 of the respondents representing 83% proposed amendments. The researcher was able to summarize the leading five reasons being recent changes in the market place and dynamic have not been factored into the laws as most were passed before the advent of the digital era; secondly, to make the laws more effective; thirdly, to realign them with the Constitution 2010, and national economic goals; fourthly, for wider stakeholder involvement and lastly, to factor in regional and international obligations that the country should adhere to. 4 of the respondents representing 17% proposed no changes at all. The researcher to this end summarized the reasons as being

content that the current laws work; secondly, the proposed amendment in many instances is pushed by interest groups to serve their own interests; thirdly, there is need for a comprehensive overhaul as opposed to piece meal amendments which serves short interests. One of the respondents in this category gave the example of the Seeds and Plant Varieties (Amendment) Act No. 53 of 2012 which substantially overhauled the Seeds and Plant Varieties Act Chapter 326 of the laws of Kenya. The last reason was stated that unless proper education and participatory approach was done, the situation on the ground would rather remain the way it is.

Participation	Number of Respondents	Percentage
Yes	17	71%
No	7	29%
Total	24	100%

Table 17: Participation in Intellectual Property Related Events

The thing that clearly comes out is that 17 of the respondents representing 71% have participated in related events including training, seminars and outreach activities. Some staff participates in multiple events giving them an opportunity to learn more at the expense of those who are not chosen. Training seminars sponsored by the government and development partners are held in luxurious and top hotels in the city complete with

accompanying per diem for attendance and that may also explain why they are popular. 7 of the respondents representing 29% of the respondents claimed to have never been invited and that it operates like a closed shop. As one of the respondents put it, the current situation is comparative to playing music in a closed restaurant with the usual audience and nothing changes as it goes on and on. The organizers of events like World Intellectual Property Day should also take advantage of the African Technological Intellectual Property Day an event that was celebrated for the first time in the year 2000 when the present Africa Union passed a resolution to celebrate this day in Africa.

Challenge	Percentage Frequency
Lack of Intellectual Property Awareness	60%
Lack of Intellectual Property Policies in Government and Research Institutions	50%
Slow Enforcement Mechanisms	30%
Poor Funding for Agency Activities	50%
Weak Inter-Agency Linkages	40%

Table 18: Challenges faced in Interaction of Intellectual Property in Daily Endeavors

From the table, 60% of the respondents quoted lack of intellectual property awareness. People outside legal and scientific domains still believe that intellectual property is a legal concept and are unable to link it with their daily lives. 50% of the respondents said in most institutions, government included, there is no intellectual property policy and the

protection of works arising out of government or industry funded research is not clear as there are no boundaries. Like in most African countries, enforcement is a major concern; private sector and industry have frequently raised concerns that counterfeiting and piracy continue unperturbed apart from occasional raids and destruction of suspected seized counterfeit property to avoid such products entering the channels of commerce. Lack of funding especially for the parastatals in the intellectual property arena is a perennial problem. Although they are paid for the service thereby collecting revenue for the national government, the money goes into the consolidated fund and thereby cannot be withdrawn unless allocated by the supervising ministry. 40% of the respondents said weak inter-agency cooperation and collaboration also served as a challenge as organizations operate in a silo manner that tended to fragment handling of matters.

Proposal	Number of Respondents	Percentage
Enhanced Intellectual Property Tribunal	21	88%
Specialized Judges and Magistrates' in the Generalized Courts	3	12%
Total	24	100%

Table 19: Proposal for an Enhanced Intellectual Property Tribunal compared to Specialized Judicial officers in the Generalized Court System

There is widespread support for enhanced intellectual property tribunal with 21 respondents representing 88% giving the idea a nod as it is more likely they will uphold the rulings arising out of the regional intellectual property conventions. The respondents were of the persuasion that they would create jurisprudence and speed up the process. The researcher realized that many of the respondents supported this move possibly due to the frustrations associated with the conventional court process including delays which, can run up to years, non progression of matters when scheduled for hearings, frequent transfers of judicial officers, incompetency on part of judicial officers when it comes to the subject of intellectual property were all cited. 3 of the respondents representing 12% preferred specialized judges and magistrates as the presiding judicial officers were competent in the field and that there was nothing special to warrant an enhanced tribunal as criminal jurisdiction remains with the magistrates courts who could be trained.

Awareness Level	Number of Respondents	Percentage
Aware	18	75%
Not Aware	6	25%
Total	24	100%

Table 20: Awareness Level of Intellectual Property in the Kenyan Constitution, 2010

From the table, 18 of the respondents representing 75% said they were aware and had read the proposed Constitution, 2010 when the government conducted a massive educational campaign just before the August 4, 2010 referendum which resulted in a 65% approval thereby allowing the proposed Constitution, 2010 to be passed into the law. The results were not surprising as most of the respondents are well versed in legal, business and scientific fields and have read the Constitution. 6 of the respondents representing 25% were not aware as they claimed that they have neither read the Constitution and the provisions have not been brought to their attention. Some of the respondents stated that they will read the Constitution, 2010, and see how those provisions can be effectuated as it was a noble reason for the drafters to put it in there for community gain.

Role	Number of Respondents	Percentage
Observer Status	15	63%
Part of Government Delegation	9	37%
Total	24	100%

Table 21: The Main Role for the Private Sector & Industry of Kenya in Regional Intellectual Property Conventions and Meetings

According to the table, 15 of the respondents representing 63% cited observer status. The researcher was interested in only one role and therefore was able to categorize them into the given responses and their elaboration. As a credited observer, in the run up to

the sessions of ARIPO Ministerial and Administrative Council meetings, the accredited organization will have the opportunity to receive unedited working documents at the same time as the ministers, submit written contributions, attend the plenary and making oral statements during the discussions. 9 of the respondents representing 37% stated to be part of government delegation to the meetings. This would enable the private sector and industry to take part in preparatory committees, inter ministerial working groups and active involvement in the preparation of position papers.

Availability of Trained Personnel	Percentage Frequency
Yes	70%
No	30%
Willing to Authorize Staff to Undergo IP Training	100%
Not Willing to Authorize Staff to Undergo IP Training	0%

Table 22: Availability of Trained Intellectual Property Personnel and Authorization to Undertake Training Courses

What is clear from the table is that there is availability of trained personnel with 70% of the respondents having been trained. It would be either through intellectual property as a unit in educational institutions or undergoing a specialized intellectual property course. Still, 30% of the respondents said they have not undergone any intellectual property training. All the respondents stated that they are willing to authorize staff to undergo

intellectual property training including those who replied in the negative falling into this bracket. The government policy on training is to continually upgrade core competencies, knowledge, skills attitude of public servants with skills oriented training emphasized and all public servants should have at least five (5) days training a year.

Level of Government Interaction	Number of Respondents	Percentage
Excellent	3	13%
Very Good	6	25%
Good	5	20%
Average	6	25%
Below Average	4	17%
Total	24	100%

Table 23: The Level of Government Interaction with the Private Sector & Industry in Intellectual Property Matters

From the table, 3 of the respondents representing 13% rated the level as excellent reasons being that the government formulates policy guidelines, reviews the legal, institutional and regulatory framework at the instance of private sector and industry engagement. The researcher noted from the responses that there was a healthy relationship between the players. 6 of the respondents representing 25% stated that the interaction was very good as the government operates an open door policy and involves the private sector and industry in strategy.

5 of the respondents representing 20% stated that it was good because the government acknowledges letters, attends functions, the private sector has the chance to contribute and regular forums. Other reasons included that the government has a lot of middle level and senior staff recruited from the private sector and industry. 6 of the respondents representing 25% gave their assessment as average, the reasoning was that there is room for improvement and even when there is interaction, implementation, many a times takes longer than the anticipated time frame. 4 of the respondents representing 17% gave their reasons as being the regular government bureaucracy and red tape.

Through	Number of Respondents	Percentage
Attorney General Chambers	8	33%
Line Ministry concerned (Industry & Enterprise Development)	3	12%
Ministry of Foreign Affairs	7	30%
Parliament	4	17%
Presidential Directive	2	8%
Total	24	100%

Table 24: Process Through which Kenya Accedes to International Agreements, Treaties and Conventions

The table indicates 8 of the respondents representing 33% stated the Attorney General. In Kenya, the holder of the office has overall responsibility of providing legal advice to the government and the agencies. The office of the Attorney General is responsible for ensuring that the Kenya legal system effectively offers opportunity for the activities of the public, private sector and industry to be carried out under the ambit of the law. He has the powers to negotiate, draft, vet local and international instruments, treaties and agreements involving the government and its institutions. The office is currently finalizing the creation of a database of agreements that Kenya is a party to. 3 of the respondents representing 12% gave their answer as the line ministry, in this case is the Ministry of Industrialization and Enterprise Development which is in charge of industry, property rights policy and the private sector development strategy.

7 of the respondents representing 30% stated the Ministry of Foreign Affairs. According to the Executive Order No. 2 of May 2013, on the organization of the government of Kenya, the Ministry of Foreign Affairs is in charge of the management of bilateral and multilateral relations: liaison with international and regional organizations; ratification of treaties, convention and agreements and trade representation. 4 of the respondents representing 17% stated Parliament which consists of the national assembly and senate. It has the power to make laws. According to the Constitution 2010, the general rules of international law shall form part of the laws of Kenya and any treaty or convention ratified by Kenya shall form part of the laws of Kenya under the Constitution. 2 respondents representing 8 % replied with the Presidential Directive. In Kenya the

Presidency enjoys executive authority and the directives are implemented by the executive arm of the government.

To conclude the questionnaire, the researcher allowed the respondents to give in their comments and was able to come up with the ones that frequently came up. The ones which featured prominently include that all stakeholders with diverse interests should be effectively involved in the decision making process; the need for an effective mechanism for co-ordination and consultation; the fragmentation of intellectual property responsibility allows for specialization but business and industry would prefer a one stop shop where all the parastatals are under one ministry; Kenya's draft intellectual property policy is gathering dust at the cabinet affairs office and the need for striking a balance between private sector and business interests and the general public.

4.2 In-depth Interview with Official in Department of Treaties and International Agreements

The in-depth interview was conducted with a Principal State Counsel in the Department of Treaties and International Agreements to provide the researcher with background information for the study. The Principal State counsel had been in the department for twelve years having risen through the ranks to the current position.

According to the Principal State Counsel, the Department is the one through which the Attorney General as principal legal adviser to the government tenders advice in all matters relating to international law and developments in the same arena. Specifically those legal issues relating to aspects of government policy; all transactions that government enters into; interpretation of legal instruments and matters of international treaties which the country accedes to. The department is headed by the deputy solicitor general and its responsible for negotiating, drafting and vetting local and international instruments, for and on behalf of the government and its agencies; legal advice relating to treaties and agreements; interpretation of treaties and agreements to the government and it operates from Nairobi with no county offices as the Constitution, 2010 preserves international relations with the national government.

When it comes to relationship with the Ministry of Foreign Affairs, the Department through the Solicitor General seconds staff to serve in the Ministry due to the voluminous work of international nature which they handle as opposed to frequently forwarding the work to the Attorney General's Chambers.

As for the line Ministry in charge of intellectual property being Ministry of Industrialization and Enterprise Development, the two government ministries enjoy cordial working relationship. Not only has the department seconded staff, but also prioritizes their requests for services as intellectual property is crucial for the country to achieve the government blue print of Vision 2030.

The Department has staff trained in intellectual property through the distance learning courses and the department through a training committee grants course approval to officers proceeding on training in accordance with the civil service regulations. An officer on training is deemed to be on duty and is entitled to all the requisite benefits as long as the course is approved, relevant and is undertaken in a recognized institution and officers attending short courses, seminars and conferences up to four weeks duration locally or abroad are regarded to be travelling on duty and will receive allowances. Serving officers who attend training lasting more than six months are required to enter into a formal agreement binding them to serve in the public service for a specified period.

When it comes to the private sector and industry, the department has no direct relations as it serves the national government and government institutions. The principal state counsel advised that whatever issues the private sector and industry has, it can be channeled through the line ministry which is in charge of private sector development strategy or through the parastatals which their representatives have been allocated a seat to represent their interests.

According to the Principal State Counsel, the Department has not received any request in relation to regional intellectual property treaties at the moment. Once received background research will be done and if beneficial to the country, the department will

directly liaise with the ministry of foreign affairs to prepare the accession instruments. At this point, the principal state counsel emphasized the need for trained intellectual property staff in the office who will prepare a comprehensive and detailed memo for the attention of the Honourable Attorney General, himself a professor of constitutional and international law with a combined practicing experience nearing three decades.

During the interview the Principal State Counsel informed that the office of the attorney general is the supervising ministry of the copyright act, 2001 and that housekeeping issues necessitate fast tracking requests from KECOBO. At this juncture, it is important to mention that KECOBO was instrumental towards Kenya's ratification of the Swakopmund Protocol.

In light of Kenya's monist constitution, the Principal State Counsel stated that treaties which Kenya ratifies immediately form part of law in the country unlike in the past when parliament had to domesticate the treaty. Accordingly, the provisions of the treaty have the full force of the law and can be referred to in the Kenyan courts in case of disputes between citizens or foreigners. What came out of the interview was that intellectual property law is related to trade and promotion of Kenya's economic cooperation. In order to improve coordination and increase efficiency, the government placed the mandate of international trade affairs, including special negotiations under the ministry of foreign affairs and international trade, introducing a much needed coherence and acuity in the country's execution of effective economic diplomacy.

The Principal State Counsel revealed that the Department is facing a lot of challenges given the dynamic nature of international law relating to intellectual property and that in the recent past they had worked on the Beijing Treaty on Audiovisual Performances and before the dust could settle, they embarked on the Marrakesh treaty to facilitate access to published works for persons who are blind, visually impaired or otherwise print disabled. This was on the background that like most other government offices, staff shortages is a regular problem with periodic transfers interrupting the work flow. At the same time there was urgent need for research on trade liberalization leading to a near crisis as intellectual property conversant state counsels had to work round the clock. At this juncture, the principal state counsel praised the parastatals for taking the lead in Kenya's ratification process, collaborating with respective stakeholders, partnering with the line ministry and being prompt when supplying related documents.

CHAPTER 5

SUMMARY, CONCLUSIONS AND RECOMMENDATIONS

5.1 Summary

The objectives of this research are implicitly enumerated in Chapter 1. From the research findings, it has been established that majority of the people who shape and drive Kenya' intellectual property dimensions are within the age group of 41 -50years and hold either degrees or masters' level education. Majority of the respondents had worked at their workplace for 11 to 15 and generally understand intellectual property. Of least concern to them was integrated circuit layout designs as there are no electronic appliances assembly plants in the country or regionally. Regional intellectual property organizations are well known to the respondents and their generalized activities. The vast majority was well read thereby familiar with the legal instruments; some of them did not stop there but went on to add that the ratification or accession document is deposited with the director general of ARIPO.

5.2 Conclusions

Academic and research institutions are the main organizations carrying out research in Kenya. Some are fully owned by the government while others are supported by the private sector and industry. The researcher is of the opinion that not enough is being done in relation to intellectual property gains but this could be as a result of factors beyond the control of academic and research institutions like lack of funds to carry out research and publicize the findings.

Although the government and development partners have been able to carry out training and capacity building activities, it is worthwhile to note that only government officials and parastatal staff are beneficiaries of the training. There should be a window to allow private sector participants to sponsor themselves or a general invitation to the general public subject to meeting their own costs.

As a founder member of ARIPO and the first country to host the headquarters, Kenya has strong intellectual property roots and has participated in all the ARIPO council of ministers and administrative council meetings. The flipside is that there needs to be a preparatory committee meeting incorporating the private sector in the development of position papers.

For a country that prides itself as having intellectual property enshrined in its constitution, there is no reason at all for not being a signatory to the Banjul Protocol, a regional agreement. The reasoning that Kenya is a member of the Madrid system is not

sufficient as most ARIPO members, who are Kenya's biggest trading partners are not in the Madrid system but the Banjul protocol.

Kenya's private sector is responding to technological innovations that will lead to higher productivity. There has been adaptation of appropriate technologies and upgrading of skills. However, the research shows that most persons acquired intellectual property skills and education while at their workplace but not out of the formal education system.

Kenya's push for integration of science, technology and innovation led to the successful lobbying to host the Pan-African University for Science, Technology and Innovation (PAUSTI) at Jomo Kenyatta University of Science and Technology. PAU is a new generation university implemented across the African continent aiming at revitalizing higher education and research in Africa with five campuses, one in each region of the continent with different focus area.

Kenya has largely complied with the Harare Protocol, nevertheless, there needs to be a review and streamline of the IPA, 2001 to incorporate the sentiments of the respondents especially in relation to the intellectual property tribunal and with reference to ARIPO as African Regional Industrial Property Organization. This is because the IPA, 2001 became operational in the year 2001 whilst ARIPO did change the name in the year 2004 incorporating Intellectual as opposed to Industrial.

The boards of directors of most intellectual property related parastatals have private sector representatives. It would be imperative for them to make sure that private sector and industry initiatives featured into the programme of activities as they have statutory mandates to fulfill their obligations through the stakeholders.

The government is the main stakeholder in intellectual property matters with overall responsibility being in the ministry of industrialization and enterprise development; treaty policy with the ministry of foreign affairs and international trade while the attorney general chambers, being the legal adviser to the national government maintains a treaties and agreements department in his office. The three ministries should work in tandem in addressing regional intellectual property matters through an inter-ministerial committee to lessen the possibility of speaking at cross purpose.

The Ministry of Education, Science and Technology should be commended for tirelessly lobbying and coming into effect of the Science, Technology and Innovation Act, 2013, a statute to facilitate the promotion, coordination and regulation of the process of science, technology and innovation into the national production system. This was heavily influenced by PAIPO, an advisory committee which came through AMCOST. No prejudice is suffered by Kenya being a member of the advisory body and simultaneously remaining in ARIPO.

The private sector is an important player on intellectual property matters, having shown interest in constructive engagement with the government. Through the umbrella of KEPSA, the private sector has been able to record significant achievements including the nomination of KEPSA proposed persons to serve in boards of government parastatals and taskforces on pertinent issues affecting the economy. Unlike most large membership organizations, KEPSA is unique in the sense that it has managed to balance the interests of the members and argued a common position on economic issues.

The research has revealed mild level of disconnect between the private sector and the government which can be consequently arrested. In the recent past, there have been irregular meetings, lack of information and of most concern is the lax coordination and want of a proper follow up mechanism. At times, there is not enough synergy between the national government and the private sector. Whenever the private sector has been involved, it is mostly through an invitation by one of the intellectual property related parastatals. Even when it happens, some of the respondents have stated that there was no monitoring and evaluation process and it was again after the lapse of a year that they would receive an invitation thereby interest had gone down substantially due to the need to concentrate on more pressing matters.

There is an existing Presidential-Private Sector Working Forum and sector working groups. They would be the most appropriate high level engagement and through this way, the private sector will be able to advance intellectual property issues. Given the

presence of the country's chief executive, it cannot be ruled out that proposals and policy directions would be fast tracked.

When it comes to national versus regional routes, business and industry, through their patent agents should be encouraged to supplement their filings with regional mechanisms because of the difficulties in having granted rights revoked. This may be a useful option in light of the ruling by the industrial property tribunal that it has no jurisdiction to revoke ARIPO granted patents. An inference can be made that ARIPO granted patents are strong patents and can withstand the challenges of litigation in generalized courts.

5.3 Recommendations

Coordination at regional level requires adequate legal and resource backing for the private sector in Kenya. Considering that lack of finances might impede the private sector capacity to participate effectively, a revolving fund should be set aside by the business membership organizations and development partners on regular intervals.

In as much as Kenya is said to be a torch bearer in intellectual property issues in the region, we can go far if KEPSA sensitizes its membership on the importance of

intellectual property so that they articulate their priorities in national and international meetings thus enhancing their interests.

In the recent past, the country's private sector and industry have been interested in the East Africa Community (EAC) and COMESA since they are major export destinations. What has not been made clear to them is that the business sectors that depend on intellectual property protection represents an important and growing part of every modern economy, particularly as those economies advance from dependency on agricultural, mineral and low value added manufacturing to higher value products and services.

In the survey, one of the intellectual property parastatal mandates all cadre of employees to undergo the WIPO Academy distance learning course on intellectual property with the prospect of advancing to do an advance related course. This is a laudable initiative which should be spread to all the related parastatals, three mentioned ministries, private sector and industry. As the course is free of charge, most of the respondents revealed they would have no objection in allowing the staffs undergo the online training.

Kenya has at least six government funded research institutions bearing in mind that research and development plays a critical role in the country's development. The research revealed limited participation of the private sector and industry in research and development yet they can take advantage of the research to develop innovative products

then lobby the government for stringent protection mechanisms regionally. Strong measures need to be taken to strengthen the institutional framework for the protection of intellectual property rights for the research institutions first of all as they have no policy in place.

KEPSA has a mechanism through which the private sector engages the government on cross cutting issues. The dialogue should remain well structured and avoid being informal as then it would be difficult to hold the government accountable on implementation and policy formulation. The constructive engagement between private sector and industry with the government should continue and amicable measures to steer off any disputes should be put in place for a win-win situation.

The ARIPO secretariat has a role to play by offering technical and legal advise to other member states to have laws which conform to its own legal instruments. If the situation is otherwise, then for the Kenyan private sector and industry, interest will wane and subside as it would be difficult for cross border engagement given the prevailing differentiation of laws among various member states.

The government already has an economic blue print of vision 2030 in place. It would be in the country's best interest to explore and expound on how regionalism can come into play and propel the Kenyan private sector and industry to new heights as they are engines of growth and development, contributing significantly to economic growth.

The government should reduce the legal and administrative barriers in intellectual property which will result in rising confidence, long term planning and investment by the private sector and industry. The suggested measures include assisting start ups with intellectual property information, simplification of statutory forms and putting the registration fees at the bare minimum and work with the theory of numbers.

The Harare Protocol could be amended to include integrated circuits layout designs as this might attract enterprises which are in the business of computer hard drive, motherboards and mobile phone assembly but are shy to invest due to the lack of an enabling legal framework in the region. This is a point to ponder as we might have our own electronics brand from this part of the world developed through research from the academic institutions, catalyzed by business and industry then catapulted by regional intellectual property instruments.

The Kenya Parliament works through committee system where parliamentarians serve in the existing house committees. The relevant one for intellectual property is the departmental committee on finance, planning and trade. For purposes of treaty involvement and compliance, the national assembly should be a reference point. This could be through the inclusion of parliamentarians in delegations to ARIPO meetings as a step in the right direction.

The Kenyan situation indicates presence of analytical capacity in private sector and the national government. Indeed, some private sector officials have been headhunted to join government at top level positions. This already shows that all the key related institutions are staffed with personnel with analytical capacity. Considering the age gap revealed in this research, they should share the skills with junior employees so that this capacity is maintained even as they exit government through retirement or any other reasons.

The research revealed parastatals as relevant institutions within which development initiatives can be carried out in liaison with the private sector and industry. In this regard, there needs to be re-orientation of intellectual property programmes in such organizations which will lead to more efficient public institutions with a proven record of accomplishment in service delivery.

The study roots for institutionalizing public private partnerships with line ministries involved in treaty making and adoption. The support could include facilitating the private sector and industry input into the process so that their concerns are adequately addressed to enhance intellectual property in the treaty making.

The three lead government institutions involved in bilateral, regional and multilateral negotiations being ministry of industrialization and enterprise development, ministry of foreign affairs and the office of the attorney general should include the private sector and industry in the negotiations as a way of developing skills and support additional

measures from the initiatives that come out of it. This will not only propagate Kenya's compliance but also increase trade volumes for the country as the private sector and industry integrates intellectual property to gain an edge in the market place.

The Swakopmund Protocol is not in force at this moment but it should not be a lost opportunity in Kenya. This is because the office of the Attorney General has drafted the Protection of Traditional Knowledge (TK) and Traditional Cultural Expressions (TCEs) Bill, 2013 which is waiting to be introduced in parliament. The end result will be Kenya gaining from its biological resources and the researcher is of the opinion that the Bill needs to take stock of the provisions contained in the Swakopmund Protocol.

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Appendix I: Introductory Letter



INSTITUTE OF PEACE LEADERSHIP AND GOVERNANCE

P.O. BOX 1320, MUTARE, ZIMBABWE - TEL: (263-20) 66788/60075/60026/61611 - FAX: (263-20) 66788/61785 - E-MAIL: iplgsec@africau.ac.zw

7 December 2014

TO WHOM IT MAY CONCERN

Re: Request for permission to undertake a research

OUTA Wilson is a student (**130088**) at Africa University, in the Institute of Peace Leadership and Governance (IPLG), studying for a Masters degree in Intellectual Property. In partial fulfillment of the requirements of the degree, students are required to write a research project in the area of Intellectual Property. OUTA Wilson's research topic is "**An Assessment of Kenya's Compliance With Regional Intellectual Property Legal Frameworks.**" I kindly request your esteemed organization to assist the student. I assure the organization that the data will be used strictly for academic purposes.

Your cooperation is appreciated.

Yours faithfully


Prof P. Machakanja
IPLG DIRECTOR

Appendix II: QUESTIONNAIRE

The following survey is part of research and data analysis for a research project course in partial fulfillment of the Masters Degree in Intellectual Property programme with Africa University. The purpose of this questionnaire is an assessment of Kenya's compliance with regional intellectual property legal framework and the modalities for the private sector engagement.

Please indicate your preference by ticking the appropriate response or filling in along the lines provided. An extra sheet can be used where necessary.

For purposes of confidentiality, no individual and corporate names will be required and responses remain confidential and used for academic purposes only. For any questions and queries, please contact Wilson Rading on cell: 0721 528272; Email wilsonrading@yahoo.com

1. Age:

- a) 21-30 years
- b) 31-40 years
- c) 41-50 years
- d) 51-60 years

2. Highest level of education

- a) Secondary School Certificate
- b) Diploma Holder
- c) Degree Holder
- d) Masters Degree
- e) Doctorate

3. Where do you work?

- a) Government Ministry
- b) Parastatal
- c) Private Sector and Industry
- d) Academic and Research Institution
- e) ARIPO/OAPI/PAIPO

4. For how long have you worked at your employment place?

- a) 1-5 years
- b) 6-10 years
- c) 11-15 years
- d) 16-20 years
- e) 21 years and above

5. What is your cadre of employment? Explain

- a) Policy and Managerial
- b) Technical
- c) Captain of Industry
- d) Legal Background
- e) Support Staff

6. What do you understand by the term intellectual property tools?

7. Do you know any regional intellectual property organization in Africa? Explain

8. What are some of the activities carried out by the regional intellectual property organizations?

9. Which are the regional intellectual property legal instruments in existence? Explain

10. In your opinion, are the legal instruments of benefit to Kenya as we strive to achieve the economic blue print of Vision 2030? Explain

- a) Beneficial to Kenya
- b) Not Beneficial to Kenya
- c) I Don't Know

11. In your opinion, what is the level of compliance with the existing regional legal framework? Explain your position

- a) Excellent
- b) Very Good
- c) Good
- d) Average
- e) Below Average

12. What is the parent ministry for intellectual property in Kenya? Explain

13. Name at least one co-ordinating parastatal for intellectual property in Kenya? Explain

14. Which laws regulates intellectual property in Kenya? Explain

15. Would you propose amendments to those laws and for what one reason?

- a) Yes
 - b) No
 - c) Perhaps
-
-

16. Have you ever participated in an intellectual property related event? If yes, which one?

- a) Yes
 - b) No
-

17. What are some of the challenges faced as you interact with intellectual property in your daily endeavors?

18. Would you propose that the Intellectual Property tribunal handle all intellectual property related civil disputes or specialized judicial officers in the generalized courts, please elaborate?

19. Are you aware that intellectual property has been specifically mentioned in the Kenyan Constitution, 2010?

- a) Aware
- b) Not Aware

20. What would you propose as the role for the private sector of Kenya in regional intellectual property conventions and meetings?

21. In your organization, are there personnel trained in intellectual property and if not, would you be ready and willing to authorize the employees undertake intellectual property training? Explain

22. How would you rate the level of government interaction with the private sector in intellectual property matters? Explain

- a) Excellent
- b) Very Good
- c) Good
- d) Average
- e) Below Average

23. What is the process for Kenya to accede to international treaties and agreements generally? Explain

- a) Through the Office of the Attorney General and Department of Justice
- b) Through the Parent Ministry
- c) Through the Ministry of International Co-operation
- d) Through Parliament
- e) Through Presidential Executive Order and Decree

24. Please use the space below to add any comments or suggestions that might be relevant to the research

Kindly return this questionnaire by the 17th March 2014 to the researcher through email at wilsonrading@yahoo.com or call 0721528272 for the researcher to arrange how to collect it.

Thank you for taking your valuable time to complete this questionnaire.

Appendix III: Proposed Questions on In-depth Interview

- Position of the officer
- Length of Employment
- Mandate of the Department of Treaties and International Agreements
- What is the working relationship with the Ministry of Industrialization and Enterprise Development?
- What is the relationship with the Ministry of Foreign Affairs and International Trade?
- What is the relationship with the private sector and industry?
- How do they interact with the parastatals considering that they are also government entities with others being semi autonomous?
- Do they have staff trained in Intellectual Property?
- What can be done so that the line ministries operate and associated parastatals co-opt private sector and industry?
- How does international law generally apply to Kenya in light of the Constitution 2010, which is monist?
- What are the criteria for Kenya's adoption and ratification of treaties relevant to intellectual property?
- What are the modalities for the private sector engagement with the government on regional intellectual property matters?
- What are some of the challenges the department is facing in relation to negotiations of regional intellectual property legal framework?