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Table of Contents

APPRAISING THE MAINLAND TANZANIAN PATENTS' LEGAL FRAMEWORK FROM INTERNATIONAL PERSPECTIVE: SUBSTANTIVE NORMS AND FEASIBLE CONFORMITY

Edward Gamaya Hoseah and Donatus Nicholas Nditi***

Abstract

The Patents (Registration) Act, herein referred to as the Patents Act and its Regulations form the core of the legal framework governing patents in Mainland Tanzania, herein referred to as Tanzania. It has far preceded the international legal framework formed up mainly by the Agreement on Trade Related Intellectual Property Rights (the TRIPS Agreement). The Patents Act was brought to the then Tanganyika before even Tanzania acceded to the Paris Convention. Since its introduction and later enactment, it has only once been amended to accommodate the prevailing situations. A cue is taken that for a patent law to feasibly work, needs frequent reviews to keep pace and align with the contemporary scientific and technological advancements. This situation has suggested a suspicion that the local framework may not be in conformity with the international framework. This work therefore appraises conformity of the substantive norms of the local framework with the international framework.

Key words: *Patents, legal framework, minimum standards and substantive norms.*

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1. INTRODUCTION

Patent refers to a right or ability granted to exclude or stop all others from exploiting a functional scientific concept or fundamental idea, which right does not grant an automatic right to exploit a certain invention.[1] Invention is nothing but a solution to a specific problem in the field of technology and may relate to a product or process.[2] It may come from any field of technology provided that the same is new, involve an inventive step and is capable of industrial application.[3].

In the main, the legal framework regulating patents is constituted by the Patents (Registration) Act[4] herein referred to as the Patents Act, and the Patents Regulations.[5] The Patents Act has been in operation in Mainland Tanzania, herein referred to as Tanzania, for about 56 years without being amended and so retaining the same structure and stature as it was brought to Tanganyika until its enactment *circa* 1931 – 1987. It was in 1991 when two amendments were made to the Patents Act and since then no other amendment has been made.[6] This means that for more than 32 years of its enactment, i.e. from 1987 to date, only the said two amendments

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1 Poltorak, A., On Patent Trolls and Other Patent Myths, p. 2 available at http://www.generalpatent.com/files/On%20Patent%20Trolls%20and%20Other%20Patent%20Myths%20chapter%20AP.pdf> (accessed on 11 September 2017). Also see Harms, L., The enforcement of Property Rights: A casebook, 3rd Edn, WIPO, Geneva, 2012, p. 247, para 6.

2 S. 7(1) of the Patent (Registration) Act Cap 217 (R.E 2023).

3 Art. 27 (1) Agreement on Trade Related Intellectual Property Rights (TRIP's).

4 Cap 217 (R.E 2023).

5 G.N 490 of 1994 made under s. 79 of the Patents Act and were published on 15 September 1995.

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

to the Patents Act have been made. Furthermore, the Act existed without regulations for 7 years. It was not until the year 1994 when the Patents Regulations were made.

Albeit Tanzania acceded to the Paris Convention in 1963,[7] yet the Patents Act was brought and later enacted before Tanzania became a member of the World Trade Organization (WTO),[8] hence the Agreement on Trade Related Intellectual Property Rights (the TRIPS Agreement), which is also known as the Minimum Standards Agreement. It is called the Minimum Standards Agreement because it establishes standards concerning the availability, scope and use of patent rights. They include: (i) basic standards for patentability and a limited list of exceptions to patentable subject matter;[9] (ii) regarding availability of patents and the enjoyment of rights, no discrimination as to the field of technology, the place of invention and whether products are imported or locally produced;[10] (iii) rights conferred by a patent,[11] and exceptions to the rights;[12] (iv) conditions concerning the disclosure of the invention in a patent application;[13]

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7 Adopted in 1883 and was revised several times. https://www.wipo.int/treaties/en/ip/paris/> (accessed on 30 April 2020). Tanzania acceded to the Convention in April 2, 1963 and came into force in June 16, 1963. Available athttps://wipolex.wipo.int/en/treaties/ShowResults?starticle_year=ANY&end_year=ANY&search_what=C&code=ALL&treaty_id=2> (accessed on 18 December 2020).

8 Established by art. 1 of the Agreement Establishing the World Trade Organization of 1995. Available at https://www.wto.org/english/docs_e/legal_e/04-wto.pdf> (accessed on 2 June 2022.

9 Art. 27 of the TRIPS Agreement.

10 Art. 27.1 of the TRIPS Agreement.

11 Art. 28 of the TRIPS Agreement.

12 Art. 30 of the TRIPS Agreement.

13 Art. 29 of the TRIPS Agreement.

(v) compulsory licenses;[14] (vi) availability of judicial review process for any decision to revoke or forfeit a patent;[15] (vii) the term of protection,[16] and (viii) the burden of proof in deciding whether a product was obtained by a patented process.[17] Also, Tanzania was not a member of the World Intellectual Property Organization (WIPO),[18] hence the Patent Cooperation Treaty (the PCT).[19] The aforementioned instruments form an integral part of the international patent legal framework.

This means that the Patents Act and its regulations preceded the TRIPS Agreement which, inter alia, calls for compliance with the Paris Convention.[20] This variance may suggest that the Act could possibly not be TRIPs compliant. Taking cue of the fact that patent law needs constant review if it is to keep up with the ever-changing nature of patents it is imperative to appraise whether the Act is compliant with the TRIPs and so the Paris Convention which basically form the international patent legal framework.

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14 Art. 31 of the TRIPS Agreement.

15 Art. 32 of the TRIPS Agreement.

16 Art. 33 of the TRIPS Agreement.

17 Art. 34 of the TRIPS Agreement.

18 It was established by article 1 of the WIPO Convention, which establishing the World Intellectual Property Organization signed at Stockholm on July 14, 1967. Tanzania became a Member in 1983. Available at https://www.wipo.int/edocs/pubdocs/en/copyright/120/wipo_pub_120_1967_08.pdf> (accessed on 30 April 2020).

19 It was concluded in 1970 and Tanzania joined it in 1999. It provides for a unified procedure that makes it possible to seek patent protection for an invention simultaneously in each of a large number of countries by filing an "international" patent application. Available at https://www.wipo.int/treaties/en/registration/pct/summary_pct.html> (accessed on 30 April 2020) and https://www.wipo.int/pct/en/pct_contracting_states.html> (accessed on 18 December 2020).

20 Arts 1(3) and 2 (1) and (2) of the TRIPS Agreement.

There are also regional instruments that are administered by the African Regional Intellectual Property Organization (ARIPO),[21] formerly the African Regional Industrial Property Organization. These regional instruments are relevant to appraise because they have contributed to the development of the international patent system through the harmonization and simplification of regional patent laws. The pertinent instrument here is the Harare Protocol on Patents and Industrial Design.[22]

Therefore, the following account is with a view to appraising conformity of the Act with the substantive norms entailing minimum standards and obligations as posed by patent related international instruments such as the TRIPS Agreement and the Paris Convention.

2. THE INTERNATIONAL INSTRUMENTS IN A NUTSHELL

2.1 The TRIPS Agreement

The TRIPS Agreement is the culmination of the Marrakesh Agreement that led to the creation of the WTO in 1994. Indeed, the Final Act,[23] signed in Marrakesh Morocco is like a cover note

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21 This is an intergovernmental organization for cooperation among African states in patent and other intellectual property matters. It was adopted at a diplomatic conference in Lusaka, Zambia in 1976 through its constituent instrument known as the Lusaka Agreement on the Creation of the African Regional Intellectual Property Organization.

22 Being a signatory to the Harare Protocol on Patents and Industrial Design, Tanzania became a member of ARIPO in 1983.

23 The WTO's Agreements are often called the Final Act of the 1986–1994 Uruguay Round of trade negotiations. These Agreements and the Final Act are available at https://www.wto.org/english/docs_e/legal_e/final_e.htm#:~:text=The%20WTO

since everything else is attached to this. Foremost is the Agreement Establishing the WTO (or the WTO Agreement), which serves as an umbrella agreement and was a result of a series of Multilateral Trade Negotiations (MTNs). The Agreement is specifically a product of the 8th round (Uruguay Round) of multilateral trade negotiations (MTN) conducted within the framework of the GATT.[24] Following this development, trade rules were reformed and brought under the aegis of the newly created WTO, which is responsible for overseeing the envisaged further reforms under various frameworks including the TRIPS Agreement that forms Part 1C of the WTO Agreement. Generally, the TRIPS Agreement establishes minimum standards that need to be complied as provided from article 27 to 34 and Tanzania is bound by the said provisions.[25]

The TRIPS Agreement being a minimum standards Agreement, it allows Members to provide more extensive protection of patents if they so wish.[26] Members are left free to determine the appropriate method of implementing the provisions of the Agreement within their own legal system and practice.[27] The Agreement leaves flexibilities for the Members to design their

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's%20agreements%20are%20often,as%20WordPerfect%20or%20pdf%20files.> (accessed on 2 February 2022).

24 Spanning from 1986 to 1993 and embracing 123 countries as contracting Parties. The Round led to the creation of the WTO with GATT remaining as an integral part of the WTO agreements. See William, C, Evaluating the Uruguay Round, The World Economy, Vol. 18 (1), 1995. Available at https://doi.org/10.1111/j.1467-9701.1995.tb00198.x> (accessed on 30th April 2020).

25 Art. 1 of the TRIPS Agreement.

26 See for instance art. 40 of the TRIPS Agreement.

27 Ibid.

patent system since certain issues are not addressed under the Agreement.[28]

2.2 The Paris Convention

The Convention is the culmination of a diplomatic conference, which was held in Paris in 1880,[29] and signed in 1883 by 11 countries called the Union.[30] It entered into force in 1963 hence making it the first multilateral treaty involving IPRs.[31] Its relevance to Tanzania may be drawn from the obligation that Members should comply with the Paris Convention.[32] Although Tanzania is not a member to the Paris Convention, in such compliance, the TRIPS Agreement requires that its Members should not derogate from obligations that Members may have to each other under the Paris Convention.

It protects industrial property in all its forms. It is the key international instrument that sets out a range of basic rules relating to patents and provides certain common rules that are either required or permitted to be implemented under the members 'national legislation.[33]

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28 For instance, issues such as ownership of patents as addressed under s. 14 and definition of invention under s. 7(1) of the Patents Act.

29 The Convention was subsequently revised several times.

30 They include Belgium, Brazil, France, Guatemala, Italy, the Netherlands, Portugal, El Salvador, Serbia, Spain, Switzerland, Guatemala, El Salvador and Serbia which denounced and reapplied to join the convention via accession.

31 It was signed in the year 1883 and revised from time to time. The latest amendment was done in 1979. http://www.wipo.int/treaties/en/ShowResults.jsp?country_id=ALL&starticle_year=ANY&end_year=ANY&search_what=C&treaty_id=2> (accessed on 30 June 2018).

32 TRIPs under art. 2(1) and (2) poses an obligation that its members should comply with arts. 1 to 12 and 19 of the Paris Convention in respect of its provisions in Parts II, III and IV.

33 See arts. 4ter, 5bis, 5ter, 5^{quater} and 11 of the Paris Convention.

It also leaves the member States free to establish a number of fundamental issues concerning substantive patent law, such as the criteria for patentability, term of protection, rights conferred by a patent and enforcement of rights. The substantive norms of the Convention include national treatment,[34] right of priority,[35] the repression of unfair competition[36] and other common rules.[37]

2.3 The Patent Cooperation Treaty

This Treaty was concluded in 1070 and Tanzania joined in 1999. It provides for a mechanism entailing standardized formality requirements that an applicant would fulfill in order to file a single international patent application that has the same effect as a national application in each Contracting Party to the PCT.[38] It also provides for a streamlined procedure in those countries by establishing a single international procedure for certain operations to process patent applications i.e. international phase. Consequently, the applicant can file an application and process his application under a single procedure with a single set of formality requirements during the international phase in accordance with the PCT and its Regulations, and this is how the Treaty is relevant to Tanzania.[39]

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34 Art. 2 of the Paris Convention.

35 Art. 4 of the Paris Convention.

36 Art. 10bis of the Paris Convention.

37 In the field of patents, they include the right of the inventor to be mentioned in the patents (Art. 4ter), questions as to importation of articles covered by patents, failure to work the patented invention and compulsory licenses (Art. 5A), grace period for the payment of maintenance fee (Art. 5bis), limitation of patent rights where the patented invention is on a means of transportation entering temporarily in the territory (Art. 5ter), process patent protection where a product manufactured by such process was imported (Art. 5quater) and temporary protection in respect of goods exhibited at international exhibitions (Art. 11).

38 Art. 27(1) of the TRIPS Convention and s. 9(3) of the Patents Act.

39 Made under art. 58 of the Patent Cooperation Treaty. Adopted on June 19, 1970 and amended from time to time (as in force from July 1, 2022).

These requirements, however, are not applicable to national applications filed under the national patent system of the member States. Further, with respect to any formality requirements, which are not regulated by the PCT, a Contracting Party to the PCT may prescribe any requirements under the national law for the purpose of processing international patent applications after the international phase i.e. national phase.

Generally, the instruments above and especially the TRIPs set minimum standards that every Member State to the WTO has to meet. Below is a brief account of these minimum standards.

3. MINIMUM STANDARDS

Minimum Standards establish and provide for minimum norms for the protection of patents, which encompass availability, scope and use of patent rights. Patent protection is defined in terms of the subject-matter to be protected, the rights to be conferred, permissible exceptions to those rights and the minimum duration of protection. The standards are set such that the substantive obligations of the TRIPs and the Paris Convention, among others, in their most recent versions, are mandatorily complied with.[40]

The Agreement requires its members to make patents available for any inventions, whether of products or processes, in all fields of technology without discrimination.[41] This availability however, should be subject to the standard tests of novelty, inventiveness

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40 Art. 2.1 of the TRIPS Agreement provides that in respect of Parts II, III and IV of this Agreement, Members shall comply with Arts. 1 through 12, and Art. 19, of the Paris Convention (1967).

41 Art. 27(1) of the TRIPS Agreement.

and industrial applicability.[42] It also requires patents to be available and patent rights enjoyable without discrimination as to the place of invention and whether products are imported or locally produced.[43]

There are three permissible exceptions to the basic rule on patentability. The Patents Act has accommodated the permissible exceptions.[44] The first exception relates to inventions, which are contrary to public order or morality. This exception explicitly includes inventions dangerous to human, animal or plant life or health or those, which are seriously prejudicial to the environment. The use of this exception is subject to the condition that the commercial exploitation of the invention must also be prevented and this prevention must be necessary for the protection of public order or morality.[45]

The second exception allows exclusion from patentability of diagnostic, therapeutic and surgical methods for the treatment of humans or animals.[46] The third exception allows Members to exclude plants and animals other than microorganisms and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes.[47] However, any country excluding plant varieties from patent protection has to provide an effective *sui generis* system of

42 See art. 27 of the TRIPS Agreement and s. 8 of the Patents Act.
43 Art. 27(1) of the TRIPS Agreement.
44 See s. 7(2) of the Patents Act.
45 Art. 27(2) of the TRIPS Agreement; S. 12 of the Patents Act.
46 Art. 27(3)(a) of the TRIPS Agreement; S. 7(2)(b) and (d) of the Patents Act.
47 Art. 27(3)(b) of the TRIPS Agreement; S. 7(2)(b) of the Patents Act.

protection.[48] In the year 2002, Tanzania took advantage of the flexibility by enacting an Act to provide for the establishment of a registry of plant breeders' rights; promotion of plant breeding and facilitation of agricultural advancements through the grant and regulation of plant breeders' rights and for matters connected therewith called the Plant Breeders' Rights Act.[49]

Tanzania also complies with the requirement that exclusive rights conferred by a product patent should relate to making, using, offering for sale, selling and importing.[50] Also, process patent protection gives rights not only over use of the process but also over products obtained directly by the process.[51] Patent owners have been given liberty to assign or transfer by succession the patent and conclude licensing contracts.[52]

Members are at liberty to provide limited exceptions to the exclusive rights conferred by a patent. Such exceptions should not unreasonably conflict with a normal exploitation of the patent and prejudice the legitimate interests of the patent owner, taking into account the legitimate interests of third parties.[53] The term of protection available is required not to end before the expiration of a period of 20 years counted from the filing date.[54] However, counting 20 years from the filing date has come with some complains that in most countries, especially the LDCs, processing

48 Tanzania enacted the Protection of New Plant Varieties (Plant Breeders' Rights) Act which was repealed and replaced by the Plant Breeder's Rights Act, s. 56.
49 No. 9 of 2012.
50 See art. 28 (1) (a) of the TRIPS Agreement; S.36(a)(i) of the Patents Act.
51 Art. 28 (1) (b) of the TRIPS Agreement; S. 36(b)(i)(ii) of the Patents Act.
52 Art. 28 (2) of the TRIPS Agreement; S. 35 (1)(a)-(c) of the Patents Act.
53 Art. 30 of the TRIPS Agreement.
54 Art. 33 of the TRIPS Agreement; S. 39(1) –(5) of the Patents Act.

of the applications from the filing date to the granting date may take more than half a year due to various reasons and this means the time of effective patent right protection becomes well less than 20 years. There would be left some flexibility, depending on technology, economic and other allowably compelling situations of a member, that effective 20 years protection would begin from the granting date. The time between the filing date and the granting date would thus be accorded a way of protection in the style of "protection pending status" to the first application actually filed.

4. OBLIGATIONS

The TRIPS Agreement has generally posed an obligation that its members should give effect to its provisions.[55] It allows them to provide more extensive protection, if they so wish, provided that such extended protection does not contravene its provisions.[56] While implementing their obligations, they are left free to determine the appropriate method of putting into operation the provisions of the Agreement within their own legal systems and practices.[57]

4.1 Obligation in Relation to Compliance with other Intellectual Property Conventions

The TRIPS Agreement requires its members to comply with some provisions of the Paris Convention, which has certain common rules that are either required or permitted to be implemented under national legislation.[58] In the course of such compliance, the

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55 Art. 1(1) of the of the TRIPS Agreement.

56 Ibid.

57 Ibid.

58 Art. 2(1) of the of the TRIPS Agreement where in the field of patent, these are arts. 4^{bis58} 4^{ter},[58] 4^{quater},[58] 5,[58] 5^{bis},[58] 5^{ter},[58] $5^{quarter58}$ and 19 in the Paris Convention.

Agreement does not prohibit discharge of existing obligations that Members may have to each other under the Paris Convention.[59] The Act is generally compliant with this general obligation.[60]

4.2 Obligation in Relation to Non-discriminatory Treatment

Both the Agreement and the Convention impose a basic obligation on each Member to protect patent right belonging to persons, referred to as nationals,[61] of other Member States.[62] They include natural and artificial persons who have a close attachment to other Members without necessarily being nationals.[63] The criteria for determining which persons must benefit from the treatment provided for under the Agreement are laid down in the Convention.[64] The following are the principles governing this obligation.

4.2.1 The National Treatment

This principle allows for what is usually called the "asymmetries" meaning the adoption of different standards of protection by

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59 Art. 2(2) of the TRIPS Agreement.

60 The Patents Act legislates into it the PCT in ss. 9(3), 31(2) and 34. It also has provisions incorporating the Harare Protocol in s. 29 and largely complies with the Paris Convention as already shown in this paper.

61 See footnote 1 above, art. 1(3) of the TRIPS Agreement. It provides: 1When "nationals" are referred to in this Agreement, they shall be deemed, in the case of a separate customs territory Member of the WTO, to mean persons, natural or legal, who are domiciled or who have a real and effective industrial or commercial establishment in that customs territory.

62 According to footnote 3 in art. 3(1) of the TRIPS Agreement: For the purposes of art. 3 and 4, "protection" shall include matters affecting the availability, acquisition, scope, maintenance and enforcement of intellectual property rights as well as those matters affecting the use of intellectual property rights specifically addressed in this Agreement.

63 Art. 1(3) of the TRIPS Agreement.

64 Art. 1 - 3 of the TRIPS Agreement.

different countries in accordance with different levels of national development provided national treatment was secured. It requires each member to accord to the nationals of other members treatment no less favorable than that it accords to its own nationals with regard to the protection of patent subject to permitted exceptions.

Members may avail themselves of the exceptions permitted in relation to judicial and administrative procedures, including the designation of an address for service or the appointment of an agent within the jurisdiction of a member, only where such exceptions are necessary to secure compliance with laws and regulations which are not inconsistent with the provisions of this Agreement and where such practices are not applied in a manner which would constitute a disguised restriction on trade. This protection includes matters affecting the availability, acquisition, scope, maintenance and enforcement of patents as well as those matters affecting the use of patent rights specifically addressed in it.[65]

To the same effect, nationals of any country of the Union are required, as regards the protection of industrial property, to enjoy in all the other countries of the Union the advantages that their respective laws now grant, or may hereafter grant, to nationals; all without prejudice to the rights specially provided for by this Convention. Consequently, they shall have the same protection as the latter, and the same legal remedy against any infringement of

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65 Art. 3(1) & (2) of the TRIPS Agreement.

their rights, provided that the conditions and formalities imposed upon nationals are complied with.[66]

To enjoy the treatment, the Convention requires that there should be no requirement as to domicile or establishment in the country where protection is claimed that may be imposed upon nationals of countries of the Union for the enjoyment of any industrial property rights.[67] The Flexibility is left to each of the countries of the Union on issues relating to judicial and administrative procedures, jurisdiction and the designation of an address for service or the appointment of an agent, which may be required by the laws on industrial property.[68]

4.2.2 The Most-Favored-National Treatment

This principle requires a member to accord to the nationals of other Members immediately and unconditionally, with regard to patent protection, any advantage, favour, privilege or immunity.[69] However, this obligation can be waived on two options. First, it derives from international agreements on judicial assistance or law enforcement of a general nature and not particularly confined to the protection of patents. Secondly, it derives from international agreements related to the protection of patents, which entered into force prior to the entry into force of the WTO Agreement. Furthermore, the two above options depend on two circumstances. First, such international agreements are notified to

66 Art. 2(1) of the Paris Convention. According to art. 1(1) of the Paris Convention, countries of the Union means the countries to which this Convention applies constitute a Union for the protection of industrial property.

67 Art. 2(2) of the Paris Convention.

68 Art. 2(3) of the Paris Convention.

69 Art. 4 of the TRIPS Agreement.

the Council for TRIPS;[70] and second, do not constitute an arbitrary or unjustifiable discrimination against nationals of other Members.[71]

This principle has also been incorporated in the Paris Convention with the effect that nationals of countries outside the Union,[72] who are domiciled or who have real and effective industrial or commercial establishments in the territory of one of the countries of the Union should be treated in the same manner as nationals of the countries of the Union. The Convention further requires the countries of the Union to assure to nationals of the other countries of the Union appropriate legal remedies effectively to repress anticompetitive acts.[73]

It requires them to further provide for measures to permit federations and associations representing interested industrialists, producers, or merchants provided that the existence of such organizations is not contrary to the laws of their countries.[74] Furthermore, such organizations should be permitted to take action in courts or before administrative authorities with a view to repressing the prohibited acts,[75] in so far as the law of the country

70 Art. 4(d) of the TRIPS Agreement.
71 Ibid.
72 See art. of the Paris Convention which defines Countries of the Union as the countries to which the Paris Convention applies constitute a Union for the protection of industrial property
73 Art. 10ter(1) read together with arts. 9, 10, and 10bis(3) of the Paris Convention.
74 Art. 10ter(2) of the Paris Convention.
75 Referred to in arts. 9, 10, and 10bis(3) of the Paris Convention.

in which protection is claimed allows such action by such organizations of that country.[76]

It generally appears that this non-discriminatory treatment obligation has not been legislated into the Act. Despite the fact that there has not been a case recorded that there has been discriminatory treatment in Tanzania, still it is mandatory that this principle be legislated into the Patents Act with a view to being TRIPS Agreement compliant but also specifically guaranteeing other nationals of non-discriminatory treatment in Tanzania.

Closely linked to the Paris Convention in this respect is the PCT, which is prescribed as a Special Agreement of Article 19 of the Paris Convention.[77] The Treaty makes it possible to seek patent protection for an invention simultaneously in each of the countries of the International Patent Cooperation Union (IPCU).[78] This protection is granted without diminishing the rights under the Paris Convention of any national or resident of any country party to that Convention.[79] Such an application may be filed by anyone who is a national or resident of a PCT contracting State, so long as such application contains all the required specifications.[80] An application may generally be filed with the

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76 Art. 10ter (2) of the Paris Convention.

77 The article is about special agreements and it provides: It is understood that the countries of the Union reserve the right to make separately between themselves special agreements for the protection of industrial property, in so far as these agreements do not contravene the provisions of this Convention.

78 See art. 3(1) of the TRIPS Agreement.

79 See art. 1(2) of the TRIPS Agreement.

80 See arts. 3(2), 4 and 9(1), (2) and (3) of the TRIPS Agreement. For the status of contracting Member States as up to 13 April 2018 visit

national patent office of the Contracting State of which the applicant is a national or resident or, at the applicant's option, with the ARIPO or WIPO.[81]

The Patents Act categorically recognizes international application as that which is filed in accordance with the PCT and its regulations.[82] This makes the Treaty is important to Tanzania where international applications for patents are made through the PCT route.[83]

4.2.3 Obligation in Relation to Repression of Unfair Competition

The TRIPS Agreement takes cognizance of and provides for control of anti-competitive practices especially in contractual licenses.[84] Generally, Members agree that some licensing practices or conditions pertaining to patent rights, which restrain competition, may have adverse effects on trade and may impede the transfer and dissemination of technology.[85] The Agreement does not prevent its Members from specifying in their local pieces of legislation licensing practices or conditions that, in particular cases may constitute an abuse of patent rights with adverse effects on competition in the relevant market. Flexibility is left to adopt appropriate measures to prevent or control such practices.[86]

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http://www.wipo.int/export/sites/www/treaties/en/documents/pdf/pct.pdf> (accessed on 4 July 2018).

81 Arts. 10, 11 together with the interpretation section, i.e., s. 2 of the TRIPS Agreement on what a receiving office is.

82 S. 31(1) of the Patents Act.

83 Tanzania became a member of PCT from 14the September 1999.

84 Generally, see s. 8 of Part II of the Patents Agreement.

85 See art. 40(1) of the TRIPS Agreement.

86 Such measures may include for example exclusive grant back conditions, conditions preventing challenges to validity and coercive package licensing, in the light of the relevant laws and regulations of that Member.

However, exercise of this flexibility must not contravene other provisions of the TRIPS Agreement.[87] It also provides for some obligations regarding cross border anti-competitive practices, which must be complied by the Members.[88]

The Paris Convention perceives any act of competition contrary to honest practices in industrial or commercial matters to constitute an act of unfair competition. It Particularly prohibits the following: 1. All acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor; 2. False allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor; 3. Indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods. In that wake, it requires each of its members to provide for effective protection against such acts and practices.[89]

Furthermore, in the course of ensuring such effective protection Members are tasked with the duty of secrecy not to divulge and protect undisclosed information and data submitted to governments or government agencies.[90] It further obliges natural and legal persons to have the possibility of preventing information lawfully within their control from being disclosed to, acquired, or

87 See art. 40(2) of the TRIPS Agreement.
88 See art. 40(3) & (4) of the TRIPS Agreement.
89 Art. 10bis(1) of the Paris Convention.
90 Art. 39(1) and (3) of the TRIPS Agreement, art. 10bis of the Paris Convention and regulation 57 of the Patents Regulations.

used by others without their consent in a manner contrary to honest commercial practices.

For the purpose of this provision, "a manner contrary to honest commercial practices" shall mean at least practices such as breach of contract, breach of confidence and inducement to breach, and includes the acquisition of undisclosed information by third Parties who knew, or were grossly negligent in failing to know, that such practices were involved in the acquisition so long as such information qualifies the legal prerequisites.[91]

The Act has legislated into it minimum protection on license contracts with a view to controlling anticompetitive behaviors.[92] The registrar is empowered to not register a license contract whose terms have the effects of tainting fair competition.[93] To this extent and at least at the minimum, the Act complies with the Agreement and the Convention. It is sufficient since there is a separate competition regime[94] in place and that would well carter for the needful not addressed in the Act.

4.2.4 Obligations in Relation to Disclosure of Technical information about the Invention.

Members are obliged to require an applicant for a patent to disclose the invention in a manner sufficiently clear and complete for the

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91 See art. 39(2) of the Agreement. Provides that Is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question; has commercial value because it is secret; and has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.

92 S. 2 and 49 of the Patents Act.

93 S. 5(f) of the Patents Act.

94 The Fair Competition Act Cap 285 (R.E 2019).

invention to be carried out by a person skilled in the art.[95] It also require the applicant to indicate the best mode for carrying out the invention known to the inventor at the filing date or, where priority is claimed, at the priority date of the application.[96] If the subject matter of a patent is a process for obtaining a product, judicial authorities have the power to order the defendant to prove that the process to obtain an identical product is different from the patented process. He has to prove that certain conditions indicating likelihood that the protected process was used are met.[97] This obligation has well been complied with by the Patents Act.[98]

4.2.5 Obligations in Relation to Enforcement

4.2.5.1 General Obligations

(a) Remedies

The Agreement requires Members to ensure that enforcement procedures specified under it are available under their laws so as to permit effective action against any act of infringement of patent rights. These requirements include expeditious remedies to prevent infringements and remedies for infringement, which constitute deterrence to further infringements. These procedures are required to be applied in such a manner as to avoid creation of barriers to legitimate trade and to provide for safeguards against their abuse.[99] The Act has generally dedicated the whole of

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95 S. 18(6) of the Patent Act.
96 See s. 18(6) of the Patents Act and art. 29(1) of the TRIPS Agreement.
97 See art. 34 of the TRIPS Agreement.
98 See s. 35(2)(a) of the Patents Act.
99 See art. 41(1) of the TRIPS Agreement.

Part XV to this obligation albeit the civil and criminal frameworks at the disposal of this obligation.[100]

(b) Judicial System for Enforcement

Tanzania does not have a separate judicial mechanism specifically for patent enforcement. The TRIPS Agreement does not create any obligation to put in place a judicial system contemplating special Tribunal or Boards for the enforcement of patents distinct from the Courts for the general enforcement of law.[101] No obligation is created with respect to the distribution of resources as between enforcement of patent rights and the enforcement of law in general.[102] However, the TRIPS Agreement has requirements, which are all available in the Tanzanian judicial system as follows:

(i) Fair and equitable enforcement procedures, which are not unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.[103]

(ii) Decisions on the merits of a case must preferably be in writing and reasoned. They must be made available at least to parties to the proceedings without undue delay. Decisions on the merits of a case must be based only on

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100 Civil Procedure Code Cap 33 (R.E 2019) and the Criminal Procedure Act Cap 20 (R.E 2019)

101 Art. 41(5) of the TRIPS Agreement.

102 Ibid.

103 Art. 41(2) of the TRIPS Agreement.

evidence in respect of which parties were offered the opportunity to be heard.[104]

(iii) Parties to the proceedings must have an opportunity for judicial review of final administrative decisions and, subject to jurisdictional provisions in a member's law concerning the importance of a case, of at least the legal aspects of initial judicial decisions on the merits of a case. However, there must be no obligation to provide an opportunity for review of acquittals in criminal cases.[105]

4.2.5.2 Specific Obligations

(a) Regarding Civil and Administrative Procedures and Remedies.[106]

The TRIPS Agreement requires Members to establish fair and equitable civil procedures concerning the enforcement of a patent right covered by the TRIPS Agreement.[107] It requires judicial authorities to observe all the principles governing evidence.[108] It furthermore requires Members to vest authority on courts to restrain a party from an infringement by issuance of prohibitory orders[109]and to order the infringer to pay the right holder damages adequate to compensate for

104 Art. 41(3) of the TRIPS Agreement.
105 Art. 41(4) of the TRIPS Agreement.
106 S. 2 of Part III of the TRIPS Agreement.
107 Art. 42 of the TRIPS Agreement.
108 S. 43 of the TRIPS Agreement.
109 Art. 44 of the TRIPS Agreement.

the injury the right holder has suffered because of an infringement, expenses the right holder may have incurred and other remedies as the court may find it appropriate to grant.[110]

It further requires its Members to provide for indemnification of the defendant.[111] That, judicial authorities should have powers to order a party at whose request measures were taken and who has abused enforcement procedures to provide to the party wrongfully enjoined or restrained adequate compensation including legal fees for the injury suffered because of such injustice.[112] In respect of the administration of any law pertaining to the protection or enforcement of patent rights, Members must only exempt both public authorities and officials from liability to appropriate remedial measures where actions are taken or intended in good faith in the course of the administration of that law.[113]

(b) Regarding Provisional Measures.[114]

The Member's judicial authorities are required to have the power to order prompt and effective provisional measures to prevent an infringement of any patent

110 Arts. 45 and 46 of the TRIPS Agreement.
111 Art. 48 of the TRIPS Agreement.
112 Art. 48(1) of the TRIPS Agreement.
113 Art. 48(2) of the TRIPS Agreement.
114 S. 3 of the TRIPS Agreement.

right from occurring.[115] In particular, to prevent in their jurisdiction the entry into the channels of commerce of goods, including imported goods immediately after customs clearance and to preserve relevant evidence in regard to the alleged infringement.[116] The power to appropriately adopt provisional measures *inaudita altera parte*, meaning "the other party not having been heard" or "not in the presence of the other or opposing party" especially where any delay is likely to cause irreparable harm to the right holder, or where there is a demonstrable risk of evidence being destroyed.[117]

In the event provisional measures have been adopted *inaudita altera parte*, the parties affected must be given notice, without delay after the execution of the measures at the latest. A review, including a right to be heard, should take place upon request of the defendant with a view to deciding, within a reasonable period after the notification of the measures, whether these measures shall be modified, revoked or confirmed.[118]

115 Art. 50(1)(a) and (b) of the TRIPS Agreement.
116 Ibid.
117 See art. 50(2) of the TRIPS Agreement.
118 See art. 50(4) of the TRIPS Agreement. Members are under obligation to comply with the requirements provided under art. 50(3)-(8) of the TRIPS Agreement.

(c) Regarding Special Requirements Related to Border Measures.[119]

Members are under obligation to adopt procedures[120] to enable a right holder, who has valid grounds for suspecting that the importation of infringed patented goods,[121] to lodge an application in writing with competent administrative or judicial authorities, for the suspension by the customs authorities of the release into free circulation of such goods.[122] The procedures adopted by Members are required to conform to provisions set out in the Agreement notwithstanding some little flexibility.[123]

(d) Regarding Criminal Procedures.[124]

Members are required to provide for criminal procedures and penalties to be applied at least in cases of willful infringement on a commercial scale.[125] Sanctions available must include imprisonment and/or monetary fines sufficient to provide deterrence. Such sanctions should be consistent with the level of penalties applied for crimes of a

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119 See footnote 12 under s. 4 of Part III of the TRIPS Agreement which notifies that where a Member has dismantled substantially all controls over movement of goods across its border with another Member with which it forms Part of a customs union, it shall not be required to apply the provisions of this Section at that border.

120 See note 13 under s. 4 of Part III of the Agreement: It is understood that there shall be no obligation to apply such procedures to imports of goods put on the market in another country by or with the consent of the right holder, or to goods in transit.

121 See note 14 under s. 4 of Part III of the TRIPS Agreement.

122 See art. 51 of the TRIPS Agreement.

123 See s. 4 of Part III, Arts. 52 to 60 of the TRIPS Agreement.

124 Generally, see s. 5 of the TRIPS Agreement.

125 See art. 61 of the TRIPS Agreement.

corresponding gravity.[126] In appropriate cases, sanctions available must also include seizure, forfeiture and destruction of the infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence.[127]

(e) Regarding Dispute Prevention and Settlement.[128]

In achieving this obligation, in the first place the Agreement requires transparency pertaining to the availability, scope, acquisition, enforcement and prevention of the abuse of patent rights. It then obliges all Member States to publish laws and regulations, final judicial decisions and administrative rulings of general application made effective by a Member State.

In the event such publication is impracticable, then the subject matter must be made publicly available, in a national language, in such a manner as to enable governments and right holders to become acquainted with them. Furthermore, it requires Member States to publish Agreements concerning the subject matter, which are in force between the governments or a governmental agency of a Member State and the government or a governmental agency of another Member State.[129] The Member State has a duty to notify the Council for TRIPS about such conformity.[130] Specifically, the Agreement applies the 1994 GATT provisions as elaborated and

126 Ibid.
127 Ibid.
128 See generally Part V of the TRIPS Agreement.
129 See art. 63(1) of the TRIPS Agreement.
130 See art. 63(2) of the TRIPS Agreement.

applied by the Dispute Settlement Understanding.[131] This application is in the course of consultations and settlement subject to a provided exception.

The exception is in fact disapplication of subparagraphs 1(b) and 1(c) of Article XXIII of GATT to the settlement of disputes under the Agreement for a period of five years from the date of entry into force of the WTO Agreement. See article 64(1) and (2) of the Agreement. During this period, the Council for TRIPS is required to examine the scope and modalities for complaints of the type provided for under subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994 made pursuant to the TRIPs, and submit its recommendations to the Ministerial Conference for approval. Any decision of the Ministerial Conference to approve such recommendations or to extend the said 5 years period must be made only by consensus and approved recommendations must be effective for all Members without further formal acceptance process.[132]

4.3 Term of Protection

The term of patent protection has attracted serious thoughts as to fairness. The TRIPS Agreement has provided that the available term shall not end before the expiration of a period of twenty years counted from the filing date.[133] The Agreement acknowledges the fact it is understood that those Members

131 Arts. XXII and XXIII of the TRIPS Agreement. Understanding on Rules and Procedures Governing the Settlement of Disputes article 1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [DSU].

132 Also see art. 64(3).

133 Art. 33 of the TRIPS Agreement.

which do not have a system of original grant may provide that the term of protection shall be computed from the filing date in the system of original grant.

The Patents Act provides that a patent shall expire at the end of the tenth year after the date of filing of the application.[134] The Patents Act further provides that on the request of the owner of the patent, or of a licensee, made not more than twelve months and not less than one month before the expiration of the patent and on payment of a prescribed fee, the Registrar shall extend the term of that patent for a period of five years.

The Registrar can grant such extension provided that the said owner or licensee proves, to the satisfaction of the Registrar, either that the invention which is the subject of the said patent is being worked in the United Republic at the date of the request, or that there are legitimate reasons for failing so to work the invention. It should be noted that A patented invention is worked if the patented product is effectively made, or if the patented process is effectively used in the United Republic on a scale which is reasonable in the circumstances and importation shall not constitute working.

Once the request of the owner of that patent, or of a licensee, made not more than twelve months and not less than one month before the expiration of the patent and on payment of a prescribed fee the Registrar shall extend the duration of the said patent for a further period of five years. If the Registrar does not reject the request within six months after its receipt, he shall be deemed to be the patentee or

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134 S. 38(1) of the Patents Act.

licensee. The owner of the patent or a licensee may appeal to the court against any refusal to extend the term of the patent.

Reading between the lines of art. 33 of the TRIPS Agreements, the provision that the term of protection available shall not end before the expiration of a period of twenty years counted from the filing date means that it is mandatory that the life span of the granted patent must not be less than 20 years. Reading between the lines of s. 38 of the Patents Act clearly shows that the mandatory life span of the granted patent is 10 years will the remaining 10 years which is staggered in two installments of 5 years each are left at the mercy of the Registrar and requirements of the law. What the Patents Act has provided in this respect is not what the TRIPS Agreement has required.

It is without doubt that the intention of s. 38 of the Patents Act was good but notwithstanding it contravenes art 33 of TRIPS Agreement for it falls short of the requirement that a patent should not end before the expiration of 20 years. The intention would be maintained, and the requirement complied by rephrasing the wording of the section.

4.4 Conclusion

It has been in the interest of this paper to appraise the conformity of the Tanzanian patents' legal framework with the substantive norms of the international instruments forming the international legal framework. It has been observed that there is partial conformity of the minimum standards and obligations required by the international instruments. This is because there are certain obligations, like the principles against discrimination, that have not been legislated into the Patents Act and issues of term of patent

ownership remain rather problematic and controversial. However, it is just explicit that the local legal framework seems to call for frequent reviews to not only remain feasibly conformant and consistent with the international framework but also remain feasibly relevant with the contemporary international and local situations brought about by the rapid and sweeping scientific, technological, commercial and economic advancements.