Intellectual Property Matters for Economic, Social, Technological, Scientific, and Industrial Development

Q: SPL – Please tell us about ARIPO. Why was ARIPO formed and what are your core functions and visions of ARIPO?

A: The African Regional Intellectual Property Organisation (ARIPO) is an intergovernmental organisation established on 9 December 1976 under the Lusaka Agreement signed in Lusaka, Zambia. It facilitates cooperation among Member States in intellectual property matters to pool financial and human resources and seek technological advancement for economic, social, technological, scientific, and industrial development.

ARIPO's Vision is to be Africa's leading intellectual property organisation that promotes socio-economic development. The mission is to foster creativity and innovation for the socio-economic growth of our Member States through an effective intellectual property system.

Membership in the Organisation is open to all the States members of the United Nations Economic Commission for Africa (UNECA) or the African Union (AU). Currently, there are twenty-one Member States, namely, Botswana, Kingdom of Eswatini, The Gambia, Ghana, Kenya, Kingdom of Lesotho, Liberia, Malawi, Mauritius, Mozambique, Namibia, Rwanda, São Tomé and Príncipe, Seychelles, Sierra Leone, Somalia, Sudan, United Republic of Tanzania, Uganda, Zambia, and Zimbabwe. The Republic of Cabo Verde is to become ARIPO's 22nd Member State. On the 7th of January 2022, the Cape Verdean Parliament approved the country's accession to the Lusaka Agreement, Banjul, and Harare Protocols. On the 27th of January, 2022, the Parliament further approved the accession to the Swakopmund Protocol. The Instruments of Accession were deposited with the ARIPO Director General on 14 July 2022 at a ceremony held at the Embassy of Cape Verde in Geneva, Switzerland, in the margins of the 63rd WIPO General Assemblies.

Substantive activities of the Organisation are implemented through three treaties, each focusing on a specific field of intellectual property. These treaties are the Harare Protocol on Patents and Industrial Designs, the Banjul Protocol on Marks, and the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore. The other treaties are the Arusha Protocol for the Protection of New Varieties of Plants and the Kampala Protocol in Voluntary Registration of Copyright and Related Rights. The two Protocols are yet to enter into force.

The protocols were established to form legal frameworks to supplement national frameworks. Currently, the Harare and Banjul Protocols are active, thus, the article will seek to explore the usage of the Harare and Banjul Protocols.

The Harare Protocol empowers ARIPO to grant patents and register industrial designs and utility models on behalf of the contracting States. All Member States of ARIPO, except for Somalia and Mauritius, are party to this Protocol. The Harare Protocol also incorporates other international treaties of relevance, such as the Paris Convention and the Patent Cooperation Treaty (PCT), enabling applicants from the African region and elsewhere to file international applications and obtain the protection of their intellectual property rights. The Harare Protocol has also been linked to the Budapest Treaty, which enables applicants to provide information on new micro-organisms claimed in patent applications.

The Banjul Protocol empowers ARIPO to register marks for goods and services on behalf of the contracting States, which are: Botswana, Kingdom of Eswatini, The Gambia, Kingdom of Lesotho, Liberia, Malawi, Mozambique, Namibia, São Tomé and Príncipe, The United Republic of Tanzania, Uganda, and Zimbabwe.

The Harare Protocol and the Banjul Protocol provides a centralised system of granting and registration of IP rights and provides a mechanism for the ARIPO system to co-exist with the national systems of the contracting States of the Protocols. Thus, an applicant can choose to seek protection with a national Office for protection limited to that country or may elect to use the ARIPO route in which case the application should designate at least one contracting State party to the Protocols.

An ARIPO application may be made by the owner or by a representative. Any resident or anyone with a place of business in any of the Member States can file an application without necessarily seeking the services of an agent. This was deliberately put in place to reduce filing costs for residents of the Member States. Filing can be by personal delivery, post, email, courier, or registered mail, whichever method is convenient to the applicant. Since 2015, filing can be done online through the ARIPO e-service platform. By the end of 2021, 96% of all patent applications were online.

The patent granted by ARIPO, or the utility model, industrial design or mark registered by ARIPO shall in each contracting state for which it is granted or registered, as the case may be, have the effect of and be subject to the same conditions as, a national patent granted, or utility model, industrial design and mark registered, by that State.

Q: Most African countries have incorporated intellectual property protection in their domestic laws, including the granting of patent protection on medicines. There are now 53 countries on the African continent, of which 42 are members of the WTO, and liable to comply with its rules, notably the TRIPS Agreement. At least half of this number consists of the least developed countries, who are eligible to apply the WTO waiver regarding providing patent protection to pharmaceuticals. Regrettably, countries have not taken advantage of this important flexibility. However, some of ARIPO member States have incorporate some flexibility in their national legislation. Can you explain how ARIPO addresses this situation.

A: On the issues of flexibility, each member State exercises their right to choose options made available in international treaties to meet its domestic policy objective. A government makes choices from the various options and implements those choices under the national legislation.

ARIPO is a Member States driven Organization, which means if a Member State chooses to implement TRIPS flexibilities in its national legislation, ARIPO complies with the laws of the country. Currently, some of our Member States, Uganda and Rwanda, have implemented the specific option of flexibilities in their national legislation by excluding pharmaceutical products from patentability subject matter. Although Section 1(3) of the Harare Protocol provides that the patent granted by ARIPO shall, in each contracting State for which it is granted, have the effect of, and be subject to the same conditions as, a national patent granted by that State, in this case, if ARIPO grants a patent on a pharmaceutical product, such patent will have no effect these countries.

The issue of some countries to not take advantage of this flexibility is a topical issue currently discussed in the WIPO Standing Committee on the Law of Patents. Several constraints encountered by governments at the stage of national implementation of flexibilities have been identified, such as Constructive ambiguity of international treaties, Complexity of practical implementation, Practical operation of law, Institutional capacity, National governance and internal coordination and Extrinsic influence, where political and economic pressure from some industrialized countries and/or pharmaceutical industries.

Q: For Patent examination, majority of countries do not have a system of substantive patent examination, there being a mere registration process of approving the formalities for applications. How does ARIPO seek to overcome these challenges?

A: One of the objectives of establishing ARIPO was pooling together human resources. At ARIPO, we have qualified and experienced patent examiners who have extensive training and experience in patent examination. A bulk of patent applications seeking protection in ARIPO Member States are filed through ARIPO under the Harare Protocol.

Once the application complies with formal requirements, it will notify the applicant, and the applicant will be required to request substantive examination (Form 13A) of the patent application within three years from the date of filing. The request shall be deemed to have been filed when the search and examination fees have been lodged. Where no request is made within the prescribed period, the application shall be deemed to have lapsed.

When receiving the request for substantive examination, the patent application will be assigned to an examiner to conduct search and substantive examination and issue a search and examination report which will be sent to the applicant.

As for the case where the applicant files a patent application directly to any of our Member States and that Member State has no capacity to substantively examine the patent application, ARIPO provides assistance by examining the application on behalf of the Member State/s.

Q: "Anti-counterfeiting" legislation in The East African Community (EAC) and several countries have wither adopted, or are in the process of adopting, legislation purportedly to regulate the serious problem of substandard and falsified medicines. The main criticism levelled against these measures is that they conflate quality and safety issues (the responsibility of drug regulators) with intellectual property enforcement (that of private law enforcement). 'Counterfeit,' in these laws, has come to be so widely defined as to attack legitimate generics. The issue is discussed in the section on TRIPS-plus initiatives. Where does your company stand regarding this topic?

A: In an effort to curb counterfeiting, ARIPO has been taking part in different initiatives to raise awareness of the consequences counterfeiting has on safety and the economy. In collaboration with the World Intellectual Property Organisation (WIPO), Interpol and the World Customs Organisation, several initiatives, including a training of trainers' programmes for police academies, designed to introduce IP modules and courses to help authorities better understand the topic. However, more work needs to be done, such as vigorous campaigns to educate people about the negative impact of counterfeiting; border measures must be strengthened; seizure and destruction of counterfeit goods must be encouraged in many cases, and legislation must be improved.

Q: Your website, despite having multiple different sections for topics such as resources, publications, and media, does not mention explicitly ARIPO's impact within the pharmaceutical industry. What plans has ARIPO made regarding the pharmaceutical industry?

A: The ARIPO website shows the services offered by the organisation as per the Lusaka Agreement and the mandates under the Protocols. Pharmaceutical companies are considered part of the diverse clients ARIPO has. We have pharmaceuticals that have used the ARIPO IP system.

ARIPO is conscious of the pharmaceutical industry. Two critical factors limit access to medical treatment: the high prices of medicines, particularly those that are protected by patent, and the lack of medicines to treat neglected diseases, a consequence of a lack of Research and Development.

A robust IP legal framework is fundamental for innovation to thrive and address the challenges relating to the development of affordable medical technologies. On the other hand, countries can take advantage of flexibilities available under the WTO Trade-Related aspects of IP Rights (TRIPS), especially by incorporating them into their national laws.

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The African Regional Intellectual Property Organization (ARIPO) is an intergovernmental organization that grants and administers Intellectual Property (IP) titles on behalf of its 22 Member States and provides IP information to its clientele in search services, publications, and awareness creation. The IP titles granted under the Harare and Banjul protocols are for patents, industrial designs and marks. Membership is open to all Member States of the African Union (AU). The Secretariat is based in Harare, Zimbabwe.

Email: communications@aripo.org