

## Major Developments in Intellectual Property Law in Botswana

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### ABSTRACT

*This paper seeks to provide for an overview of major developments in intellectual property law in Botswana over the past fifty years, with specific reference to patent law. It traces major developments in patent law at both international and national level. It is observed that to a large extent, Botswana has successfully implemented its obligations under international conventions on intellectual property. Botswana has also implemented WTO TRIPS flexibilities in its national legislation. Although it took a long time to update patent laws in Botswana, the past fifty years have seen a gradual and incremental reform in intellectual property law in Botswana.*

### 1. INTRODUCTION

This paper seeks to provide for an overview of major developments in intellectual property law in Botswana over the past fifty years, with specific reference to patent law. It will highlight and comment on the major milestones on these developments. The paper is not intended to be highly critical and analytical on all these developments. Rather, it gives a historical account, some descriptions and comments on these major developments. Because intellectual property law is a vast field, this paper would not be exhaustive in its coverage of intellectual property developments in Botswana. Rather, it will focus mainly on the following: membership to international organizations; the constitutional framework and developments in patent law.

The next section argues a case for a stronger intellectual property rights regime in Botswana. This is followed by a highlight on the importance of Botswana's membership to multilateral and regional intellectual property institutions. The bulk of the discussion which follows this section relates to the

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constitutional and legal framework governing patent law. The paper winds up with conclusions and recommendations.

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## 2. IMPORTANCE OF STRONG PROTECTION OF INTELLECTUAL PROPERTY RIGHTS IN BOTSWANA

Economists are divided on the effects of strengthening intellectual property rights (IPRs) in developing countries.<sup>1</sup> The opponents emphasize that the strengthening of IPRs has negative effects on economic development in developing countries and has unfair gains for developing countries.<sup>2</sup> On the other hand, supporters of strong IPRs stress the benefits emerging from the international harmonization of intellectual property rights regimes for both developed and developing countries.<sup>3</sup> Studies which have been undertaken include the relationship between stronger intellectual property rights and the following: foreign direct investment; international trade; international technology transfer and domestic innovation; public health; and genetic resources and traditional knowledge. Each of these will be discussed briefly below.

With respect to the relationship between intellectual property rights and foreign direct investment and trade, evidence has shown that there is a direct relationship between stronger intellectual property rights protection and the volume of foreign direct investment.<sup>4</sup> This is mainly in countries with stronger technical absorptive capabilities where the risk of imitation is high.<sup>5</sup> Stronger IPRs are said to create ownership advantages and to reduce the transaction costs associated with trade.<sup>6</sup> However, stronger IPRs can deter trade and encourage

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1 See for instance, C.M. Correa, *Intellectual Property Rights, the WTO and Developing Countries: The TRIPS Agreement and Policy Options*, London, Zed Books, Third World Network, (2000); J. E. Stiglitz, "Economic Foundations of Intellectual Property Rights," *57 Duke Law Review Journal* (2008), pp. 1693-1724.

2 See for instance, C.M. Correa, *Intellectual Property Rights, the WTO and Developing Countries: The TRIPS Agreement and Policy Options*, London, Zed Books, Third World Network (2000). See also J.E. Stiglitz, "Economic Foundations of Intellectual Property Rights," *57 Duke Law Review Journal*, (2008)1693-1724.

3 C. Fink and E. Mansfield (eds) *Intellectual Property and Development: Lessons from Recent Economic Research*, New York: World Bank/Oxford University Press, (2004).

4 L.G. Branstetter, R. Fisman, C.F. Foley and K. Saggi "Intellectual Property Rights, Imitation and Foreign Direct Investment: Theory and Evidence", NBER Working Paper 13033, (2007).

5 W.G. Park, W.G. and D. Lippoldt "International Licensing and the Strengthening of Intellectual Property Rights in Developing Countries during the 1990s," *40(1) OECD Economic Studies* (2005), pp. 7-48.

6 K. Maskus, *Intellectual Property Rights in the Global Economy*, Institute for International Economics, Washington DC, (2000); K. E. Maskus, 'The Role of Intellectual Property Rights in Encouraging Foreign Direct Investment and Technology Transfer,' in C. Fink and K.E. Maskus (eds), *Intellectual Property and*

licencing.<sup>7</sup>

In relation to IPRs and international technology transfer and domestic innovation, empirical evidence suggests that stronger IPRs in developing countries may encourage international technology transfer through market based channels like licensing.<sup>8</sup> Stronger IPRs can provide incentives for firms to invest in research and development.<sup>9</sup> In addition, stronger IPRs can facilitate access to knowledge and benefit sharing from innovation in developing countries. However, the effectiveness of IPRs in this regard depends on local capabilities in developing countries, in particular capabilities to engage the market in production and exchange, negotiate and establish the right legal infrastructure and enforcement.<sup>10</sup>

With respect to IPRs and public health, literature suggests that strong IPRs may hamper access to medicine in developing countries and does not necessarily encourage pharmaceutical innovation that responds to developing country needs.<sup>11</sup> For health issues of particular relevance to developing countries, IPRs are of value to commercial product and technology developers only if viable market can be created through advanced market commitment.<sup>12</sup> Patents increase prices whilst generics reduce prices.<sup>13</sup>

A strong IPRs regime can be of great importance to Botswana. Botswana is developing a technology-driven and knowledge based economy in order to

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*Development: Lessons from Recent Economic Research*, New York: World Bank/Oxford University Press (2004), pp. 41–74; K.E Maskus, and M. Penubarti ‘How Trade-Related are Intellectual Property Rights?’ 39 (3-4) *Journal of International Economics* (1995), pp. 227–248.

- 7 C. Fink and C.A. Primo Braga, “How Stronger Protection of Intellectual Property Rights Affects International Trade Flows,” in C. Fink and E. Mansfield (eds), *Intellectual Property and Development: Lessons from Recent Economic Research*, New York: World Bank/Oxford University Press (2004), pp. 19–40.
- 8 L. Branstetter, R. Fisman and C.F. Foley, “Do Stronger Intellectual Property Rights Increase International Technology Transfer? Empirical Evidence from US Firm-level Panel Data,” 121(1) *Quarterly Journal of Economics* (2006), pp. 321–49.
- 9 P. J. Smith, ‘How Do Foreign Patent Rights Affect US Exports, Affiliate Sales and Licenses?’ 55(2) *Journal of International Economics* (2001), pp. 411–439.
- 10 J. Kiggundu, “Intellectual Property Law and the Protection of Indigenous Knowledge” in: I. Mazonde and P. Thomas (eds), *Indigenous Knowledge Systems and Intellectual Property in the Twenty-First Century*, Dakar, Codesria, (2007).
- 11 J.E. Stiglitz, “Economic Foundations of Intellectual Property Rights,” 57 *Duke Law Review Journal* (2008), pp. 1693-1724.; J.R. Borrell, “Pricing and Patents of HIV/AIDS Drugs in Developing Countries,” 39(4) *Applied Economics* (2007), pp. 505–518.
- 12 J.R. Borrell, “Pricing and Patents of HIV/AIDS Drugs in Developing Countries,” 39(4) *Applied Economics* (2007), pp. 505–518.
- 13 R.D. Smith, C. Correa and C. Oh, “Trade, TRIPS and Pharmaceuticals,” 373(9664) *The Lancet* (2009), pp. 684–691; J.R. Borrell, “Pricing and Patents of HIV/AIDS Drugs in Developing Countries,” 39(4) *Applied Economics* (2007), pp. 505–518; C. Correa, “Implications of Bilateral Free Trade Agreements on Access to Medicines,” 84(5) *Bulletin of the World Health Organization* (2006), pp. 399–404.

position itself to be able to be competitive. In this vein, the Botswana Innovative Hub (BIH) was incorporated to develop the first Science and Technology Park for Botswana. BIH's mandate is to contribute to the country's economic development and competitiveness by creating new scientific, technological and indigenous knowledge-based business opportunities. It also fosters entrepreneurship and technology transfer as well as generating knowledge-based jobs. BIH's mission is to "offer a unique platform for scientific, technological and indigenous based innovation".<sup>14</sup> BIH promotes research and development as well as innovation and development. The main sectors which are targeted by the BIH are: Information Communication Technology; Biotechnology; Mining Technology; Clean Technology and Traditional Knowledge.<sup>15</sup> In addition to the BIH, Botswana has also set up the Botswana Institute for Technology Research and Innovation (BITRI), a parastatal under the Ministry of Infrastructure Science and Technology. It was established in 2012, with a view to conduct needs-based research and development in focused areas.<sup>16</sup> The mandate of BITRI is to identify and/or develop appropriate technology solutions which provide sustainable innovative solutions through co-creation and collaboration in line with national priorities and needs of Botswana.<sup>17</sup>

Given the new thrust of Botswana as a technology and knowledge based economy, it is imperative that Botswana should have a stronger regime for the protection of IPRs. This would encourage creativity and innovation in the country and would attract foreign investments in the Botswana Innovation Hub and in other sectors of the economy. Stronger protection of IPRs would thus contribute to economic diversification and economic development in Botswana.

### 3. MEMBERSHIP TO INTERNATIONAL ORGANISATIONS

One of the main achievements of Botswana was joining and actively participating in international and regional intellectual property organizations. These include the World Intellectual Property Organisation (WIPO), the World Trade Organization (WTO) and the African Regional Intellectual Property Organisation (ARIPO). The importance of Botswana's membership to each of the organizations is briefly discussed below.

14 See <http://www.bitri.co.bw/about-us/> accessed on 28 August 2016.

15 See <http://www.bitri.co.bw/about-us/> accessed on 28 August 2016.

16 See <http://www.bitri.co.bw/about-us/> accessed on 28 August 2016.

17 See <http://www.bitri.co.bw/about-us/> accessed on 28 August 2016.

### 3.1 The World Intellectual Property Organisation

WIPO is the global forum for intellectual property services, policy, information and cooperation. It is a self-funding agency of the United Nations, with 188 member states. Its mission is to lead the development of a balanced and effective international IP system that enables innovation and creativity for the benefit of all. Its mandate, governing bodies and procedures are set out in the WIPO Convention, which established WIPO in 1967.

In general, WIPO helps governments; businesses and society to realize the benefits of IP. More specifically, it provides the following: a policy forum to shape balanced international IP rules for a changing world; global services to protect IP across borders and to resolve disputes; technical infrastructure to connect IP systems and share knowledge; cooperation and capacity building programs to enable all countries to use IP for economic, social and cultural development; and a world reference source for IP information.

With respect to developing countries like Botswana, WIPO is involved in technical assistance,<sup>18</sup> capacity building and offers legislative and policy advice.

### 3.2 The World Trade Organization

The WTO, which came into effect in 1995, is the successor to the General Agreement on Tariff and Trade (GATT) 1947. It is an organisation set up by Member States to administer multilateral trade agreements. The multilateral agreements cover trade in goods, trade in services, trade-related aspects of intellectual property, dispute settlement and trade policy review. These agreements are contractual in nature and they provide for the rights and obligations of Members. The WTO has a strong dispute settlement mechanism which seeks to ensure that rights and obligations of Members are respected.

The WTO seeks to attain the following objectives through regulation of international trade: raising standards of living; ensuring full employment and a large and steadily growing volume of real income and effective demand;

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<sup>18</sup> From 2009 to August 2016, Botswana has hosted at least 29 WIPO technical assistance conferences or workshops and this has been of great importance for Botswana. For details of these workshops, see <http://www.wipo.int/tad/en/activitysearchresult.jsp?ventry=BW> accessed on 28 August 2016; and over 80 more workshops held in other countries, where Botswana was a beneficiary, see <http://www.wipo.int/tad/en/activitysearchresult.jsp?bcntry=BW> accessed 28 August 2016.

expanding the production of trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development; seeking both to protect and preserve the environment, and to enhance the means of doing so in a manner consistent with respective needs and concerns of Members at different levels of economic development; and securing for developing countries, and especially the least developed among them, a share in the growth in international trade commensurate with the needs of their economic development.<sup>19</sup>

Of interest for the purposes of protection of intellectual property rights is the Agreement on Trade Related Aspects of Intellectual Property (TRIPS Agreement), which is included in Annex 1C of the Marrakesh Agreement Establishing the WTO. This Agreement provides for standards of IP protection as well as the rules regarding the administration and enforcement of IPRs.<sup>20</sup> Like all other Agreements under the WTO, the TRIPs Agreement is subjected to the WTO Dispute settlement mechanisms. The TRIPs Agreement covers the following areas of intellectual property: copyright and related rights; trademarks; geographical indications; industrial designs; patents;<sup>21</sup> layout designs (topographies) of integrated circuits; and protection of undisclosed information.<sup>22</sup>

### 3.3 The African Regional Intellectual Property Organisation

ARIPO formerly the African Regional Industrial Property Organisation, was established by the Lusaka Agreement in 1976. ARIPO was established mainly to pool the resources of its member countries in industrial property matters together in order to avoid duplication of financial and human resources.<sup>23</sup> The preamble to the Lusaka Agreement highlights that there are advantages 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 as well as promotion of and co-operation in industrial property matters. Its objectives include promoting the harmonization and development

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19 See Preamble of the Marrakesh Agreement Establishing the WTO, 15 April 1994, which entered into force on 1 January 1995.

20 See A. Taubman, H. Wager and J. Watal (ed), *A Handbook on WTO TRIPS Agreement*, Cambridge, Cambridge University Press (2012), pp. 10.

21 This includes the protection of new varieties of plants.

22 This includes trade secrets and test data.

23 <http://www.aripo.org/about-aripo/>, accessed on 26 August 2016.

of the industrial property laws, and matters related thereto, appropriate to the needs of its members and of the region as a whole.<sup>24</sup>

One of the interesting agreements under ARIPO is the Protocol on Patents and Industrial Designs within the Framework of the African Regional Intellectual Property Organisation (the Harare Protocol).<sup>25</sup> This was concluded by the Administrative Council of ARIPO in Harare in 1982. This Protocol entered into force in 1984. The Protocol empowers the ARIPO Office to receive and process patent and industrial design applications on behalf of States party to the Protocol. Under the Protocol, an applicant for the grant of a patent for an invention or the registration of an industrial design can, by filing only one application, designate any one of the Harare Protocol Contracting States in which that applicant wishes the invention or industrial design to be accorded protection. The Protocol requires the filing of the application to be made with any one of the Contracting States or directly with the ARIPO Office. On receipt of the patent application, the ARIPO Office undertakes a substantive examination to ensure that the invention which is the object of the application is patentable. Where an application complies with the substantive requirements, copies thereof are sent to each designated Contracting State which 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 strong one as the examination substantially raises its presumption of validity.

Of interest is that in 1994, the ARIPO Administrative Council adopted amendments to the Harare Protocol and its Implementing Regulations to create a link between the protocol and the WIPO-governed Patent Cooperation Treaty (PCT). This link commenced operation on July 1, 1994, and has the following effects: 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 acts as a receiving office under the PCT for such States; and the ARIPO Office may be elected in any PCT application.

Furthermore, in 1999, the Administrative Council amended the Harare Protocol to make provision for patent applications involving micro-organisms

24 <http://www.aripo.org/about-aripo> accessed 26 August 2016.

25 Currently, there are 18 Harare Protocol Contracting States, namely Botswana, The Gambia, Ghana, Kenya, Lesotho, Liberia, Malawi, Mozambique, Namibia, Rwanda, Democratic Republic of São Tomé and Príncipe, Sierra Leone, Sudan, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe.

in accordance with the Budapest Treaty on the International Recognition of the Deposit of Micro-organisms for the Purposes of Patent Procedure. The Administrative 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.

#### **4. INTERNATIONAL DEVELOPMENTS IN PATENT LAW**

##### **4.1 The Paris Convention**

This is the first Convention dealing with industrial property protection at international level.<sup>26</sup> Its scope and coverage includes provisions relating to patents, trademarks, industrial designs, appellations of origin and indications of source and unfair competition. The Convention deals with substantive law which includes the right to national treatment,<sup>27</sup> rules establishing rights and obligations of natural persons and legal entities, administrative and financial provisions through the establishment of the Paris Union. It also establishes the right of priority.<sup>28</sup>

The Paris Convention does not provide for multiple registrations of patents. It follows the national patent system which requires the filing of individual patent for each country for which the patent is sought. It only provides for the right of priority where an earlier application can be claimed for applications filed subsequently in foreign countries. Such later applications must be filed within 12 months of the filing date of the earlier application. This means that the applicant must prepare and file patent applications for all countries in which he is seeking protection for his invention within one year of first application. This entails expenses for translation, patent attorneys in various countries and payment of fees to the patent offices, all at a time when the applicant often does not know whether he is likely to obtain a patent or

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26 The Paris Convention, concluded in 1883, was revised at Brussels in 1900, at Washington in 1911, at The Hague in 1925, at London in 1934, at Lisbon in 1958 and at Stockholm in 1967, and was amended in 1979.

27 See Articles 2 and 3 which deal with the equal treatment of local and foreigners in the protection of their industrial property. It should be noted that Article 2(3) provides for exceptions to the national treatment rule and includes matters relating to judicial and administrative procedures.

28 Article 4 of the Convention. The essence of the right of priority in this Convention is that an application for an industrial property rights field by a given applicant in one of the member countries, the same may, within a specified period of time, apply for protection in other member countries. This later applications will then be regarded as if they had been filed on the same day as the earliest application.



whether his invention is really new compared to the state of the art.

## 4.2 Patent Cooperation Treaty (PCT)

This Treaty was set in order to overcome the problems involved in the national system. Under the national system, every single patent office with which an application is filed has to carry out a formal examination of every application filed with it. Where Patent Offices examine patent applications as to the substance, each office has to make a search to determine the state of the art in the technical field of the invention and to carry out an examination as to patentability. In order to reduce duplication of the effort both for applicants and national patent offices, the PCT was adopted in 1970.<sup>29</sup> It is an agreement for international cooperation in the field of patents and has been dubbed “the most significant advance in the international cooperation in this field since the adoption of the Paris Convention itself.”<sup>30</sup> It is a treaty for rationalization and cooperation with regards to the filing, search and examination of patent applications and the dissemination of the technical information contained therein. It should be noted that the PCT does not provide for the grant of international patents, for that is the task and responsibility exclusively for Patent Offices or other designated offices.

The main features of the PCT are as follows: it establishes an international system which enables the filing, with a single patent office, of a single application in one language having the effect in each of the countries party to the PCT which the applicant names in his application; it provides for the formal examination of the international application by a single patent office; it subjects each international application to an international search which results in a report citing the relevant prior art which may be taken into account in deciding whether the invention is patentable; it provides for centralized international publication of international applications with the related international search reports, as well as their communication to the designated offices; and it provides an option for an international preliminary examination of the international applications, which gives the applicant and subsequently the offices that have to decide whether or not to grant a patent, a report containing an opinion as to whether the claimed invention meets international criteria for patentability.

The PCT system has numerous advantages for Patent Offices. First, less

<sup>29</sup> The PCT entered into operation on 1 June 1978.

<sup>30</sup> WIPO Intellectual Property Handbook: Policy, Law and Use pp. 277.

manpower would be needed in Patent Offices since those applications coming via the PCT are already in compliance with the formal requirements during the international phase. Secondly, Patent Offices can save cost of publishing. If the international application has been published in an official language of the country, they can forgo publication altogether. Thirdly, examining Patent Offices benefit in respect of most applications filed by foreigners, from an international search report and preliminary examination report. Search costs are also thereby reduced. Fourthly, non-examining offices receive an application which has already been examined as to form, which is accompanied by an international search report and possibly by an international preliminary examination report.

The PCT system has advantages for a regional system like the Harare Protocol. Patent Offices of states party to the Harare Protocol which opt to close the national route are not involved in the processing of international applications designating such states. Furthermore, choosing this option is therefore particularly advisable if the national patent office is less well equipped than the regional office and is not prepared to receive and process increasing numbers of applications.

For the applicants, the main advantage is that applicants may file the application with effect in foreign countries, and have more time to make up their minds as to the foreign countries in which they wish to seek protection. National economies also benefit from the PCT system. International applications will usually provide a sound basis for investment and transfer of technology, foreign investment will be stimulated and more advanced technologies and investment leads to more employment creation.<sup>31</sup>

### 4.3 The TRIPS Agreement

The TRIPS Agreement has been dubbed as ‘arguably the most innovative of the WTO Agreements.’<sup>32</sup> This is mainly because the TRIPS Agreement requires Members to put in place legislation which ensures that there is a minimum level of protection and enforcement of IPRs in their territories. The TRIPS Agreement is the most comprehensive international instrument on intellectual property rights.

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31 WIPO, *WIPO Intellectual Property Handbook: Policy, Law and Use*, 2<sup>nd</sup> ed., Geneva, (2004), pp. 302.

32 P. Bossche and W. Zdouc, *The Law and Policy of the World Trade Organization*, 3<sup>rd</sup> ed., Cambridge, Cambridge University Press (2013), pp. 952.

The TRIPS Agreement is made up of seven parts.<sup>33</sup> The first part provides general principles as well the incorporation by reference of some parts of the Paris<sup>34</sup> and Berne Conventions. The second part provides substantive norms with respect to various forms of intellectual property. For each type of intellectual property, the following aspects are covered: the subject matter eligible for protection; the scope of rights to be conferred; permissible exceptions to those rights; and the minimum duration of protection. The third part requires domestication and domestic enforcement of IPRs. The fourth part deals with the acquisition and maintenance of IPRs. The fifth part provides for dispute settlement whilst the sixth part has transitional arrangements. The last part establishes a WTO-based institutional framework for TRIPs. With respect to patent law, relevant provisions of the TRIPS Agreement will be discussed along with the Industrial Property Act, 2010.

#### **4.4 The Harare Protocol**

Within the framework of the ARIPO, Botswana signed the Protocol on Patents and Industrial Designs (the Harare Protocol). Under the Harare Protocol, an applicant for a grant can file one application in one of the contracting states or directly with the ARIPO secretariat and designate any of the contracting states in which he wishes his intervention to be accorded protection.<sup>35</sup> Section 29 of the Industrial Property Act, 2010, implements the Harare Protocol.

### **5. THE CONSTITUTIONAL FRAMEWORK FOR THE PROTECTION OF INTELLECTUAL PROPERTY RIGHTS IN BOTSWANA**

The relationship between the constitution and intellectual rights law merits some consideration. The Bill of Rights in the Botswana Constitution has some rights which are applicable to intellectual property law. These include privacy;<sup>36</sup>

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33 For a detailed analysis of these seven parts, see M. Trebilcock, R. Howse and A. Eliason, *The Regulation of International Trade*, 4<sup>th</sup> ed., London, Routledge (2013), pp. 528-546.

34 Articles 1 to 2 and 19 of the Paris Convention.

35 S. Morolong, *Intellectual Property law: Botswana, International Encyclopedia of Laws*, The Hague, Kluwer Law International (2007), pp. 42.

36 Section 9 of the Constitution.

freedom of expression;<sup>37</sup> and property.<sup>38</sup> In this regard this paper will focus mainly on section 8 (1) of the Constitution which provides as follows:

“(1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied, that is to say—

(a) the taking of possession or acquisition is necessary or expedient—

(i) in the interests of defence, public safety, public order, public morality, public health, town and country planning or land settlement;

(ii) in order to secure the development or utilization of that, or other, property for a purpose beneficial to the community; or

(iii) in order to secure the development or utilization of the mineral resources of Botswana; and

(b) provision is made by a law applicable to that taking of possession or acquisition—

(i) for the prompt payment of adequate compensation; and

(ii) securing to any person having an interest in or right over the property a right of access to the High Court, either direct or on appeal from any other authority, for the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right, and the amount of any compensation to which he is entitled, and for the purpose of obtaining prompt payment of that compensation.”

The main issue is whether intellectual property rights enjoy protection under the Constitution. Within South African jurisprudence, it has been held that intellectual property rights fall within the concept of “property” as used in section 25 of the South African Constitution.<sup>39</sup>

<sup>37</sup> Section 12 of the Constitution.

<sup>38</sup> Section 8 of the Constitution.

<sup>39</sup> See the following cases: *Laugh it Off Promotions CC v The South African Breweries International (Finance) BV t/a Sabmark International and Another* 2006 (1) SA 144 (CC); *In re Certification of the*

There are legal basis for recognising intellectual property as property under the ambit of section 8 of the Botswana Constitution since both tangible and intangible property are recognised as property in Botswana. Having argued that intellectual property falls within the constitutional protection clause, section 8 (1) of the Botswana Constitution prohibits expropriation except where following conditions are met. First, the expropriation must be for public interest. Second, it must be accompanied by adequate compensation. Third, it must be according to the due process of the law, that is, it must follow a written law which provides for access to the courts or other dispute settlement mechanism to challenge the reasons for expropriation and the adequacy of compensation. Lastly, it provides for free repatriation of the compensation.

In Botswana, the main legislation governing expropriation is the Acquisition of Property Act.<sup>40</sup> However, this deals only with immovable property. In the *Bruwer case*<sup>41</sup> where the government sought to expropriate a farm, cattle and shares, it was held that the said Act only applies to immovable property.<sup>42</sup> Thus the Acquisition of Property Act does not apply to intellectual property since it is movable property. However, it can be argued that with respect to expropriation of intellectual property, more specifically, patents and copyrights, the Industrial Property Act, 2010 and the Copyright and Neighbouring Rights Act apply respectively. For instance, section 31 of the Industrial Property Act, 2010 provides for the conditions under which compulsory licences can be granted. A compulsory license is a non - voluntary license which is issued by the government in order to override patent protect. Essentially, it is expropriation of intellectual property rights. Thus, it can be concluded that the constitutional and legal framework of Botswana provides for both the protection and expropriation of intellectual property rights.

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*Constitution of the Republic of South Africa, 1996*, 1996 (4) SA 744 (CC); *National Soccer League T/A Premier Soccer League v Gidani (Pty) Ltd* [2014] 2 All SA 461. See also O H Dean “Deprivation of trade marks through state interference in their usage.” *South African Intellectual Property Law Journal* (2013), pp. 1.

40 Acquisition of Property Act, (Chapter 32:10).

41 See, *Bruwer and Another v President of the Republic of Botswana and Others* [1997] BLR 477 (HC), and *President of the Republic of Botswana and Others v Bruwer and Another*, [1998] BLR 86 (CA).

42 For a discussion of the *Bruwer case*, see C. Ng’ong’ola, “Challenging the legality of a notice of expropriation in Botswana” *115 The South African Law Journal* (1998), pp. 616 - 627.

## 6. NATIONAL DEVELOPMENTS IN PATENT LAW

### 6.1 The Patents and Designs Protection Act

The Patent and Designs Protection Act was inherited at independence and was in force until 1996, when it was repealed and replaced by the Industrial Property Act, 1996. The Patent and Designs Protection Act required Botswana to protect all patents granted in the United Kingdom and in South Africa.<sup>43</sup> Where one had a certificate of grant and registration of patent from either the United Kingdom or South Africa, they would simply forward them to Botswana where the Registrar would routinely enter the details of the patent in the register. Thus, Botswana did not have any policy space to accept or reject some of the patents. It should be noted that this colonial piece of legislation was in force for three decades after Botswana attained her independence, and had outlived its relevance. Commenting on the legislation, one prominent scholar noted that this piece of legislation was “anachronistic and of limited application.”<sup>44</sup>

The Patent and Designs Protection Act had some shortcomings. It did not allow any person to directly register a patent in Botswana, but had to first register it either in the United Kingdom or South Africa. Furthermore, where the owner of a patent wished to sue in Botswana when there was patent infringement, they would have to do so under the terms and conditions of the applicable legislation in place either in the United Kingdom or South Africa.<sup>45</sup> It can, therefore, be concluded that the Act was meant to protect United Kingdom and South African patents in Botswana, and had little regard local patent and policy. As mentioned above, this Act was repealed and replaced by the Industrial Property Act of 1996, which is discussed below.

### 6.2 The Industrial Property Act, 1996

The Industrial Property Act, 1996 and the regulations thereunder<sup>46</sup> ushered a new dispensation in the protection of industrial property in Botswana. It covered the

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43 S. Morolong, *Intellectual Property law: Botswana, International Encyclopedia of Laws*, The Hague, Kluwer Law International (2007), p. 42.

44 J. Kiggundu, “Legal Aspects of Doing Business in Botswana,” in D. Campell (ed), *Legal Aspects of Doing Business in Africa*, The Hague, Kluwer Law International (2013), p. BOT 31.

45 *Ibid.*

46 See Industrial Property Regulations, 1997.

protection of patents,<sup>47</sup> utility models,<sup>48</sup> industrial designs<sup>49</sup> and trademarks.<sup>50</sup> This section will now turn to the main features of the Act.

### 6.2.1 Registration Process

The Act established a Patent, Marks and Designs Office.<sup>51</sup> It also established the office of the Registrar of Patents, Marks and Designs.<sup>52</sup> The main functions and powers of the Registrar were provided for as follows:<sup>53</sup> processing of all applications made in terms of the Act; granting of patents and utility model certificates; registration of industrial designs, marks and collective marks; administration of granted patents and utility model certificates and registered industrial designs, marks and collective marks; and, the establishment and maintenance of a journal of marks, patents and designs.

The Industrial Property Act, 1996, implemented the Harare Protocol which deals with the filing of patents and designs under ARIPO. This opened an avenue for patent protection to applicants who sought to obtain a patent through an ARIPO application system. Thus, under the 1996 Act, there were two ways of for filing for patent, namely: under the national system or under the ARIPO system.

### 6.2.2 Patentability Criteria and Patentable Subject Matter

According to the Industrial Property Act, 1996, only inventions are patentable. An invention is “an idea of an inventor which permits in practice the solution to a specific problem in the field of technology.”<sup>54</sup> Three conditions must be met for such an invention to be patentable, namely: novelty, an inventive step and industrial application.<sup>55</sup> However, the following were treated as non-patentable subject matter: a discovery; a scientific theory or mathematical method; a literary, dramatic, musical or artistic work or other aesthetic creation; a scheme,

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47 Sections 8-33 of the Industrial Property Act, 1996.

48 Sections 34 – 38.

49 Sections 39-52.

50 Sections 53-68.

51 Section 3.

52 Section 4.

53 Section 5.

54 Section 2.

55 Section 8.

rule or method for doing business, performing a mental act or playing a game; computer program; methods for the treatment of the human or animal body by surgery; and a diagnostic method practised on the human or animal body.<sup>56</sup> It should be noted that although methods for the treatment of human or animal body and diagnostic methods did not fall under patentable subject matter, the prohibition does not extend to products for use in these methods.<sup>57</sup> These requirements are in line with the TRIPs Agreement in as far as the criteria for patentability are concerned.

### 6.2.3 Exclusive Rights and Their Limitations

The Industrial Property Act, 1996, granted rights to a patent holder for a period of twenty years. The right to a patent may be transferred by cession, assignment, testamentary disposition or by operation of law.<sup>58</sup> The Industrial Property Act, 1996, also granted exclusive rights to the patentee to exploit or authorize the exploitation. Although the rights granted under the Industrial Property Act, 1996, were exclusive, they were not absolute. The Act contained some exceptions and limitations. These include the following: parallel importation and exhaustion; government use; compulsory licensing.

Parallel importation generally denotes a situation where goods which are under patent in one jurisdiction are imported into another state for resale without the patent holders consent. The provision for parallel imports is not expressly created by the TRIPS Agreement but by way of implication. Article 6 states that “nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights.” This provision allows states to determine their own legislation on exhaustion of intellectual property rights. If the intellectual property rights are exhausted at the first sale then no such rights can effectively be operative at any subsequent sale. States may therefore buy, import and most importantly resell such goods lawfully and without the patent holders consent.<sup>59</sup> Thus, this provision allows states to source the cheapest goods from other markets and place them for resale domestically. This has the

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<sup>56</sup> Section 9 (1).

<sup>57</sup> Adams and Adam, *Adams & Admas Practical Guide to Intellectual Property in Africa*, Pretoria, Pretoria University Law Press, Pretoria, (2012), p. 60.

<sup>58</sup> Section 12.

<sup>59</sup> D. Matthews, “From the August 30, 2003 WTO Decision to the December 6, 2005 Agreement on an Amendment to TRIPS: Improving access to medicines in developing countries” *2 Intellectual Property Quarterly* (2006), p. 91.



effect of creating competition and reducing prices.

However, the Industrial Property Act, 1996, limited exhaustion only to goods placed on the domestic market by the patentee or with his consent.<sup>60</sup> This provision indicated that Botswana legislators had opted for domestic exhaustion rather than the wider notion of international exhaustion. It is submitted that Botswana legislators should have opted for the doctrine of international exhaustion. This would have particularly benefited Botswana in the health sector and particularly in relation to the HIV /AIDS epidemic given the prevalence rates in Botswana. By allowing the operation of the international exhaustion doctrine it would have been possible to import patented medicines, particularly HIV/AIDS drugs, where they are sold cheaper and this would probably ensure that a greater number of people would then benefit from antiretroviral drugs.

#### **6.2.4 Infringement and Remedies**

The Act provides for both civil and criminal penalties for the infringement of patent rights.<sup>61</sup> The civil remedies provided for under the Act are: an interdict or injunction; delivery up or destruction of an infringing product or article; and damages or an account of the profits derived from the infringement.<sup>62</sup> The Act also provides as criminal sanctions, either a fine or imprisonment or both.<sup>63</sup>

#### **6.2.5 Assessment of Achievements under the Industrial Property Act, 1996**

The achievements of this Act were that, after a period of 30 years into the independence, Botswana at last had autonomy in the administration of its industrial property. Patents were now granted in terms of the terms and conditions under the Botswana law, in sharp contrast to the previous regime.

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60 Section 25 of the Industrial Property Act, 1996.

61 See Sections 25 and 76 of the Industrial Property Act, 1996.

62 Section 25.

63 Section 76 (6).

### 6.3 The Industrial Property Act, 2010

The Industrial Property Act, 2010, repealed and replaced the Industrial Property Act, 1996. This was necessitated by international developments in this area. For instance, there was a need to update the law to be in tandem with the TRIPS Agreement as well as the Patent Cooperation Treaty to which Botswana was a party. This Act retained some aspects of the Industrial Property Act, 1996 which include: the registration process; criteria for patentability; and remedies for patent infringement. It also has some new and interesting features. For the purposes of this discussion, these include: the international system of patent registration; international exhaustion of patents regime; broadening the scope of non-patentable subject matter, and implementation of the paragraph 6 system of the TRIPs Agreement.

#### 6.3.1 International System of Patent Registration

Sections 37 through 41, of the Industrial Property Act, 2010, implemented the Patent Cooperation Treaty. It provides that the Botswana Patent Office can be a receiving office, designated offices or elected office. It also provides for national processing as well as the processing of international applications. This is a welcome development since the 1996 Act only implemented the Harare Protocol and not the PCT system. The advantages of being part of the PCT system have been discussed already.

#### 6.3.2 International Exhaustion of Patents Regime

In stark contrast to the 1996 Act, the Industrial Property Act, 2010 provided for international exhaustion regime.<sup>64</sup> The operation of the international exhaustion doctrine would be beneficial to Botswana. For instance, it could be used to import patented medicines, particularly HIV/AIDS drugs, where they are sold cheaper anywhere in the world. In turn, this would probably ensure that a greater number of people would then benefit from antiretroviral drugs.

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<sup>64</sup> See section 25 (1) (a) of the Industrial Property Act, 2010. For a discussion of exhaustion under the TRIPS Agreement, see A. Taubman, H. Wager and J. Watal (eds.), *A Handbook on WTO TRIPS Agreement*, Cambridge University Press, Cambridge, (2012), pp. 18-20.

### 6.3.3 Broadening the Scope of Non-patentable Subject Matter

The discussion above has indicated that the Industrial Property Act, 1996, had a provision relating to matters excluded from patent protection. However, the list was narrow. The Industrial Property Act, 2010, has a wide and expansive list of inventions which are excluded from patent protection.<sup>65</sup> For instance, whilst the 1996 Act excluded just a discovery from patent protection, the 2010 Act broadened this to include “a discovery or a plant, animal, micro-organism or substances as found in nature, including a human body.”<sup>66</sup> In addition, some inventions whose commercial exploitation affects human, animal or plant life and health as well as the environment are excluded from patentability.<sup>67</sup>

### 6.3.4 Implementation of the Paragraph 6 System of the TRIPS Agreement

In order to put the discussion on the paragraph 6 system into perspective, this paper would start with a brief overview of the Doha Declaration on TRIPS Agreement and Public Health. In the aftermath of the TRIPS Agreement, there were many concerns on how a strong intellectual property rights protection regime was hindering access to medicine, especially by developing countries. For instance, under compulsory licensing, a member would only utilize it when such a member has pharmaceutical manufacturing capacity. Furthermore, Members had varying views on the nature and scope of TRIPS flexibilities.

The Declaration reiterated the importance of IP protection with regards to pharmaceutical products but also underlined that a strong protection may lead to high prices of medicines. Members underpinned that the TRIPS Agreement “does not and should not prevent members from taking measures to protect public health. It also emphasized that the TRIPS Agreement should be interpreted in a manner supportive to the right to promote access to medicines for all. Thus, the Declaration helped in building multilateral cooperation on intellectual property and public health as well clarification on the Members’ rights and responsibilities under the TRIPS Agreement.

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<sup>65</sup> For a discussion of permissible exclusions from patentable subject matter under the TRIPS Agreement, see A. Taubman, *et al, ibid*, pp. 102-104.

<sup>66</sup> Section 9 (1) (a) of the Industrial Property Act, 2010.

<sup>67</sup> See section 9(2) (b) of the Industrial Property Act, 2010. See also section 9(2) (c) of the Industrial Property Act, 2010, which excludes plants, animals and other micro-organisms as well as section 9(2)(d) which excludes essential biological processes for the production of plants or animals.

One of the main achievements of the Declaration was to kick-start negotiations which culminated in the establishment of the Paragraph 6 system. The Paragraph 6 system was meant primarily to assist countries which could not utilize compulsory licensing due to insufficiency or lack of manufacturing capacity. Paragraph 6 of the Doha Declaration instructed the TRIPS Council to find an expeditious solution and to report to the General Council by the end 2002. However, due to disagreements between the US on one hand and the EU and other countries on the other, Members did not meet the deadline. The Council for TRIPS finally reached a decision on 30 August 2003 which is known as the decision on the implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, 2003 (the Paragraph 6 system.)

The essence of the Paragraph 6 system is the creation of a special compulsory license system for exporting medicines. Least Developing Countries (LDC) are automatically eligible to utilize this system as importers. However, other WTO Members also qualify to utilize the system as importers subject to notification requirements. Any WTO Member can be an exporting Member although such participation is optional.

Like the compulsory license system under Article 31, the Paragraph 6 system has its own safeguards and transparency requirements to avoid diversion of the medicines. First, importing Members are required to take reasonable measures to prevent re-importation of medicine. Second, Members should have effective legal means to prevent diversion. Third, both importing and exporting Members should ensure that the system is used for the intended purposes. For a country to utilize the Paragraph 6 system, it should domesticate the system in its own national legislation.

Under Article 31(f) of the TRIPS Agreement, production under compulsory license was predominantly for supply of domestic market. The paragraph 6 system waives this requirement for exporting Members in cases of production or export of a pharmaceutical product to eligible importing Members, subject to conditions on transparency and safeguards. Importing Members are required to take reasonable measures to prevent re-exportation and the system should be used for its intended purpose. The exporting Member is also required to pay remuneration taking into account the economic value of the authorization in the importing Member. The importing Member is not required to pay remuneration since it would have been paid by the exporting Member on the same products.

The paragraph 6 system is also subject to criticism. Valach observed that the cumulative effect of the steps to be taken by the importing country in order to grant a compulsory license is that the process becomes complex and constitutes a real obstacle.<sup>68</sup> Due to a complex application procedure, it also follows that it would take more time to grant a compulsory licence. For instance, an application to the Council for TRIPS can take time to be approved thereby causing delays at the crucial time of national emergencies. The other shortfall is that neither TRIPS nor the Council Decision address how developing countries can secure access to confidential data supplied by the rights holder to national regulatory authorities. Matthews points out that the added costs on altering packaging, pill size and colour will have a detrimental effect on availability of essential medicines in developing countries, who will find it less cost efficient to produce identifiable pills.<sup>69</sup> This negatively affects importers of generic drugs who have no manufacturing capacity since the manufacturing industries will have less incentive for manufacturing generic drugs due to the high costs associated with the exercise. If these industries have to manufacture at high costs, this would mean that the cost of drugs on importing countries would also increase and this would defeat the essence of compulsory licensing, that is, offering drugs at cheap and affordable prices. Thus, it can be concluded that although the paragraph 6 system gives room for manufacturers to export beyond their domestic markets, it also brings with it numerous complex requirements thereby making granting of compulsory licenses cumbersome.

Section 32 of the Industrial Property Act, 2010, deals with the "Importation of patented Products by government or third parties." Medicines may be imported from any legitimate alternative foreign source without the patent holder's approval if it is in the public interest to do so for purposes of national security, nutrition, health or development of other vital sectors of the economy or society. Similar requirements as in Doha Declaration exist in that the importation will include the name and quantities to be imported. The section further echoes the TRIPs Agreement in that it places the obligation to pay the patent holder remuneration on the exporting state and not on Botswana (the would be importing state).

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68 A. Valach "Protecting the Rights of Patent Holders and Addressing Public Health Issues in Developing Countries," *Chicago-Kent Journal of Intellectual Property* (2005), pp.156.

69 D. Matthews "From the August 30, 2003 WTO Decision to the December 6, 2005 Agreement on an Amendment to TRIPS: Improving Access to Medicines in Developing Countries," *2 Intellectual Property Quarterly* (2006), pp. 91.

Considering the lack of a pharmaceutical industry in Botswana, this would be the most ideal method of importing more affordable drugs to help fight the HIV/AIDS scourge. This is because it does not require Botswana to immediately have the manufacturing capacity. It does not require Botswana, as an importing country, to pay remuneration to the patent holder. However, there are also challenges in the utilization of this flexibility. Botswana has to find a country with both the pharmaceutical manufacturing capacity and willingness to issue a compulsory license for import.<sup>70</sup>

## 7. CONCLUSION

This paper has traced developments in intellectual property law in Botswana with specific reference to patent law. From independence up to 1996, patent issues were governed by the pre-colonial legislation which robbed Botswana of its policy space to determine what inventions were patentable. The year 1996 ushered a new dispensation in patent law in Botswana with the enactment of the Industrial Property Act. This development was further cemented by the Industrial Property Act of 2010. Over the past fifty years, Botswana has actively participated in international and regional intellectual property organizations thereby being part of the norm setting and agenda setting in intellectual property. Botswana has also ratified and implemented most intellectual property conventions. The Industrial Property Act, 2010, is in tandem with international developments and it also enshrined WTO TRIPS flexibilities. Thus, it can be concluded that to a large extent there have been major and positive developments in patent law in Botswana.

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70 For a discussion on some challenges with the implementation of the paragraph 6 system, see S.A. Barbosa, "Implementation of the Doha Declaration: Its impact on American pharmaceuticals," *Rutgers Law Journal*, (2004), p. 205; D. Matthews, "WTO Decision on Implementation of Paragraph 6 of the Doha Declaration and Public Health: A solution to the Access to the Essential Medicines Problem?" *7 Journal of International Economic Law*, (2004), p. 73; D. Matthews, "From the August 30, 2003 WTO Decision to the December 6, 2005 Agreement on an Amendment to TRIPS: Improving Access to Medicines in Developing Countries," *2 Intellectual Property Quarterly*, (2006), p. 91.