

TRIPS FLEXIBILITIES AND THE EVOLUTION OF THE MOZAMBICAN INDUSTRIAL PROPERTY SYSTEM: PROSPECTS AND CHALLENGES FOR IMPLEMENTATION

Télio Murrure¹

ABSTRACT

This article aims to analyse the evolution of the Mozambican industrial property system. The research probes the level of adoption and implementation of the flexibilities provided in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) in the Mozambican industrial property system, bearing in mind the fact that Mozambique is a Least Developed Country (LDC) that joined the World Trade Organization (WTO) in 1994. The paper provides an overview related to the Mozambican industrial property system before the accession to WTO, and it subsequently addresses the compliance of Mozambique with general TRIPS obligations and then focuses on the adoption and implementation of TRIPS flexibilities within the context of the Mozambican industrial property legislation.

Key words: Industrial Property System, TRIPS, Flexibilities, Adoption, Implementation, compulsory licenses.

1. INTRODUCTION

Mozambique was colonized by Portugal and attained its political independence in 1975. Before and soon after independence it did not join any international intellectual property (IP) agreement. In 1994, Mozambique ratified the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS) and this became the first international legal Agreement related to Intellectual Property Rights (IPRs) that the country acceded to.²

TRIPS required the establishment of a minimum standards on copyrights and related rights (including computer programs and databases), trademarks,

geographical indications, industrial designs, patents, integrated circuits, and undisclosed information (trade secrets) for WTO member states.³ Such standards include the availability of rights as well as to their enforcement in sense that Member countries may not confer a lower level of protection than provided under TRIPS, in the same way as the Member states cannot be obliged to provide higher protection, as per Article 1.1.⁴ TRIPS brought specific obligations related to administrative and judicial procedures including, among others, provisions on evidence, injunctions, damages, measures at the border against counterfeiting, and penalties in case of infringement.⁵

The Mozambique accession to TRIPS gave raise to enormous obligations for the government in a context that there was no an IP system in Mozambique. In this regard, Mozambique took significant steps to comply with TRIPS, such as the adoption of the first Industrial Property Code post-independence in 1999⁶ and the establishment of the Industrial Property Institute (IPI) in 2003.⁷ Mozambique subsequently acceded to other international agreements on industrial property within the World Intellectual Property Organization (WIPO) framework such as the Paris Convention for the Protection of Industrial Property of 1883.⁸ At the regional level, Mozambique joined the African Regional Intellectual Property Organization (ARIPO)⁹ and acceded to the Harare Protocol for the Patents and Industrial Designs Registration of 1982.¹⁰

¹ Télio Murrure (Mozambique), Master's degree in Intellectual Property in the Institute of Peace Leadership and Governance - Africa University - AU (Zimbabwe). Degree in Law at Faculty of Law of Eduardo Mondlane University - UEM. Lawyer and Consultant at Sal & Caldeira Advogados, Lda - A Law Firm Member of DLA Piper Africa Group. Trademark and Patent Attorney. Lecturer of Intellectual Property Law at Polytechnic University and Technical University of Mozambique.

² Resolution of the Council of Ministers n.º 31/94 of 20 September 1994 adherence of Mozambique to the World Trade Organization.

³ Carlos M. Correa, *Intellectual Property Rights, the WTO and Developing Countries: The TRIPS Agreement and Policy Options* (Third World Network, 2000) 1.

⁴ Ibid 2.

⁵ Ibid 3.

⁶ Industrial Property Code approved by Decree n.º 18/1999 of 4 May (published in BR I Series - No. 17 of 4 May 1999).

⁷ National Institute of Industrial Property, established by Decree n.º 50/2003 of December 24, (published in BR I Series - No. 52 of 24 December 2003).

⁸ Mozambique ratified the Paris Convention on 1997 through the Resolution of the Council of Ministers n.º 21/97 of 12 August 1997, authorizing the ratification of Paris Convention for the Protection of Industrial Property of 20 March 1883.

⁹ Resolution of the Council of Ministers n.º 34/99 of 16 November, authorizing the adherence of Mozambique to Lusaka Agreement, which established African Regional Intellectual Property Organization.

¹⁰ ARIPO, *Compendium of ARIPO Basic Documents, Containing the Lusaka Agreement, Harare Protocol, Banjul Protocol and Swakopmund Protocol*, (2014 Edition, 2014), 5.

As other LDCs, the Mozambican socio-economic challenges determined the needs to strike a reasonable balance between the interests of the IPR owners and the public interest such as public health, food security and knowledge access. In this sense, for most of African countries IP has often been considered as an obstacle to access to essential goods and services which are protected by the IP system.¹¹

This article attempts to portray the context and circumstances, which influenced Mozambique's accession to TRIPS, and how the country has attempted to comply with the TRIPS obligations. On the other hand, how the flexibilities have been used to strike a balance between the IPRs protection and the public interests.

The remainder of the paper is organized as follows: The first section provides an overview of the Mozambican industrial property system before the accession to the TRIPS Agreement. The second deals with the general compliance of Mozambique with TRIPS minimum standards. The third section then focuses on the adoption and implementation of TRIPS flexibilities within the context of the Mozambican industrial property legislation. The fourth section shall focus on some relevant aspects related to the issuance of the compulsory licence in Mozambique, given the pros and cons around it, considering that various African countries rely on this TRIPS flexibility. And finally, a conclusion and some salient recommendations will then be drawn from the foregoing.

2. MOZAMBIKAN INDUSTRIAL PROPERTY SYSTEM BEFORE TRIPS

The history of the development of the Mozambican industrial property system runs parallel with its colonial

history, independence and post-independence. During the first millennium, Bantu speakers migrated to Mozambique, and subsequently Arab and Swahilis traders settled the region and later Portugal initiated the colonization process in 1505.¹²

During the colonial period, the industrial property system was much active compared to the period immediately after independence. This can be attributed to the fact that during colonialism, the management of the system was guaranteed by a local department through the Pre-Registration System, which consisted of the first registration made in Portugal and subsequently extended to Mozambique.¹³ This mechanism has negatively influenced the Mozambican industrial property system by discouraging local creativity and concentrating the competence of attribution and management of industrial property rights in the metropole - Portugal.¹⁴ In this sense, during this period, only Portugal was able to reap the benefits from the established industrial property system.

After the proclamation of independence in 1975, Mozambique inherited the weaknesses related to inadequate expertise to implement the Industrial Property Code adopted during the colonial period.¹⁵ The proclamation of independence also culminated with the adoption of the first Constitution of Mozambique inspired by the ideology of collective ownership, being that this did not include any provision on IP.¹⁶

The government in power shortly after independence gave itself the tripartite role, namely the role of planner, regulator and producer. The planning role consisted in the fact that it was responsible for designing the plans, programs and strategies for socio-economic development

¹¹ George M. Sikoyo, Elvin Nyukuri and Judi Wakhungu, *Intellectual Property Protection in Africa: Status of Laws, Research and Policy in Ghana, Kenya, Nigeria, South Africa and Uganda*, (Acts Press, 2006) 5. <https://www.africaportal.org/documents/12653/ecopolicy16_1.pdf>, accessed 29 May 2018.

¹² Fernando dos Santos, Julieta Nhane and Filipe Siteo, *African Copyright and Access to knowledge Project ACA2K Country Report – Mozambique – Chapter 6 Access to Knowledge in Africa: The role of Copyright* (the International Development Research Centre (IDRC), the Shuttleworth Foundation and the LINK Centre,

Graduate School of Public and Development Management (P&DM), Wits University 2009). 8. <https://www.fakongjian.com/int_doc/laws/20160601/2133/mz023en20160601213305.pdf> accessed 08 May 2018.

¹³ Télió Murrure, *Direito da Propriedade Intelectual* (W Editora, 2017) 114.

¹⁴ Ibid.

¹⁵ Industrial Property Code - Approved by the Decree nº 30.679 of 24 August 1940, which became applicable to Mozambique further to enactment of 'Portaria' n.º 17043 of 20 February 1959.

¹⁶ Dos Santos, Nhane and Siteo (n 10) 16.

of the country. In the regulatory role, it determines the conditions and the actions of the various economic agents; and in the role of producers, it is responsible for providing all products and services to satisfy the collective needs.¹⁷ Within this frame, industrial property matters were not considered a priority notwithstanding the inherited Industrial Property Code.¹⁸

The nationalised economic model was characterised by lack of sustainability since the country was plunged in an economic crisis around 1980. In this context, Mozambique turned to the international community for the aid. Capitalist economies, such as the United States and other western countries expressed interest in making donations. It raised the needs for economy shift towards a market-oriented economy and Mozambique joined the International Monetary Fund and World Bank.¹⁹

The alteration of the economic approach was sealed by the constitution approved in 1990, which brought a radical transformation, in the social, economic and political landscape.²⁰ The 1990 constitution was the first to establish the protection of IP in Mozambique.²¹

The end of the civil war in 1992, and the first multi-party and democratic elections in 1994 culminated in the election of the first government. The elected government prioritized IP as a tool for economic development. In this regard, the Ministry of Industry, Trade and Tourism carried out a series of actions to empower IP.²²

It is important to note that during that period, Mozambique was not bound to any international agreements related to IP. There was no institutional

framework, and the only IP legislation available was the Industrial Property and Copyright Codes inherited from the colonial period. The inherited industrial property code focused, essentially, on the Portuguese context and not necessarily on the Mozambican reality.

3. THE GENERAL COMPLIANCE OF MOZAMBIQUE WITH TRIPS MINIMUM STANDARDS

The establishment of World Trade Organisation (WTO) and the roping in of IPRs in world trade through TRIPS provided minimum standards for the protection of IPRs. The developments brought new challenges for the Sub Saharan African countries, since IP was intricately linked to trade, competition, industrial growth and economic development.²³ African countries generally subscribed to the WTO and attempted steps towards complying with its rules out of compulsion occasioned by their needs to participate in the international trade system.²⁴

The Mozambican accession to WTO and the implementation of TRIPS may also be seen within this context of globalization since the country aspiration was to align itself in the race to secure a place in the international trade system.²⁵ This is one of the cases if considering that in 1994, the first democratically elected government aimed at redefining the direction of the country in terms of socio-economic and political policies.

Neither did TRIPS constitute a uniform law nor it was an exhaustive codification of IPRs at the international level. In fact, TRIPS merely dealt with some IP issues and left out many other aspects on which consensus was not reached.²⁶ While for the Developed Countries TRIPS

¹⁷ Council of Ministers, *National Intellectual Property Strategy: 2008 - 2018, approved in 23.^ª Ordinary Session of Council of Ministers, in 28 August 2007* (2007). P 190.

¹⁸ Dos Santos, Nhane and Siteo (n 10) 16.

¹⁹ Joseph Hanlon and Teresa Smart, *Há Mais Bicicletas – Mas Há Desenvolvimento?* (Missanga Ideias & Projectos Lda, 2008) 35.

²⁰ The 1990 Mozambican constitution was the second one approved after the independence and is the one which brought a new vision on the economic and political ground since it has established the multiparty system in substitution of the mono party system and established the open market system in substitution of the centralized system.

²¹ Article 7 of 1990 constitution establish that: "1. Every citizen shall have the right to freedom of scientific, technical, literary and artistic activity." 2. The State shall protect the rights inherent in

intellectual property, including copyrights, promote and practice the diffusion of letters and the arts."

²² Joseph M Wekundah, *A study on Intellectual Property Environment in Eight Countries, Swaziland, Lesotho, Mozambique, Malawi, Tanzania, Uganda, Kenya and Ethiopia*, (African Technology Policy Studies Network, Working Paper Series n. 9 66, 2012) 52.

²³ Sikoyo, Nyukuri and Wakhungu (n 9) 1.

²⁴ Adronico Adede, *Trips and Development: Origins and History of the TRIPS Negotiations*, (ICTSD, 2003) 30.

²⁵ Murrure (n 11) 122.

²⁶ Carlos Correa, *The TRIPS Agreement and Developing Countries: The World Trade, Legal Economic and Political Analysis*, (2005), 19.

https://www.researchgate.net/publication/227107105_The_T

minimum standards are deemed crucial in order to mitigate the piracy and counterfeiting that may affect negatively their industries, for LDCs TRIPS impositions are less obvious.²⁷ The statistics of Patent Cooperation Treaty indicate that most of patent applications come from North America and Europe, it may be the reason for discussions in some African countries in relation to what extend the IPRs may be seen as barriers for accessing medicines and other essential goods and services, considering the critical socio economic challenges of LDC's like Mozambique.²⁸

In this regard, Mozambique's accession to TRIPS was unavoidable since the establishment of the WTO almost coincided with the establishment of the first government in Mozambique, which had the mission to guide the country to socio-economic stability.²⁹ This also implied, somehow, the need for the government to take decisions which appeared, at the moment, to be efficacious in pulling the country along the economic competitiveness path. With the view to enable TRIPS compliance, Mozambique adopted three Industrial Property Codes, the first was approved in 1999, the second in 2006³⁰ and the last in 2015.³¹

Compliance of Mozambique with TRIPS may be questionable bearing in mind that, theoretically, TRIPS make more sense for stronger economies since it may be a relevant tool to their industrialised realities. Compliance was, however, understandable due to the Mozambican context at the time, given that the social, economic and political circumstances did not give room to different decision.

Sihanya citing Gervais, explains that TRIPS addresses, essentially, about seven doctrines, namely copyright and related rights, trademarks, geographical indications, industrial designs, patents, layout designs (logo graphics) of integrated circuits and protection of undisclosed information.³² The Mozambican industrial property system has provided for the majority of TRIPS doctrines.

The 1999 Industrial Property Code provides for trademarks regime, as well as the 2006 and 2015 Industrial Property Code. Besides, the 1999 Industrial Property Code and the 2006 Industrial Property Code mention geographical indications and appellation of origin as one of the industrial property categories, however, they did not provide for an exhaustive regulation about it. In 2009 the government approved a sui generis instrument to cover that aspect.³³ This autonomous regulation was repealed with the entering into force of the 2015 Industrial Property Code, given that it incorporated, entirely, the content of the Regulation of Appellation of Origin and Geographical Indications.³⁴ The 1999 Industrial Property Code also provided for an industrial designs regime, this is also the case of the 2006 and 2015 Codes. The patent regime was provided for in the three Industrial Property Codes. In addition, the Mozambican industrial property system provides for the protection of undisclosed information as trade secrets. The 1999 Industrial Property Code did not provide for the protection of trade secret. The 2006 and 2015 Industrial Property Codes provide for provisions of protection of trade secret. However, none of the Mozambican Industrial Property Codes has provided for layout designs of integrated circuits, and it is not protected through a sui generis system.

[RIPS agreement and developing countries](#)> accessed 1 June 2018.

²⁷ Paul J Heald, *Moving the playing field: addressing information distortion and asymmetry in the TRIPS game*, (88 Minnesota Law Review Foundation 249, 2003) 1.

²⁸ Sikoyo, Nyukuri and Wakhungu (n 9) 8.

²⁹ Murrure (n 11) 122.

³⁰ Decree n. ° 4/2006 of April 12, approving the Industrial Property Code (published in BR I Series – n. ° 15 of 12 April 2006).

³¹ Decree n. ° 47/2015 of 31 December, approving the Industrial Property Code (published in the BR I Series – n. ° 104 of 31 December).

³² Ben Sihanya, *Intellectual Property and Innovation Law in Kenya and Africa: Transferring Technology for Sustainable Development*, (Sihanya Mentoring & Innovative Lawyering, 2016) 64.

³³ Decree n. ° 21/2009 of 3 June, approved the Regulation of Appellation of Origin and Geographical Indications (published in BR I Series – n. ° 22 of 12 June 2009).

³⁴ In May 2018 the industrial property institute has concluded the process of the registration of the first Mozambican geographical indication, namely the Tete's Goat – "*Cabrilo de Tete*."

Apart from the doctrines aforementioned, TRIPS demands for specific obligations related to administrative and judicial procedures, including, among others, provisions on evidence, injunctions damages, measures at the border against counterfeiting, and penalties in case of infringement.³⁵ In this regard, Mozambique has given competence for the specialized sections of the Judicial Provincial Courts (that is the Sections of Trade Matters) to deal with the litigation related to IP.³⁶ From an administrative point of view, the National Inspection of Economic Activities has the competence to enforce the infringements of the industrial property rights and according to the IPI, customs agents have systematically been trained so that they may be able to enforce counterfeit goods in the Mozambican borders.

The compliance of Mozambique to TRIPS doctrines may be confronted in the table below, as follows:

Enforcement

Generally, in terms of enforcement, TRIPS provide for Administrative measures, Civil Enforcement, Criminal Action and Alternative Dispute Resolution. The Mozambican jurisdiction provides for administrative enforcement through the IPI and National Inspection of Economic Activities, Civil enforcement is provided by the three industrial property codes, Criminal enforcement is, somehow, provided by the Penal Code. And apart from the judicial courts, alternatively the IP disputes may be addressed in the arbitration, conciliation and mediation forum. Finally, the boarder measures are under the responsibility of customs agents.

4. ADOPTION AND IMPLEMENTATION OF TRIPS FLEXIBILITIES

From the establishment of TRIPS, there has been political and economic pressure for the increase of IP protection and awareness in LDCs, and such pressures have had

implications for the industrial property system, especially when it comes to policies in LDCs.³⁷ The strengthening of the system to the levels that are more suitable for Developed Countries brought certain gaps and there are reflections of this in the Mozambican system. The Mozambican IP Strategy provides that its main objective is to create an environment where the results of scientific research are utilized to improve the scientific, technological, economic, cultural and social development.³⁸ This strategy also states that IP is a tool that may be used to stimulate and protect creativity and innovation to promote the country's economic, scientific, technological and cultural development.³⁹

The Mozambican industrial property system has taken cue and provided for some of the TRIPS flexibilities, namely, compulsory license, parallel importation, and transitional periods. And it also adopted other mechanisms that may be deemed as flexibilities, namely utility model. The specificities of these flexibilities in Mozambique are addressed in much detail below.

4.1. Exhaustion Regime and Parallel or Grey Imports

The exhaustion of rights is founded in the fact that exclusive rights lapses after the first sale act of distribution.⁴⁰ The idea behind is related to a fact that once a person has legitimately obtained an item protected, such person is entitled to sell, transfer or distribute this item without asking for authorization of the right holder.⁴¹ The exhaustion of IPRs may vary according to national, regional and international modalities. Article 6 of TRIPS states that member states have the sovereignty to adopt any exhaustion modality according to its priorities and context.⁴²

The flexibility of parallel importation is linked with the exhaustion modality. In case of Mozambique, the

³⁵ Correa (n 3) 2.

³⁶ Murrure (n 11) 283.

³⁷ Jeremy de Beer, Chidi Oguamanam and Tobias Schonwetter, *Innovation, Intellectual Property and development Narratives in Africa, Innovation & Intellectual Property: Collaborative dynamics in Africa*, (UCT Press, 2014) 2.

³⁸ Council of Ministers (n 15) 18.

³⁹ Fernando dos Santos and Simão Pelembe, *The state of Biofuel innovation in Mozambique, Innovation & Intellectual Property: Collaborative Dynamics in Africa*, (UCT Press, 2014) 254.

⁴⁰ World Trade Organization, *A Handbook on the WTO TRIPS Agreement*, (Cambridge University Press, 2012) 18.

⁴¹ *Ibid.*

⁴² Correa (n 3) 83.

industrial property system has adopted a national exhaustion regime. This is evidenced by the fact that the three Mozambican Industrial Property Codes adopted the following provision:

‘The following shall not be within the scope of the patent: (...) b) Acts related to products placed on the market in Mozambique by the proprietor of the patent or so placed with the proprietor’s consent; (...)’

Most African countries would like to protect their consumers and third parties arguing that their laws provide that once a patentee has authorized a manufacture or sale, anywhere in the world the patentees’ rights are exhausted.⁴³ The national exhaustion regime adopted by Mozambique is more suitable for Developed Countries considering their interest in enforcing the IPRs all over the world.⁴⁴

Parallel imports take place when a third-party import and sells IPRs protected products from a country where they were lawful distributed by a right holder to another country with the rights holder’s permission.⁴⁵ This flexibility makes sense when we face differential pricing of a product in different markets. It may happen as result of local manufacturing costs, market conditions, among other factors. Thus, there are several advantages of allowing parallel imports, principally for LDCs.⁴⁶

Considering the above scenario, we realize that the advantages of parallel imports may be obvious to Mozambique. First, in the public health context, the importation of a patented medicine from a country where it is sold at a lower price will enable more patients in an importing country to gain access to the product. Second, at the same time, the patentee is not prevented from receiving the remuneration for the patented invention in the country where the product was first sold.⁴⁷

It is possible to argue that the WTO should impose on all WTO members a generalized and compulsory system of international exhaustion without any possibility to rely on national or regional regimes to boost economic integration of all WTO member states.⁴⁸

4.2. LDC Transition Periods

There are substantive flexibilities and time-based flexibilities.⁴⁹ TRIPS offered member states transitional periods so that they could accomplish the obligations stated in the agreement, and such transitional periods vary according to the stage of development of each country.⁵⁰ The transitional period was essential for many LDCs since it allowed them to introduce new legislation and adapt the economic sector to the regulation derived from the IP legal framework.⁵¹ TRIPS came into force on 1 January 1996 for Developed Countries, on 1 January 2000 for Developing Countries and finally on 1 January 2006 for LDCs.⁵² Transitional periods constitute a modality of flexibility that deals with time arrangements in order to permit local preparation so that the country may be able to fully comply with TRIPS obligations.

The dates of transitional periods were changed in the WTO Ministerial Conferences of Doha and Hong Kong.⁵³ As a result of the Doha Declaration, which focused on TRIPS and Public Health, it was decided in 2002 that the LDCs transitional period in respect to pharmaceutical products would be extended to 1 January 2016, and then it was extended to 1 January 2033. In parallel, upon a request in 2005, the LDCs transitional period for the application of all other provisions of TRIPS, with exception of Article 3 to Article 5 regarding non-discrimination, was also extended until 2013 and then until 2021.⁵⁴

The implementation of IP legal and policy framework requires a supportive infrastructure, which includes

⁴³ Sihanya (n 30) 129.

⁴⁴ Ibid.

⁴⁵ Leonel Bentley and Brad Sherman, *Intellectual Property Law*, (3rd Edition, Oxford University Press, 2009) 14 – 15.

⁴⁶ World Trade Organization (n 38) 19.

⁴⁷ Ibid.

⁴⁸ Enrico Bonadio, *Parallel Imports in a Global Market: Should a Generalised International Exhaustion be the Next Step?* European

Intellectual Property Review, (Vol. 33, No. 3, 2011) 156 <<https://ssrn.com/abstract=1762900>> accessed 29 June 2018.

⁴⁹ Dos Santos, Nhane and Siteo (n 10) 19.

⁵⁰ World Trade Organization (n 38) 21.

⁵¹ Correa (n 3) 10.

⁵² Sihanya (n 30) 64.

⁵³ Ibid.

⁵⁴ World Trade Organization (n 38) 23.

trained personnel, office resources, judicial and legal practitioners. The industrial property legislation must be aligned with the other imperatives such as trade, economic growth and competitiveness.⁵⁵ It is noteworthy, however, that the issue of unavailability of local production of medicines is largely beyond the industrial property system. As such, according to the Mozambican Ministry of Health, most of the medicines in the national health system are imported given the weakness of the local capacity of producing medicines.

4.3. Utility Models

TRIPS do not provide for the protection of utility models.⁵⁶ Citing Correa, Sihanya explain that under article 27 of TRIPS, member states are free to shape a system in accordance with its own reality, meaning that utility model may be a sui generis regime. Utility models are also seen as an alternative to the patent regime since their requirements are less rigid than patents requirements.⁵⁷

This industrial property category differs from patents because it does not demand for stronger requirements (like inventive step required for patentability) and it has a shorter term (patent duration is 20 years while utility model duration is 15 years in the Mozambican legislation).⁵⁸ A utility model is also less expensive and quicker to obtain.⁵⁹

The three Mozambican Industrial Property Codes provided for utility model protection. This mechanism may address the inventions of small dimension if its novelty is examined nationally, involving an inventive step and capable of industrial applicability. This could be a useful alternative for the Mozambican context since it tries to overcome the rigidity of the patent system.

The Mozambican manufacturing capacity and the research activities are limited and would benefit more from the lower standards of invention as found in utility models. Most registered patents in Mozambique are not local. In 2017, 20 patents were registered through National System, 1 through Paris Convention, 25 through Patent Cooperation Treaty and 519 through Harare Protocol.⁶⁰

The Small and Medium Enterprises (SMEs) constitute an important entrepreneurship block in Mozambique, covering 98.6% of the Mozambican market. Thus, the economic growth, increase of employment rates and reduction of poverty depend on boosting the SMEs.⁶¹ Utility model addresses properly the dynamics of SMEs given the non-hardship of the protection requirements, thus, with this option the Mozambican SMEs could be able to enhance their innovation capacity and get it protected through an easier legal procedure.⁶²

Other flexibilities such as bolar exceptions were not adopted in law because as a matter of fact they demand for technical capacity when it is coming to researching capacity, which Mozambique still largely lacks in.

4.4. Compulsory License

Compulsory license is an authorization given by the government entity to a person who is not the patent holder, so that this person may produce, import, sell or use the patent protected product without prior consent of the patent holder.⁶³ TRIPS provide for this flexibility in Article 31 and the original designation is “use without

⁵⁵ Sikoyo, Nyukuri and Wakhungu (n. 9) 14.

⁵⁶ Sihanya (n 30) 139.

⁵⁷ Murrure (n 11) 200.

⁵⁸ World Intellectual Property Organization, *WIPO Intellectual Property Handbook*, (WIPO Publication, 2004) 40.

⁵⁹ Sihanya (n 30) 137.

⁶⁰ Information provided by the Trademark and Patents Directorate of the Mozambican Industrial Property Institute.

⁶¹ Baker Tilly Moçambique, *PME em Moçambique: Oportunidades e Desafios*, (Mozambique Support Program for Economic and Enterprise Development - Speed 2014), 21. <<https://pt.scribd.com/document/361725742/Relatorio-PME->

> accessed 6 May 2018.

⁶² In Mozambique, while for patent application the timeframe for registration is about 22 months the utility model registration takes about 6 months. While the cost for patent application costs about 5.400,00 Meticals, the application for utility model costs about 1.850,00 Meticals. In addition to that, the inventive is required for patentability while the utility model regime does not impose the inventive step since it just deals with small innovation around already patentable products, systems and process. See Murrure (n 15) 202 – 203.

⁶³ World Trade Organization (n 38) 109.

authorization of the right holder".⁶⁴ The three Mozambican Industrial Property Codes provide for it. In all codes, the issuance of compulsory license is justified by public interest whenever it is of great importance to public health, national defense and technological development.

However, the only issuance of a compulsory license in Mozambique was in 2004 to Pharco Mozambique, a local company. The justification was the need to address the very critical situation of extreme urgency related to HIV/AIDS through retroviral drugs, namely stavudine, lamivudine and nevirapine.⁶⁵ With approximately 29 million people, Mozambique has a national HIV prevalence that is estimated at 11.5%, with substantial variation in regional prevalence ranging from 17.8% in the Southern Region to 5.6% in the Northern Region.⁶⁶ However, in the case of Mozambique, there are not evidences that the issuance of the compulsory license in 2004 has contributed to the reduction of the HIV national prevalence. In fact, the initiative was abandoned because of the higher price of active pharmaceutical ingredients, which rendered the production economically unfeasible.⁶⁷ It is noteworthy that, surprisingly there were no patents for such products in Mozambique thus bringing into question the validity and enforceability of the compulsory licence.

As a matter of fact, the issuance of the compulsory license by the Mozambican authorities in 2004 deserves a special analysis either by the context in which it was issued or by the degree of compliance of the requirements for it to be issued, but above all, because it is the only TRIPS flexibility which was effectively implemented to address public health in Mozambique. In this manner, this part will probe

the efficacy and the fulfilment of the requirements in relation to the option of the Mozambican authorities relying on this mechanism.

The issuance of a compulsory licence resembles a prohibition to the patent owner on excluding third parties to work its patent under a decision of the national authority based on the safeguarding of public interest.⁶⁸ This mechanism is provided by Article 31 of TRIPS as "other use without the authorization of the right holder", being an exceptional situation through which a patent may be exploited.⁶⁹ This provision covers both compulsory licences granted to third parties for their own use and use by or on behalf of government without the authorization of the right holder.⁷⁰

Many African countries are keen to have the power of granting compulsory license to the pharmaceutical products.⁷¹ These licenses are relatively common in the African countries however, are not publicized.⁷² The notable cases of compulsory license issuance in Africa took place between 2001 and 2005, for instance South Africa in 2001, Zimbabwe in 2002, Mozambique, Swaziland and Zambia in 2004, Cameroon, Ghana, Guinea, Eritrea in 2005.⁷³ On the other hand, the purpose of the compulsory license issuance in those countries are related to importation and manufacturing of pharmaceutical, for instance Ghana, Guinea, Eritrea for importation, Cameroon for importation and manufacturing, Zimbabwe to import, Mozambique and Zambia for manufacturing.⁷⁴

Considering the international legal framework, namely the CUP and TRIPS, virtually all countries around the world allow compulsory license in their national

⁶⁴ Ibid.

⁶⁵ Dos Santos, Nhane and Siteo (n 10) 19.

⁶⁶ U.S. President Emergency Plan for AIDS Relief, *Mozambique Operational Plan (COP/ROP) 2017, Strategic Direction Summary* (2017). 5. <https://mz.usembassy.gov/wp-content/uploads/sites/182/2017/04/SBU_Moz-SDS-2017_3.02.17-SUBMITTED-v2-PUBLIC-1.pdf> accessed 2 March 2018.

⁶⁷ Patrick Lumumba Osewe, Yvonne Korkoi Nkrumah, Emmanuel Sackey, *Improving access to HIV/AIDS medicines in Africa: Trade-Related Aspects of Intellectual Property Rights (TRIPS) flexibilities utilization*, (The World Bank, 2008) 17.

⁶⁸ Nuno Pires de Carvalho, *The TRIPS Regime of Patent Rights* (Kluwer Law International, 2002), 231.

⁶⁹ Correa (n 3) 241.

⁷⁰ World Trade Organization (n 38) 109.

⁷¹ Sihanya (30) 65.

⁷² James Packard Love, *Recent Examples of the Use of Compulsory Licenses on Patents*, (Knowledge Ecology International, Research Note 2, 2007), 15-17. <https://www.keionline.org/misc-docs/recent_cls_8mar07.pdf> accessed 10 May 2019.

⁷³ Ibid.

⁷⁴ Love (n 70) 15 – 17.

legislation.⁷⁵ Mozambique therefore is part of those agreements thus, may utilize this flexibility specially to address situations of public interest.

According to the wording of the compulsory license n. 9 01/MIC/04, the government of Mozambique decided to grant it based on its quality of WTO member, thus bound by TRIPS.⁷⁶ The foreword of TRIPS suggests that the special needs of LDCs were taken into account given that it conferred maximum flexibility in the domestic implementation of laws and regulations capable to enable these countries to create technological base and strike balance between IP and public interest.⁷⁷ Article 7 and 8 of TRIPS transmits the idea that, at least theoretically, TRIPS aimed to safeguard sensitive matters such access to food, to medicines and to knowledge, especially for LDCs like Mozambique.⁷⁸

The possibility of issuing a compulsory license by WTO members was always available in TRIPS however, this issue was enhanced by the Doha Declaration in sense that the concern of World Health Organization and WTO was to amplify the access to medicines to address diseases such as HIV AIDS, tuberculosis, malaria among others.⁷⁹ Doha Declaration has drawn the grounds under which the WTO members may apply for compulsory licences, namely: (i) national or situation of extreme emergency, (ii) dependency of patents, (iii) licences to remedy anti-competitive practices, (iv) lack of or insufficient working of the patent, (v) refusal to deal, (vi) public interest and public health. However, such grounds ought to be prescribed under national patent law.⁸⁰

Article 92 of the Mozambican Industrial Property Code prescribe that an invention may be exploited by authorization of the Minister of Trade and Industry without consent of the patent holder, to address public interest, according to this article the invention deemed to public interest whenever it is of fundamental relevance to the following situations: (i) public health, (ii) national defence and (iii) economic and technological development. In fact, the ground mentioned by Mozambican authorities to grant the compulsory n. 01/MIC/04 was the extreme emergency. The declaration of the emergency may be done either by a competent authority or by the authority which grant the compulsory licence.⁸¹ The Mozambican Industrial Property Code does not point the authority with competence to declare such emergency, in this case, the extreme emergency was declared by the competent authority to grant compulsory licence namely the Ministry of Trade and Industry.

There are different approaches on whether the compulsory licences are capable of boosting dissemination of patented technologies. Some argue that it is crucial to foster transfer of technology from industrialized countries to LDCs. Others defend that it harms patent holders, depriving them of exclusive rights on their own invention apart from reducing the incentives for LDCs to invest in research and development.⁸² Other argument is that compulsory licence issuance might even be useless in scenarios that patentees have developed and not disclosed in the application, a significant know how on how to work the invention. In such cases there is

⁷⁵ Esther Van Zimmeren and Geertrui Van Overwalle, *Compulsory Licence Regimes for Public Health in Europe* (Center for Intellectual Property Rights), 8. <<https://www.eolss.net/Sample-Chapters/C17/E6-58-10-05.pdf>> accessed 8 May 2019.

⁷⁶ See translated text of the compulsory licence available at: <<http://cptech.org/ip/health/c/mozambique/moz-cl-en.pdf>> accessed 10 May 2019.

⁷⁷ Correa (n 3) 217.

⁷⁸ Murrure (n 11) 125.

⁷⁹ Carlos Correa, *Implications of the Doha Declaration on TRIPS Agreement and Public Health*, (University of Buenos Aires, 2002) 5.

<<https://apps.who.int/medicinedocs/pdf/s2301e/s2301e.pdf>> accessed 9 May 2019.

⁸⁰ Carlos Correa, *Guide for the Application and Granting of Compulsory Licences and Authorization of Government Use of Pharmaceutical Patents*, (World Health Organization, 2009) 9. <<http://apps.who.int/medicinedocs/documents/s19902en/s19902en.pdf>> accessed 10 May 2019.

⁸¹ Ibid.

⁸² Enrico Bonadio, *Compulsory Licensing of Patents: The Bayer/Natco Case* (European Intellectual Property Review, Issue, 2012) 12. <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=215747> accessed 9 May 2019.

no possibility to materialize the alleged transfer of technology.⁸³

In case a WTO member decides to apply for and grant a compulsory licence, there is a need to observe the respective formalities. One of the main preconditions for the application of a compulsory licence is that the required product is patented and the purchasing party is seeking to obtain the product from the source of different patent owner of his licensees or other authorized parties.⁸⁴ If the product is not patent-protected in the country where the importation will occur, there is no limitation to import such product.⁸⁵ It means that there are principles and rules which should be followed by WTO member to grant a compulsory licence given that it constitutes an exceptional procedure.

Patents are territorial, being valid only in the countries where they have been applied for and granted, it means that there is no need to apply for a compulsory licence if the patent is not in force in the country of importation irrespective of the existence of such patent in other countries.⁸⁶ The relevant issue for applying for a compulsory licence is to determine the existence of enforceable patents in the importing country.⁸⁷ The most practical way to verify whether a relevant and valid patent exists and whether a compulsory licence is needed is to consult the patent office. The point is that, industrial property offices may take much time to undertake the search and, in many cases the results may not be conclusive due to the lack of appropriate records.⁸⁸

One of the curiosity in the issuance of the compulsory licence in Mozambique is that, according to information given by the Mozambican Industrial Property Office, the compound under which the compulsory licence was granted was not even patented, in the moment it was granted.⁸⁹ The wording of the compulsory licence n. ° 01/MIC/04 states that:

“Considering further that a triple compound of lamivudine, stavudine and nevirapine has proved, in the last few years, to be one of the most effective and economical anti-retroviral treatment, but the three different international owners of such single drugs failed to reach an agreement to produce this combination.”

Since patents are territorial in nature there should be no automatic assumption that a patent applied for or granted in a foreign country has been applied for or granted domestically.⁹⁰ The wording of the compulsory licence n. ° 01/MIC/04, then proceed stressing that:

“Therefore, the Ministry of Commerce and industry of the Republic of Mozambique, making use of the provision of article 70 n. ° 1 point b) of Decree n. ° 18/99 of 4 May, has decided to grant the compulsory licence n. ° 1/MIC/04 to the company Pharco Moçambique Lda, which has already presented a project for local manufacture of the mentioned triple compound under the names of PHARCOVIR 30 and PHARCOVIR 40.”

In attention to the fact that the Mozambican Industrial Property Office had not registration about any patents on the triple compound of lamivudine, stavudine and nevirapine conjugated with the fact that a legal entity, namely Pharco Moçambique Lda, drafted and submitted a project to manufacture it, it is believed that there was not need to grant a compulsory licence, contrary the company which was granted the compulsory licence could be assisted to carry out the manufacturing of this compound and subsequently protect it through patent in Mozambique and probably extend such protection abroad.

Other detail which raises attention is the one related to the moment in which the compulsory licence n. ° 01/MIC/04 was issued - 2004. LDCs has enjoyed special

⁸³ Ibid.

⁸⁴ Correa (n 77) 5.

⁸⁵ Ibid.

⁸⁶ Correa (n 77) 5.

⁸⁷ Correa (n 77) 7.

⁸⁸ Correa (n 77) 8.

⁸⁹ An open-ended interview to the head of patent and trademark services in the Mozambican Industrial Property Institute.

⁹⁰ Correa (n 77) 8.

situation because of the transitional periods, in this regard, the purchase and importation of such products could be made without compulsory licences.⁹¹ Mozambique, as LDC, was not bound by TRIPS obligations till 2005, however, the compulsory licence n.º 01/MIC/04 was issued in 2004, thus within the transitional period.

The issuance of the compulsory licence n.º 01/MIC/04 appears to be out of the requirements for it, either in terms of substantial requirements or in terms of timing requirements – transitional period.

Even if the requirements for applying for and granting of this licence were neglected, it would be possible to raise the question on whether such granting was efficacy or not. Proponents of compulsory licences only look at the issue in terms of diminution of consumer price, although what they fail to realise is that these benefits would be small in the long term.⁹²

The percentage of ARV distribution in the Mozambican hospitals was 2% in 2004, when the compulsory licence n.º 01/MIC/04 was issued and 65% in 2015.⁹³ However, this improvement is not necessarily related to the production of the compound under which the compulsory licence n.º 01/MIC/04 was granted to Pharco Moçambique, Lda given that the most visible attempt of local production of ARV in Mozambique is headed by a project sponsored by Brazilian government under the cooperation project started with an economic feasibility study which took place between 2005 to 2007 followed by effective action from 2008.⁹⁴ At present, the Combined Fixed Dose of ARV drug combinations available in the Mozambican health system is zidovudina (AZT), lamivudina (3TC) e abacavir (ABC).⁹⁵ While the compulsory licence n.º 01/MIC/04

focus on the combination of lamivudine, stavudine and nevirapine.

It gives the impression that the provision of compulsory licences stated in the Mozambican Industrial Property Code was not interpreted correctly, in sense that the attention was only given to the fact that situations related to public interest would be addressed by this mechanism, however the substantial and timing requirements were neglected. In addition to that, the manufacturing of the compound under which the compulsory license was issued was not effective.

5. CONCLUSION

Even though the colonial industrial property system in Mozambique was established to facilitate the interests of Portugal as the colonizer, the same system had an influence on the Mozambican industrial property system since it formed the initial basis of establishment of a local system. This is visible especially after independence in 1975 when the pre-colonial Industrial Property Code remained in force in Mozambique despite minimal application. The inadequacy in use was attributable to several factors including lack of awareness, inadequate human capital, institutional inefficiencies as well as non-prioritisation in political and economic policies. TRIPS therefore offered an opportunity for Mozambique to re-examine its system considering the need to comply with minimum TRIPS standards since subscription to WTO was necessary due to the government's desire to accede to the facilities of the international trademark.

The institutional framework was established in 2003 through the IPI because of the legal framework that had been established in 1999 with the approval of the first

⁹¹ Correa (n 77) 6.

⁹² Stephanie Skees, *Thai-ing up the TRIPS Agreement: Are Compulsory Licenses the Answer to Thailand's AIDS Epidemic?* (Pace International Law Review, Volume 19, 2007) 285. <<https://core.ac.uk/download/pdf/46711699.pdf>> accessed 6 March 2019.

⁹³ Ministério da Saúde, *Resposta Global à SIDA, Relatório do Progresso, Moçambique*, (Conselho Nacional de Combate ao SIDA, 2016) 28.

⁹⁴ Antonielli, A B, *Conferência Desafios da Investigação Social e Económicas em Tempos de Crise, a Transferência de Tecnologia*

do Brasil para Moçambique para a Fabricação Local de Medicamentos Genéricos: Condições Práticas de uma Cooperação em Saúde Pública e Tecnologia, (2017). <http://www.iese.ac.mz/wp-content/uploads/2017/11/VConfIESE_Antonielli.pdf> accessed 14 April 2019.

⁹⁵ Ministério da Saúde, *Tratamento Antirretroviral e Infecções Oportunistas do Adulto, Adolescente, Grávida e Criança*, (2016). <https://aidsfree.usaid.gov/sites/default/files/mz_tratamento_arv_infecoes.pdf> accessed 14 April 2019.

Industrial Property Code, then deeply altered in 2006 with entering into force of the second Industrial Property Code and finally revised in 2015 with the third Industrial Property Code which is still in force. All the instruments contain TRIPS minimum standards in terms of protection of IPRs at least for the doctrines of trademarks, geographical indications and appellation of origin, industrial designs, patents and protection of undisclosed information. However, there is no provision for layout design of integrated circuits.

The fact that Mozambique is an LDC confers the opportunity to use flexibilities to strike a balance between the IPRs minimum standards and the social economic challenges. Some flexibilities such as compulsory license, voluntary license, parallel imports, transitional periods and utility models were generally adopted in the Mozambican industrial property system. However, in the particular case of compulsory license it was not implemented in the best way since the requirements were not fulfilled, considering the prominent example of the issuance of the compulsory licence n.º 01/MIC/04 which appeared to be inopportune, the result has not met the expectation of Mozambican priorities. On the optimistic side, the Mozambican industrial property system has shown signals of consolidation notwithstanding the implementation of the TRIPS flexibilities not playing the desired role. To sum up, there is a need to redouble efforts to overcome lack of awareness, low capacity of local research and development policy.

EVOLUTION	DOCTRINES				
	Trademarks	Geographical Indications - Appellations of Origin	Industrial Designs	Patents	Protection of Undisclosed Information
TRIPS	<p>Scope Article 15 - Any sign or combination of signs, capable of distinguishing the goods or services.</p> <p>Duration Article 18 - No less than 10 years, renewable indefinitely.</p>	<p>Scope Article 22 - Indications which identify a good as originating in the territory of a Member, or a region or locality where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.</p> <p>Duration No time limitation.</p>	<p>Scope Article 25 - Industrial Designs that are new or original.</p> <p>Duration Article 26 - At least 10 years.</p>	<p>Scope Article 27 - Any inventions, if they are new, involve an inventive step and are capable of industrial application.</p> <p>Duration Article 33 - Shall not end before 20 years.</p>	<p>Scope Article 39 - Any information which is secret, have commercial value and have been subject to reasonable steps.</p> <p>Duration No time limitation.</p>
1999 Mozambican Industrial Property Code	<p>Scope Article 1, paragraph f) defines trademark as a distinctive sign clearly visible or audible, capable of graphic representation, allowing to distinguish products or services.</p> <p>Duration Article 105 - 10 years, renewable indefinitely.</p>	<p>Scope Silent on this doctrine.</p> <p>Duration Silent on this doctrine.</p>	<p>Scope Article 83 - Any set of lines, colors, or any shape in three dimensions, associated or not with lines or colors, provided that this set or shape gives a special aspect to an industrial or craft product. Also, it has to be new and not illegal or offensive.</p> <p>Duration Article 91- 7 years.</p>	<p>Scope Article 20 - Inventions which has novelty, inventive step and industrial applicability.</p> <p>Duration Article 62 - 20 years.</p>	<p>Scope Silent.</p> <p>Duration Silent.</p>
2006 Mozambican Industrial Property Code	<p>Scope Article 1, paragraph f) define Trademark as a distinctive sign clearly visible and or audible, capable of graphic representation, allowing to distinguish products or services from different companies.</p> <p>Duration Article 120 - 10 years, renewable indefinitely.</p>	<p>Scope Silent</p> <p>Duration Silent. However, in 2009 a separate regulation was approved, namely the Decree n. º 21/2009 of 3 June, approving the Regulation of Appellation of Origin and Geographical Indications.</p>	<p>Scope Article 98 - Define Industrial Design as any combination of lines or colours or three-dimensional form, which gives a new and original appearance to a product and serves as a model for the industrial or craft manufacture. Also, it has to be new and not illegal or offensive.</p> <p>Duration Article 107 - 5 years, renewable for the same periods up to a maximum of 25 years.</p>	<p>Scope Article 24 - Inventions which has novelty, inventive step and industrial applicability.</p> <p>Duration Article 66 - 20 years.</p>	<p>Scope Article 174 - information which is secret, have commercial value and have been subject to reasonable steps</p> <p>Duration No time limitation.</p>
2015 Mozambican Industrial Property Code	<p>Scope Article 1, paragraph i) defines a Trademark as a distinctive, clear visible, audible or olfactory sign, capable of being represented graphically and distinguishing the goods or services.</p> <p>Duration Article 139 - 10 years, renewable indefinitely.</p>	<p>Scope Article 1, paragraph c) and f) - Describes GIs as the name of a region, a specific place or in exceptional cases a country, which has become known as for the production, transformation, extraction or creation of a product or the rendering of a particular service. Appellations of Origin are defined as a name of a country, a region or a specific place used to designate a product originated in that country, region or place, whose qualities, characteristics or reputation are exclusively or essentially due to the geographical location, including either natural or human factors.</p> <p>Duration Art 164 - No time limitation.</p>	<p>Scope Article 105 - Define Industrial Design as any combination of lines or colours or three-dimensional form, which gives a new and original appearance to a product, provided that it is new and not illegal or offensive.</p> <p>Duration Article 118 - 5 years from the date of filling, renewable for the same periods up to a maximum of 25 years.</p>	<p>Scope Article 32 - Inventions which has novelty, inventive step and industrial applicability.</p> <p>Duration Article 73 - 20 years.</p>	<p>Scope Article 213 - information which is secret, have commercial value and have been subject to reasonable steps.</p> <p>Duration No time limitation.</p>

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