

All eyes on Africa

It is hard to ignore the strong signs of growth and potential in Africa. While South Africa is the powerhouse of the continent, other countries are building up steam as their patent systems improve

By **Cara DiSisto** and **Craig Kahn**

The eyes of the world were on Africa this past June for the 2010 FIFA World Cup. Even though Ghana was the only African country to make it past the group stage, the tournament, similar to the 2008 Olympic Games in Beijing, was a successful debut event for Africa.

In preparation for the tournament, South Africa improved its public transportation system within the host cities and implemented security measures to ensure guests' safety. A September 2010 survey conducted by the Democratic Alliance, the official opposition party to the ruling African National Congress, revealed that international tourists left the World Cup with a positive image of South Africa. Nearly 90% of guests visiting the country for the event found South Africans to be "very" or "extremely friendly" and hospitable, and despite what the media may have portrayed, fewer than 4% reported feeling only "somewhat unsafe" during their stay.

The McKinsey Global Institute's June 2010 report *Lions on the move: The progress and potential of African economics* also shed a positive light on Africa this year. It points out that Africa was the world's third-largest growing region between 2000 and 2008, recording an average 5% per year growth in gross domestic product (GDP). And by further transforming its agricultural sector, Africa could generate revenues of US\$500

billion a year by 2020, up from the current US\$72 billion a year.

While the media often paints a picture of Africa as a poor and corrupt region, the report highlights just how economically significant the continent is. In fact, the continent as a whole is the 12th largest economy in the world. The report estimates US\$1.671 trillion of potential wealth and additional production potential in six key sectors: agriculture; water; fisheries; forestry; tourism; and human capital. This represents a combined market size of US\$909 billion, with US\$762.4 billion of additional production potential. The report also estimates current stocks of extractable energy resources (oil, natural gas, coal and uranium) to be worth between US\$13 trillion and US\$14.5 trillion.

As reports of Africa's growth and economic potential file in, it is increasingly apparent that Africa is a critical region for multinationals to consider in their international patent filing strategies.

A strong foundation

The African patent system has undergone much transformation over the years. Consider that the South African Patent Act was passed in 1978 and Angola became a member of the Patent Cooperation Treaty (PCT) and Paris Convention as recently as 2007. Comparatively, the modern US patent system is over 200 years old. However, many African countries have recently updated and modernised their patent systems to bring them into line with international agreements/obligations and first world patent systems.

Historically, patent protection in Africa came by way of automatic protection through extension of rights from former colonial powers, patents of importation or re-registrations of granted patents from



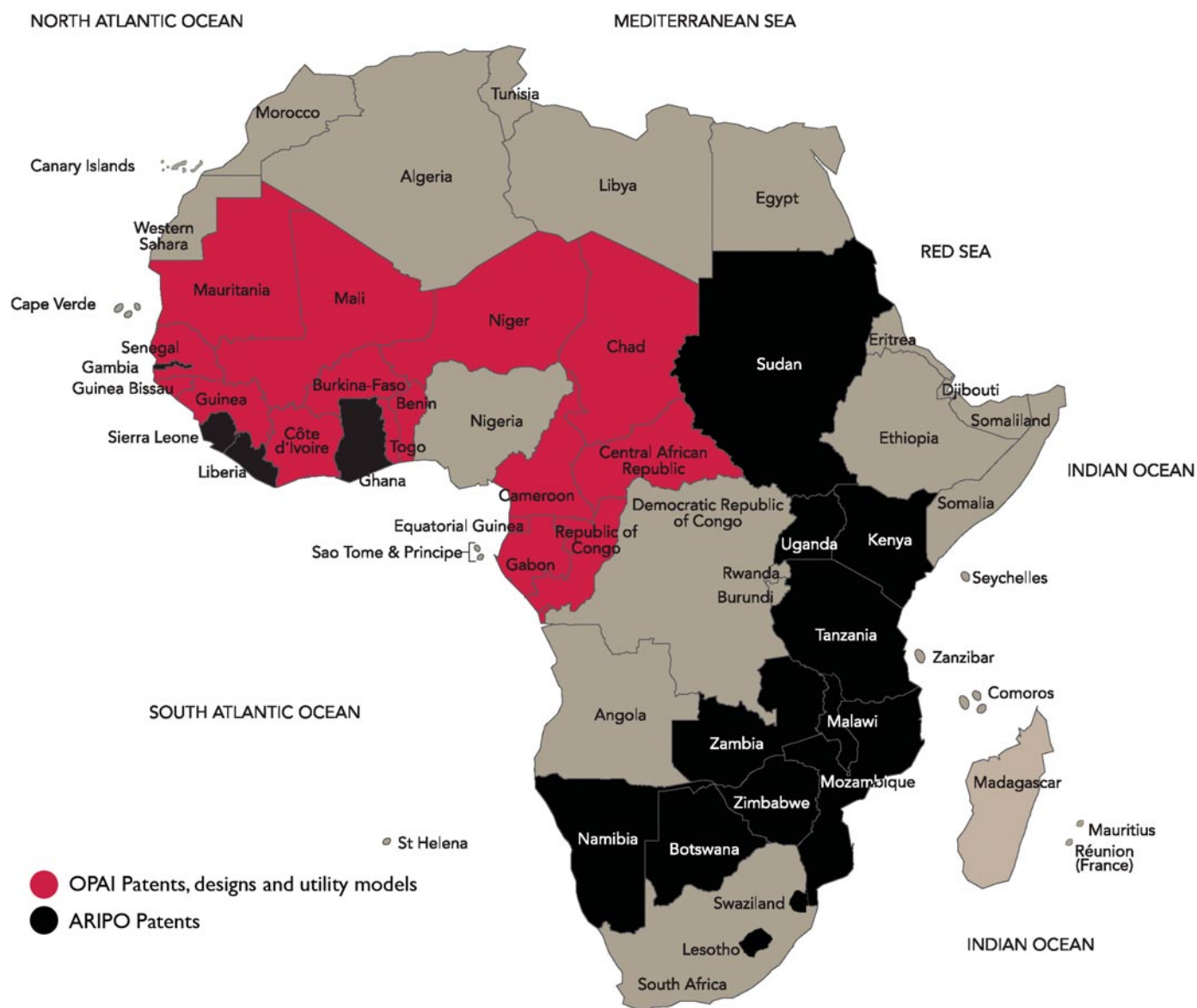
African countries that are members of the Paris Convention

colonial countries. Today, with the exception of Comoros, Eritrea, Réunion, Somalia and Somaliland, nearly all African countries have their own or regional patent laws and patent offices.

There are also two regional patent organisations, the African Intellectual Property Organisation (OAPI) and the African Regional Intellectual Property Organisation (ARIPO), which help to simplify the process of obtaining widespread patent protection in Africa. OAPI, established in 1962, began as a central office for filing patent and trademark applications into the former French colonies. In 1977, the office changed its name to *Organisation Africaine de la Propriété Intellectuelle*, or the African

Intellectual Property Organisation. OAPI has 16 member countries (Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Republic of Congo, Equatorial Guinea, Gabon, Guinea, Guinea Bissau, Ivory Coast, Mali, Mauritania, Niger, Senegal and Togo), and patent applications can be filed via the Paris Convention or the PCT.

ARIPO was created as a result of a diplomatic conference held in Zambia in 1976 and now has 16 member countries (Botswana, Gambia, Ghana, Kenya, Lesotho, Liberia, Malawi, Mozambique, Namibia, Sierra Leone, Sudan, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe). It is possible to file into ARIPO via the Paris Convention or the PCT. ARIPO was

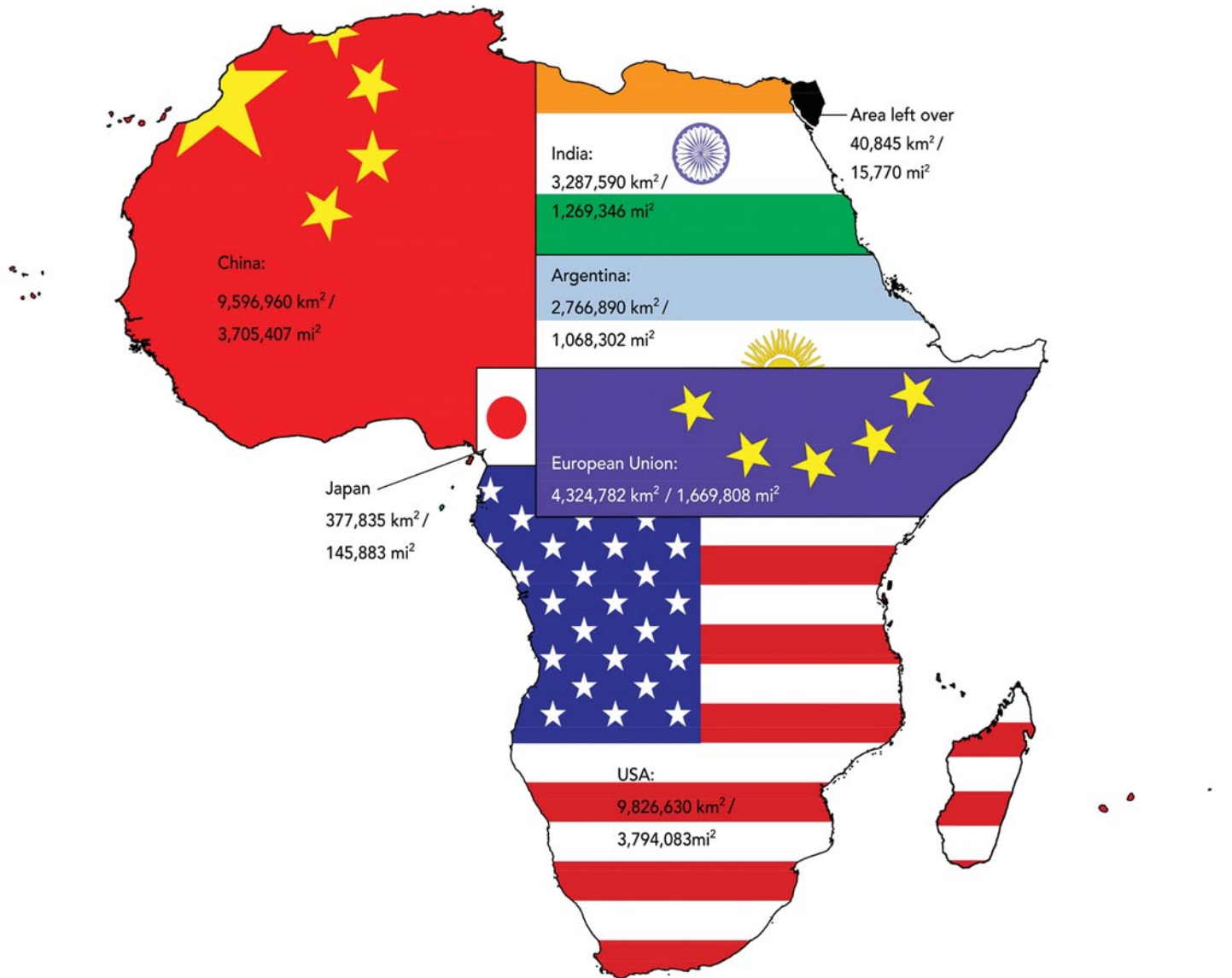


OAPI/ARIPO – membership of Africa's two regional IP organisations

Outside organisations are also helping to improve Africa's patent system by sponsoring training and education. WIPO organises seminars, workshops and training programmes to increase understanding of PCT reform and enhance participation in the PCT system. WIPO often focuses these activities on countries that it has identified in the following categories: developing countries, least-developed countries – all 25 of which are in Africa – and certain countries in Europe and Asia. WIPO notes that countries falling within these categories currently represent the majority of PCT member states. In 2009, to aid some of these developing countries, WIPO organised and participated in 133 PCT

promotional activities in 40 countries. Among those included in the educational activities were Botswana, Ivory Coast, Congo, Nigeria, South Africa and Zambia.

Perhaps the most positive sign of Africa's growth is the innovation occurring within its own borders. In late September 2010 South Africa petrochemicals company Sasol flew the world's first passenger aircraft using 100% synthetic jet fuel. A press release on the company's website reveals that the fuel, produced by Sasol's proprietary coal-to-liquids process, is the world's only fully synthetic jet fuel to have received international approval as a commercial aviation turbine fuel. Amid the many international companies entering Africa to



leverage the region’s available resources, Sasol seeks to establish itself as a global energy player on its own soil.

Comparisons to BRIC

The rapidly growing BRIC countries (Brazil, Russia, India and China) are receiving a lot of press. While the BRIC acronym has a nice ring to it, Africa’s growth may require that it be added to the mix in a few years’ time (ABRIC, BRAIC, BRICA?).

Concerns about weak IP laws and enforceability issues plague both the BRIC countries and Africa. While South Africa has a well-developed legal system where patents are regularly enforced, the ease of enforceability of patents in the rest of Africa

depends on the country. Many African countries suffer from a lack of resources, in addition to a lack of trained officials in their patent offices, police departments and customs offices. Corruption in certain African countries also poses a challenge to IP protection.

Looking to the other BRIC countries as examples, these challenges will lessen as patent filings into Africa increase. Consider China, for example, where IP law and enforcement has improved significantly over the last 10 years as a result of growth in the retail market. While China often receives negative press for its IP system, the results of a 2010 survey conducted by the Chinese State Intellectual Patent Office

The countries that fit into Africa, illustrating the size of the continent

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(SIPO) indicated that applicants were satisfied with the quality of patent examination in China. The degree of satisfaction increased in 2009 on the previous year, measured by both “correctness of examination” and “examination efficiency”. Notably, reports on the examination efficiency of PCT applications entering the national phase were also positive: 86% of respondents said that the first office action issued by SIPO was received no later than those issued by the US, Japanese or European patent offices.

The African patent system is currently being enhanced thanks to its applicants. Infringement cases, driven by patent litigation suits from the major pharmaceutical companies against the large generic companies, are popping up in courts outside of South Africa. These suits force the courts to get up to speed with difficult scientific concepts described in patent specifications. But it’s not just South Africa. In Nigeria, patentees have been able to enforce their rights and, in fact, the Nigerian courts have tended to be pro-patentee.

The patent systems in many African countries may need several years to catch up, but it is important to remember that patent protection can last for up to 20 years and, taking China as a prime example, a lot can change in that time.

Navigating Africa’s IP challenges

There are subtle differences in the patent laws of each of the nearly 60 African countries. For example, Botswana became a member of the PCT in 2003; however, the local law has not yet been amended to recognise the PCT. National phase applications can be filed and are accepted, but it cannot be guaranteed that enforceable rights will be granted. Alternatives, such as Paris Convention applications, are

recommended. So how can applicants navigate the challenges presented by Africa’s patent systems?

Obviously, applicants should work with a local or regional patent attorney who is well versed in the specific laws of the country or region in which the application is filed. The South African Institute of Intellectual Property Law (SAIIPL) may be a helpful resource when researching firms. SAIPL, an organisation that encourages the promotion and regulation of intellectual property in South Africa, was established in 1954 and represents more than 140 patent attorneys, patent agents, trademark practitioners and academics in South Africa. A search of its members can be conducted on the organisation’s website at www.saiipl.org.za. However, not all South African IP firms have relationships with the local patent and trademark offices across the continent to assist with filings outside of South Africa.

Africa may have good reason to be more questioning of and/or combative about the patent system than other countries, as technological development seems to come at the expense of African consumers. The pharmaceutical industry poses an interesting dilemma for the continent: the industry drives a large volume of applications into Africa each year, forcing the patent systems to grow. Yet one perception is that with patent protection, pharmaceutical companies can charge higher prices for their drugs, putting them out of reach of the general African consumer. As highlighted in an August *Wall Street Journal* article, the root issues are more likely the lack of infrastructure and the diversion of aid money. For example, fewer than 5% of the World Health Organisation’s 423 designated essential medicines are currently protected by patents. Despite the debates, it is reasonable

to believe that increased patent filings into Africa will do more good than harm. As patent filings increase, so too will litigation, and patent offices across Africa will become more sophisticated and aware of the value of intellectual property. Such awareness will help to spur Africa to increase filing and innovation within its own borders.

Filing trends

As in any country, filing strategies in Africa differ depending on the technology. The key industries seeking patent protection across Africa are pharmaceuticals, petrochemicals, oil and gas, telecommunications, agrochemicals and agriculture, and mining; however, new industries are cropping up as awareness of Africa's wealth and potential grows. Today, patent applications are being filed in different technological fields, including agrochemicals, transgenic crops, telecommunications, software and business methods, and all types of fast-moving consumer goods.

Applicants are beginning to file in a range of African countries. They will focus on where their markets are or where the technology is relevant. For example, pharmaceutical inventions tend to be filed quite broadly in many countries or via regional applications. Telecommunications technologies, particularly cellular, also tend to be filed broadly.

As expected, mining technology patents are filed where mining (eg, for diamonds, coal, iron ore, gold, copper or platinum) occurs, while oil technology clients file in oil countries. However, for oil technology, the particular countries designated depend on whether the invention involves upstream (the search, recovery and production of crude oil and natural gas) and/or downstream (the refining of crude oil and the sale and distribution of natural gas) technology.

The countries and regions of interest to applicants in the key industry sectors are as follows:

- Pharmaceuticals – South Africa, ARIPO (all 16 countries designated), OAPI (16 countries), Nigeria, Algeria, Morocco, Egypt, Angola, Democratic Republic of Congo, Mauritius and Ethiopia.
- Petrochemicals, oil and gas – South Africa, Angola, Nigeria, OAPI (16 countries), Algeria, Libya, Egypt, Mozambique, Madagascar (heavy oil) and Namibia.
- Telecommunications – South Africa, ARIPO (all 16 countries designated), OAPI (16 countries), Nigeria, Algeria, Morocco, Egypt, Angola, Democratic Republic of Congo, Mauritius.

- Agrichemicals and agriculture – South Africa, ARIPO (all 16 countries designated), OAPI (16 countries), Nigeria, Algeria, Morocco, Egypt, Angola, Democratic Republic of Congo and Madagascar.
- Mining – South Africa, ARIPO (select countries designated), OAPI (16 countries), Nigeria, Angola, Democratic Republic of Congo, Rwanda and Burundi.

Africa's IP outlook

Sluggish economic growth in the 1980s and 1990s may have clouded Africa's potential despite its enormous size – China, Japan, the United States, India, Argentina and the entire European Union could fit inside Africa's 30.2 million square kilometres. However, GDP growth picked up in the late 1990s and has continued to accelerate dramatically since 2000.

We are now incredibly aware of Africa's growth and abundant resources – but what's next? MGI forecasts that Africa's collective GDP will hit US\$2.6 trillion by 2020, with consumer spending up to US\$1.4 trillion. And the increase in patent filings into Africa indicates that foreign companies are aware of the continent's potential as well. The 2010 World Cup may be responsible for a renewed focus on the world's largest continent, but Africa's activity is holding our sustained interest in the continent's future. *iam*

Action plan



When evaluating a filing strategy into Africa, it is important to understand the key IP challenges in order to properly navigate them:

- We discuss Africa as if it is one jurisdiction, but in reality it is made up of nearly 60 unique countries and many have their own patent system. Make sure that you work with a patent attorney who is familiar with the local laws where you are seeking patent protection.
- Some countries/regions (eg, South Africa, OAPI, Nigeria) do not have substantive examination. If you are considering filing there, it is critical that your patent attorney makes sure the subject matter is allowable so that your patent is granted with valid and enforceable claims.
- For countries that do conduct substantive examination (eg, ARIPO, Egypt), it is important that you work with a patent attorney who knows the specific local laws and how best to respond to official actions.
- Due to a lack of resources, delays in examination and prosecution of patent applications plague certain countries. Plan your filing timeline accordingly to account for such delays.

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