

**Data Collection Survey on the
Cooperation in the Business-Related
Legal and Judicial Sectors
Final Report**

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Japan International Cooperation Agency

IC Net Limited

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List of Abbreviations

ACA	Anti-Counterfeit Agency
ACC	Anti-counterfeiting Collaboration of Nigeria
ADR	Alternative Dispute Resolution
AMCON	Asset Management Corporation of Nigeria
ARIPO	African Regional Intellectual Property Organization
ARSOG	Audiovisual Rights Society of Ghana
AU	African Union
BOFIA	Banks and Other Financial Institutions Act
BRIPAN	Business Recovery and Insolvency Practitioners Association of Nigeria
BRS	Business Registration Service
CAMA	Companies and Allied Matters Act
CBN	Central Bank of Nigeria Act
CCC	Conseil Communautaire de la Concurrence
CCU	Commercial Crime Unit
CEMAC	Central African Economic and Monetary Community
COMESA	Common Market for Eastern and Southern Africa
DfID	Department for International Development
DID	Destination Inspection Department
EAC	East African Community
EACA	East African Competition Authority
EBES	Enabling Business Environment Secretariat
ECOWAS	Economic Community of West African States
EFCC	Economic and Financial Crimes Commission
EGDI	E-Government Development Index
ERCA	ECOWAS Regional Competition Authority
EU	European Union
FBFMB	Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Act
FCCPA	Federal Competition and Consumer Protection Act 2018
GARIA	Ghana Association of Restructuring and Insolvency Advisors
GHAMRO	Ghana Music Rights Organization
GPBHR	Guiding Principles on Business and Human Rights
GSA	Ghana Standards Authority
ICT	Information and Communication Technology
IIPCIC	International Intellectual Property Crime Investigators College
ILO	International Labour Organization
IP	Insolvency Practitioners
ITUC	International Trade Union Confederation
JETRO	Japan External Trade Organization
JICA	Japan International Cooperation Agency

KECOBO	Kenya Copyright Board
KIPI	Kenya Industrial Property Institute
NAFDAC	National Agency for Food and Drug Administration and Control
NAP	National Action Plan
NCC	Nigerian Copyright Commission
NDIC	Nigerian Deposit Insurance Commission Act
NIPPS	National Intellectual Property Policy and Strategy
NPL	Non-Performing Loan
OAPI	Organisation Africaine de la Propriete Intellectuelle
OECD	Organization for Economic Co-operation and Development
OHS	Occupational Health and Safety
PCT	Patent Cooperation Treaty
PEBEC	Presidential Enable Business Environment Council
PRI	Principle for Responsible Investment
SACU	Southern African Customs Union
SON	Standards Organization of Nigeria
SSE	Sustainable Stock Exchange Initiative
TICAD	Tokyo International Conference on African Development
UEMOA	West African Economic and Monetary Union
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNECA	United Nations Economic Commission for Africa
UNEPFI	United Nations Environment Programme Finance Initiative
UNICEF	United Nations Children's Fund
UNODC	United Nations Office on Drug and Crime
USD	United States Dollar
WIPO	World Intellectual Property Organization

1. Overview of the Survey

1.1 Background and Purpose

The Japan International Cooperation Agency (JICA) has provided cooperation for legal and judicial development worldwide to realize the promotion and establishment of the rule of law as indicated in the 2015 Development Cooperation Charter. Thus far, JICA's cooperation has been primarily implemented in each country in Asia. Since the 2000s, JICA has also focused on cooperation for legal and judicial development in the field of business law, but support for the African region has been limited.

In the 2019 Yokohama Declaration of the seventh Tokyo International Conference on African Development (TICAD VII), it was declared that Japan would strive to realize a free, fair, non-discriminatory, transparent, predictable, and stable trade and investment environment, and to keep markets open to achieve inclusive and sustainable growth in Africa. As a part of these initiatives, a Bilateral Business Environment Improvement Committee was established with seven African countries to expand investment in Africa, and the public and private sectors in Japan and Africa have promoted the joint resolution of business issues.

It has been decided that TICAD VIII will be held in Tunisia this year. This is the second time the conference has been held in Africa. Based on TICAD VII results, Japan will continue to support the development initiatives led by African countries and is expected to actively promote the cooperation for legal and judicial development in the field of business law in the African region.

The Survey examines the possibility of, and approach toward cooperation for the legal and judicial development in the African region. Specifically, it collects and analyzes the basic information necessary to identify the region, legal field, and approach whereby JICA can assist in ensuring the rule of law and develop a fair business environment in Africa. This report summarizes the results of this entire survey.

1.2 Objectives, Methods, Implementation Structure, and Main Activities of the Survey

1.2.1 Objectives and Methods

The Survey team examines three legal fields: intellectual property law, competition law, and insolvency law. The team also surveys possible regions and legal fields where Environmental, Social, and Corporate Governance (ESG) investments in the African region can be promoted.

In the above three legal fields, the Survey team is targeting three countries— Kenya, Ghana and Nigeria- in consideration of the aforementioned establishment of the Bilateral Business

Environment Improvement Committee, economic scale, and other factors.

Regarding the cooperation on the competition law in Kenya, since JICA previously provided cooperation in Kenya, the Survey team aims not to explore the potential for new cooperation, but rather to follow up on the previous cooperation and to explore the possibilities to work as JICA’s partner for the cooperation for other countries in African region. Also, in addition to the three countries surveyed, the Survey team researched the competition and intellectual property laws in regional economic communities that include international organizations in Africa.

Regarding the ESG investment-related legal fields, the Survey team focused on the legal fields in society (S) and corporate governance (G) from the perspective of promoting the rule of law by examining the potential for JICA’s cooperation for legal and judicial developments. The Survey on ESG investment fields mainly focused on Kenya, Ghana, and Nigeria, but provided an overview of the countries that could significantly focus on ESG investments in the future.

In this study, considering the impact of COVID-19, the necessary information was collected through surveys via the Internet and other means, as well as by remotely conducting interviews and sending questionnaires to government offices, local law firms, and various African organizations in legal field.

In addition to this, from November 2021 to December 2021, the Survey team visited Ghana and Kenya and conducted field surveys with relevant institutions and local law firms on intellectual property law, competition law, and insolvency law, as well as surveys with institutions related to ESG investment, especially in the area of anti-corruption.

1.2.2 Structure of the Survey

Table 1-1 presents the members of the Survey team and their duties of the survey.

Table 1-1 Members of the Survey Team and Their Duties

Name	Position	Scope of Work
Kazuhira Nakasato (IC Net Limited)	Chief Advisor; Analyst of Business-Related Legal Systems (1); Analyst of the Need for Business-Related Laws and Cooperation by Donors	<ol style="list-style-type: none"> 1. Activity planning, operation and management of the entire survey 2. Conducting a bibliographic survey <ul style="list-style-type: none"> ➤ Websites of governments ➤ Websites of professional organizations in each legal field ➤ Information provided by Japanese government agencies, such as Japan Fair Trade Commission

Name	Position	Scope of Work
		<ol style="list-style-type: none"> 3. Conducting interviews <ul style="list-style-type: none"> ➤ Companies doing business in the initial survey countries ➤ Interviews with other donors 4. Drafting the Inception Report <ul style="list-style-type: none"> ➤ Analyzing the cooperation by other donors 5. Conducting a field survey <ul style="list-style-type: none"> ➤ Authoritative bodies on competition 6. Analyzing cooperation by international organizations, and other donors 7. Holding workshops 8. Drafting various reports (e.g., planning activities in the survey, drafting the Final Report)
Takuto Hirabayashi (TMI Associates)	Deputy Chief Advisor; Analyst of Business-Related Legal Systems (2)	<ol style="list-style-type: none"> 1. Conducting a bibliographic survey <ul style="list-style-type: none"> ➤ Laws and related regulations of each country ➤ Websites of government agencies, international organizations, professional organizations in each legal field, and law firms ➤ Information provided by Japanese government agencies 2. Conducting interviews <ul style="list-style-type: none"> ➤ Government, professional organizations in each legal field, and law firms ➤ Companies doing business in the initial survey countries 3. Drafting the Inception Report <ul style="list-style-type: none"> ➤ Overview of the status of legal enforcement and practice ➤ Legal challenges and possibility of cooperation for legal and judicial development 4. Conducting a field survey <ul style="list-style-type: none"> ➤ Intellectual Property Agency, Anti-Counterfeit Agency, Customs and courts and professional organizations that have jurisdiction over intellectual property disputes ➤ Courts, trustees, and other supervisory bodies and expert organizations that have jurisdiction over bankruptcy cases ➤ Local law firms 5. Holding Workshops 6. Drafting the Final Report
Yusuke Kobayashi (TMI Associates)	Analyst of Priority Survey Legal Fields	<ol style="list-style-type: none"> 1. Conducting a bibliographic survey <ul style="list-style-type: none"> ➤ Laws and related regulations of each country ➤ Websites of government agencies, international organizations, professional organizations in each legal field, and law firms

Name	Position	Scope of Work
		<ul style="list-style-type: none"> ➤ Information provided by Japanese government agencies such as JETRO, Japan Patent Office, and Japan Fair Trade Commission <ol style="list-style-type: none"> 2. Conducting interviews <ul style="list-style-type: none"> ➤ Government, professional organizations in each legal field, and law firms ➤ Companies doing business in the initial survey countries 3. Drafting the Inception Report 4. Conducting a field survey <ul style="list-style-type: none"> ➤ Intellectual Property Agency, Anti-Counterfeit Control Agency, Customs, and courts and professional organizations that have jurisdiction over intellectual property disputes ➤ Courts, trustees and other supervisory bodies and expert organizations that have jurisdiction over bankruptcy cases ➤ Local law firms 5. Holding Workshop 6. Drafting the Final Report
Hikari Harrison, Masahiro Toriu, Hideyuki Yamasaki (IC Net Limited)	Analyst of ESG Investment-Related Legal Fields	<ol style="list-style-type: none"> 1. Conducting a bibliographic survey <ul style="list-style-type: none"> ➤ Websites of governments ➤ Websites of professional organizations in ESG investment-related legal fields ➤ Information provided by Japanese government agencies 2. Conducting interviews <ul style="list-style-type: none"> ➤ Companies doing business in the survey countries ➤ Interviews with other donors 3. Drafting the Inception Report <ul style="list-style-type: none"> ➤ Overview of the roles played by the regional economic communities and related international organizations 4. Analyzing countries other than initial survey countries where the need and effectiveness of legal and judicial development are expected in the priority survey field and ESG investment promotion fields <ul style="list-style-type: none"> ➤ Authoritative bodies on competition ➤ International organizations, other donors 5. Supporting Project operation (e.g., budget management, contract management for local subcontracting) 6. Drafting various reports

Table 1-2 Support Members of the Survey Team and Their Duties

Name	Position	Scope of Work
Shunsuke Inai (TMI)	Analyst of Priority Survey Legal Fields (Insolvency Law)	<ol style="list-style-type: none"> 1. Conducting a bibliographic survey <ul style="list-style-type: none"> ➤ Laws and related regulations of each country

Name	Position	Scope of Work
Associates)		<ul style="list-style-type: none"> ➤ Websites of government agencies, international organizations, professional organizations in each legal field, and law firms ➤ Information provided by Japanese government agencies <ol style="list-style-type: none"> 2. Conducting interviews <ul style="list-style-type: none"> ➤ Government, professional organizations in each legal field, and law firms ➤ Companies doing business in the initial survey countries 3. Drafting the Inception Report 4. Drafting the Final Report
Takumi Sato (TMI Associates)	Analyst of Priority Survey Legal Fields (Intellectual Property Law)	<ol style="list-style-type: none"> 1. Conducting a bibliographic survey <ul style="list-style-type: none"> ➤ Laws and related regulations of each country ➤ Websites of government agencies, international organizations, professional organizations in each legal field, and law firms ➤ Information provided by Japanese government agencies 2. Conducting interviews <ul style="list-style-type: none"> ➤ Government, professional organizations in each legal field, and law firms ➤ Companies doing business in the initial survey countries 3. Drafting the Inception Report 4. Drafting the Final Report

1.3 Basic Policy and Main Activities of the Survey

1.3.1 Basic Policy of the Survey

The basic policy of the technical and operational aspects of this survey are listed in the table below.

Basic policy on technical aspects	<ul style="list-style-type: none"> - Accurately analyze and verify operational issues and solutions, as well as support needs and potential for support, in the areas of intellectual property law, competition law, and insolvency law, which are priority areas of this survey. - Conduct survey and analysis on legal areas that are useful for promoting investment in Africa and improving the business environment, based on actual operational conditions. - Conduct survey that contributes to the development of a fair business environment in anticipation of the post-COVID-19 economy and the growing interest in ESG investment. - Conduct survey and analysis while taking into account the possibility of collaboration with regional economic communities and relevant international organizations. - Conduct survey and analysis that takes into account gender perspectives.
Basic Policy for	<ul style="list-style-type: none"> - Conducting effective surveys using online technology.

Operations	<ul style="list-style-type: none"> - A flexible implementation system with a view to using local law firms and local consultants. - Implementation structure and flexible plan for COVID-19 risks.
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1.3.2 Overview of the field survey

The team conducted field survey in Ghana and Kenya from November 11 to December 2, 2021.

During the field survey in Ghana, the survey team visited (1) Ghana Standards Authority (GSA), (2) Ghana Customs Service, (3) Ghana Copyright Office, and (4) Ghana Industrial Property Office in relation to intellectual property laws. In the area of competition law, the survey team visited the Ministry of Trade and Industry of Ghana, and in the area of insolvency law, the survey team visited (1) the Registrar General's Department of the Ministry of Justice, and (2) the Ghana Association of Restructuring and Insolvency Advisors (GARIA). In addition, in relation to ESG investments, the survey team visited (1) the Ghana Economic and Organized Crime Office (EOCO), (2) the Ghana Commission for Human Rights and Administrative Justice (CHRAJ), (3) Ghana Financial Intelligence Centre (FIC), (4) Ghana Ministry of Employment, and remotely interviewed a representative of the Ghana Anti-Corruption Coalition (GACC).

In addition, the survey team met with the judge of the Supreme Court and the judge of the Court of Appeal, who also heads the Judicial Service Secretariat, to discuss various issues in Ghana's judicial system as a whole. The team also visited the local law firms of (1) N. Dowuona & Company, (2) AB & David, and (3) Bentsi- Enchill, Lesta & Ankomah and discussed the three priority areas of this survey.

During the field survey in Kenya, the survey team visited (1) Anti-Counterfeit Authority (ACA), (2) Kenya Intellectual Property Institute (KIPI), (3) Kenya Revenue Authority (KRA), and (4) Kenya Copyright Board in relation to intellectual property laws. In the area of competition law, the survey team visited Competition Authority of Kenya (CAK), and in the area of insolvency law, the survey team visited Business Registration Service (BRS) and interviewed their officials. In addition, in relation to ESG investments, the survey team visited the Ethics and Anti-Corruption Commission (EACC) for an interview and visited Oraro & Company Advocates, a local law firm, to discuss the current situation and issues in all three priority research areas. The survey team also visited a High Court called the Milimani Law Courts in Nairobi to discuss various issues on intellectual property law and insolvency law with the judges and clerks there.

1.3.3 Organizing Workshops

Workshops were held in January and February 2022 in each of the three priority survey areas of intellectual property laws, competition law, and insolvency law, and discussions were held with African stakeholders on the current status and issues in the field of business law in Africa.

The workshop on intellectual property laws was held on January 25, 2022. In the workshop on intellectual property laws, patent attorney Masashi Kurose took the stage and made a presentation on the importance of cooperation among relevant organizations and the establishment of a hub organization for effective enforcement of counterfeit goods, based on actual examples from Asian countries. More than 100 participants from customs authorities and IP-related authorities in Kenya and Ghana attended the seminar and actively asked questions about the importance of a hub for law enforcement and who should make decisions on counterfeit goods.

The workshop on Insolvency Law was held on January 27, 2022. At the workshop on insolvency law, Mr. Yusuke Shimizu, Attorney-at-Law, took the stage and made a presentation on the development and practical operation of Japanese restructuring insolvency proceedings. The workshop was attended by more than 100 participants from the courts and administrative bodies related to insolvency practice in Kenya and Ghana, who actively exchanged questions and comments on the treatment of security interest holders in insolvency proceedings and the expediting of the proceedings.

The workshop on competition law was held on February 3, 2021. The speakers were Ms. Teresa Moreira and Mr. Ives Kenfack from the Competition and Consumer Policy Division of the United Nations Conference on Trade and Development (UNCTAD), Professor Emeritus Iwakazu Takahashi of Meiji University, and Attorney Teruhisa Ishii. Presentations were made by UNCTAD on the current status and challenges of competition policy in the African region, by Professor Emeritus Takahashi on the relationship between competition policy and industrial policy, and by Attorney Ishii on Japan's regulations on abuse of superior bargaining position and the Subcontract Act. In addition, the consultant team delivered a presentation on corruption in public procurement and the role of competition authorities. On the day of the seminar, there were about 60 participants from various institutions in Kenya, Ghana, and Nigeria, the target countries of the study, as well as from the regional economic communities and the Gambia, and participants discussed the contents of the presentations during the Q&A session.

2. Results of the survey

2.1 Overview of Intellectual Property Laws, Practical Issues, and Potential for Cooperation in Kenya, Ghana, and Nigeria

2.1.1 Overview of Intellectual Property Laws in Kenya, Ghana, and Nigeria

(1) Overview of Intellectual Property Laws in Kenya

(a) Primary Intellectual Property-Related Treaties ratified by Kenya

- Trademark right

Kenya has ratified the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (the “**Madrid Protocol**”),¹ and Japanese companies can obtain trademark protection in Kenya by filing an international application designated for Kenya based on the trademark for which they have applied or registered in Japan.² In Kenya, which has a legal system derived from English law, statutory laws must be established for a ratified international treaty to be officially incorporated into the national law system. Kenya has already enacted a law incorporating the Madrid Protocol into its national law.³

- Patent right

Kenya ratified the Paris Convention for Protection of Industrial Property (the “**Paris Treaty**”)⁴ and the Patent Cooperation Treaty (“**PCT**”)⁵ regarding patents. In the PCT system, when a patent application is filed in a contracting country, including Japan, it is treated as having been filed in countries that are designated by the applicant. Accordingly, when filing a patent application in Japan, applicants may elect to treat the patent as having been filed simultaneously in Kenya.⁶ Kenya also ratified the Harare Protocol on Patents and Industrial Designs within the Framework of the African Regional Intellectual Property Organization Protocol (the “**Harare Protocol**”) on Patents and Industrial Designs, which is within the framework of the African Regional Intellectual Property Organization (“**ARIPO**”), a treaty for the protection of intellectual property in the African region.⁷ Applicants who wish to receive intellectual property protection under the Harare Protocol may obtain patent protection in Kenya by applying directly or by applying to ARIPO using the PCT system and designating Kenya.⁸

¹ https://wipolex.wipo.int/en/treaties/ShowResults?search_what=C&treaty_id=8

² Article 4 of the Madrid Protocol

³ Article 40 C of Trademarks Act, Spoor & Fisher, Wayne Meiring “Africa Intellectual Property Newsletter, August 2015 (Vol. 2)” Japan External Trade Organization, JETRO DÜSSELDORF, 2015(https://www.jetro.go.jp/ext_images/_Ipnews/africa/newsletter201508.pdf)

⁴ https://wipolex.wipo.int/en/treaties/ShowResults?search_what=C&treaty_id=2

⁵ https://www.wipo.int/pct/en/pct_contracting_states.html

⁶ Article 11 of PCT

⁷ <https://www.aripo.org/wp-content/uploads/2022/01/Harare-Protocol-on-Patents-and-Industrial-Designs-2022-Edition-2.pdf>

⁸ <https://www.aripo.org/aripo-filing-procedures/>

- Copyright

Kenya ratified the Bern Convention on Copyright (“**Bern Convention**”) and adopted a system for copyright similar to that of Japan, including the principle that copyright accrues simultaneously with its creation.⁹

(b) Intellectual Property Laws in Kenya

Kenya has the Industrial Property Act,¹⁰ Trademarks Act,¹¹ and Copyright Act,¹² along with their respective complementary regulations, and has enacted standard intellectual property laws.

The Anti-Counterfeit Act, which provides for the establishment of a decision-making body for curbing counterfeit goods, the appointment and authority of this executive body, and the appointment, authority, codes of conduct, and penalties of the executive body to prevent counterfeit goods, has been enacted. The Anti-Counterfeit Act is the basis for the establishment of the Anti-Counterfeit Agency (“**ACA**”).¹³

In addition, the trademark registration system for ACA was introduced during the amendment of the Statute Law (Miscellaneous Amendments) Act in 2018.¹⁴ This registration system is separate from the registration of trademark rights and obliges those who intend to import goods into Kenya to register trademarks that are displayed on goods to be imported with the ACA.¹⁵ It also prohibits the import of goods bearing a trademark that is not registered and those without a trademark (excluding raw materials).

This registration system is expected to have a major impact on import procedures, and Japanese companies that export products to Kenya are therefore, highly interested. Many countries have a system that permits voluntary declarations by right holders to withhold imports at the border, but it is rare for a country to require the registration of trademarks. The ACA officials decided to impose a legal obligation because they could not be expected to register trademarks quickly if it was voluntary. The operation has not begun, but ACA officials believe that some flexibility is expected in the actual implementation.

⁹ https://wipo.int/en/treaties/ShowResults?search_what=C&treaty_id=15

¹⁰ <https://www.wipo.int/edocs/lexdocs/laws/en/ke/ke001en.pdf>

¹¹ <https://www.wipo.int/edocs/lexdocs/laws/en/ke/ke025en.pdf>

¹² <https://www.wipo.int/edocs/lexdocs/laws/en/ke/ke026en.pdf>

¹³ <https://www.aca.go.ke/images/downloads/Anti-Counterfeit-Act-No13-of-2008.pdf>, Article 3, Paragraph 1 of ACA

¹⁴ Kenya Association of Manufacturers, “Legislative Review: Amendments to the Anti-Counterfeit Act in 2018” 2018 (<https://kam.co.ke/legislative-review-amendments-to-the-anti-counterfeit-act-of-2018/>)

¹⁵ Article 34B (1) of s.34 New. in the section relating to Anti-Counterfeit Act of Statute Law (Miscellaneous Amendments) Act, WIPO, “Kenya: Statute Law (Miscellaneous Amendments) Act, 2018” 2019 (https://www.wipo.int/news/en/wipolex/2019/article_0005.html)

(c) Specialized Institutions

- Overview

The following Kenyan agencies are related to the protection and enforcement of intellectual property rights: Kenya Industrial Property Institute (KIPI) and Kenya Copyright Board (KECOBO) are organizations for the registration of intellectual property rights. The courts (High Court of Kenya), National Police Agency (Anti-Counterfeit Agency (ACA), and Revenue Authority (KRA (Custom))) are organizations related to the protection and enforcement of intellectual property rights.

- Organization for registration of intellectual property rights

- Kenya Industrial Property Institute (KIPI)

The Kenya Industrial Property Institute (“**KIPI**”) is a parastatal organization under the Ministry of Industrialization, Trade, and Enterprise Development. It was established in 2002, under the Industrial Property Act and the Trade Act, and was the predecessor to the Kenya Industrial Property Office (KIPO), which was established under the Industrial Property Law in 1990.¹⁶

The KIPI is the core organization of Kenya’s intellectual property regime, responsible for the registration and dissemination of intellectual property rights other than copyrights. The statutory functions of the KIPI include: (1) registration and management of industrial property and trademark rights, (2) provision of technical information, (3) promotion of domestic creativity and inventions, and (4) implementation of training on industrial property rights.¹⁷

There are 74 staff members¹⁸ in charge of examining and registering patents and trademarks, along with information provision and dissemination activities.

Both formal and substantive examinations of patents are conducted, and examination guidelines have been published, as well as guidelines for trademark examination,¹⁹ The scope of the review procedure meets international standards.²⁰

Regarding information provision and dissemination activities, trainings, exhibitions, conferences, and workshops are held to raise awareness of intellectual property in Kenya.²¹

As international activities, KIPI is collaborating with WIPO and ARIPO.

- Kenya Copyright Board (KECOBO)

The Kenya Copyright Board (“**KECOBO**”) is a state corporation under the Office of the

¹⁶ <https://www.kipi.go.ke/index.php/about>

¹⁷ <https://www.kipi.go.ke/>

¹⁸ As of November 24, 2021

¹⁹ KIPI, "Guideline for the Examination of Patents, Utility Models, and Industrial Designs," 2007 ([http://www.kipi.go.ke/images/docs/guidelines %20 to %20 patenting.pdf](http://www.kipi.go.ke/images/docs/guidelines%20to%20patenting.pdf))

²⁰ Figures stated by the rapporteur in the interview with KIPI

²¹ <https://www.kipi.go.ke/index.php/about/117>

Attorney General and Department of Justice established in Section 3 of the Copyright Act 2001.²² The overall mandate of KECOBO is to develop legislation on copyright and related rights in Kenya, strengthen education and social awareness of copyright, licensing and overseeing organizations that manage copyright, and maintain databases on authors and their works.²³

Though copyright registration is voluntary, KECOBO began operating the online registration system in 2020 and has allowed registration to be completed online. This reduces the number of days required for registration and improves the convenience of the process. KECOBO also conducts training for police and customs and court officials on copyright infringement and public awareness campaigns.

- Organization for protection and enforcement of intellectual property rights

- Anti-Counterfeit Agency (ACA), Kenya Revenue Authority (KRA) (Customs)

The Anti-Counterfeit Agency (ACA) is a state corporation within the Ministry of Industry, Trade, and Enterprise Development that was established in 2008 in accordance with the Anti-Counterfeit Act 2008. ACA is a specialized agency that monitors counterfeit goods and has the broad authority to investigate, arrest, and seize counterfeit goods.²⁴ The ACA dispatched inspectors to major border checkpoints to take measures against counterfeit goods at the border. However, because of limited ACA inspectors, there are many border checkpoints where ACA inspectors are not dispatched, or where the number of inspectors are insufficient for the quantity of imported goods. Accordingly, border control measures are being implemented in cooperation with customs under the jurisdiction of the Kenya Revenue Authority (KRA). ACA officials are also working to improve the inspection capacity of customs officials—by providing them with training, for instance. ACA training is also provided to prosecutors who have the authority to prosecute or judge. In addition, the ACA has been conducting public awareness-raising activities.

- High Court, Industrial Property Tribunal

Regarding the enforcement of intellectual property rights in Kenya, the High Court has jurisdiction over intellectual property cases and has exclusive jurisdiction for filing trademark infringement cases. Additionally, an injunction against patent infringement can be filed with the Industrial Property Tribunal, and if there is an objection to the decision, an appeal will be filed with the High Court.²⁵

²² <https://copyright.go.ke/>

²³ <https://copyright.go.ke/about-us/our-organization>

²⁴ <https://www.aca.go.ke/departments>

²⁵ Article 115 of the Industrial Property Act

(2) Overview of Intellectual Property Laws in Ghana

(a) Major Intellectual Property-Related Treaties Ratified by Ghana

- Trademark right

Ghana ratified the Madrid Protocol²⁶ and incorporated it into national law under the Trademark (Amendment) Act, 2014.

- Patent right

As with Kenya, Ghana ratified the Paris Treaty,²⁷ PCT,²⁸ and Harare Protocol²⁹ within the framework of ARIPO. Therefore, rights can be protected through PCT applications designating Ghana and applications to ARIPO, as in Kenya.

- Copyright

Ghana ratified the Bern Convention and adopted the same non-formalism systems as Japan.³⁰

(b) Intellectual Property Laws in Ghana

Ghana enacted the Trademarks Act of 2004³¹ and its amendment, Trademarks (Amendment) Act, 2014³²; Patents Act 2003³³; Industrial Designs Act,³⁴ 2003; Copyright Act, 2005³⁵; Layout-Designs Act (Topographies) of Integrated Circuits Act, 2004³⁶; Geographical Indications Act, 2003³⁷; Protection Against Unfair Competition Act, 2000³⁸; and standard intellectual property laws. The Patent Act stipulates that a utility model right shall be granted to a device that is novel or industrially applicable, and that the protection of utility models is enacted.

Unlike Kenya, Ghana does not have a law that specifically stipulates measures against counterfeit goods.

(c) Specialized Institutions

- Overview

In Ghana, the Industrial Property Office, established under the Register General's Department, is an institution that examines and registers industrial property rights, such as patent and

²⁶ https://wipolex.wipo.int/en/treaties/ShowResults?search_what=C&treaty_id=8

²⁷ https://wipolex.wipo.int/en/treaties/ShowResults?search_what=C&treaty_id=2

²⁸ https://www.wipo.int/pct/en/pct_contracting_states.html

²⁹ <https://www.aripo.org/wp-content/uploads/2022/01/Harare-Protocol-on-Patents-and-Industrial-Designs-2022-Edition-2.pdf>

³⁰ https://wipolex.wipo.int/en/treaties/ShowResults?search_what=C&treaty_id=15

³¹ <https://www.wipo.int/edocs/lexdocs/laws/en/gh/gh013en.pdf>

³² <https://www.wipo.int/edocs/lexdocs/laws/en/gh/gh037en.pdf>

³³ <https://www.wipo.int/edocs/lexdocs/laws/en/gh/gh019en.pdf>

³⁴ <https://www.aripo.org/wp-content/uploads/2018/12/IndustrialDesignsAct2003.pdf>

³⁵ <https://www.aripo.org/wp-content/uploads/2018/12/Ghana-Copyright-Act.pdf>

³⁶ <https://www.aripo.org/wp-content/uploads/2018/12/layoutdesign.pdf>

³⁷ <http://extwprlegs1.fao.org/docs/pdf/gha168849.pdf>

³⁸ <https://www.wipo.int/edocs/lexdocs/laws/en/gh/gh005en.pdf>

trademark rights, and the Copyright Office is established as a copyright registration institution. The agencies that protect and enforce intellectual property rights other than the court include the Ghana Customs Service under the Ghana Revenue Authority (GRA), the Commercial Crime Unit (CCU) of the Ghana Policy Service, Criminal Investigation Department, the Ghana Standards Authority (GSA),³⁹ and the Food and Drugs Authority (FDA).⁴⁰ However, there is no organization that specializes in counterfeit measures as the Kenyan ACA.

- Organization for registration of intellectual property rights

- Industrial Property Office

The Industrial Property Office is the government agency responsible for registering patents and trademarks in Ghana. It is within the Registrar General's Department of the Ministry of Justice and Attorney General's Department. The Industrial Property Office is the designated patent-examining authority under paragraph 1 of Article 31 of the Patent Act and has been designated as the trademark-examining authority under paragraph 1 of Article 18 of the Trademarks Act.⁴¹

- Ghana Copyright Office The Ghana Copyright Office was established within the Ministry of Justice as a copyright registration agency.⁴² The Ghana Copyright Office provides alternative dispute resolution ("ADR"), which opens the possibility of resolving disputes without litigation as well as general copyright consultations.⁴³ However, the Copyright Office has no prosecution power and criminal cases are handled by the police.

In addition, the Ghana Music Rights Organization ("GHAMRO"),⁴⁴ Audiovisual Rights Society of Ghana ("ARSOG"), and Copy Ghana are copyright management companies in the music, video, and publication industries.⁴⁵

- Organization for protection and enforcement of intellectual property rights

Unlike Kenya, Ghana has no organization specializing in counterfeit measures. Counterfeit measures are undertaken by the customers, CCU, GSA, and FDA, on their own or in partnership. Final remedies for infringements of intellectual property are in litigation under the jurisdiction of the Commercial Division of the High Court.

- Ghana Revenue Authority (GRA), Ghana Customs Service

In Ghana, many counterfeit goods are imported from abroad. Customs are responsible for border countermeasures; since no specialized organization has been established to deal with counterfeit goods, customs play an extremely important role in counterfeit countermeasures in Ghana.

³⁹ <https://www.gsa.gov.gh/>

⁴⁰ <http://www.fdaghana.gov.gh/>

⁴¹ <https://rgd.gov.gh/About-Us.html>

⁴² <https://www.copyright.gov.gh/>

⁴³ <https://www.copyright.gov.gh/about-us/>

⁴⁴ <https://www.ghamroonline.com/>

⁴⁵ <https://www.copyright.gov.gh/intellectual-property/collective-management/>

A list of registered trademarks filed by the rights holder is preserved in customs. In addition—although not a right stipulated by law—in some cases these lists are inspected and seized.⁴⁶

- Commercial Crime Unit (CCU)

The Commercial Crime Unit (“CCU”) oversees responding to counterfeit countermeasures in Ghana. The CCU investigates counterfeits, seizes them, and arrests infringers upon request from right-holders.

- Ghana Standards Authority (GSA)

The Ghana Standards Authority (“GSA”) operates within the Ministry of Trade and Industry and complies with the Standards Authority Act of 1973 (N.R.C.D. 173) and subsequent amendments to the Labeling Regulations of 1992. It establishes standards with which all manufactured and imported goods, other than food and drugs, must comply.

- Food and Drags Authority (FDA)

The Food and Drug Authority (“FDA”) has established standards for food and pharmaceutical products and has authorized marketing.

- The Commercial Division of the High Court

The Commercial Division of the High Court handles the intellectual property litigation.

(3) Overview of Intellectual Property Laws in Nigeria

(a) Major Intellectual Property-Related Treaties Ratified by Nigeria

- Trademark right

Nigeria did not ratify the Madrid protocol.⁴⁷ Accordingly, trademark holders of member countries may not receive trademark protection by designating Nigeria under the Madrid Protocol, and they must file a trademark application directly in Nigeria if they desire trademark protection.

- Patent right

Nigeria ratified the Paris Convention⁴⁸ and PCT⁴⁹ in connection with patents, and it is possible for member countries to file a PCT application designating Nigeria.

- Copyright

Regarding copyright, Nigeria ratified the Bern Convention and adopted a non-formalism system similar to Japan.⁵⁰

⁴⁶ Japan External Trade Organization, JETRO DUBAI Intellectual Property Division "Study on Intellectual Property System and its Operation in Ghana"

2021(https://www.jetro.go.jp/ext_images/world/africa/ip/report_gha_20210330.pdf)(p.59)

⁴⁷ https://wipolex.wipo.int/en/treaties/ShowResults?search_what=C&treaty_id=8

⁴⁸ https://wipolex.wipo.int/en/treaties/ShowResults?search_what=C&treaty_id=2

⁴⁹ https://www.wipo.int/pct/en/pct_contracting_states.html

⁵⁰ https://wipolex.wipo.int/en/treaties/ShowResults?search_what=C&treaty_id=15

(b) Intellectual Property Laws in Nigeria

Nigeria has enacted the Patents and Designs Act,⁵¹ Trademarks Act,⁵² and the Copyright Act.⁵³

These laws provide a basic legal framework for intellectual property. However, Nigeria has not enacted a utility model rights law, which is also an area of intellectual property that protects the shape of objects.⁵⁴ Utility model rights are generally granted for the creation of technical ideas that lack the creativity required for patent protection.

Nigeria has adopted the so-called non-examination principle for patent rights. The extent of patent examination upon registration is limited to whether the invention, for which the application has been filed, satisfies the formality requirements, and a patent certificate is issued without substantively examining the patent requirements, such as novelty and inventiveness. Even if a patent has been granted, the patent holder is responsible for certifying and ensuring that the patent satisfies substantial patent requirements if the patent's validity is contested in court.⁵⁵

(c) Specialized Institutions

- Organization for registration of intellectual property rights

- Trademark, Patents and Designs Registry

Nigeria's Trademarks, Patents, and Designs Registry manages registration and examination of patents, trademarks, and designs.⁵⁶

- Nigerian Copyright Commission (NCC)

The Nigerian Copyright Commission ("NCC"), a copyright registration agency, grants and supervises licenses to organizations that comprehensively control copyright, issues certified copies of registered works, cracks down illegal reproductions, and consults on copyright.⁵⁷

- Intellectual Property Law Association of Nigeria

The Intellectual Property Law Association of Nigeria comprising lawyers and judges working in the intellectual property-related domain as policymakers, scholars, and law students, is an example of an intellectual property law-related organization in Nigeria.⁵⁸

⁵¹ <https://lawsofnigeria.placng.org/laws/P2.pdf>

⁵² <https://lawsofnigeria.placng.org/laws/TRADE%20MARKS%20ACT.pdf>

⁵³ <https://lawsofnigeria.placng.org/laws/copyright.pdf>

⁵⁴ International Association for the Protection of Intellectual Property of Japan, AIPPI- JAPAN "Report on Research and Study on the Actual Operation of Intellectual Property Rights Systems in African Countries and Intellectual Property Activities by Major Countries Outside the Region" 2014 (<https://www.globalipdb.inpit.go.jp/jpowp/wp-content/uploads/2015/11/196859e4aba06607a24fad1d541aeb6a.pdf>) (p.46)

⁵⁵ Article 4 of the Patents and Designs Act

⁵⁶ <http://www.iponigeria.com/AboutUs#>

⁵⁷ <https://copyright.gov.ng>

⁵⁸ <http://www.iplan.ng/demo/index.php>

- Organization for protection and enforcement of intellectual property rights

Regarding the enforcement of intellectual property rights in Nigeria, the Federal High Court is the court of first instance for intellectual property-related cases and for the exercise of intellectual property rights. Government agencies involved in the control of counterfeit goods include the National Agency for Food and Drug Administration and Control (“NAFDAC”), Standards Organization of Nigeria (“SON”), and the Nigerian Police Force.

- National Agency for Food and Drug Administration and Control (NAFDAC)

NAFDAC was formed mainly to protect citizens’ health. Consistent with its purpose, NAFDAC is authorized to investigate the facilities of importers and distributors of counterfeit foods and drugs, to seize and destroy products, and to prosecute such businesses.

- Standards Organization of Nigeria (SON)

SON is an agency that develops industrial standards for products and ensures that they conform to these standards. Although it is not directly related to the crackdown on counterfeit products, SON has the power to address products that are dangerous or potentially life threatening and monitors counterfeit products.

- Nigeria Police Force

In response to requests from rights holders, the Nigerian Police Force conducts compulsory investigations, seizes counterfeit goods, and arrests infringers.⁵⁹

- Anti-counterfeiting Collaboration of Nigeria (ACC)

The Anti-Counterfeiting Collaboration of Nigeria (“ACC”) is an example of a private organization involved in counterfeit measures. The ACC, a non-governmental organization, was established in 2006 to conduct awareness-raising campaigns, training sessions, and conferences on counterfeit goods, along with revising Nigeria’s intellectual property-related laws.

(4) Overview of the African Regional Intellectual Property Organization (ARIPO)

(a) Outline

Anyone who wishes to obtain patent rights, design rights, or utility model rights in member countries (Botswana, Sierra Leone, Gambia, Ghana, Sudan, Kenya, Eswatini, Lesotho, Tanzania, Liberia, Uganda, Malawi, Zambia, Mozambique, Zimbabwe, Namibia, Rwanda, and São Tome and Principe) may be treated as having filed an application if the individual files an application in one of the member countries or directly to ARIPO, in accordance with ARIPO’s

⁵⁹ International Association for the Protection of Intellectual Property of Japan, AIPPI- JAPAN “Report on Research and Study on the Actual Operation of Intellectual Property Rights Systems in African Countries and Intellectual Property Activities by Major Countries Outside the Region” 2014 (<https://www.globalipdb.inpit.go.jp/jpowp/wp-content/uploads/2015/11/196859e4aba06607a24fad1d541aeb6a.pdf>) (p.169 ~ p.171)

Harare Protocol.⁶⁰

Any person who wishes to obtain a trademark right in the member countries of the Banjul Protocol of ARIPO (Botswana, Eswatini, Lesotho, Liberia, Malawi, Mozambique, Namibia, São Tome and Principe, Tanzania, Uganda, and Zimbabwe) may also be treated as having filed a trademark application in the designated countries if the individual files an application in one member country or directly in ARIPO, consistent with ARIPO's Banjul Protocol.⁶¹

In either case, the ARIPO Secretariat grants protection unless it receives any notification from member countries that the rights are ineffective within the specified period. According to the Harare Protocol and the Banjul Protocol, intellectual property rights registered with the ARIPO Secretariat have the same effect as national applications in designated countries.⁶²

(b) Member States

The current member states are Botswana, Sierra Leone, Gambia, Somalia, Ghana, Sudan, Kenya, Eswatini, Lesotho, Tanzania, Liberia, Uganda, Malawi, Zambia, Mozambique, Zimbabwe, Namibia, Rwanda, Mauritius, and São Tome and Principe. The member states of each protocol are described above. Member states of the United Nations Economic Commission for Africa (UNECA) and the African Union (AU) are eligible to participate.⁶³

(5) Overview of the African Intellectual Property Organization (OAPI)

(a) Outline

Any person wishing to obtain a patent, utility model right, design right, or trademark shall be treated as having applied for a patent, design, utility model, or trademark in all member states by filing an application directly with the African Intellectual Property Organization (“OAPI”). Unlike ARIPO members, OAPI members do not have their own registries, and may only register intellectual property rights through the OAPI. In addition, judgments on intellectual property rights by the courts of any member state are bound to other member countries.⁶⁴

⁶⁰ <https://www.aripo.org/member-states/>, <https://www.aripo.org/aripo-filing-procedures/>, <https://www.aripo.org/wp-content/uploads/2020/01/Harare-Protocol-2020-Edition-1.pdf>

⁶¹ <https://www.aripo.org/wp-content/uploads/2018/11/Banjul-Protocol-2019.pdf.pdf>

⁶² <https://www.aripo.org/aripo-filing-procedures/>

⁶³ <https://www.aripo.org/member-states/>

⁶⁴ International Association for the Protection of Intellectual Property of Japan, AIPPI- JAPAN “Report on Research and Study on the Actual Operation of Intellectual Property Rights Systems in African Countries and Intellectual Property Activities by Major Countries Outside the Region” 2014 (<https://www.globalipdb.inpit.go.jp/jpowp/wp-content/uploads/2015/11/196859e4aba06607a24fad1d541aeb6a.pdf>) (p.82)

(b) Member States

Currently, the OAPI comprises the following seventeen member states: Benin, Burkina Faso, Cameroon, the Central African Republic, Chad, the Democratic Republic of Congo, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Côte d'Ivoire, Mali, Mauritania, Niger, Senegal, Togo, and Comoros.⁶⁵

2.1.2 Issues in Kenya, Ghana, and Nigeria and Potential for Cooperation of Intellectual Property Laws

(1) Issues Related to Kenya's Intellectual Property Laws and Potential for Cooperation

(a) Issues

➤ Application and registration of intellectual property rights

Kenya has fewer trademark and patent applications than Japan, European countries, and the United States (“US”). In 2019, statistics from the World Intellectual Property Organization (“WIPO”) showed that 471,749 trademark applications were filed by domestic companies in Japan compared to 5,825 in Kenya. Similarly, there were only 302 patent applications in Kenya compared with 245,372 in Japan during the same year.⁶⁶ One reason is that, initially, the absolute number of inventions may be small, but intellectual properties, which are recognized as intangible assets, are not firmly rooted in society, and there is a lack of awareness to register, use, and benefit from intellectual property rights. Although the market is flooded with counterfeit goods from abroad and illegal downloading is rampant, it is difficult to deal with such infringements, and the cost effectiveness of efforts to acquire intellectual property rights is considered to be low. In addition, few experts support the application of intellectual property rights.

The KIPI, which deals with examination and registration, has a weak personnel system, such as the number of examiners and clerks, owing to budgetary constraints. The application is paper based and staff enter data manually. Thus, there are problems with the efficiency of examination procedures.⁶⁷ The same was true for copyright registrations, but in 2020, the online registration system began operations, and applications for copyright registrations were made online through a dedicated portal site. Similar to other intellectual property rights, even if the copyright is registered, the response to infringing activities is limited. Therefore, the extent to which the number of registrations will increase in the future

⁶⁵ <http://oapi.int/index.php/en/>

⁶⁶ <https://www3.wipo.int/ipstats/index.htm>

⁶⁷ KIPI “Strategic Plan 2018-2022” (http://www.kipi.go.ke/images/docs/KIPI_Strategic-Plan_2018-2022_VF_1021.pdf), International Association for the Protection of Intellectual Property of Japan, AIPPI- JAPAN “Report on Research and Study on the Actual Operation of Intellectual Property Rights Systems in African Countries and Intellectual Property Activities by Major Countries Outside the Region” 2014 (<https://www.globalipdb.inpit.go.jp/jpowp/wp-content/uploads/2015/11/196859e4aba06607a24fad1d541aeb6a.pdf>)(p.141)

is unknown. From the viewpoint of the stability of rights, the key is whether KECOBO can maintain and operate the system continuously.

➤ Issues related to the enforcement of intellectual property rights

- Issues related to countermeasures against the distribution of counterfeit goods such as border protection

Kenya's ACA attends to matters regarding counterfeit goods, although issues concerning such goods have not been resolved. The main reasons for this include the vulnerability of the personnel and material systems of the ACA and the lack of cooperation with the customs department to stop the importation of counterfeit goods at the border.⁶⁸

The ACA staff is small in absolute numbers. As the ACA dispatches inspectors to key borders, it is not sufficient for the volume of imports flowing into the country; additionally, some border ACA personnel are not dispatched. Although ACA and customs provide a certain amount of cooperation, such as ACA's provision of training for customs officers, ACA and customs fulfill their respective responsibilities in their respective roles. It is difficult to say whether information exchange concerning countermeasures against counterfeit goods is adequately and systematically shared beyond informal exchanges between officials. Moreover, the understanding that the spread of counterfeit goods leads to a reduction in revenue for the nation does not seem to permeate customs. Particularly, looking at the actual situation of customs clearance, at the level of customs officials who are charged with the obligations of collecting import duties to achieve the tariff collection target, it is difficult to provide sufficient motivation for the import suspension of counterfeit goods, which would miss immediate tariff collection opportunities.⁶⁹

To handle border measures, the trademark registration system was introduced by an amendment to the ACA in 2018, and the registration of trademarks at the time of importing goods into Kenya is necessary by law. However, this system has yet to be implemented.⁷⁰ It has been pointed out that the system will have a large impact on import procedures, and many concerns have been expressed by foreign countries, including Japan. It is still unclear what kinds of operations will be implemented in practice.

- Issues related to judicial remedies

Preventing the distribution of counterfeit goods once they have flowed into the country is more difficult than implementing counterfeit measures at the border. While it has been highlighted that counterfeit goods account for a significant proportion of goods distributed

⁶⁸ ACA "Realigned Strategic Plan 2019-2022" (<https://aca.go.ke/images/downloads/ACA-Realigned-Strategic-Plan-2019-2022.pdf>)

⁶⁹ According to the remarks by ACA in the hearings to the ACA.

⁷⁰ <http://kenyalaw.org/kl/fileadmin/pdfdownloads/AmendmentActs/2018/StatuteLawMiscellaneousNo18of2018.pdf>

to the market, many rights holders question the cost-effectiveness of preventing the distribution of counterfeit goods by legal means.

In the context of judicial remedies, it is possible to demand an injunction against infringements at the High Court or Industrial Property Tribunal. However, the total number of judges in Kenya is small (107 judges⁷¹; the population per judge in Kenya is approximately 500,000 (1,07 judges/5,377,000 people⁷²), while that in Japan is approximately 40,000 (3,075 judges⁷³/125,440,000 people⁷⁴), and there are limits to the ability to train judges specialized in a particular field of law. There are few judges with expertise and processing skills in intellectual property-related cases and owing to the cases exceeding the capacity of the courts, delays in procedures are becoming common, and prompt relief cannot be expected.

(b) Potential for Cooperation with Kenya

Considering these issues, there is potential for cooperation with Kenya in the following areas:

➤ Support for the promotion of the registration and utilization of intellectual property rights

- Cooperation to awareness activity of intellectual property rights

Regarding the level of penetration of intellectual property rights in Kenya, it would be important to provide educational activities on intellectual property rights systems to promote the registration and use of intellectual property rights in Kenya.

Regarding trademark and patent rights, with the support of the Ministry of Industrialization, Trade, and Enterprise Development, KIPI currently holds training sessions, exhibitions, conferences, and workshops to raise awareness of intellectual property rights in Kenya. KECOBO also conducts educational and awareness-raising activities in the copyright field. Supporting KIPI and KECOBO's activities is an effective means of support.

- Cooperation in improving the efficiency of the application and registration system for intellectual property rights

In addition, as applications for trademarks and patent rights require specialized skills, such as those possessed by Japanese patent attorneys, it is possible to provide training for local lawyers representing patent application procedures in cooperation with the KIPI. To provide effective support for the development of specialists, it would also be necessary to establish a system for their certification, such as the patent attorney system and intellectual property certified lawyer system.

⁷¹ Based on the numbers given by the judge in the hearing to the High Court.

⁷² World Bank, 2020 (<https://data.worldbank.org/indicator/SP.POP.TOTL?locations=KE>)

⁷³ The number of judges in Japan is 3,075 (excluding Judges of the Summary Court)-2021(https://www.courts.go.jp/vc-files/courts/datebook/2021/db2021_22p-24p.pdf)

⁷⁴ <https://www.stat.go.jp/data/jinsui/new.html>

To increase the number of registered trademarks and patent rights, it is important to provide practical support for the KIPI itself, which is responsible for the scrutiny process. The limited number of examiners is an important issue for KIPI, and there is room for support in establishing a system to train examiners to increase their numbers. Support for strengthening the capabilities of existing examiners, verification, and improvement of the flow of examination work, and improving the efficiency and speed of examination by formulating operational rules would also be effective. The KIPI also seemed to be highly aware of the need for improvement, including in the online review process, which accompanied the COVID-19 pandemic. Regarding copyright registration, KECOBO is promoting the introduction of advanced and efficient systems, such as online application systems. Although the nature of the rights is different, a prompt introduction of the system may be possible in Kenya's intellectual property-related registration procedures. It may also be useful to provide technical support to drastically improve the system in the application and examination procedures for trademarks and patent rights.

➤ Support for protection and enforcement of intellectual property rights

- Support for countermeasures against the distribution of counterfeit goods such as border protections

- Promotion of consumer education

The prevalence of counterfeits in Kenya can be attributed to the strong demand for cheap counterfeit products in the market, lack of discriminatory power between counterfeit and legitimate goods, and lack of awareness that counterfeit goods are illegal goods that infringe on the rights of others. Organizations, such as KIPI, KECOBO, and ACA, conduct education and awareness-raising activities on intellectual property systems for consumers, but they may not have been sufficiently effective so far. In Kenya, the distribution of counterfeit goods is very common and deeply accepted by consumers, therefore, there is little resistance to the purchase and consumption of counterfeit goods. In such situations, the effects are limited by economic policy perspectives, such as industrial development through the protection and promotion of R&D activities, and by appeals from ethical perspectives, such as the protection of rights holders, to consumers who want to buy cheap products for economic reasons. Thus, it is considered an effective means of appealing to consumers to prevent the distribution of counterfeit products from the viewpoint of protecting the safety of consumers, focusing on the risks posed by counterfeit products and the actual situation of consumer harm. During the workshop on intellectual property rights held on February 25, 2022, many participants agreed with the lecturer on this point. Regarding awareness-raising activities, it is necessary to carefully consider cost

effectiveness and implement effective methods such as television and social network services (SNS).

- Capacity building of ACA

It is important to support the ACA, which detects counterfeit goods. Since ACA inspectors have a basic knowledge of intellectual property rights, it would be useful to provide more advanced support in the areas of practical training for ACA officials regarding the identification and detection of counterfeit goods, verification, and development of the procedure flow from the filing of a petition by rights holder to the detection of counterfeit goods, and the development of a highly effective control method for controlling infringing activities with general preventive effects in mind. Such cooperation is considered a highly effective means of support in directly leading to the improvement of counterfeit measures in Kenya. Since the ACA comprises human resources familiar with Japan's systems, such as senior officials who have studied at the Graduate School of Public Policy in Japan for several years, they could act as a bridge to foster a common understanding and make more effective use of support.

- Capacity building of customs and promotion of cooperation among relevant organizations.

In Kenya, the proportion of counterfeit products manufactured domestically is likely to be small, and because many products are imported from foreign countries, border control measures are considered to be the most effective measures against counterfeit products. As described above, once distributed domestically, counterfeit products are difficult to detect; therefore, it is important to halt them at the border. Although the ACA has also dispatched officers to major borders, staff shortage is a problem. Therefore, customs play a major role in the field. Customs are responsible for managing imported goods and have the power to prevent the import of counterfeit goods. However, because customs officials are not necessarily experts in intellectual property rights, properly identifying counterfeit goods is difficult. Accordingly, providing support to customs, such as training by ACA, which has expertise in intellectual property rights, is necessary, but currently, it these organizations do not collaborate organically. Therefore, to promote smooth cooperation between ACA and customs, it is important to support the formulation of a framework and procedures for cooperation to enhance the effectiveness of countermeasures against counterfeit goods.

However, regarding the problem that customs officers may not actively take measures against counterfeit goods with a preference for the collection of customs duties, it is important to involve the Revenue Authority (KRA), which has jurisdiction over customs,

from the viewpoint that countermeasures against counterfeit goods will contribute to an increase in revenues as a whole. Close cooperation with the KRA are required to establish an effective support system.

Regarding KRA and customs, when the workshop on counterfeit measures was held, dozens of officials participated enthusiastically. We received positive feedback during the Q&A session and could share information regarding the issues, thus expecting fruitful support from the participants.

The system for registering imported goods in the ACA, which was introduced due to the amendment to the Counterfeit Product Control Law in 2018, is yet to be put into effect. However, this system may have a considerable impact on the international companies having businesses in Kenya. It would be necessary to provide support as an effective measure against counterfeit goods, so that does not harm the interests of intellectual property rights holders. In this regard, the ACA also expressed its expectations for assistance based on the actual implementation of border countermeasures in Japan.

- Assistance in judicial remedies (assistance to the courts)

Regarding judicial remedies, high courts and industrial property tribunals where infringement injunctions are filed, play an important role. However, as mentioned above, fundamental problems, such as the absolute number of judges, make it difficult to support the establishment of specialized departments.

However, as elaborated later, there is a high level of awareness among judges regarding the improvement of their own abilities and acquisition of specialized knowledge, as evidenced by responses to the on-site survey and the fact that many judges participated in the workshops in other fields (the Bankruptcy Law). Therefore, it is possible to provide effective support that can be implemented at an early stage, such as providing training for judges on the handling of intellectual property-related cases and establishing guidelines for hearing procedures for intellectual property-related cases that have been expressed as highly useful in court hearings.

In addition, it would be useful to provide qualifications to judges who have received a certain level of training, to have them take charge of intellectual property judges, to introduce the system of intellectual property judgment, and to support the establishment of the system at their requests.

(2) Issues Related to Ghana's Intellectual Property Laws and Potential for Cooperation

(a) Issues

➤ Applications for registering intellectual property rights as number of registrations is small

In 2016, 14 domestic patent applications were filed by local enterprises in Ghana, 15 in 2017, and 13 in 2018. The number of trademark applications by local enterprises in Ghana was also very low, with less than 1,000 applications, much lower than in Japan, the European Union, and the US.⁷⁵

One reason for the low number of registrations in Ghana would be that an understanding of intellectual property rights has not yet been established, and there is a lack of awareness to register, utilize, and benefit from intellectual property rights. Even if intellectual property rights are registered, it is often not possible to obtain returns that would otherwise be attained, owing to the spread of counterfeit goods; therefore, the incentive for registration is still low.

At present, there are only 15 staff members and 10 examiners in the Industrial Property Office of the Register General's Department, which is responsible for examining and registering trademarks, patents, designs, and layout designs of ICs, and there are no personnel to deal with the increased number of registrations. At present, the period for completing an examination is generally two years or less. However, if the number of registrations increases, it is concerned that the registration process would take longer.⁷⁶

➤ Strategic issues pointed out in the National Intellectual Property Policy and Strategy

Ghana launched the National Intellectual Property Policy and Strategy (“NIPPS”) in 2016.⁷⁷ This national strategy on intellectual property was formulated with the cooperation of Switzerland to allow citizens of Ghana to benefit from intellectual property rights. The strategic issues identified are as follows.

- (i) Reviewing intellectual property laws and intent to join international treaties, especially in areas of unfair competition, plant variety protection and seed laws, integrated circuits, traditional knowledge, and genetic resources
- (ii) Establishing an autonomous national intellectual property office to improve the institutional framework of intellectual property rights
- (iii) Encouraging creativity and promoting the utilization of intellectual property rights at universities

⁷⁵ <https://www3.wipo.int/ipstats/index.htm>

⁷⁶ Japan External Trade Organization, JETRO DUBAI Intellectual Property Division “Study on Intellectual Property System and its Operation in Ghana”

2021(https://www.jetro.go.jp/ext_images/world/africa/ip/report_gha_20210330.pdf) (p.3)

⁷⁷ Ntrakwah & Company - Abena Ntrakwah-Mensah “Ghana launches a National Intellectual Property Policy” 2016(<https://www.lexology.com/library/detail.aspx?g=89862cf5-4fb1-4d5e-88b6-34112cbc9fb4>)

- (iv) Educating and creating awareness among the public on benefits of intellectual property rights
- (v) Strengthening laws governing the exercise of intellectual property rights
- (vi) Authorizing system of intellectual property specialists
- (vii) Implementing programs to encourage the public to improve their awareness of intellectual property rights
- (viii) Establishing joint management organizations for interested parties in intellectual property rights
- (ix) Promoting research on issues relating to intellectual property rights

Since only five years have passed since the policy formulation, many of the above issues have not been resolved, and the need for efforts continues.

➤ Issues related to the enforcement of intellectual property rights

- Support for countermeasures against the distribution of counterfeit goods (border protections etc.)

In Ghana, as in Kenya, few counterfeit goods are manufactured domestically, and many seem to be imported from foreign countries. The distribution of counterfeit goods in the domestic market is widespread, and it is difficult to curb counterfeit goods inside the country. Therefore, border countermeasures are considered important for counterfeit measures.

In Ghana, there is no organization dedicated to counterfeit goods like the ACA in Kenya. Thus, the GSA, FDA, and customs work together to implement countermeasures.

The customs department maintains a list of registered trademarks submitted by rights holders and has the power to identify and seize counterfeit goods when they enter Ghana. However, no specific procedures for border control at customs have been enacted, and the above list of registered trademarks is considered informal.⁷⁸ In addition, customs may demand a guarantee fee from the rights holder for the seizure of counterfeit goods, but it is unclear whether this fee is legal.⁷⁹ Furthermore, if the importer contests that the imported goods are an infringing product, the rights holder must bring civil action and determine whether the imported goods are an infringing product.⁸⁰

⁷⁸ Japan External Trade Organization, JETRO DUBAI Intellectual Property Division “Study on Intellectual Property System and its Operation in Ghana” 2021(https://www.jetro.go.jp/ext_images/world/africa/ip/report_gha_20210330.pdf) (p.59)

⁷⁹ Japan External Trade Organization, JETRO DUBAI Intellectual Property Division “Study on Intellectual Property System and its Operation in Ghana” 2021(https://www.jetro.go.jp/ext_images/world/africa/ip/report_gha_20210330.pdf) (p.60)

⁸⁰ Japan External Trade Organization, JETRO DUBAI Intellectual Property Division “Study on Intellectual Property System and its Operation in Ghana”

The GSA establishes standards for products distributed domestically and may prohibit the sale and distribution of nonconforming products. In addition to cooperating with customs and other organizations, the Destination Inspection Department (“**DID**”) within the GSA can detain offenders until police respond. However, the GSA does not have the authority to prosecute, and cases are handled under the authority of the police after the seizure or destruction of counterfeit goods or the detention of offenders. Although the FDA has jurisdiction over food and drugs, there is a problem in demarcating them from the GSA. In some cases, there are overlapping jurisdictions under laws and regulations, and institutional problems hinder smooth coordination between the GSA and the FDA. The GSA dispatches inspectors to border checkpoints to inspect imports; however, the inspectors are technicians lacking a legal background. This is attributable to GSA inspecting products from the viewpoint of conformity to technical standards and not focusing on counterfeit measures. Although inspectors can avoid technical problems by preventing technical non-conformities, the problem lies in their incapability to identify products that infringe intellectual property rights.

- Issues related to judicial relief

Ghana’s markets have plenty of counterfeit goods, and the illegal distribution of music, movies, and other content via the Internet is very common. The police are primarily responsible for dealing with the distribution of counterfeit goods within the country, and are primarily authorized to conduct investigations in response to the complaints of right holders and to search and seize counterfeit goods in the country.⁸¹ However, the police’s discretion in searching for and seizing counterfeits depends on various circumstances. Moreover, infringing goods cannot be destroyed until the facts of the infringement are recognized in criminal proceedings. However, in criminal proceedings, the processing of the infringing goods is often delayed, and it takes time for the final rights to be established.⁸² In civil litigation, an injunction or claim for damage is possible, and a provisional order, including permission for investigation, can be sought depending on the nature of the case.⁸³ However, in reality, the number of intellectual property litigation cases handled by courts is small, and the capacity of courts to handle intellectual property disputes is also limited.

2021(https://www.jetro.go.jp/ext_images/world/africa/ip/report_gha_20210330.pdf) (p.60)

⁸¹ Japan External Trade Organization, JETRO DUBAI Intellectual Property Division “Study on Intellectual Property System and its Operation in Ghana”

2021(https://www.jetro.go.jp/ext_images/world/africa/ip/report_gha_20210330.pdf) (p.61)

⁸² Japan External Trade Organization, JETRO DUBAI Intellectual Property Division “Study on Intellectual Property System and its Operation in Ghana”

2021(https://www.jetro.go.jp/ext_images/world/africa/ip/report_gha_20210330.pdf) (p.62)

⁸³ Japan External Trade Organization, JETRO DUBAI Intellectual Property Division “Study on Intellectual Property System and its Operation in Ghana”

2021(https://www.jetro.go.jp/ext_images/world/africa/ip/report_gha_20210330.pdf) (p.66)

Consequently, the restoration of intellectual property rights in civil lawsuits seems practically negligible.

(b) Potential for Cooperation with Ghana

There is potential to assist Ghana in the areas identified under the NIPPS after assessing the status of initiatives to date. In particular, there is scope to consider the following:

- (1) educating the general public on the benefits of intellectual property rights;
- (2) implementing programs to encourage the general public to improve their awareness of intellectual property rights (iv, vii);
- (3) establishing systems for authorizing intellectual property experts (vi);
- (4) establishing an autonomous national intellectual property agency to improve the institutional framework of intellectual property rights and strengthening laws governing the enforcement of intellectual property rights (ii, v); and
- (5) reviewing intellectual property laws in the field of unfair competition (i).

Switzerland's assistance has been terminated, and no donor currently provides support in the area of intellectual property law.

➤ Cooperation for promoting registration and use of intellectual property rights

To promote the registration and use of intellectual property rights, it would be important to conduct education and awareness-raising activities for intellectual property rights systems. As mentioned above, NIPPS calls for the implementation of programs to encourage the public to improve their awareness of intellectual property rights and education on the benefits of intellectual property rights. When other donors do not come forward with support, this is a possible way to provide assistance.

Although Ghana is advancing the creation of a recognized professional qualification with the cooperation of Switzerland, the on-site interviews indicated that this program will not continue. Therefore, after confirming the intention to continue this program in the future, support should be focused on the development of human resources that can obtain a recognized qualification that is equivalent to the Japanese patent attorney, such as assistance for institution building and on-site training by Japanese experts.

It is also important to strengthen the capacity of institutions responsible for examining and registering intellectual property rights. At present, examining institutions are under the jurisdiction of the Intellectual Property Division of the Register General's Department, but the NIPPS has proposed the establishment of an independent intellectual property office

with adequate size and budget.

With the establishment of such independent intellectual property offices, support, including the provision of training courses to improve staff skills, seems to be effective. However, at the local level, no concrete progress has been made in establishing such an independent intellectual property office.

➤ Cooperation for protection and enforcement of intellectual property rights

- Cooperation for measures for the distribution of counterfeit goods, such as border measures

- Promotion of consumer education

In Ghana, similar to Kenya, the distribution of counterfeit goods is very common and deeply embedded in civil society, making consumers less reluctant to purchase and consume counterfeit goods. In such societies, it is difficult to restrain consumers who want to buy cheap products for economic reasons from an economic policy or ethical perspective. Therefore, when conducting the safety of consumers, an educational and awareness-raising activity to encourage consumers to prevent the distribution of counterfeit products, it would be effective to place the danger of counterfeit products at the forefront with a view to protect the safety of consumers. The lecturer for the workshop on intellectual property rights on February 25, 2022, also explained this point. The relevant organizations agreed on this point, and prompt cooperation with various government agencies is expected.

- Capacity building of relevant organizations and promotion of cooperation

In Ghana, the lack of a specialized organization for counterfeit goods, such as the Kenyan ACA, makes border measures more difficult. Customs officials inspecting borders and GSA inspectors are not experts in intellectual property rights and lack the ability to detect counterfeit goods. GSA inspectors may instruct customs officials to conduct inspections from a technical standpoint, but they may not instruct them to conduct inspections from an intellectual property rights standpoint. According to the Copyright Office, its staff may provide training to customs officials on copyright infringement; however, there is no interaction with the GSA. There are two staff members in the Legal Department of the Copyright Office, and it is uncertain whether the system can provide sufficient guidance. Ultimately, the aim should be to enable customs officials who conduct inspections, to acquire knowledge about intellectual property rights and to expose counterfeit goods at the border. First, it is necessary to develop human resources capable of providing guidance to numerous customs officials. Specifically, the capacity of customs officials to deal with

counterfeit goods on the ground should be improved by assisting in the development of personnel of the Industrial Property Office, Copyright Office, GSA, and FDA inspectors who have intellectual property knowledge and by providing the necessary support (e.g., preparation of teaching materials) for these personnel to further guide customs officials. In addition, in human resource development, it is important to involve government agencies that are currently not sufficiently coordinated to create people-to-people exchanges and support the creation of mechanisms that facilitate cooperation between organizations.

- Assistance in judicial remedies (assistance to courts)

In Ghana, the number of intellectual property litigation cases is small, and the capacity of courts to deal with intellectual property disputes is limited. In addition to the difficulty of specifying defendants and executing judgments, it is difficult to expect short-term results from support relating to counterfeit measures, because court procedures are not widely used due to general problems, such as procedural delays. However, to promote the awareness of intellectual property rights, it is necessary to show that disputes over intellectual property rights are settled in the courts and that the protection of rights is guaranteed. Therefore, it is impossible to ignore the improvements of court capacity.

Since Ghana has 403 judges⁸⁴ and a population of 31.07 million⁸⁵, the number of citizens per judge is approximately 77,000, which is approximately double that of Japan (about 40,000). Therefore, there is room for strengthening judges' expertise. In the on-site survey, the courts of Ghana expressed strong expectations for Japan's assistance, and there is a possibility that they will actively participate in the training of judges and exchanges with Japan's Intellectual Property High Court. Such engagement would allow for continuous improvement of the capacity of courts to handle intellectual property disputes, support the introduction of a system of intellectual property judge qualifications, and establish a system for dealing with intellectual property cases by providing qualifications to judges who have received a certain level of training.

(3) Issues Related to Nigeria's Intellectual Property Laws and Potential for Cooperation

(a) Issues

➤ Few applications for intellectual property rights

As in Kenya and Ghana, counterfeit goods are prevalent nationwide in Nigeria, and the awareness of intellectual property rights is weak. In this situation, there is little incentive to apply for and register intellectual property rights. Even including registration by both

⁸⁴ <https://judicial.gov.gh/>

⁸⁵ World Bank, 2020 (<https://data.worldbank.org/indicator/SP.POP.TOTL?locations=GH>)

nationals and foreigners, the number of patent applications in Nigeria was 248 in 2016, 296 in 2017, and 371 in 2018, which remains insignificant. The number of domestic applications for trademarks is around 20,000, but considering the size of the economy, it can be stated that the number of domestic applications for trademarks is small compared to that in developed countries.⁸⁶

➤ Issues related to examination and registration of intellectual property rights

Nigeria's Trademarks, Patents, and Designs Registry oversee the registration and examination of patents, trademarks, and designs. As mentioned above, among the 20,000 trademark applications filed each year, approximately 6,000–8,000 applications are registered, indicating that the bureau's system for examination and application processing is not sufficient.

As mentioned above, Nigerian patents are examined formally. If a document satisfying all formal requirements is submitted, a patent certificate is issued without the examination of substantive requirements. In the absence of a substantive examination, the rights holder can obtain rights at an early stage, but the existence of substantive requirements will be questioned when exercising these rights. Many African countries do not conduct substantive examinations of patent rights. This system has been adopted in developing and developed countries and may be considered as an issue pertaining to policy or institutional design. However, if Nigeria considers transitioning to a system that conducts substantive examinations, it may be eligible for assistance, including in the development of such systems.

➤ Legal protection of utility models

As mentioned above, Nigeria does not have a system to protect utility model rights. Even if a device is excluded from a patented invention, it may be regarded as the creation of a technical idea, and the failure to protect such ideas may hamper the incentive to invest in the development and promotion of the industry.

➤ Issues related to the enforcement of intellectual property rights

The police force and the National Agency for Food and Drug Administration and Control (NAFDAC) in Nigeria are primarily involved in counterfeit measures, both of which start investigations upon request from rights holders. However, the law does not seem to

⁸⁶ <https://www3.wipo.int/ipstats/index.htm>

stipulate detailed procedures, and there are problems with their effectiveness and stability. Further, enforcement officers' understanding of intellectual property rights and their capacity to enforce laws may be inadequate. At NAFDAC, the focus is on food and pharmaceuticals rather than on products, indicating the limitations of the agency's counterfeit measures.

A problem specific to Nigeria is that no effective measures have been implemented through customs. In some cases, if the rights holder is actively involved, the customs department can seize counterfeit goods. However, there is no intellectual property registration system in customs, and it is difficult to stop the import of counterfeit goods.

In civil litigation against infringers, procedural delays, generally observed in Nigeria, could be an issue and judges' knowledge of and capacity for intellectual property-related cases may be inadequate.

(b) Potential for Cooperation with Nigeria

➤ Cooperation for promotion of registration and use of intellectual property rights

Nigeria has little awareness of the exploitation of intellectual property rights, and there are limited human resources to support the registration of intellectual property rights. Owing to its large market and local companies that are active in investment activities, the potential to generate intellectual property is strong. It is believed that the registration of intellectual property rights can be promoted by deepening the understanding of intellectual property. Thus, education and activities to raise awareness of the intellectual property system and training and grooming specialists engaged in registration work can be effective support methods. There is scope to consider assistance through the Office of Trademarks, Patents, and Designs Registry, which is the competent authority, as well as via the Intellectual Property Law Association of Nigeria, which is composed of local lawyers, judges, policymakers, and scholars.

To promote the acquisition of intellectual property rights, it is also important to support the Office of Trademarks, Patents, and Designs Registration, which is responsible for conducting examination and registration procedures. There is also potential to support the establishment of a system to train examiners, aimed primarily at increasing the number of examiners, strengthening the capabilities of existing examiners, verifying and improving the flow of examination work, and improving efficiency and accelerating the pace of the examination process by formulating operational rules. Further, it is possible to quickly

resolve the issue of personnel shortages by improving work efficiency and providing IT support.

➤ Cooperation for amending the Patent Law

As previously mentioned, Nigeria does not have a utility model protection system. The current system requires only a formal examination for patent examinations, and substantive examinations are not conducted. In the future, if the Government of Nigeria indicates an intention to consider changes to the above system through interviews with the Office of Trademarks, Patents, and Design Registration, it is possible to support an amendment to the law, as well as the development of related practical systems.

➤ Cooperation related to the protection and enforcement of intellectual property rights

The prevalence of counterfeit goods in Nigeria, as in Kenya and Ghana, is mostly due to a lack of awareness that counterfeit goods are illegal goods that infringe upon the rights of others. Therefore, it is possible to provide support in the form of education to a wide range of potential consumers and awareness-raising activities concerning the intellectual property system in cooperation with the Office of Trademarks, Patents, and Design Registration, and the ACC. It is possible to provide assistance in the area of copyright that can be executed with the NCC. As in Kenya and Ghana, it is important to consider the cost-effectiveness of awareness-raising activities and select the appropriate media.

The customs department in Nigeria provides the most important support for the enforcement of intellectual property rights. As mentioned above, there is no system for registering intellectual property rights at customs to date and no effective practical measures have been implemented at customs. Thus, it is possible to provide comprehensive support, including the designing of systems, establishment of laws and regulations, formulation of practical rules, and capacity building of personnel with overall responsibility. Within Nigeria, the police and NAFDAC are the administrative agencies primarily responsible for enforcing intellectual property rights. However, owing to problems with the effectiveness and stability of procedures, it is possible to support the establishment of transparent rules for a series of procedures ranging from allegations by rights holders to the detection of counterfeit products. There is scope to consider establishing a system of cooperation among the police, NAFDAC, customs, and other agencies; training officials in charge of operating the system; and devising methods to control infringing activities with successful prevention.

Regarding the effective use of civil lawsuits against the infringement of intellectual property rights, support can be provided to strengthen the capacity of courts that deal with intellectual property cases. Specifically, training can be provided to judges of the Federal High Court, which is the court of first instance for intellectual property cases, and to support the development and acceleration of procedures for intellectual property litigation. In addition, it is possible to support the establishment of a system of intellectual property judicial qualifications and credit judges who have received a certain level of training to take charge of intellectual property cases.

(4) The African Regional Intellectual Property Organization (ARIPO) Challenges and Potential for Cooperation

(a) Issues

- Many ARIPO member countries have legal systems based on English law. In such countries, it is generally understood that for a treaty to have a domestic legal effect, it must be clearly incorporated into the national legal system through statutory law. However, legislation in some member countries has not yet been completed, and it has been noted that the validity of intellectual property rights acquired through ARIPO in these countries may become an issue.

(b) Potential for Cooperation to and through ARIPO

- ARIPO actively supports intellectual property organizations in African countries. For example, ARIPO supports the International Intellectual Property Crime Investigators College (“IIPCIC”). Individuals involved in the enforcement of intellectual property rights across African countries (police, customs officials, prosecutors) can participate in the online curriculum of intellectual property criminal investigations provided by the school free of charge.⁸⁷ In the on-site survey, the officials in charge of each intellectual property organization stated that they were actively exchanging information and collaborating with ARIPO. Due to the cooperative relationship between the government agencies of each country and ARIPO, there is a great possibility of supporting the development of legislation in African countries in cooperation with ARIPO. Specifically, the incorporation of JICA’s assistance programs into support programs, such as the capacity building implemented by ARIPO among government agencies in each country, can be expected to facilitate the wide-ranging and efficient dissemination of assistance by utilizing the ARIPO network and the intellectual property organizations of each ARIPO member country.

⁸⁷ <https://www.aripo.org/notices/interpol-ip-crime-investigators-college-courses/>

(5) The African Intellectual Property Organization (OAPI) Challenges and Potential for Cooperation

(a) Issues

- The amendments made to the Bangui Agreement of the OAPI and the modifications made to provisions on trademarks came into force in 2021, and those on patents will come into force in 2022.⁸⁸ Several important institutional changes will be made with this amendment, including the introduction of substantive examination of patents from the formal examination, filing of appeals in the event of objections, revision of third-party objections, and improvement of counterfeit control and import measures.⁸⁹ During the system change process, various issues, such as the development of rules and training of personnel in charge, are expected to arise.

(b) Potential for Cooperation with OAPI

Various types of cooperation may be required to resolve the issues associated with the aforementioned institutional reforms. We also consider working with the WIPO and the support of other donors. In addition, member states of the OAPI do not have their own registries and can only register their intellectual property rights through the OAPI. Therefore, assisting OAPI in improving its practical capabilities, including the examination and registration of intellectual property rights, is directly linked to the expansion of its intellectual property system. Considering the central role played by the OAPI in the intellectual property system of all OAPI member states and the momentum toward OAPI reform in recent years, providing assistance to OAPI is considered effective and timely.

(6) Holding Workshops and Expectations for Future Cooperation

As mentioned above, a workshop on intellectual property law was held on January 25, 2022 as part of this survey. Mr. Masashi Kurose presented at a workshop on intellectual property law.

Under the theme of “Proposals for Efficiency Cracking Down on Counterfeits Products,” Mr. Kurose gave a presentation on the necessity of establishing countermeasures against counterfeits and how organizations should collaborate to promote the detection of counterfeit products, referring to case studies from China and Southeast Asia.

Participants from government agencies and local law firms involved in intellectual property law and the crackdown on counterfeit goods in Kenya and Ghana—particularly officers from

⁸⁸ Spoor & Fisher “Africa Intellectual Property Newsletter Vol. 56” Japan External Trade Organization, JETRO DUBAI, 2020(https://www.jetro.go.jp/ext_images/_Ipnews/africa/newsletter202010.pdf)

⁸⁹ Spoor & Fisher “Africa Intellectual Property Newsletter Vol. 56” Japan External Trade Organization, JETRO DUBAI, 2020(https://www.jetro.go.jp/ext_images/_Ipnews/africa/newsletter201903.pdf)

the Revenue Authority (Customs), which is responsible for counterfeit goods at the border—participated in the event, totaling more than 100 interested and engaged participants.

During the Q&A session, there were lively discussions, including questions about the entity that determines the infringement of trademark rights and questions about collaborating with the country exporting counterfeit goods.

Eighteen people responded to the questionnaire collected after the workshop, on whether they were “very well” or “well” with the content of the workshop. Respondents said that counterfeit measures were particularly necessary for consumers’ safety and it was useful in addressing the need for cooperation between intellectual property registration agencies, customs agencies, and other regulatory agencies.

According to the questionnaire, the themes of future workshops could include the introduction of best practices for counterfeit measures, methods for counterfeit measures in the digital field, and the modality of inter-organizational and international cooperation in Japan.

2.2 Overview of Competition Laws, Practical Issues, and the Potential for Cooperation in Kenya, Ghana, and Nigeria.

2.2.1 Overview of Competition Law in Kenya, Ghana, and Nigeria

(1) Overview of Kenya's Competition Law and Enforcement Regime

The Competition Act, 2010 is the governing competition law in Kenya. The most recent amendments were made in 2019, and the amended law came into force in December 2019. The 2019 amendments include a provision on abuse of buyer power as one of the abuses of a dominant market position.

The Competition Act, 2010, consisting of 100 articles including consumer protection provisions, is a comprehensive competition law. Detailed regulations on merger regulations and investigation procedures are set forth in the Competition (General) Rules, 2019, which provide for merger notification thresholds and settlement procedures. In the event that the provision in the Competition Act, 2010, conflict with other laws, the provisions in the Competition Act, 2010, prevail as far as competition and consumer protection are concerned.⁹⁰

The Competition Act, 2010, applies to any person, including public authorities, who is involved in any transaction in Kenya.⁹¹ Thus, the Act applies to a foreign company even if the offense is not committed in Kenya, if it is an anti-competitive transaction by a Kenyan, or if it is an anti-

⁹⁰ Competition Act, 2010, Article 5 Paragraph 2.

⁹¹ Competition Act, 2010, Article 5 Paragraph 1.

competitive transaction by a company doing business in Kenya.⁹²

The Competition Authority of Kenya (CAK), established under Section 7 of the Competition Act, 2010, is the enforcement agency and is headed by a five-member Board, including the Chairman. The CAK Secretariat has 3 Directorates and 13 Divisions with 74 staff members as of 2020.⁹³

While many African Union (AU) Member States have lagging competition laws, Kenya is one of the countries with the most developed competition laws, and CAK is one of the most active competition authorities in Africa. In 2020, the CAK handled 121 business combination cases, 18 abuse of buyer power cases, 24 competition restriction cases, and 178 consumer protection cases.⁹⁴ In Africa, there are many cases where the independence of competition authorities is not sufficiently ensured,⁹⁵ but CAK has ensured the independence of its duties by law⁹⁶.

The CAK is empowered to conduct on-site inspections without a warrant⁹⁷ and to conduct searches under a court-issued warrant pursuant to Article 108 of the Criminal Procedure Code,⁹⁸ giving it strong investigative powers. At the same time, there are procedural safeguards such as attorney client privilege⁹⁹ and the right to have an attorney present during on-site inspections¹⁰⁰.

Once the CAK has completed its investigation of the case, it may, at the request of the parties involved, hear directly from the parties before making a decision¹⁰¹. If the person involved in the case is dissatisfied with the decision made by the CAK, he or she may file a petition for initiation of appeal proceedings with the Competition Tribunal within 30 days of the decision¹⁰². Furthermore, in case of dissatisfaction with the decision of the Competition Tribunal, an appeal to the High Court is allowed¹⁰³.

The substantive provision prohibiting Restrictive Trade Practices in the Competition Act, 2010, is Article 21, which prohibits not only so-called hard-core cartels such as price fixing, but also price maintenance practices. In addition, anti-competitive practices by business associations are

⁹² Competition Act, 2010, Article 6.

⁹³ CAK, Annual Report and Financial Statements, Financial Year 2019/2020, p.13.

⁹⁴ Ibid.

⁹⁵ International Monetary Fund (IMF), Competition, Competitiveness and Growth in Sub-Saharan Africa, 2020, p.21.

⁹⁶ Competition Act, 2010, Article 7 Paragraph 2.

⁹⁷ Competition Act, 2010, Article 32.

⁹⁸ CAK, Search and Seizure Guideline, p.5.

⁹⁹ Ibid., p.7.

¹⁰⁰ Ibid., P11.

¹⁰¹ Competition Act, 2010, Article 35.

¹⁰² Competition Act, 2010, Article 40 Paragraph 1.

¹⁰³ Competition Act, 2010, Article 40 Paragraph 2.

prohibited¹⁰⁴, and provisions on abuse of a dominant market position are included in Article 23 and below, and provisions on natural monopolies are included in Article 50 and below.

Article 41 of the Competition Act, 2010, contains provisions on merger, under which the parties must notify the CAK in advance and obtain its approval¹⁰⁵. Detailed regulations on merger are set out in the Competition (General) Rules, 2019. In addition, the Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act provide detailed explanations on examination methods and other areas.

The Competition Act, 2010, provides for strong penalties, with imprisonment of up to five years or a fine of up to 10 million Kenyan shillings, or both¹⁰⁶, for restricting competition, including cartels, as provided for in Article 21 of the Competition Act, 2010, and for abuse of a dominant market position as provided for in Article 24 of the Act.

There is also a leniency program in place¹⁰⁷, which allows the CAK to reduce or eliminate penalties for those who accurately report all of their violations to the CAK, cooperate fully with the investigation, do not divulge the facts of their report, and immediately cease all violations¹⁰⁸. If the leniency is approved, the penalty reduction is 100% for the first person to file a report, 50% for the second, 30% for the third, and 20% for any subsequent persons¹⁰⁹.

(2) Movements toward Enacting Competition Laws and Related Regulations in Ghana

Ghana does not yet have a comprehensive competition law in place at this time, nor does it have a competition authority. However, this does not mean that there are no legal provisions related to competition. Provisions related to competition law are scattered among sectoral business laws, with each regulator having jurisdiction over enforcement.

For example, the regulation of merger for banks is under the jurisdiction of the Central Bank of Ghana, which has issued the Mergers and Acquisition Directive,¹¹⁰ which was enacted under the Banks & Specialized Deposit-Taking Institutions Act, 2016. The Central Bank of Ghana has issued the Mergers and Acquisition Directive, which regulates merger of banks. The Central Bank of Ghana is required to consider the impact on competition in the market when approving

¹⁰⁴ Competition Act, 2010, Article 22.

¹⁰⁵ Competition Act, 2010, Article 42 Paragraph 2, Paragraph 3.

¹⁰⁶ Competition Act, 2010, Article 21 Paragraph 9, Article 22 Paragraph 6.

¹⁰⁷ Competition Act, 2010, Article 89A.

¹⁰⁸ CAK, Leniency Program Guidelines, Paragraph 12.

¹⁰⁹ CAK, Leniency Program Guidelines, Paragraph 13.

¹¹⁰ Banks & Specialized Deposit-Taking Institutions Act, 2016, Article 54 Paragraph 4, Article 92 条 Paragraph 1.

mergers.¹¹¹ Furthermore, the National Communication Authority regulates mergers in the telecommunications sector based on the National Communication Act, 2008.¹¹² One of the responsibilities of the National Communication Authority is to ensure fair competition among telecommunications vendors.¹¹³

Merger in the mining sector is regulated by the Ministry of Lands and Natural Resources under the Minerals and Mining Act, 2006.¹¹⁴ Mergers in the oil and gas sector are regulated by the Ministry of Energy under the Petroleum (Exploration and Production) Act, 2016.¹¹⁵ However, the purpose of these regulations is such as to ensure the appropriate use of resources and not to ensure fair competition in the market.

Merger of public companies are regulated by the Ghana Securities and Exchange Commission under the Securities Industry Act, 2016.¹¹⁶ General provisions, including the definition of merger, are contained in Article 238 to 260 of the Companies Act, 2019.

Ghana is a member of the Economic Community of West African States (ECOWAS), a regional economic community, and ECOWAS has its own competition laws that apply to its Member States. Therefore, the ECOWAS competition laws apply to cross-border cases within the ECOWAS region, even if they are in Ghana.

Ghana also has a law related to competition, the Protection against Unfair Competition Act, 2000. The Act prohibits any steps that may cause confusion with other businesses¹¹⁷ or damage the reputation of other businesses,¹¹⁸ any act that may divulge the secrets of a business,¹¹⁹ and any act that violates international treaties such as those with the World Trade Organization (WTO) and ECOWAS.¹²⁰

In this survey, a team conducted a field survey in Ghana and interviewed the Ministry of Trade and Industry of Ghana. According to these hearings, the need for a comprehensive competition

¹¹¹ Banks & Specialized Deposit-Taking Institutions Act, 2016, Article 54 Paragraph 1 Item (b).

¹¹² Article 5 of the National Communications Act, 2008 contains provisions on merger of telecommunications vendors. Currently, the guidelines for merger are under public comment by the National Telecommunications Agency.

¹¹³ National Communications Authority Act, 2008, Article 3 Item (e).

¹¹⁴ Minerals and Mining Act, 2006 Article 47 Paragraph 1.

¹¹⁵ Petroleum (Exploration and Production) Act, 2016 Article 15.

¹¹⁶ Securities Industry Act, 2016 Article 3 Item (h). The detailed regulations are set forth in the SEC Code on Takeovers and Mergers 2008.

¹¹⁷ Protection against Unfair Competition Act, 2000, Article 1.

¹¹⁸ Protection against Unfair Competition Act, 2000, Article 2.

¹¹⁹ Protection against Unfair Competition Act, 2000, Article 5.

¹²⁰ Protection against Unfair Competition Act, 2000, Article 6 Paragraph 2.

law has long been recognized in Ghana. The Government of Ghana established seven priority areas in the Ghana Trade Policy formulated in 2005¹²¹, and the Trade Sector Support Programme (TSSP), which is a measure implemented by the Ghana Trade Policy, has stated the establishment of a transparent and effective competition law regime as one of its goals¹²². The Ministry of Trade and Industry (MoTI) has been working on the establishment of a transparent and effective competition law regime since 2008. The Ministry of Trade and Industry began developing a competition law bill in 2008, and the bill has already been completed and tweaked several times. However, due to political factors such as the change of government in 2016, the competition law bill has not been submitted to the cabinet to date. According to a local law firm in Ghana, the most recent competition bill at this time is the one prepared in 2019.

The content of Ghana's competition law bill has not been made public, but part of it has been included in the ECOWAS' Regional Competition Policy Framework¹²³. According to this framework, Ghana's competition law bill is comprehensive and imitates competition laws in developed countries. It establishes competition authority, widely prohibits anti-competitive activities, and provides provisions to control mergers.

The Minister of Trade and Industry was responsible for drafting Ghana's competition law bill. His comments¹²⁴ at an August 2019 meeting on the African Continent Free Trade Zone (AfCFTA) in Ghana indicated that he was ready to enter the competition law bill for parliamentary deliberation soon. This was believed to be a gesture of external diplomacy because the AfCFTA Phase 2 negotiations, which came into effect in 2019, note that member states will discuss competition policy protocols. The Minister of Trade and Industry said that the fundamental issue involved how to align the bill with the ECOWAS' competition law and with the AfCFTA's protocol after the domestic competition law was enacted.

In this regard, the survey team confirmed with the Ministry of Trade and Industry during the field survey in Ghana that they are currently discussing with ECOWAS in parallel with the preparation of the domestic bill, and that ECOWAS member countries are expected to consolidate their opinions and submit their views on the protocol for a unified competition policy to the AfCFTA. The Ministry of Trade and Industry hopes to have a competition law bill in place by the end of 2022.

¹²¹ The Ghanaian government had identified seven areas in its trade policy: (1) Multilateral Trade, (2) Creating a Fair and Transparent Import-Export Regime, (3) Facilitating Trade, (4) Enhancing Production Capacity for Domestic and Export Markets, (5) Domestic Trade and Distribution, (6) Consumer Protection and Fair Trade, and (7) Protection of Intellectual Property Rights.

¹²² <https://www.oecd.org/dac/aft/43190865.pdf>,

¹²³ ECOWAS Regional Competition Policy 2007, p 17.

¹²⁴ <https://goldstreetbusiness.com/2019/business/competition-law-being-considered-by-cabinet/>

According to the Ghanaian Ministry of Trade and Industry, the process of enacting laws in Ghana is complex and the road to passage is long. The first step is for the Ministries to submit their bill to the Cabinet, at which point they are submitted for public comment. Next, the bill is sent to the Attorney General, who reviews it and returns it with opinions to the Ministry where the bill was drafted. The Ministry in charge then submits the bill to the Cabinet again, reflecting the Attorney General's opinion, and the Attorney General publishes the bill in the Official Gazette for 40 days before it is debated in the Parliament.

Bills introduced for parliamentary debate are first introduced to the Ministers at the First Reading, after which the bill is referred to the Sub-Committee, which in the case of competition bill, refers it to the Industrial Committee. The Sub-Committee will hold a public hearing and refer the bill to the Second Reading, where it will be amended accordingly, and then to the Third Reading. The bill that has passed the Third Reading is referred to the President, and the bill that has received the President's assent is referred to the plenary session of the Diet. If the bill is passed, it is sent back to the President, who signs it into law.¹²⁵

In Ghana, the existence of laws and regulations that restrict competition has become a problem. The Public Utilities Regulatory Commission established by the Public Utilities Regulatory Commission Act 1997 is empowered to control the prices of a wide range of public services¹²⁶.

(3) Overview of Nigeria's Competition Law and Enforcement Regime

Currently, competition law in Nigeria consists of the Federal Competition and Consumer Protection Act 2018, which includes 168 articles regarding consumer protection provisions; this law came into effect in January 2019. In Nigeria, establishment of the Federal Competition and Consumer Protection Commission (FCCPC) transferred the function of the Consumer Protection Council, which had previously overseen consumer protection administration, and part of the function of the Securities and Exchange Commission, which had been responsible for regulating mergers, to the Federal Competition and Consumer Protection Commission.

The Federal Competition and Consumer Protection Act 2018 applies to all commercial transactions that affect the Nigerian domestic market and covers commercial transactions conducted by both private companies and public institutions.¹²⁷ According to the FCCPC's

¹²⁵ <https://www.parliament.gh/laws>

¹²⁶ Ghana has a law called the Protection against Unfair Competition Act 2000, which at first glance seems to be a competition law, but it is a law that regulates such as a misrepresentation from the perspective of consumer protection.

¹²⁷ Federal Competition and Consumer Protection Act 2018, Article 2.

response to the questionnaire sent in this survey, the Competition and Consumer Protection Act of 2018 applies outside Nigeria in certain cases and has become increasingly necessary in recent years, especially in the digital economy.

The FCCPC was established as an enforcement authority of the Federal Competition and Consumer Protection Act 2018 and has a secretariat with eight commissioners including the chairman; the committee's vice-chairman also serves as secretary general of the secretariat. In addition to the Chairman and Vice-Chairman, there are two senior Commissioners who oversee the Bureau of Operations and the Bureau of Corporate Service, respectively.

The Operations Bureau is responsible for the core operations of the FCCPC, including (1) Complaint Resolution, (2) Surveillance & Enforcement, (3) Sales Promotions & Monitoring (4) Consumer & Business Education, (5) Quality Assurance & Development, (6) Mergers & Acquisition, (7) Investigations, (8) Legal & Litigation (6) Mergers & Acquisitions, (7) Investigations, and (8) Legal Service & Prosecution. In 2020, 47 merger cases were handled.¹²⁸

The Corporate Services Bureau is responsible for the operations of the FCCPC's administrative divisions, which are: (1) Information and Communication Technology, (2) General Administration, (3) Human Resource Management, (4) Planning Research and Strategy, and (5) Finance & Accounts.

The FCCPC Secretariat has 7 departments, 5 units, 6 regional offices, 2 branch offices, and 245 staff members, according to the response from the Federal Competition and Consumer Protection Commission. Of these, the Legal Service Department conducted five investigations in 2020, all of which were consumer protection cases and apparently did not investigate cartels or other anti-competitive activities.¹²⁹ According to the responses to the aforementioned questionnaire, all the staff of the former Consumer Protection Council, which were merged into the FCCPC, have joined the FCCPC, and there are probably some areas where the FCCPC is in fact continuing only its previous work, and such circumstances may also be affecting the current activities of the FCCPC.

The FCCPC has strong investigative powers, such as conducting raids¹³⁰ and seizing evidence under a court warrant.¹³¹ The Federal Competition and Consumer Protection Commission can also

¹²⁸ Federal Competition Consumer Protection Commission, Annual Report 2020, pp 46-50.

¹²⁹ Ibid., P53.

¹³⁰ Federal Competition and Consumer Protection Act 2018, Article 27.

¹³¹ Federal Competition and Consumer Protection Act 2018, Article 28.

issue a Request for Information to those involved in a case¹³² and summon them to public hearings.¹³³

The people involved in the case may file a petition with the Competition and Consumer Protection Tribunal to adjudicative proceedings if they are dissatisfied with the decision made by the FCCPC.¹³⁴ Additionally, if the person involved in the case is dissatisfied with the Competition Consumer Protection Tribunal's decision, he or she may appeal to the Court of Appeal.¹³⁵ Violations of provisional injunctions issued by the Competition and Consumer Protection Tribunal will be subject to administrative sanctions by the Tribunal.¹³⁶

The substantive provisions prohibiting anti-competitive acts are stipulated in Article 59 and its subsequent sections. Article 59 prohibits acts that are considered part of a purported "hardcore" cartel, such as price fixing, market allocations, supply restrictions, and bid rigging. Additionally, Article 70 and its subsequent sections contain provisions regarding the abuse of dominant position, while Article 76 contains provisions regarding structural regulations, other than those that are behavioral. For example, certain natural monopolies are prohibited.

Article 104 stipulates that the Federal Competition and Consumer Protection Act 2018 will be applied in preference to other laws and regulations regarding competition and consumer protection.

Moreover, as a characteristic point, Article 88 of the Federal Competition and Consumer Protection Act 2018 stipulates controlled economic provisions, in that the President can decide the price of goods and services under certain requirements.

Beginning with Article 92, the FCCPA provides provisions to control mergers with the adoption of a mandatory pre-notification system.¹³⁷ The 2020 Merger Review Regulations also present the detailed rules of such control, while the Merger Review Guidelines explain the general examination methods involved in the merger control.

¹³² Federal Competition and Consumer Protection Act 2018, Article 32.

¹³³ Federal Competition and Consumer Protection Act 2018, Article 33 Paragraph 2.

¹³⁴ Federal Competition and Consumer Protection Act 2018, Article 39. The Competition and Consumer Protection Tribunal consists of seven administrative law judges, including the Chairman, who must be nominated by the President and approved by Congress the administrative law judges were appointed and the Tribunal established in March 2021.

¹³⁵ Federal Competition and Consumer Protection Act 2018, Article 55.

¹³⁶ Federal Competition and Consumer Protection Act 2018, Article 51.

¹³⁷ Federal Competition and Consumer Protection Act 2018, Article 93.

Alternatively, the Federal Competition and Consumer Protection Act 2018 outlines extremely strict criminal penalties for violations of competition law in Article 107. For example, hardcore cartels are subject to imprisonment of up to three years, fines of up to one billion naira, or both,¹³⁸ and legal entities are fined up to 10% of their sales.¹³⁹ Article 108 of the Federal Competition and Consumer Protection Act 2018 provides for conspiracy-based crimes.

In addition to these criminal penalties, the FCCPC (Administrative Penalties) Regulations, 2020, was enacted in 2020, under which administrative penalties could be imposed not only for procedural violations but also for violations of hard-core cartels. In addition, the FCCPC may, at its discretion, pursue criminal penalties in addition to administrative penalties if necessary.¹⁴⁰ For example, in the case of price fixing, the FCCPC may order a corporation to pay an administrative fine based on 2% of its annual sales, after determining the degree of malicious intent behind the violation.¹⁴¹

The Federal Competition and Consumer Protection Act, 2018, does not currently contain a leniency regime, but according to the response to the questionnaire, a leniency rule covering cartels is currently being prepared.

For cases of violations other than cartels, the FCCPC Investigative Cooperation/Assistance Rules & Procedures, 2021, allows for reduced penalties for those who cooperate in investigations, subject to certain requirements.¹⁴²

2.2.2 Current State of Competition Law Practice in Kenya, Ghana and Nigeria

(1) Current Status of Competition Law Practice in Kenya and International Initiatives

As mentioned above, Kenya is a country with one of the most developed competition laws, and CAK is one of the most active competition authorities in Africa. According to the field survey conducted in Kenya, the CAK is already engaged in various activities to promote competition law in neighboring countries in Africa. For example, the EAC, one of the regional economic communities that Kenya is a member of, has established the East African Competition Authority (EACA), which has commenced full-scale activities in recent years. The CAK aids the development of guidelines for the EACA.

¹³⁸ Federal Competition and Consumer Protection Act 2018 Article 107 (a).

¹³⁹ Federal Competition and Consumer Protection Act 2018 Article 107 (b).

¹⁴⁰ 2020 年 FCCPC 行政罰規則 4 条。

¹⁴¹ Federal Competition and Consumer Protection Commission (Administrative Penalties) Regulations, 2020, Schedule 1.

¹⁴² FCCPC Investigative Cooperation/Assistance Rules & Procedures 2021 Article 4.1.

Kenya has also been working with the Common Market for Eastern and Southern Africa (COMESA), another regional economic community of which Kenya is a member, to ensure that competition laws in the region operate effectively. For example, Kenya is assisting COMESA Member States in developing guidelines to ensure that their merger regulatory notification thresholds do not conflict with those of the COMESA Competition Commission and the COMESA competition authority.

In addition, CAK has been receiving staff from the Ethiopian competition authority through COMESA, as well as competition authority staff from Botswana to learn about competition law practices.

In the African region, there is an organization called the African Competition Forum (ACF), which was established in 2011 in Nairobi, Kenya, by competition authorities to promote and raise awareness of competition law. The ACF was established in 2011 in Nairobi, Kenya, and CAK is one of its core members, serving as the first chairperson. According to what CAK stated during the field survey, the ACF not only conducts activities to promote and raise awareness of competition law, but also conducts surveys and exchanges opinions among authorities. For example, they conduct surveys on the cement market, which has become an oligopolistic market, and exchange opinions on survey methods.

With the AfCFTA coming into force in 2019, the CAK recognizes that the African continent as a whole has varying levels of competition law and that this agreement will lead to the development of a free economy across the continent. CAK seems to be proud of its ability to contribute to the development of competition law across the continent.

The CAK is both a competition authority and a consumer protection authority, and it participates in the activities of the International Consumer Protection and Enforcement Network (ICPEN) as part of its international efforts. In the African region, CAK leads the African Consumer Protection Dialogue, a forum for consumer protection authorities to exchange views on legal issues in the rapidly expanding digital financial services and e-commerce markets.

The CAK has been watching the situation of abuse of buyer power against small and medium-sized enterprises (SMEs) since the provisions on abuse of buyer power were established in the Competition Act, 2010, in 2019. However, the CAK has not yet accumulated sufficient know-how, and in this regard, the CAK would like to receive knowledge from Japan, as Japan has a long track record of operations regarding abuse of superior bargaining position.

(2) Current Status and Issues of Competition Law Practice in Ghana

As mentioned above, Ghana does not have a comprehensive competition law in place, nor does it have a competition authority. Provisions related to competition law are scattered among sector-specific business laws, with each regulator having jurisdiction over enforcement.

The laws regulating various industrial sectors, which contain provisions related to competition law, also contain provisions that require fair competition in each sectoral market, but there are no provisions prohibiting or penalizing so-called hard-core cartels such as price fixing, no provisions that prohibit abuse of a dominant market position, and no provisions that crack down on unfair trade practices such as resale price maintenance.¹⁴³

In recent years, Ghana has been experiencing rapid economic growth and significant changes in the market due to the expansion of global companies. In this context, cases related to competition policy have also been observed.

For example, there is a recent example in the digital communications sector. Ghana's Ministry of Communications and Digitalization published its National Telecommunication Policy in 2005. It includes a chapter on competition policy in the telecommunications sector, which calls for the establishment of a fair, transparent, and non-discriminatory telecommunications market.¹⁴⁴ The National Telecommunications Policy states that if a telecommunications vendor has the potential to adversely affect competition in the market, the vendor shall be identified as having Significant Market Power (SMP),¹⁴⁵ and the National Telecommunications Agency shall require the vendor to take the necessary corrective measures. In order to qualify as an SMP, a vendor must have a market share of more than 40% in the relevant market.¹⁴⁶ As mentioned above, the National Telecommunications Agency (NTA) is responsible for ensuring fair competition among electric vendors, according to Article 3e of the National Telecommunications Law, 2008.

In recent years, a number of global companies have entered the digital communication market in Ghana. In June 2020, the National Communications Authority (NCA) declared MTN to be an SMP,¹⁴⁷ stating that MTN had a 75% share of the market in the fourth quarter of 2019 and that this trend is expected to continue. NCA asked MTN to correct its pricing practices that exclude other companies.¹⁴⁸ MTN filed a complaint with the High Court, claiming that the National

¹⁴³ Bowmans, Africa Guide – Competition, 2021, p 50.

¹⁴⁴ National Telecommunication Policy 4.3, p 17.

¹⁴⁵ Ibid., pp 19-20.

¹⁴⁶ Ibid., p 19.

¹⁴⁷ <https://www.gna.org.gh/1.18411928>

¹⁴⁸ <https://citinewsroom.com/2020/06/government-moves-to-check-mtns-dominance-in-telecoms-sector/>

Telecommunications Agency's unilateral recognition of SMP was not a fair procedure.¹⁴⁹ According to local press reports, in 2020, MTN was the leader in the cell phone market in Ghana with 57% of the market on a subscription basis, Vodafone 22%, Airtel Tigo 20%, and Glo 1.8%, while MTN had a 67% share of the Internet service market,¹⁵⁰ and a 60.51% share for the six months ending June 2020.¹⁵¹

The lower court rejected MTN's appeal, and MTN appealed the decision to the Supreme Court. However, MTN eventually withdrew its appeal in October 2020, saying that it would discuss an amicable way forward with the National Communications Agency in the future¹⁵². Later, there were no significant developments for a while, but in November 2021, as part of its corrective measures, MTN launched the onnet/offnet parity service, which allows users to use its network at the same rate even when calling another company's network.¹⁵³

The MTN case would probably have proceeded differently if the competition law on abuse of a dominant market position had been developed and if a specialized competition authority with expertise in market analysis had been in charge of enforcement, which would have included an analysis of the substitutability of goods and services in the market.

According to what the Ministry of Trade and Industry told us during our field survey in Ghana, there are concerns about competition law issues in the cement industry as well. The demand for cement is growing due to economic growth and the construction of roads, which is causing prices to skyrocket. Indeed, in general terms, the World Bank's report on the cement industry in Africa has raised concerns,¹⁵⁴ stating that there is an oligopoly of nine global companies in the continent, with one company holding the majority share in 18 countries and prices at 183% of the global average. The World Bank says it can free consumers from overpaying \$2.5 billion a year by enforcing competition laws and removing non-tariff barriers.

In Africa, competition authorities in South Africa¹⁵⁵ and Zambia¹⁵⁶ have uncovered cartels among cement companies. If competition law problems are suspected in Ghana as well, it is hoped that a competition law enforcement system will be put in place as soon as possible and appropriate

¹⁴⁹ <https://mtn.com.gh/mtn-ghana-seeks-judicial-review-of-smp-declaration/>

¹⁵⁰ <https://techpoint.africa/2020/06/11/ghanas-measures-mtns-dominance/>

¹⁵¹ http://www.connectingafrica.com/author.asp?section_id=761&doc_id=764614

¹⁵² <https://www.mobileworldlive.com/featured-content/top-three/mtn-ghana-withdraws-legal-case-in-dominance-row>

¹⁵³ <https://www.myjoyonline.com/mtn-ghana-implements-onnet-offnet-parity-measures-in-compliance-with-smp-directives/>

¹⁵⁴ <https://www.worldbank.org/en/news/feature/2016/07/27/africa-competition>

¹⁵⁵ <https://www.comptrib.co.za/case-detail/6418>

¹⁵⁶ <https://www.facebook.com/photo/?fbid=4868794599814679&set=a.543985422295640>

measures will be taken.

(3) Challenges in the Practice of Competition Laws in Nigeria

There are some challenges to the effective implementation of Nigerian competition law, which range from the issues inherent in the law itself to operational issues within organizations.

The issue within the Nigerian Competition Law is that it seems it does not legally ensure the independence of the enforcement by the FCCOC.¹⁵⁷ Competition law in developed countries ensures independent enforcement by competition authorities without exception, and thus, politics cannot influence or distort the law. However, Article 88 and adherence to the Federal Competition and Consumer Protection Act 2018 provides that the President may determine the prices of goods and services under certain conditions.

Article 104 of the Federal Competition and Consumer Protection Act, 2018, provides that the Act supersedes other relevant laws in the areas of competition and consumer protection law. However, the consumer protection area is also under the jurisdiction of the National Agency for Food and Drug Administration and Control and the Nigerian Customs Service, which have expertise and experience in this area. This raises the issue of the relationship between the Federal Competition and Consumer Protection Commission and its decisions.¹⁵⁸

In addition, it is not fully clear how the Federal Competition and Consumer Protection Act, 2018, and the competition law of ECOWAS, to which Nigeria belongs, will be applied and how conflicting jurisdictions will be dealt with.

At present, the Federal Competition and Consumer Protection Act, 2018, does not have a leniency program in place, and doubts have been raised as to whether the widespread introduction of strict criminal penalties alone will be effective in uncovering cartels, which are generally conducted behind closed doors and are considered difficult to investigate.¹⁵⁹ However, as mentioned above, preparations for the development of leniency program for cartels are currently underway, and procedures for cooperating in investigations of matters other than cartels have already been developed. It is possible to assume that the systemic problems are on the way to being solved, regardless of the operational issues.

¹⁵⁷ Enyinnaya Uwadi, Challenges to the Implementation of Competition Law in Nigeria: Lessons from South Africa, Concurrence Antitrust Writing Awards 2020, p3 2020. <https://awards.concurrences.com/en/awards/2020/student-articles-en/challenges-to-the-implementation-of-competition-law-in-nigeria-lessons-from>

¹⁵⁸ Enyinnaya Uwadi, supra note 4, P4, 2020.

¹⁵⁹ Enyinnaya Uwadi, supra note 4, P5, 2020.

In addition, problems may arise from the perspective of due process because detailed procedural rules for the methods of examination, such as on-site inspection, and for seizing evidence have not been established.

With regard to the operational aspects of the FCCPC, it has been pointed out that there is a lack of human resources capable of properly enforcing the new law, that there are concerns about the negative effects of political appointments to the Commission's members, and that there may not be a system in place to properly manage the confidential information obtained from business operators.¹⁶⁰ In this regard, according to the responses to the questionnaire sent in this survey, the FCCPC has been conducting training to improve the capacity of its staff with the cooperation of the U.S. Federal Trade Commission, ECOWAS Regional Competition Authority (ERCA), and ACF, and it is expected that the problem will gradually be resolved.

2.2.3 Issues Related to Corruption and Competition Law

(1) Corruption Problems in Kenya, Ghana and Nigeria

The African Union (AU) adopted the African Union Convention on Preventing and Combating Corruption in 2003, and it was ratified by 44 of the 55 AU member states. In 2009, the African Union Advisory Board was established to conduct various activities to encourage member countries to eradicate corruption.

In one regional example, the ECOWAS—which involves Nigeria and Ghana adopted the ECOWAS Protocol in the Fight against Corruption in 2001 and established a Technical Commission to monitor the implementation status of agreements in member countries.¹⁶¹

However, according to Transparency International, an international research group on corruption, the Corruption Perceptions Index for 2021 ranks Ghana, which is considered to be relatively good in Africa, 73rd out of 180 countries, Kenya 128th, and Nigeria 154th.

In the field survey conducted in this survey, interviews were held with corruption control authorities in Kenya and Ghana. This section provides an overview of the current status of corruption in Kenya, Ghana, and Nigeria, the target countries of this survey, based on the results of the field survey.

¹⁶⁰ Omotayo Akinrinwa, *Federal Competition and Consumer Protection Act 2019 and Prospects for Nigeria Economy*, 2019, <https://www.linkedin.com/pulse/federal-competition-consumer-protection-act-2019-omotayo-akinrinwa/>

¹⁶¹ ECOWAS Protocol on the Fight against Corruption Article 19 1 a).

In addition to the Penal Code, Kenya has several other laws against corruption, including the Bribery Act, 2016, the Anti-Corruption and Economic Crimes Act, 2003, the Ethics and Anti-Corruption Commission Act, 2011, and the Public Officer Ethics Act, 2003.

There are several agencies that are responsible for fighting corruption in Kenya, the main ones being the Ethics and Anti-Corruption Commission (EACC), the Directorate of Criminal Investigations (DIC) and the Office of the Director of Public Prosecutions (ODPP). The DIC was established under the National Police Service Act, 2011, and the ODPP was established under Article 157 of the Constitution. The ODPP is an agency that handles all criminal cases.

The High Court of Kenya has established the Anti-Corruption and Economic Crimes Division, which will hear corruption cases.

According to the interview at the EACC, the EACC has about 750 staff members and 11 branches in addition to the headquarters; according to the EACC's annual report for 2020, there were 6021 cases received for filing in 2020¹⁶², 620 cases are under investigation¹⁶³, and 163 cases have been referred to the ODPP¹⁶⁴. The EACC not only investigates corruption cases, but also conducts awareness-raising activities for the private sector and is involved in a wide range of activities related to the revision of relevant laws and regulations. However, due to the large number of cases they handle and budgetary constraints, they are struggling to cope with the fact that the cases they uncover are being used as a political battleground.

Furthermore, in Ghana, bribery is prohibited under the Penal Code, and laws other than the Penal Code are used to crack down on corruption offences. Laws related to corruption include the Office of the Special Prosecutor Act, 2017, the Financial Administration Act, 2003, the Internal Audit Agency Act, 2003, and the Public Procurement Act, 2003, and the Economic and Organized Crime Act, 2010.

In Ghana, as in Kenya, there are several institutions that crackdown on corruption, and one institution that has been working prominently in recent years in relation to corruption investigations is the Office of the Special Prosecutor¹⁶⁵. In the fieldwork of this survey, we

¹⁶² EACC, Report of Activities and Financial Statements for the Financial Year 2019/2020. p. 3.

¹⁶³ Ibid., p. 5.

¹⁶⁴ Ibid., p. 12.

¹⁶⁵ In 2020, the special prosecutor in charge of investigating the deal with Agyapa Royalties, which is run by a governmental fund on gold once approved by the parliament, submitted a report to the president stating that corruption was suspected. Later, the matter became a political issue due to the resignation of the special prosecutor, and the government proposal was scrapped.

interviewed the Economic and Organized Crime Office (EOCO), the Commission for Human Rights and Administrative Justice (CHRAJ), and Financial Intelligence Center (FIC). In addition, the survey team interviewed the Ghana National Anti-Corruption Coalition (GACC), an anti-corruption organization that includes both private businesses and government officials.

EOCO is an authority formed under the Economic and Organized Crime Act of 2010 to investigate and prosecute organized crime and serious criminal cases. EOCO is in charge of investigating corruption as one of the serious criminal cases. EOCO says that corruption can take many forms, and it works with other relevant agencies to investigate corruption. As corruption generally occurs in situations where human hands are involved, such as in contracts and bidding, EOCO believes that it is effective to promote the digitization of procedures. In fact, Ghana is promoting the digitization of procedures to prevent corruption. The digitization of passport, driver's license applications, and tax payment procedures are some examples.¹⁶⁶

While EOCO is in charge of criminal investigations of corruption cases, CHRAJ has jurisdiction over the non-criminal aspects of corruption. In the area of corruption, CHRAJ investigates violations of ethics rules and conflicts of interest by public officials and takes disciplinary action against them when found to be in violation.

The FIC, which the survey team visited during the field survey, does not conduct criminal investigations like EOCO, but it manages confidential government information and monitors for economic crimes such as money laundering. If it discovers information related to a corruption case, it will ask the coordinating investigating agency to conduct an investigation and will continue to monitor and assist in the investigation.

According to the GACC, Ghana already has anti-corruption laws in place, but there are challenges such as a lack of budget for anti-corruption agencies and a lack of human resources with leadership skills.

Nigeria, like Kenya and Ghana, has well-developed institutions and organizations to fight corruption. However, corruption in Nigeria is considered to be a serious problem.¹⁶⁷

In addition to the Penal Code, Nigeria also has several laws against corruption. These include the Corrupt Practices and Other Related Offences Act 2000, the Economic and Financial Crimes

¹⁶⁶ <https://practiceguides.chambers.com/practice-guides/anti-corruption-2022/ghana/trends-and-developments/O9645>

¹⁶⁷ Prince Pius Imiera, *The corruption race in Africa: Nigeria versus South Africa, who cleans the mess first?*, 2020 *De Jure Law Journal*, 2020, pp. 80-81.

Commission Establishment Act 2004, and the Money Laundering Prohibition Act 2012.

There are also several anti-corruption authorities in Nigeria. The Independent Corrupt Practices and Other Related Offences Commission, established under the Prevention of Corruption Act of 2000, is the specialized agency for policing corruption. In addition, the Economic and Financial Crimes Commission (EFCC), established under the Economic and Financial Crimes Commission Act of 2004, is the authority in charge of policing financial crimes such as money laundering. Other authorities include the Code of Conduct Bureau established under the Code of Conduct and Tribunal Act to uphold ethics in public service, and the Fair Competition in Public Procurement Bureau established under the Public Procurement Act 2007. The Technical Unit on Governance & Anti-Corruption Reform was established to manage cross-sectional information from various authorities on anti-corruption and to make policy recommendations.

According to a report submitted by the Nigerian government to a working group meeting of the United Nations Office on Drugs and Crime (UNODC), the existence of multiple anti-corruption authorities poses a challenge to inter-agency coordination.¹⁶⁸ In addition, there is a lack of coordination among the authorities. There are also challenges such as low public awareness of the efforts of the anti-corruption authorities, lack of cooperation of other government agencies in the activities of the anti-corruption authorities, and insufficient budget.¹⁶⁹

(2) Corruption and Competition Law

The interconnection of issues surrounding corruption and competition law issues has been a subject of awareness and discussion in the practices of competition authorities and criminal justice authorities for quite some time. This argument is based on the fact that, empirically, information obtained from investigations by competition authorities often brings to light the reality of corruption cases and competition law violation cases are often uncovered simultaneously¹⁷⁰. For example, Operation Car Wash¹⁷¹ in Brazil and the Marine Hose case,¹⁷² which is an international

¹⁶⁸ Thematic Compilation of relevant Information Submitted by Nigeria Article 6 UNCAC Preventive Anti-Corruption Body or Bodies, p.12.

¹⁶⁹ Ibid.

¹⁷⁰ Marie Chêne, *The Linkages between Corruption and Violation of Competition Laws*, Transparency International, 2016, p 3.

¹⁷¹ In 2014, an investigation into money laundering uncovered bribes by construction company executives and others to executives of state-owned companies and big-name politicians, including former presidents. The investigation evolved into an international corruption case, and former presidents of Brazil, El Salvador, and Panama were also prosecuted. The case resulted in 1,450 arrest warrants and 179 criminal prosecutions in Brazil by the time the investigation was completed in 2021. During the series of investigations, not only the anti-corruption authorities but also the Brazilian competition authorities conducted investigations in parallel, and many applications for leniency were filed, and collusion over the construction of power generation facilities and soccer stadiums were uncovered.

¹⁷² This was an international cartel case involving Japanese, British, French, and Italian manufacturers of marine

cartel case, are famous cases, and as competition law permeates Africa and competition authorities become more active, it is likely that cases involving corruption and competition law violations will be uncovered in Africa in the future.

The Organization for Economic Co-operation and Development (OECD) has long been discussing the compatibility of investigating competition law violations and investigating corruption cases.¹⁷³ Discussions among OECD Member States have confirmed that cracking down on bid rigging in public procurement can also contribute to fighting corruption, and that cooperation between competition authorities and anti-corruption authorities is essential.¹⁷⁴

Furthermore, the OECD has been considering several challenges, and it has been pointed out that there is a tension between the demand for the application of appropriate penal laws, regulations to those involved in corruption, and the demand for increased detection of competition law violation cases through the leniency program.¹⁷⁵ In other words, since cartels and other violations of competition laws are generally conducted behind closed doors and are difficult to uncover, leniency programs have been introduced in competition laws around the world. However, in France, for example, there is a concern that the leniency program will not be effective as filing a leniency application will put the person at risk of criminal prosecution by the anti-corruption authorities.¹⁷⁶ It has also been pointed out that administrative sanctions and criminal penalties for violation of competition laws may result in violators being punished more than necessary and a lack of balance in punishment. For example, in Brazil, apart from criminal penalties, the competition authority and the corruption control authority can each impose administrative sanctions on the same case.¹⁷⁷

In this regard, in some countries, criminal immunity is granted to leniency applicants by law or by operation from the viewpoint of ensuring the effectiveness of the leniency program, and the

hoses, a special type of hose that connects tankers to above-ground storage facilities, and it was a precedent case that drew attention for its procedures, including the coordinated dawn raids by the competition authorities of the countries involved, including Japan Fair Trade Commission. In Japan, the Japan Fair Trade Commission (JFTC) issued a Cease-and-Desist order against the company involved in the case in 2008. In the U.S. and the U.K., the company executives involved in the case were criminally prosecuted, and in the EU, Australia, and South Korea, the companies involved were ordered to pay fines. In this case, the alleged ringleader, a Bridgestone representative, paid large bribes to executives of state-owned companies in Argentina, Brazil, Ecuador, Mexico, and Venezuela in order to maintain the cartel. The U.S. Department of Justice criminally prosecuted and convicted the Bridgestone representative in question for violating the Foreign Corrupt Practices Act.

¹⁷³ OECD, *Roundtable on Collusion and Corruption in Public Procurement*, Global Forum on Competition, 2010.

¹⁷⁴ OECD, *Fighting Corruption and Promoting Competition*, Global Forum on Competition, 2014, p3.

¹⁷⁵ OECD, *supra* note 12, p5.

¹⁷⁶ Paula Farani de Azevedo Silveira, Paula de Andrade Baqueiro, *Can competition authorities address corruption in public procurement? The Brazilian experience in Car Wash cases*, *Concurrences* N° 2-2020, p12.

¹⁷⁷ Denis Guimaraes, Diaulas Costa Ribeiro, *5 YEARS OF OPERATION CAR WASH: REVISITING BID RIGGING AND BRIBERY INVESTIGATIONS*, *CPI Antitrust Chronicle* April 2019, p 3.

relationship between double punishment has been sorted out in precedents. In some cases, laws and regulations stipulate certain considerations.¹⁷⁸

There are differences in the way authorities conduct investigations and strategies between anti-corruption investigations and competition law investigations, which can be an obstacle to mutual investigations.¹⁷⁹

As mentioned above, there have been active discussions among practitioners worldwide on the parallel between addressing competition law violations and policing corruption, but there are few similar discussions in Africa. This is probably due to the fact that many countries in Africa do not have competition laws and often have separate authorities for public procurement.

2.2.4 Possible Cooperation with Kenya and Competition Law Assistance to Ghana and Nigeria

(1) Potential for Cooperation with Kenya on Competition Law Assistance

In this survey, it was expected to examine the possibility of JICA collaborating with CAK, which has a good track record in providing assistance to countries other than Kenya in the African region. In this section, we report on these possibilities.

As mentioned above, CAK is already engaged in various activities to promote competition law in neighboring countries in Africa, such as providing support to the EACA and COMESA competition authorities and hosting officials from the Ethiopian and Botswana competition authorities.

During our field survey in Kenya, CAK expressed strong interest and confidence in working with Japan to spread competition law and promote competition policy throughout the African continent, and a CAK representative indicated that they would like to have African authorities come to CAK for a few months to witness their work.

As the CAK is a core member of the ACF, it would be possible for the CAK to provide assistance to ACF Member States on various competition law issues. The CAK may also be able to provide assistance to the EACA and COMESA competition authorities, as well as to the EAC and COMESA Member States.

¹⁷⁸ For example, Japan's Antimonopoly Act, Article 7-7, Paragraph 1, states that if a fine and surcharge are imposed together, 50% of the amount equivalent to the fine shall be deducted from the surcharge.

¹⁷⁹ Kevin E. Davis, *Competition and anti-bribery law*, Concurrences N° 2-2020, p. 16.

As the AfCFTA protocol on competition policy is being negotiated, many African countries are now tackling competition policy head-on, and the present time is perfect to make competition law pervasive in Africa. The widespread adoption of competition law in Africa will not only revitalize African economies, but also be of great benefit to foreign companies operating in Africa and promoting investment in Africa by fostering a fair competitive environment in the market.

Specific forms of collaboration with CAK could include, for example, assistance to African countries that have not yet developed competition laws but have ratified the AfCFTA and are in urgent need of developing competition laws. For such countries, CAK could be a starting point to share Japan's knowledge of competition law, which has a history of more than 70 years, through the ACF, and try to strengthen their capacity in building a system to promote competition policy. In addition, for the Member States of the EAC and COMESA, to which Kenya belongs, that do not have well-functioning competition laws and authorities, Japan could share its knowledge of cartel investigation methods and market analysis methods necessary for merger regulations, with the cooperation of the CAK.

Since CAK received JICA's training program from 2017 to 2019, it maintains a good relationship with Japan, which has a wealth of experience in international initiatives for neighboring countries in the African region, supporting CAK's international activities is a viable option.

(2) Potential Competition Law Assistance for Ghana

At first glance, one might get the impression that the need for competition law assistance in Ghana is not that great, given that the country has no competition law or competition authority at this time and has not had a competition bill considered for many years. However, this survey, especially the field survey and additional research conducted in response to it, has revealed that the need for competition law support in Ghana is not low.

Negotiations are currently underway to formulate a protocol on competition policy in the AfCFTA negotiations, and in light of this, Ghana, which has ratified the AfCFTA and where the AfCFTA headquarters is located, hopes to have a national competition law in place as soon as possible.

The field survey and additional research conducted in response to it revealed that the business environment in Ghana requires a competition authority to enforce competition policy in a uniform manner. Interviews with several local law firms also indicated that duplication of enforcement authorities is a problem. In some cases, such as the MTN case mentioned above, decisions are made by regulatory authorities that do not specialize in competition policy, which seems to cause

confusion in the business activities of operators.

The Ghanaian cement industry association has been lobbying the government for many years, claiming that imported cement prices are low and that competition is not fair, and the Ghanaian government has recently taken protectionist measures to ban both new entrants and imports in order to protect the domestic industry.¹⁸⁰ These government measures could have led to different conclusions if proper policy recommendations had been made by the competition authorities.

According to the interviews with the Ministry of Trade and Industry during the field survey, Ghana has an absolute shortage of competition law experts and needs assistance in all legal and enforcement aspects of competition law. At present, a competition law bill has been drafted, and the government is willing to prepare guidelines and strengthen the capacity of its staff in line with the bill. They have received technical assistance from UNCTAD in the past, but currently they are not receiving any assistance on competition policy.

In light of the above situation, it seems that providing support to Ghana for the establishment of a competition authority and strengthening the capacity of its staff to ensure smooth enforcement after the establishment of the competition authority would be a viable option.

(3) Potential for Competition Law Assistance to Nigeria

There are many challenges in Nigeria's competition law and policy enforcement regime, and there is much that Japan can do to assist. As mentioned above, the FCCPC has taken over the work of the Consumer Protection Council, which used to be in charge of consumer protection administration, and the relevant functions of the Securities and Exchange Commission, which used to be in charge of merger regulation, together with its staff. The current FCCPC, as far as the performance of its activities in 2019 and 2020 is concerned, does not fully function as a competition authority to regulate cartels and other anti-competitive activities that have been newly assigned to it.

With regard to the FCCPC's merger regulations, laws, rules, and guidelines have already been established, and practical application is underway. Therefore, what is particularly needed is the establishment and operation of a leniency system, as well as the strengthening of the capacity for investigative practices such as on-site inspections.

¹⁸⁰ <https://www.worldcement.com/africa-middle-east/28012020/ministry-of-trade-and-industry-in-ghana-bans-the-issuance-of-permits-to-new-cement-companies/>

In this regard, according to the responses to the questionnaire of this survey, the FCCPC has conducted training with the ACF and the ECOWAS Competition Agency on competition law practices and has also conducted training with the support of the US Federal Trade Commission. In terms of matters that require support, the FCCPC would like to gain practical knowledge on issues such as writing decisions and conducting cartel investigations.

(4) Holding Workshops and Expectations for Future Cooperation

As mentioned in the opening part of this report, a workshop on competition law was held on February 3, 2022. At this competition law workshop, Ms. Teresa Moreira, Director of the Competition and Consumer Policy Division, and Mr. Yves Kenfack, Economic Officer from UNCTAD, as well as Professor Emeritus Iwakazu Takahashi from Meiji University and Attorney Teruhisa Ishii, and a team of consultants also gave presentations.

In the workshop on competition law, Ms. Moreira of UNCTAD explained the activities of UNCTAD in the African region, followed by a presentation by Mr. Kenfack on the current status of competition law in the African region and expectations for the AfCFTA negotiations.

Following UNCTAD, Professor Emeritus Takahashi gave a presentation on the historical transition of Japan's industrial structure and the relationship between competition policy and industrial policy, and Attorney Ishii gave a presentation on the basic structure and practical issues regarding Japan's regulations on abuse of superior bargaining position and the Subcontract Act. Finally, the consultant team gave a presentation on corruption in public procurement and the role of competition authority.

In the workshop, there were participants not only from Kenya, Ghana, and Nigeria, but also from regional communities such as the EAC and ECOWAS, and from the Gambian Competition Authority. Participants from Ghana included the government authority with jurisdiction over telecommunications and academics. There were also several participants from law firms in Ghana and Kenya, indicating the high level of international interest.

During the Q&A session on the day, there was a lively discussion. One of the opinions was about the need to share knowledge on corruption as it has a serious negative impact on the competitive market environment, and another opinion was about the need for coordination of leniency systems at the international level. There were also questions on cooperation between competition authorities and prosecutors in bid rigging investigations, and on the compatibility of competition policy and industrial policy.

Six people responded to the questionnaires collected after the workshop on competition law, all of whom indicated that they were very satisfied or satisfied with the content of the workshop. Of these, one attendee from ECOWAS indicated that all presentations were informative, and two officials from CAK in Kenya, FCCPC in Nigeria, and one academic from Ghana indicated that the presentation on the relationship between corruption and competition law was informative. Another attendee from CAK indicated that the presentation on subcontracting law was useful.

According to the questionnaire, as for the workshops to be held in the future, CAK requested to hold a workshop on abuse of superior bargaining position, especially on abuse of superior bargaining position in the digital market. In addition, ECOWAS requested to organize a workshop on the relationship between corruption, industrial policy and competition law, and FCCPC in Nigeria requested a workshop on cartel investigation. On the other hand, an academic from Ghana requested to organize a workshop on competition law enforcement and protection of intellectual property rights in digital markets.

2.2.5 Overview of and Challenges to the Competition Laws in the Regional Economic Community

(1) Overview of and Challenges to Competition Laws in COMESA

The COMESA is one of the AU's core regional economic communities, with 21 southeastern African countries as members. While the predecessor organization of COMESA focused on regional peace and security, the current COMESA is primarily aimed at regional economic prosperity. The group includes several organizations for economic development, or specifically, those pertaining to banking, investments, and insurance. One of these is the COMESA Competition Commission, which is the most active competition-related authority in the African Regional Economic Communities.¹⁸¹

Article 55, Paragraph 1 of the COMESA Treaty broadly prohibits anti-competitive behavior in the region, with detailed rules of the COMESA Treaty stipulated in the 2004 COMESA Competition Regulations. Based on Article 6, Paragraph 1 of the COMESA Competition Regulations, the COMESA Competition Commission has been established as an EU-type supranational organization. The COMESA Competition Commission has jurisdiction over cross-border anti-competitive practices among member states under Article 8, Paragraph 1 of the COMESA Competition Regulations.

¹⁸¹ Kamala Dawar, George Lipimile, *Africa: Harmonising competition policy under the AfCFTA*, Concurrences N° 2, 2020, p. 246.

The COMESA Competition Committee is an organization with 9 to 13 commissioners to judge whether the COMESA Competition Rules are violated.¹⁸² The COMESA Competition Regulations are comprehensive rules that prohibit purported “hardcore” cartels¹⁸³ and include provisions on the abuse of market-dominant positions¹⁸⁴ and merger controls.¹⁸⁵

Further detailed rules of the COMESA Competition Regulations are stipulated in the COMESA Competition Rules 2004, which define investigatory procedures and the organization of the COMESA Competition Commission. Investigations by this commission are conducted through summons¹⁸⁶ and subsequent hearings,¹⁸⁷ as well as requests issued for information and raids. Penalties are also outlined in the COMESA Competition Rules, and fines of up to 10% of the annual sales in the region are imposed on violators, such as cartels.¹⁸⁸

The COMESA Competition Committee has made five decisions on anti-competitive cases since 2016 and has handled more than 200 merger cases thus far. Although the COMESA Competition Commission is more active than the competition authorities in other regional economic communities, it still faces major challenges. One of these involves a conflict with jurisdictions. For example, COMESA member countries Burundi, Kenya, Rwanda, and Uganda are also members of the EAC, and both COMESA and the EAC have competition authorities; thus, conflicts of jurisdiction exist between the two entities. According to the responses to the survey questionnaire, negotiations are currently underway between the COMESA Competition Commission and the East African Competition Authority (EACA) on how to deal with the issue of overlapping jurisdictions.

Additionally, Article 43 of the COMESA Competition Rules stipulates that the COMESA Competition Committee can order Member States’ competition authorities to conduct necessary investigations, but some of the COMESA Member States have no competition laws. Four countries lack competition laws (Eritrea, Libya, the Federal Republic of Somalia, and the Republic of Uganda) and four countries lack competition authorities (Burundi, Djibouti, the Comoros Union, and the Democratic Republic of Congo), creating enforcement challenges among COMESA nations.

In 2016, the United Nations Conference on Trade and Development (UNCTAD) provided

¹⁸² COMESA Competition Regulations, Article 13, paragraph 1.

¹⁸³ COMESA Competition Regulations, Article 16.

¹⁸⁴ COMESA Competition Regulations, Article 18.

¹⁸⁵ COMESA Competition Regulations, Article 23.

¹⁸⁶ COMESA Competition Rules, Article 19.

¹⁸⁷ COMESA Competition Rules, Article 29.

¹⁸⁸ COMESA Competition Rules, Article 45, paragraph 2.

technical support to COMESA member states with financial cooperation from the World Bank.

(2) Overview of and Challenges to Competition Laws in the EAC

As with COMESA, the EAC is one of eight regional economic communities that the AU certifies as core to regional economic integration. Currently, the EAC has six member states, with regional integration that has evolved toward a common market preparing for currency integration. It has ultimately become the most integrated regional economic community in Africa. The EAC has nine specialized organizations, one of which is the EACA.

The EAC's current competition law is the 2006 EAC Competition Act, with detailed rules in the 2010 EAC Competition Regulations. The EACA was established based on Article 37, Paragraph 1 of the EAC Competition Law, and was not established as a permanent organization, but rather, a temporary organization as needed. If the EAC's 2020 Competition Law Amendment Bill currently under deliberation is passed, the EACA will become a permanent organization.

The EACA is an EU-type supranational organization with five commissioners selected from each EAC Member State, except South Sudan;¹⁸⁹ the entity has jurisdiction over the anti-competitive practices between Member States according to Article 4, Paragraph 1 of the EAC Competition Law. This comprehensive competition law's legal structure covers a range of anti-competitive practices, such as provisions prohibiting purported "hardcore" cartels,¹⁹⁰ the abuse of dominant market position,¹⁹¹ and merger controls.¹⁹²

Regarding the EACA's investigatory procedures, Article 21 Paragraph 1 of the EAC's Competition Regulations stipulates that the EACA can conduct any investigations necessary to uphold the EAC's Competition Law. Additionally, Article 21 Paragraph 2 of the EAC's Competition Regulations allows the EACA to order the necessary investigations of the Member State's competition authorities. In this regard, if the Member State does not have such an authority, the relevant authority in the Member State is obliged to cooperate with the EACA's investigation under Article 43 of the EAC's Competition Law.

Any agreement that violates the EAC Competition Law is invalid,¹⁹³ and if the EACA discovers

¹⁸⁹ A representative from South Sudan is also expected to be a member of the committee once the EAC Competition Amendment Bill of 2020 is passed.

¹⁹⁰ EAC Competition Law, Article 5.

¹⁹¹ EAC Competition Law, Article 8.

¹⁹² EAC Competition Law, Articles 11-13. The thresholds for merger notifications are not specified in the current law, but the EAC Competition Law Amendment Law 2020 is supposed to stipulate provisions for such purpose.

¹⁹³ EAC Competition Law Article 26, paragraph 1.

any violation, it may notify the parties concerned and take necessary measures.¹⁹⁴ Those who receive a decision from the EACA may file an appeal with the East African Court of Justice if they are dissatisfied with the EACA's decision.

As previously mentioned, the legal system for the EACA's operation is already in place, and the EACA commenced such activities in 2018; however, according to the answer to the questionnaire, no investigations have been conducted at this time, and the EACA has presented no declaration of violations.

The EACA must still resolve some challenges to proceed with its activities in the future, one of which is that some EAC member states lack competition laws (such as Uganda or South Sudan), and only Kenya and Tanzania have competition authorities. In this regard, the EACA has encouraged EAC member states to introduce competition law, but this has had little effect.

Additionally, four of the EAC member states are also members of COMESA, and thus, conflicts of jurisdiction exist between competition authorities in each regional economic community. Hence, negotiations are currently underway between the COMESA Competition Commission and EACA to establish a framework for cooperation in enforcing competition law.

It should be noted that EACA seems to be preparing for the development of the guidelines with the cooperation of CAK and other organizations but has not yet received any support from international cooperation organizations. According to EACA's response to the questionnaire, EACA needs to strengthen its capacity in investigating and analyzing mergers and cartel investigations. The EACA is also seeking assistance in developing its organizational infrastructure, dispatching personnel to advise on investigations of mergers, cartels, and abuse of dominant market position in the pharmaceutical industry, training for EACA members and judges, development of guidelines, and dissemination of competition law to Member States.

(3) Overview of and Challenges to Competition Laws in the ECOWAS

As with the EAC and COMESA, the ECOWAS is one of eight regional economic communities certified by the AU as core to the region's economy. The ECOWAS has 15 West African member states and began issuing common external tariffs in 2015. It is the second-most regionally integrated organization after the EAC.

¹⁹⁴ EAC Competition Law Article 22.

At the 2007 ECOWAS Summit, the ECOWAS Regional Competition Policy Framework (ERCPF) was adopted as a guideline on competition policy for all ECOWAS members. Based on the ERCPF, the ECOWAS Competition Act (Supplementary Act A/SA.2/12/08) and ECOWAS Competition Regulations (Supplementary Act A/SA.1/12/08) were adopted in 2008.

Article 1 of the ECOWAS Competition Law stipulates that the ECOWAS Regional Competition Authority (ERCA) will be established as a competition authority. Furthermore, the ERCA has the authority to conduct investigations,¹⁹⁵ including raids, to discover violations of the competition law. The ERCA has an authority to impose sanctions on violators¹⁹⁶ or order compensation for victims.¹⁹⁷

The ECOWAS Competition Regulations detail the provisions of the ECOWAS Competition Law regarding prohibited anti-competitive practices, or specifically: provisions prohibiting purported “hardcore” cartels,¹⁹⁸ the abuse of dominant market position,¹⁹⁹ and merger controls.²⁰⁰

Article 14 of the ECOWAS Competition Law stipulates that the ERCA may establish rules of procedure within the organization with the approval of the ECOWAS Council of Ministers. However, the procedural rules have not been enacted yet. Currently, ERCA has internal discussions on how to set the notification thresholds for mergers.

ERCA has so far not handled any competition law cases, neither merger cases nor cartel cases. According to ERCA's response to the questionnaire sent to them for this survey, they currently have five staff members, none of whom were sent from Member Countries but are employed from within Nigeria. Thus, it seems that ERCA's enforcement system is not yet in place, and that ERCA considers it a priority to quickly establish an enforcement system for the ECOWAS competition law and for Member States to establish independent competition authorities.

Alternatively, 8 of the 15 ECOWAS Member States are also members of the West African Economic and Monetary Union (UEMOA),²⁰¹ which has competition laws that apply to its member states. In this regard, Article 13 Paragraph 3 of the ECOWAS Competition Regulations provides for cooperation with UEMOA competition authorities regarding enforcement. In this

¹⁹⁵ ECOWAS Competition Law, Article 5.

¹⁹⁶ ECOWAS Competition Law, Article 7, paragraph 1.

¹⁹⁷ ECOWAS Competition Law, Article 10.

¹⁹⁸ ECOWAS Competition Regulations, Article 5.

¹⁹⁹ ECOWAS Competition Regulations, Article 6.

²⁰⁰ ECOWAS Competition Regulations, Article 7.

²⁰¹ Burkina Faso, Cote d'Ivoire, Mali, Niger, Senegal, Togo, and Guinea-Bissau are members of UEMOA.

regard, according to ERCA's response, discussions between ERCA and UEMOA have been ongoing since January 2021 to conclude an MOU to coordinate the handling of jurisdictional conflicts.

The ECOWAS Competition Law does not stipulate that it applies to cross-border cases as the EAC Competition Law does, and Article 4 Paragraph 1 of the ECOWAS Competition Rules states that it applies to anti-competitive conduct affecting trade and investment in the region. Therefore, there is a lack of clarity on the extension of the regulation. In this regard, ERCA has been informed that the ECOWAS competition law applies to cross-border cases and that the competition law of the member states applies to purely domestic cases.

Article 11 Paragraph 4 of the ECOWAS Competition Law notes that ERCA can appoint authorities to enforce ERCA decisions, but the majority of ECOWAS Member States have no competition authorities. Therefore, it is difficult to enforce ERCA decisions in practice. In this regard, ERCA states that if a Member State does not have a competition authority, the Ministry of trade of the Member State will be responsible for investigating and enforcing the case under the direction of ERCA.

Furthermore, Article 13(4) of the ECOWAS Competition Rules stipulates that the ERCA shall establish a Consultative Competition Committee consisting of two members dispatched from each member state as an advisory body to the ERCA.

At present, ERCA does not seem to be receiving any technical assistance from international cooperation agencies. According to ERCA, it is urgently required to improve the case handling capacity of its staff.

(4) Overview of and Challenges to Competition Laws in the UEMOA

As previously mentioned, the UEMOA is comprised of eight member states that also belong to ECOWAS. The entity has designated the West African CFA franc as its common, single currency within the UEMOA region. In recent years, ECOWAS has discussed converting the CFA francs in the UEMOA to the Eco, a currency common to ECOWAS, but the debate is yet to progress significantly.

Article 6 of the UEMOA Convention (*Traite Modifie de l'Union Economique et Monetaire Ouest Africaine*) states that the laws and regulations enacted by UEMOA shall be directly applied in preference to each Member State's laws and regulations.

Article 88 of the UEMOA Convention prohibits cartels, the abuse of dominance, and state aid that impedes competition in the region, while Article 90 of the UEMOA Convention allows the UEMOA Commission to enforce the violations stipulated in Article 88.

As the implementing body of the UEMOA Treaty under the Conference of Head of States and Government and the Council of Ministers, the UEMOA Commission is comprised of eight commissioners dispatched from each Member State. The UEMOA Commission is not an organization specializing in the enforcement of competition law, and the seven departments under the Commission oversee their respective affairs. Competition law is handled by the Competition Department (La Direction de la Concurrence), which according to the answers to the questionnaire received from UEMOA, has a number of investigative and contentious sections, staffed by officials seconded from Member States. The UEMOA Committee has so far decided on 12 competition law cases.

The competition law in UEMOA is the 2002 UEMOA Competition Regulations (*Règlement* no. 02/2002/CM/UEMOA *du 23 mai 2002*), which generally prohibits “hardcore” cartels²⁰² and the abuse of dominant market position.²⁰³ Additionally, the UEMOA Competition Procedure Regulations (*Règlement* no. 02/2002/CM/UEMOA) was separately enacted to indicate procedures. Based on the UEMOA’s Competition Procedure Regulations Article 17 Paragraph 1, the UEMOA Commission has the authority to conduct hearings regarding any persons of concern. Given Article 21 Paragraph 1 of the same regulation, the UEMOA Commission may order the Member States’ relevant authorities to conduct an investigation. Additionally, and based on Article 21 Paragraph 3 of the UEMOA’s Competition Procedure Regulations, the UEMOA Committee may, by decision, request that the relevant persons submit evidence. According to UEMOA's response, the UEMOA Competition Regulations apply not only to cross-border cases, but also to anti-competitive behavior in a single Member State.

Moreover, Article 6 of the UEMOA’s Competition Procedure Directive (Directive No. 02/2002/CM/UEMOA) requires member states to establish a system for enforcing competition law; however, it has been pointed out that there are insufficient procedures in place for the relationship between the investigation of cases by the UEMOA Commission and the investigation of cases by the competition authorities of the Member States,²⁰⁴ and that there are no procedures in place for cases where Member States have regulatory authorities other than competition

²⁰² UEMOA Competition Regulations, Article 3.

²⁰³ UEMOA Competition Regulations, Article 4.

²⁰⁴ United Nations Conference on Trade and Development (UNCTAD), Preparatory report for the ex-post review of the competition policy of the West African Economic and Monetary Union, 2020, P5.

authorities.²⁰⁵ In fact, among the UEMOA Member States, Benin and Guinea-Bissau do not have competition laws, and only two of the eight member countries have competition authorities. According to UEMOA's response, UENOA Commission will ask the Ministry of Trade of the Member State to cooperate in conducting investigations when the Member State has no competition authorities. However, it seems to be difficult in practice.

If the UEMOA Commission discovers a violation, it can issue a Cease-and-Desist order to violators of competition law, such as cartels, based on Article 4 Paragraph 1 of the UEMOA Competition Procedure Regulations. Article 22 of the same regulation indicates that the UEMOA Commission can mandate that violators pay a maximum of 100 million CFA francs as a sanction.

In this way, the UEMOA competition law regulates cartels and the abuse of dominance, although there are no regulations existing regarding merger controls. According to UEMOA, there are plans to amend the law to introduce merger regulation, leniency program, and compliance program in the future.

The UEMOA's Competition Procedure Regulations, Article 28 Paragraph 3 notes that—as with competition law in ECOWAS—the Competition Advisory Committee (*Comité Consultatif en Matière de Concurrence*) has been established. The Competition Advisory Committee is composed of 16 members, two from each Member State, who can be involved in the decisions of the UEMOA Committee. The term of office for each committee member is three years, and they are allowed to be reappointed only once. According to UEMOA's response, the Competition Advisory Committee was set up to enable member states to participate effectively in the decision-making process.

A peer review by UNCTAD has been conducted on the UEMOA's Competition Law, but with no legal and judicial cooperation from international organizations. UEMOA would like to see financial support as well as capacity building on case investigation methods and economic analysis.

(5) Overview of and Challenges to Competition Laws in the Southern African Customs Union

The Southern African Customs Union (SACU) is considered the oldest customs union in the world, as it was founded in 1910 during the British colonial era. Initially, it did not involve an

²⁰⁵ Ibid., p. 10.

international treaty with multiple independent countries but was a regional agreement under British rule. Subsequently, the SACU Agreement was amended in 1969 to become an international treaty by including Botswana, Lesotho, Swaziland (now Eswatini), and South Africa.

However, there was no system during the 1969 revision in which Member States could equally participate in decision-making, and a system led by South Africa was adopted. After Namibia became independent in 1990 and apartheid was abolished in South Africa in 1994, the SACU Agreement was amended; the current SACU Agreement was signed in 2002 and became an international treaty with equal participation among its member states.

The SACU Agreement only provides laws on competition in Articles 40 and 41: Article 40 Paragraph 1 requires each Member State to establish a competition policy, and Article 40 Paragraph 2 requires Member States to cooperate in the enforcement of competition law. Article 41 of the SACU Agreement notes that the Council of Ministers has the authority to decide competition policy and anti-competitive practices should be addressed, with advice from the Customs Union Commission. However, the SACU Agreement lacks substantive provisions for curbing violations as well as procedural provisions, and the Council of Ministers does not function as a competition authority.

As a SACU member, South Africa has the most active competition authorities in Africa. Botswana and Eswatini, which are also SACU members, have competition laws and authorities. In contrast, Lesotho has no competition law, and no harmonizing system of competition policy exists among SACU member states.

Further, international organizations have no legal and judicial cooperation regarding SACU competition law.

(6) Overview of and Challenges to Competition Laws in the Economic and Monetary Community of Central Africa

The Economic and Monetary Community of Central Africa (*Communauté économique et monétaire de l'Afrique Centrale*—CEMAC) is a regional economic community consisting of six Member States: Cameroon, the Central African Republic, Congo, Gabon, Equatorial Guinea, and Chad. The CEMAC consists of two organizations, the Central African Economic Union (*l'Union Economique de l'Afrique Centrale*) and the Central African Monetary Union (*l'Union Monétaire de l'Afrique Centrale*). The CEMAC's primary goal is to create an integrated, safe, united, and well-governed economic zone by 2025 based on its current Regional Economic Plan (*Programme*

Économique Régional).

The current competition law among CEMAC Member States is the 2019 CEMAC Competition Law (*Règlement* no. 06/19-UEAC-639-CM-33 *du 7 avril 2019*). Based on Article 6 of the CEMAC Competition Law, the CEMAC Competition Commission (*La Commission*) was established as a competition authority; based on Article 8, the community Competition Council (*Conseil Communautaire de la Concurrence—CCC*) was established within the CEMAC Competition Commission. The CCC has the authority to investigate anti-competitive practices. Furthermore, the competition authorities in member states must cooperate with investigations conducted by the CEMAC Competition Commission. If a member state has no competition authority, the CEMAC Competition Commission will conduct its own independent investigation.²⁰⁶

The CEMAC Competition Law prohibits purported “hardcore” cartels as a whole²⁰⁷ and states that those agreements that violate the competition law are automatically invalid.²⁰⁸ It also includes provisions prohibiting the abuse of dominance²⁰⁹ and detailed provisions regarding merger controls.²¹⁰

The CCC has the authority to conduct raids and confiscate relevant evidence,²¹¹ and if the CEMAC Competition Commission discovers a violation, it can issue an injunction or cease-and-desist order by decision.²¹² It can also impose fines that do not exceed 10% of global sales or 20% of regional sales and can double the fine for a second offense.²¹³

If those involved in the case are dissatisfied with the CEMAC Competition Commission’s decision, they can appeal to the CEMAC Community Court of Justice (*La Cour de Justice Communautaire*),²¹⁴ the decisions of which are final.²¹⁵

In this way, the CEMAC competition law is both comprehensive and comparable to the competition laws in developed countries. However, the CEMAC Competition Commission has

²⁰⁶ CEMAC Competition Law, Article 22.

²⁰⁷ CEMAC Competition Law, Article 30.

²⁰⁸ CEMAC Competition Law, Article 31.

²⁰⁹ CEMAC Competition Law, Article 33.

²¹⁰ CEMAC Competition Law, Article 58 and below.

²¹¹ CEMAC Competition Law, Article 37 Item (a). The right to have a lawyer present during on-site inspections is recognized.

²¹² CEMAC Competition Law, Article 49.

²¹³ CEMAC Competition Law, Article 50.

²¹⁴ CEMAC Competition Law, Article 24.

²¹⁵ CEMAC Competition Law, Article 106.

not yet begun to operate as a competition authority fully.²¹⁶

Additionally, among the CEMAC member states, the Central African Republic, Chad, Gabon, and Equatorial Guinea have not yet enacted national competition laws. Thus, various obstacles remain to enforcing the CEMAC Competition Law.

The EU has contributed a budget of one million euros for two years from 2017 as a gesture of legal and judicial developmental cooperation. From international organizations, UNCTAD is providing technical support to CEMAC member states, such as the dissemination and clarification of competition law.

2.2.6 Potential of Widespread Cooperation on Competition Laws

Considering the African region as a whole, we find countries that do not yet have competition laws in place, and countries that have competition laws but lack competition authorities to enforce them. Many African countries are part of overlapping regional economic communities, and the status of competition law in the regional economic communities varies, with some having competition authorities and others lacking them. Many of them have competition law provisions but they do not function practically. Many of the regional economic communities with competition authorities are struggling to operate due to differences in the development of competition laws in the Member States.

Under these circumstances and to spread competition law to countries in the African region, it is necessary to raise the level of its development as a whole. To do so, one effective option would be to strengthen the capacity in a widespread forum that includes countries with less developed competition laws. For example, it would be effective for a country in a regional economic community that has a well-developed competition law to serve as a host and gather officials from Member States of the regional economic community to share useful practices and theories.

In this regard, the CAK in Kenya has found it useful to have authorities from countries with less developed competition laws experience practice for a few months at the CAK. The CAK is also a core member of the EAC and COMESA and has hosted joint EAC-COMESA workshops²¹⁷. In addition, CAK is a core member of the ACF, which brings together competition authorities in Africa and has hosted workshops on merger in 10 countries through the ACF²¹⁸. Given this

²¹⁶ Kamala Dawar, George Lipimile, *supra* note 19, 2020, p. 248.

²¹⁷ [https://www.cak.go.ke/sites/default/files/2019-](https://www.cak.go.ke/sites/default/files/2019-06/Competition%20Authority%20of%20Kenya%20News%20Bulletin%20%2C%20October%202016-min.pdf)

[06/Competition%20Authority%20of%20Kenya%20News%20Bulletin%20%2C%20October%202016-min.pdf](https://www.cak.go.ke/sites/default/files/2019-06/Competition%20Authority%20of%20Kenya%20News%20Bulletin%20%2C%20October%202016-min.pdf), p.8

²¹⁸ https://twitter.com/cak_kenya/status/1014479630609342464

situation, supporting the CAK's international efforts would be beneficial for the development of competition law in the wider African region.

In the African region, the South African Competition Commission, the competition authority of South Africa, also has a wealth of enforcement experience. As the chair of the ACF, South African Competition Commission held a webinar on competition law enforcement challenges in 2020 under the pandemic of COVID-19. Although the team did not obtain any specific information from the South African Competition Commission in this survey, we believe that there is room for consideration of collaboration with the South African Competition Commission in the future when trying to conduct widespread cooperation.

Capacity building through the ACF would make it easier to go beyond the framework of the regional economic community, even for countries such as Ghana that do not currently have a competition law.

2.3 Overview of Insolvency Law, Practical Issues, and Potential for Cooperation in Kenya, Ghana, and Nigeria

2.3.1 Overview of Insolvency Laws in Kenya, Ghana, and Nigeria

(1) Overview of the Kenyan Insolvency Laws

(a) Insolvency Laws and Regulations in Kenya

- Current Laws and Regulations

The main law applicable to insolvency proceedings in Kenya is the Insolvency Act, 2015,²¹⁹ which is a comprehensive law on insolvency proceedings applicable to natural persons, partnerships, limited liability partnerships, companies and other corporate bodies established by any written law.²²⁰ In addition, Insolvency Rules 2016,²²¹ a subordinate norm of the Act, supplements its provisions (Rules have been amended by the Insolvency (Amendment) Regulations, 2018,²²² Insolvency (Amendment) (No. 2) Regulations, 2018,²²³ and the Insolvency (Amendment) Regulations, 2019²²⁴).

The Insolvency Act, 2015 was partially amended in 2019 by the Business Laws (Amendment)

²¹⁹ <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2018%20of%202015>
http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/Insolvency_Act18of2015_-_compressed.pdf

²²⁰ MMAN Advocates, First-step analysis: restructuring & insolvency in Kenya - Lexology, 2019,
<https://www.lexology.com/library/detail.aspx?g=6f3611e3-3d9b-4a0c-9ebe-fe5bea4af65f>

²²¹ http://kenyalaw.org/kl/fileadmin/pdfdownloads/LegalNotices/2016/LN47_2016.pdf

²²² http://kenyalaw.org/kl/fileadmin/pdfdownloads/LegalNotices/2018/LN7_2018.pdf

²²³ http://kenyalaw.org/kl/fileadmin/pdfdownloads/LegalNotices/2018/LN7_2018.pdf

²²⁴ http://kenyalaw.org/kl/fileadmin/pdfdownloads/LegalNotices/2019/LN29_2019.pdf

Act, 2020,²²⁵ and the Business Laws (Amendment) (No. 2) Act, 2021.²²⁶

- Enactment process

Kenya's insolvency legislation has been the subject of reform efforts since 2004, with support from Canada, the United States, the United Kingdom, Australia, and New Zealand. A New Zealand consultant drafted the first draft of the legislation and, after subsequent discussions, the Insolvency Act, 2015 was enacted. Kenya is a former colony of the United Kingdom and its legal system is based on common law; thus, the reform of insolvency legislation was implemented with the support of common-law countries. These countries also supported the reform of the insolvency law system. However, no assistance has been provided by the international donors in the operational phase after the enactment of the Insolvency Act, 2015.

(b) Institutions Involved in Insolvency Practice in Kenya

- Overview

Insolvency cases are handled by courts, the Official Receiver, and insolvency practitioners such as lawyers and accountants. In addition, the Business Registration Service (BRS)²²⁷ has jurisdiction over the development of insolvency laws and regulations and the dissemination of insolvency laws and regulations. The certification and supervision of insolvency practitioners are handled by the Office of the Official Receiver in Insolvency, a division of the BRS.

- Court

The Commercial & Tax Division of the High Court of Kenya handles insolvency and restructuring proceedings in Kenya.²²⁸ It is common for judges with at least seven to eight years of experience in commercial and taxation matters to be assigned to this division, where they stay for three to four years. In addition, there are cases where judges in Kenyan courts perform administrative duties performed by clerks in Japanese courts. While the clerk's role is particularly important in handling insolvency cases in Japanese courts, there is no clerk in charge of such a role in Kenyan courts.

- Insolvency Practitioner

Those appointed as liquidators, administrators, and insolvency trustees are certified as insolvency practitioners. In Japan, mainly lawyers are appointed as trustees in insolvency, and

²²⁵ <http://kenyalaw.org/kl/fileadmin/pdfdownloads/AmendmentActs/2020/BusinessLawsAmendmentAct2020.PDF>

²²⁶ <http://kenyalaw.org/kl/fileadmin/pdfdownloads/AmendmentActs/2021/No.1of2021.pdf>

²²⁷ <https://brs.go.ke/index.php>

²²⁸ <https://www.judiciary.go.ke/courts/high-court-2/>

<https://cms.law/en/ken/news-information/overview-of-kenyan-insolvency-law>

the number of lawyers who are candidates for appointment is quite large. In Kenya, however, most certified insolvency practitioners are accountants and only a few are lawyers, and the total number of certified insolvency practitioners is approximately 30. Those who are qualified to become insolvency practitioners are those who have a certain level of experience in insolvency practice, such as lawyers who have worked at the Official Receiver's Office for at least two years, or those who have worked under an insolvency practitioner for at least four years.²²⁹ Insolvency practitioners are certified by the Office of the Official Receiver in Insolvency.

- Business Registration Service: BRS

The BRS²³⁰ is an organization under the Office of the Attorney General and Department of Justice; it is involved in the development of insolvency legislation and conducts public relations activities to inform the public about insolvency legislation.

- Office of the Official Receiver in Insolvency

The Office of the Official Receiver in Insolvency is a division of the BRS, which is responsible for the management and supervision of insolvency practices under the Insolvency Act, 2015.

The Official Receiver is also responsible for the administration and supervision of the insolvency of natural persons, and the insolvency, administration, and liquidation of companies, as well as the conduct of litigation and disposal of real estate and other assets on its own initiative.²³¹

(c) Types of Insolvency Proceedings

Insolvency proceedings in Kenya are mainly concerned with the voluntary arrangement of natural persons,²³² administration of an insolvent deceased person's estates,²³³ liquidation of companies,²³⁴ voluntary liquidation,²³⁵ liquidation of unregistered companies,²³⁶ administration of insolvent companies,²³⁷ and voluntary arrangement.²³⁸

With the enactment of the 2015 Insolvency Act in Kenya, a corporate rescue mechanism has been introduced for companies that were previously forced into liquidation. There are two main

²²⁹ Insolvency Act, Article 6 and Insolvency Regulation, Article 11

²³⁰ <https://brs.go.ke/index.php>

²³¹ Insolvency Act, Article 703.

²³² Insolvency Act, Article 303 and below.

²³³ Insolvency Act, Article 362 and below.

²³⁴ Insolvency Act, Article 381 and below.

²³⁵ Insolvency Act, Article 393 and below.

²³⁶ Insolvency Act, Article 512 and below.

²³⁷ Insolvency Act, Article 520 and below.

²³⁸ Insolvency Act, Article 624 and below.

procedures as follows: company administration and voluntary liquidation. However, presently, company administration is seemingly used more widely, with company administration procedures being used for well-known domestic companies, such as Nakumatt, ARM Cement, and Deacons, which were among the largest retailers in Kenya.²³⁹

The 2015 Insolvency Act has been credited with facilitating the continuation of business operations of debtors in insolvency proceedings and rescuing companies that have difficulty in continuing their operations by allowing equal treatment of creditors and greater participation in insolvency proceedings.

(2) Overview of Ghana's Insolvency Laws

(a) Implementation of the Insolvency Act of 2020

Ghana has enacted the Corporate Insolvency and Restructuring Act, 2020 (hereinafter referred to as "Insolvency Act," 2020).²⁴⁰ Consequently, the previous law (Bodies Corporate (Official Liquidations) Act) has been repealed.

The Insolvency Act, 2020 extends to ordinary companies the options of restructuring and administration, which were previously available only to banks and insurance companies. This has been hailed as a "rescue culture," that is, helping companies, which are viable in the long term but are temporarily distressed, to restructure their businesses in a way that protects jobs, safeguards the company's assets and the rights of creditors, and allows for efficient, swift, and fair restructuring.

Under the 2020 Insolvency Act, the following procedures are allowed. Notably, "Official Liquidation" was the only option for many companies under the previous law.

Administration (Article 3 to Article 38).

Restructuring (Articles 39 to Article 59)

(Article 60 to Article 78 are common to both Administration and Restructuring).

Official Liquidation (Article 79 to Article 149)

Insolvency Services (Article 153 to Article 164)

Cross border insolvency (Article 150 to Article 152)

Netting agreements and other miscellaneous matters (Article 165 to 171).

²³⁹ CMS, Overview of Kenyan Insolvency Law, 2018

<https://cms.law/en/ken/news-information/overview-of-kenyan-insolvency-law>

²⁴⁰ <https://rgd.gov.gh/docs/Act%201015-2.pdf>

The new systems introduced by the Insolvency Act of 2020 are as follows.²⁴¹

- (i) Establishment of the Insolvency Services Division in the Registrar General's Office under the Companies Act, 2019.²⁴²
- (ii) A qualification and regulatory system for insolvency practitioners.²⁴³
- (iii) A post-commencement financing framework for companies that initiated insolvency proceedings, which takes priority over other claims.²⁴⁴
- (iv) Development of Cross Border Insolvency Proceedings.²⁴⁵
- (v) Establishment of Ring-Fencing of Netting Agreements for Qualified Financial Contracts.²⁴⁶
- (vi) Enhancing and strengthening insolvency procedures, including the establishment of an insolvency department.²⁴⁷
- (vii) Sanctions (fines and imprisonment) for directors who engage in insolvency transactions and strengthening governance systems.²⁴⁸
- (viii) Strengthening the role of creditors in insolvency proceedings²⁴⁹

In the on-site interviews, practitioners recognized this shift from liquidation to rehabilitation as important.

(b) Institutions Involved in Insolvency Practices in Ghana

- Courts

The Insolvency Act of 2020 provides for involving courts in insolvency proceedings. Regarding the organization of courts in Ghana, the commercial division or the financial division of the High Court is involved in insolvency proceedings.²⁵⁰

- Insolvency Practitioner

Prior to the enactment of the Insolvency Act, 2020, the Companies Act, 2019 was enacted,²⁵¹ which allowed to establish the Registrar General's Office and Receivers and Managers.²⁵² The Insolvency Act, 2020 introduced the Insolvency Division in the Registrar General's Office and insolvency practitioners as estate administrators in insolvency proceedings.²⁵³

²⁴¹ <https://garia.org/president-assent-to-the-corporate-restructuring-and-insolvency-act-2020-act-1015/>

²⁴² Companies Act, Article 351 and below, Insolvency Act, Article 153.

²⁴³ Insolvency Act, Article 161.

²⁴⁴ Insolvency Act, Article 107.

²⁴⁵ Insolvency Act, Article 150 and below.

²⁴⁶ Insolvency Act, Article 166.

²⁴⁷ Insolvency Act, Article 153.

²⁴⁸ Insolvency Act, Article 119.

²⁴⁹ Insolvency Act, Article 20 and below.

²⁵⁰ <https://www.judicial.gov.gh/index.php/the-high-court>

²⁵¹ <https://rgd.gov.gh/docs/Act%20992.pdf>

²⁵² Companies Act, Article 261 and below.

²⁵³ Insolvency Act, Article 154.

To become an insolvency practitioner, one must be an accountant (belonging to the Institute of Chartered Accountants of the Republic of Ghana), a lawyer (belonging to the Ghana Bar Association), or a banker (belonging to the Bankers Association) and must have practical competence in business, law, accounting, and banking. Insolvency practitioners need to be certified by the Insolvency Division of the Registrar General's Office,²⁵⁴ which is supported by the Ghana Association of Restructuring and Insolvency Advisors (GARIA) (see below).²⁵⁵ Currently, there are approximately 100 registered insolvency practitioners.

- Registrar General Office

The Insolvency Division of the Registrar General's Office is responsible for supervising insolvency practitioners, including recognizing their qualifications. The Registrar General's Office maintains a list of insolvency practitioners and can recommend them for appointment by the court as trustees in individual insolvency proceedings. The Registrar General's Office also has a cooperative relationship with GARIA, as described below, and is involved in the process of GARIA becoming a public corporation:

- Ghana Association of Restructuring and Insolvency Advisors (GARIA)

GARIA is an association of professionals founded in 2006. Although it is a private organization, it is currently in the process of submitting a bill to become a public corporation and is expected to achieve its goal soon. GARIA, a member of INSOL International, is responsible for (i) providing leadership in the field of restructuring and insolvency, (ii) assisting in the restructuring of companies, including state-owned enterprises, (iii) providing a forum for practitioners to exchange views and ideas, and (iv) promoting the reform of insolvency laws and international cooperation in the field of insolvency.²⁵⁶

GARIA supports the role of the Registrar General's Office, is involved in the certification and training of insolvency practitioners, seminars, and other activities to promote the insolvency system.

GARIA is currently a small organization with only 7 full-time officers and employees but has about 300 individuals and organizations as members. The budget for its operation is made up of funds from non-governmental organizations such as banks and membership fees.

(3) Overview of Nigeria's Insolvency Laws

(a) Insolvency Laws and Regulations in Nigeria

<http://rgd.gov.gh/liquidation.html>

²⁵⁴ Insolvency Act, Article 154 and below.

Audrey Rey, Ghana has a New Corporate Restructuring and Insolvency Act, 2020,

<https://audreygrey.co/home-grid-slider/ghana-has-a-new-corporate-restructuring-and-insolvency-act/>

²⁵⁵ Insolvency Act, Article 171(2)

²⁵⁶ <https://garia.org/about-us/>

<https://www.insol.org/Member-Associations/The-Ghana-Association-of-Restructuring-and-Insolve>

No single law comprehensively regulates business restructuring and insolvency in Nigeria. With regard to insolvency systems (including regulations on restructuring, such as mergers and acquisitions), there are certain regulations in the Companies Act and other laws and regulations applicable to each business.

- Companies Act and Company Liquidation Rules

Companies and Allied Matters Act, 2020 (CAMA 2020)²⁵⁷

Companies Winding Up Rules (2012)

CAMA 2020 offers new provisions for restructuring, in contrast to the Companies and Allied Matters Act, 1990 (CAMA 1990), which only provided for winding up or dissolution and was repealed and replaced by the former. CAMA 2020 offers companies new options for reorganization and financial security and provisions for restructuring the company, in addition to corporate liquidation.

The systems introduced by CAMA 2020 are mainly company voluntary arrangements (Articles 434–442), Administration (Articles 443–549), and Netting (Articles 718–721). Regarding administration, in addition to the appointment of administrators by the court and the out-of-court appointment of administrators by the company or director, there are detailed provisions for the administration of the company by the administrator and procedures.

- Banking Laws

Asset Management Corporation of Nigeria Act (“AMCON Act”, 2010, as amended in 2015 and 2019)

Banks and Other Financial Institutions (“BOFIA”) Act (Cap B3 LFN) (2004)

Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Act (“FBFMB Act”) (1994)

Central Bank of Nigeria Act (“CBN Act”)

Nigerian Deposit Insurance Commission Act (“NDIC Act”) (2006)

The FBFMB, BOFIA, and NDIC Acts apply to the insolvency and reorganization of banks and other financial institutions.²⁵⁸

The AMCON Act was enacted to manage the unsound assets of banks during the global financial crisis of 2008 and was amended in 2015 and 2019. Unlike the CBN Act and the NDIC

²⁵⁷ <https://www.cac.gov.ng/wp-content/uploads/2020/12/CAMA-NOTE-BOOK-FULL-VERSION.pdf>

²⁵⁸ <https://ndic.gov.ng/resources/legal-matters-regulations/>

Act, which are based on the assumption of management succession and liquidation, the AMCON Act is primarily aimed at ensuring the continuity of banks' business and the health of the economy through the disposal of non-performing loans (NPLs).

- Laws in Specific Industry Other than Banking

The following laws provide for the application of special regimes to specific sectors other than banking.

Insurance Act (2003)²⁵⁹

National Insurance Commission Act (1997)

The Insurance Law and the Law of the State Insurance Commission apply to all insurance companies, and the procedures for mergers, business transfers, and liquidation of insurance companies are carried out in accordance with the law.²⁶⁰

Petroleum Act (1969)

The Petroleum Act is applicable to reorganizations and mergers in the oil and gas industry and requires ministerial consent for the transfer of interests in oil and gas assets and licenses.

- Laws Applicable to Reorganization Including M&A

Investment and Securities Act (2007), as amended in 2015

Securities and Exchange Commission Rules (2013), as amended in 2019

Federal Competition and Consumer Protection Act 2019 (2019)

As mentioned above, CAMA applies to general companies' restructuring and insolvency; however, laws that apply to reorganization (including M&A) are also described below for reference.

The Investment and Securities Act, enacted in 2007, regulates the capital markets (including the activities of the Securities and Exchange Commission (SEC) and publicly traded companies) and provides for mergers and acquisitions. However, the Federal Competition and Consumer Protection Act was enacted in 2019; it repealed some provisions of the Investment and Securities Act regarding mergers and control and transferred the authority for approving merger transactions from the SEC to the Competition Commission.

²⁵⁹ <https://lawsofnigeria.placng.org/laws/I17.pdf>

²⁶⁰ Insurance Act, Article 30 and below.

- Other Related Laws

Finance Act (2020)

Federal High Court (Civil Procedure) Rules, 2019

In recent years, significant changes have been implemented in the Nigerian restructuring and insolvency system, particularly the enactment of the Federal Competition and Consumer Protection Act (2018) and amendments to the AMCON Act (2019) and CAMA (2020), all of which have had a significant impact on the insolvency system.

(b) Institutions Involved in Insolvency Practices in Nigeria

- Federal High Court

According to CAMA 2020, the Federal High Court will handle restructuring and insolvency matters in Nigeria.²⁶¹ The Act recognizes the Business Recovery and Insolvency Practitioners Association of Nigeria (BRIPAN) as one of the certifying bodies for Insolvency Professionals.

- Business Recovery and Insolvency Practitioners Association of Nigeria (BRIPAN)

The BRIPAN, a non-profit organization founded in 1994, is a member of INSOL International—a global federation of national associations for accountants and lawyers who specialize in turnaround and insolvency—and an observer of Working Group V meetings on Insolvency Law in the United Nations Commission on International Trade Law (UNCITRAL). The BRIPAN champions the growth of restructuring and insolvency practices in Nigeria through supporting legal reforms in the area of insolvency laws.²⁶²

The organization was involved in preparing the Bankruptcy and Insolvency Bill, which was presented to Parliament in 2016 with the support of the United Kingdom's Department for International Development (DfID).

- Presidential Enable Business Environment Council (PEBEC)

The Presidential Enabling Business Environment Council (PEBEC), established by President Muhammadu Buhari in July 2016 with ministers as councilors, appears to be considering the possibility of a comprehensive insolvency bill to promote business and address various existing legal challenges, including the turnaround and insolvency framework.²⁶³ The Enabling Business Environment Secretariat (EBES) exists as an operational arm of the PEBEC.

- Asset Management Corporation of Nigeria (AMCON)

AMCON, established in July 2010, is a public agency that specializes in the resolution of bank

²⁶¹ <https://fhc-ng.com/jurisdiction.htm>

²⁶² <http://bripan.org.ng/about-us/>

<https://www.insol.org/Member-Associations/Business-Recovery-and-Insolvency-Practitioners-Ass>

²⁶³ <https://statehouse.gov.ng/policy/councils-committees/presidential-enabling-business-environment-council/>

NPLs.²⁶⁴ It was established to stabilize and revitalize the Nigerian economy by efficiently disposing of NPLs arising from the 2008 global financial crisis. It is similar to the restructuring framework in that it manages the unhealthy assets of a bank and implements bailout measures to empower the bank to continue its business, as opposed to the CBN Act and the NDIC Act, which involve management succession and liquidation.²⁶⁵

2.3.2 Challenges in the Practice of the Insolvency Laws in Kenya, Ghana, and Nigeria and Potential for Cooperation

The various issues involved in the practice of the insolvency law in Kenya, Ghana, and Nigeria can be mainly categorized into issues such as (i) whether the Insolvency Law and related regulations have been developed (hereinafter referred to as "issues related to the development of laws") and (ii) whether public institutions and insolvency practitioners can properly implement the legal system, assuming that it has been developed to a certain extent (hereinafter referred to as "issues related to the operation of laws").

Based on these issues, the possibility of cooperation in the development and operation of laws and regulations is discussed below.

(1) Issues in the Kenyan Insolvency Laws' Practices and Potential for Cooperation

(a) Issue

(i) Issues Related to the Development of Laws

The Insolvency Act, 2015 is progressive in that it introduces procedures that allow to rehabilitate corporations that previously had no choice but to proceed with liquidation. It is also a complex law with 800 articles, and, at first glance, it appears to be an elaborate legal system.

However, during the on-site survey, a local lawyer recognized that although the Act was based on British law, it was a patchwork of old and new laws, and there were many unclear and contradictory points in the legal text.

The BRS is responsible for the development of the insolvency legislation; however, in the process of enacting the Act, the lack of coordination with the practice and consideration of operational aspects became apparent. For example, the courts were not sufficiently involved in the process of enacting the Act; thus, the practical application of the Act has not been

²⁶⁴ <https://amcon.com.ng/about-us.php>

²⁶⁵ Punuka, Recent Strides In Nigerian Insolvency Law - Banking Insolvency & AMCON Act - Insolvency/Bankruptcy/Re-structuring – Nigeria, 2015, <https://www.mondaq.com/nigeria/insolvencybankruptcy/431946/recent-strides-in-nigerian-insolvency-law--banking-insolvency-amcon-act>

smooth, as judges' understanding of the Act is outdated, and procedures have taken a very long time.

(ii) Issues Related to the Operation of Laws

- Issues Related to the Court

Insolvency cases require a higher level of expertise than general commercial and tax litigation; however, the court has not trained judges who specialize in insolvency cases. In addition, in implementing the Insolvency Act of 2015, many judges find it difficult to properly interpret and apply the extremely complex and sometimes unclear provisions, and the courts recognize this as a major challenge.

Furthermore, as mentioned in the field of intellectual property law, the absolute number of judges in Kenyan courts is small, and a limited number of judges are required to handle all types of cases. Therefore, it is not easy to train judges with expertise within the organizational framework of establishing specialized divisions.

In addition, the absence of clerks, such as those in Japan who play a role in the support of expeditious handling of insolvency cases, makes the handling of insolvency cases even more difficult.

- Issues Related to the Professionals such as Insolvency Practitioners

In Japan, with respect to strengthening the capabilities of professionals, courts determine the appointment of lawyers registered on the list of candidates for trustees in insolvency proceedings by considering their level of experience in such cases. In addition, to develop professionals involved in the operation of the insolvency system, measures have been taken to ensure that research and practical exchanges are conducted by practitioner organizations such as the insolvency law subcommittees and study groups of each bar association. In Kenya, a certification system for insolvency practitioners has been established by the Official Receiver, which allows for the gathering of persons with a certain level of experience and to strengthen their skills. However, the number of certified insolvency practitioners is still small (approximately 30), and most of them are accountants. It cannot be said that legal professionals are actively involved in insolvency proceedings; therefore, the development of human resources is not sufficiently advanced.

(b) Potential for Cooperation for the Development and Implementation of Laws and Regulations

Based on the above, the options available for legal support in Kenya are as follows:

- (i) Cooperation to improve the ability of courts and insolvency practitioners to operate the insolvency laws by promoting organic cooperation between the two, referring to the

practice in Japan where the courts and private practitioners working together.

- (ii) Analyzing unclear points and inconsistencies in the Insolvency Act, 2015 and its regulations; assisting in amending the Act and the preparation of detailed regulations and various forms to ensure smooth operation of the practice.

One of the reasons why insolvency practices in Kenya have faced obstacles is that the courts have not been able to operate the system sufficiently and are aware of this point as a challenge. Therefore, the first issue that needs to be addressed is to improve the ability of courts to handle insolvency cases. As mentioned above, although there is an absolute shortage of capacity in terms of the number of judges, the handling capacity can be improved by strengthening individual judges' abilities and improving operational methods. Strengthening the interaction between the courts and other entities and organizations, such as insolvency practitioners and BRS, will also contribute greatly to improving the operation of the system. In Japan, judges and clerks in the insolvency division of the courts and lawyers specializing in insolvency law routinely discuss the operation of the practice and hold study sessions to improve the operation of the practice on a daily basis. Consequently, Japan's insolvency practices have gained a high reputation internationally. By emphasizing the importance of such human exchange and supporting the development of a framework for cooperation between courts and practitioners, the quality of insolvency practice in Kenya can be improved.

The Judiciary of Kenya showed strong interest in the way insolvency practice is managed in Japan in the hearings held during the field study, and 47 court officials, including 34 judges, participated in the workshop on the collaboration between courts and practitioners in Japanese insolvency practice. In light of the above situation, we would like to take this opportunity to express our strong interest and willingness to improve insolvency practices by referring to Japanese practices; support directly targeting the courts can be implemented at an early stage and is expected to be an effective support that can make use of Japan's strengths by developing a framework for cooperation between the courts and practitioners.

In addition to the cooperation to improve the practical operation, it is possible to consider providing assistance to resolve issues related to the legal system itself, which were identified during the field survey. As mentioned above, a comprehensive insolvency law was enacted in 2015 and has been amended several times since then. However, in addition to the opinion that the law is extremely complex and difficult to operate, there are indications of mutually contradictory and unclear provisions. This is because the enactment of the new laws and the subsequent amendments were implemented without fully listening to the opinions of those who actually administer the system, such as the courts and insolvency practitioners. Consequently, the legal system itself has diverged from the existing practice, and problems

in the text have been left unresolved.

As mentioned above, the comprehensive development of the insolvency law system seems to have been done with the support of common law countries; however, there seems to be no support to solve the problems that have arisen at the stage of operation, and both the courts and practitioners indicated the need for support in this regard during the field survey. Correcting defects in existing laws and regulations and developing the necessary detailed regulations from a practical point of view requires detailed consideration of local conditions rather than legal theory; this is an area where support by Japanese experts who are not familiar with the common law system can function effectively.

In addition, as mentioned above, to improve the operation of the system through cooperation between the courts and practitioners, the interaction between the courts that preside over insolvency cases, practitioners who are involved in the procedures, and organizations, such as BRS, that develop the legal system, can activate mutual communication and be utilized to quickly improve the defects in the legal system.

(2) Issues in Ghana's Insolvency Laws' Practices and Potential for Cooperation

(a) Issue

(i) Issues Related to the Development of Laws

According to the Insolvency Act, 2020, rules required by the Act shall be implemented within 12 months of enactment of the Act;²⁶⁶ however, such rules are still being developed.

(ii) Issues Related to the Operation of Laws

With the implementation of the Companies Act, 2019 and the Insolvency Act, 2020, the Register General's Office and its Insolvency Division have established a system to certify insolvency practitioners and a framework to examine and evaluate the activities and performance of insolvency practitioners who are certified.²⁶⁷ GARIA will support the accreditation of insolvency practitioners, and the actual operation of the framework seems to have started. However, it is believed that the system is still in the process of being developed, as GARIA is in the process of becoming a public corporation.

In addition, both the Companies Act, 2019 and the Insolvency Act, 2020 were enacted recently; thus, the business community is not fully aware of the fact that rehabilitation-type insolvency proceedings have been enacted, and the actual number of cases of use is only three,²⁶⁸ which is still very low. Prior to the Insolvency Act, 2020, only liquidation-type

²⁶⁶ Insolvency Act, Article 167.

²⁶⁷ Insolvency Act, Article 154 and below.

²⁶⁸ According to the numbers given by the Registrar General at the hearing.

procedures existed under the old law, but the number of cases was approximately 10 per year, indicating that the use of insolvency procedures itself was not widespread.

In the courts as well, although judges who handle specialized fields are supposed to receive training in those fields, it is difficult to say that each judge has sufficient knowledge and ability in insolvency law.

(b) Potential for Cooperation for the Development and Implementation of Laws and Regulations

Based on the above, the possibilities for legal support in Ghana are as follows.

- (i) Cooperation for the establishment of rules and regulations and practical operation manuals to implement the Companies Act, 2019 and the Insolvency Act, 2020.
- (ii) Cooperation for training and strengthening professionals involved in insolvency proceedings.

As mentioned above, Ghana has just enacted the Companies Act, 2019 and the Insolvency Act, 2020, which are the fundamental laws and regulations for insolvency proceedings, and the bylaws and regulations are yet to be fully developed. Currently, however, there is no assistance from other countries for developing such regulations. In addition, as the number of insolvency cases processed is small, there is no accumulation of practical experience, and there is no set method of operation. Thus, it is considered necessary to prepare a basic manual on how to operate insolvency proceedings, especially rehabilitation-type insolvency proceedings. In the on-site survey, the Registrar General responded to the hearing for a long time, and a representative of GARIA participated in the hearing for two days. The expectations of the relevant organizations for Japan's support are high, and there is a possibility that the support efforts can be realized as soon as possible.

As mentioned above, under the Companies Act, 2019 and the Insolvency Act, 2020, the Insolvency Practitioners system will now operate in Ghana under certification from the Insolvency Division of the Registrar General's office. The Registrar General's office will maintain a register of insolvency practitioners, which is considered a system similar to Japan's register of candidates for trustees in insolvency proceedings.

In Japan, the courts appoint lawyers registered in the list of candidates as trustees in insolvency proceedings by considering the latter's level of experience in similar insolvency cases. In addition, it is possible to provide cooperation in Ghana based on the Japanese system. A Justice of the Ghanaian Supreme Court said that while it is important to improve the

capacity in advanced fields such as insolvency law and intellectual property law, it is even more important to improve basic legal interpretation and dispute resolution skills. This is an apt analysis; to make support for specialized fields effective, it is necessary to consider support measures that always take into account the perspective of improving the basic legal interpretation and dispute resolution skills of judges as a whole.

In addition, although not the direct subject of this study, the Supreme Court Justice mentioned that in Ghana, access to justice in rural areas is inadequate; there are only a few courts in a vast area, and even their buildings are not sufficiently maintained. This is a common problem in many African countries, and we would like to add that support for a basic judicial infrastructure is also needed.

(3) Issues in Nigeria's Insolvency Laws' Practices and Potential for Cooperation

(a) Issue

(i) Issues Related to the Development of Laws

CAMA 2020 amended the company system in Nigeria and introduced provisions on company voluntary arrangements, administration, and netting, in addition to winding up or dissolution. However, as the law was enacted recently, practical and detailed rules and regulations are yet to be fully developed.²⁶⁹

In addition, although Nigeria has made progress in developing an insolvency legislation with the enactment of CAMA 2020, there is a wide range of applicable laws, and the prospect for enacting a comprehensive insolvency bill is being considered.²⁷⁰ It is necessary to identify issues that cannot be resolved by CAMA 2020 and examine the need to draft a comprehensive insolvency law.

(ii) Issues Related to the Operation of Laws

With regard to the business rehabilitation system, which has been introduced by CAMA 2020, some issues must be addressed to strengthen the understanding and competencies of experts who are responsible for administering the system.

Moreover, there may be issues in the basic aspects of the insolvency system, such as whether the civil enforcement system is functioning effectively as a means of securing the insolvency

²⁶⁹ CAMA, Article 434 and below, Article 443 and below, Article 718 and below.

WIGWE & PARTNERS, WHAT IS NEW IN THE NEW CAMA? – Legal Services at your Go to Firm, 2020, <https://wigweandpartners.com/news/2020/08/10/what-is-new-in-the-new-cama/>

²⁷⁰ <https://www.mondaq.com/nigeria/insolvencybankruptcy/812246/overview-of-insolvency-and-restructuring-in-nigeria>

foundation and if the debtor's assets can be fairly distributed among creditors.

(b) Potential for Cooperation for the Development and Implementation of Laws and Regulations

Based on the above, the possibilities for legal support in Nigeria are as follows.

- (i) Cooperation for training and strengthening experts involved in formulating rules and procedures associated with the enactment of CAMA 2020.
- (ii) Examining the issues of CAMA 2020 and assisting in the consideration of a comprehensive insolvency bill.
- (iii) Cooperation for improving the basic operational aspects of the insolvency system, including the civil execution system for securing the insolvent estate.

As mentioned above, although the enactment of CAMA 2020 has introduced provisions for restructuring in Nigeria, the enactment of relevant various rules and regulations is yet to progress, and cooperation for developing rules and practical operations based on these rules and regulations may be considered.

In addition, if it is necessary to consider a comprehensive insolvency legislation, which has been proposed by some, Japan's insolvency law has expertise in formulating such legislation, as evidenced by the comprehensive revision of the Insolvency Act in 2004 and the enactment of the Civil Rehabilitation Act in 2000.

Moreover, it is possible that the basic operation of the insolvency system, such as the fair distribution of debtors' assets to creditors, may not be sufficiently implemented, and it would be possible to provide assistance in the proper operation of the civil enforcement system by using the knowledge of Japanese practitioners.

With the above in mind, it is possible to envision providing support as specific assistance such as local training and dispatch of long-term experts to (i) the Federal High Court, which handles cases related to restructuring and insolvency in Nigeria, (ii) BRIPAN, a certification body for insolvency practitioners, which is also involved in drafting a comprehensive Insolvency Bill and has a cooperative relationship with the government, and (iii) EBES, the operational arm of PEBEC, which is examining the possibility of a comprehensive Insolvency Bill. BRIPAN could be considered a strong candidate for receiving the project because it has been involved in the preparation of the bill with the support of the DfID.²⁷¹

²⁷¹ <https://www.mondaq.com/nigeria/insolvencybankruptcy/431946/recent-strides-in-nigerian-insolvency-law--banking-insolvency-amcon-act> Punuka, Overview Of Insolvency And Restructuring In Nigeria -

(4) Holding Workshops and Expectations for Future Cooperation

As mentioned above, a workshop on insolvency law practice was held on January 27, 2022. Mr. Yusuke Shimizu gave a presentation at this workshop on the theme of "Development and Establishment of Restructuring Proceedings in Japan – Realization of speedy and fair procedures through collaboration of the courts and practitioners." He discussed the changes in the operation of insolvency proceedings in Japan and its background, as well as the restructuring-type insolvency proceedings in Japan. This presentation was based on Mr. Shimizu's many years of experience in the field of insolvency law.

On the day of the workshop, there were participants from government offices, courts, and local law firms related to the insolvency law in Kenya and Ghana; in particular, 47 court officials, including 34 judges from Kenyan courts, participated in the workshop, which showed a high level of interest in the topic.

During the Q&A session, there was a lively discussion on practical issues, such as how to expedite rehabilitation proceedings, including ideas on extending the deadline to submit a proposed rehabilitation plan, how to evaluate collaterals subject to the security interests, and adjust the interests between the secured and unsecured creditors.

Fourteen people responded to the questionnaire collected after the workshop, and all of them answered that they were "very well" or "well" with the workshop content. The respondents said that the workshop was very helpful in understanding how insolvency procedures operate efficiently in Japan, including the historical development process from the past.

According to the questionnaire, the themes of the workshop that the participants would like to see in the future were those related to the detailed operation of the insolvency law system, such as an overview of the system from the perspective of insolvency practitioners, the duties of trustees in insolvency proceedings, the role of the court and the position of secured creditors in rehabilitation proceedings, and how to formulate a rehabilitation plan in restructuring proceedings, as well as more specific themes such as the introduction of Japanese case studies.

2.4 ESG Investment Promotion-Related Laws

As an investment approach, ESG investing adopts environmental (E), social (S), and corporate

Insolvency/Bankruptcy/Re-structuring – Nigeria, 2019,
<https://www.mondaq.com/nigeria/insolvencybankruptcy/812246/overview-of-insolvency-and-restructuring-in-nigeria>
Anthony I Idigbe, Recall: Insolvency & Restructuring In Nigeria, 2017,
<https://www.proshareng.com/news/Debtors%20&%20Recovery/Recall--Insolvency---Restructuring-In-Nigeria/34616>

governance (G) perspectives in investment decision making.²⁷² The Principles for Responsible Investment (PRI)—which were formulated in 2006 under the United Nations’ Global Compact initiative and United Nations Environment Programme and Finance Initiative (UNEPFI)—call for investors to consider ESG issues. The PRI’s signatories are required to appropriately respond to ESG issues and disclose such information. The interest in ESG investments has risen sharply in recent years. Although there were 63 signatories and 6.3 trillion US dollars (USD) in assets under management at the time of its formulation, as of 2020 the number of signatories and assets under management reached USD 3,000 trillion and 100 trillion, respectively.²⁷³ Furthermore, ESG investments have grown in Africa, with the total assets under management estimated to reach USD 428.3 billion in 2017.²⁷⁴

This survey focused on the society (S) and corporate governance (G) characteristics from a viewpoint aiming to promote the rule of law and examine the possibility of JICA’s cooperation for legal and judicial development. This survey also provides an overview of the issues in African countries by covering ESG issues from four perspectives: (1) trends in ESG investments in Africa, (2) labor issues, (3) consumer protection, and (4) corruption.

In addition to the main target countries (1) Kenya, (2) Ghana, and (3) Nigeria, this survey also covers (4) Mauritius, (5) Rwanda, (6) Seychelles, (7) Uganda, (8) Tanzania, (9) Zimbabwe, (10) Tunisia, (11) Botswana, (12) Namibia, (13) Côte d’Ivoire, as those countries are expected to focus on ESG investments in the future.²⁷⁵

2.4.1 ESG Investment Trends in Africa

The Sustainable Stock Exchange Initiative (SSE) is a platform established by UNCTAD, the United Nations Global Compact, UNEPFI, and PRI. As of January 2022, 110 stock exchanges in 114 countries are members, and all ESG Target Countries except Ghana are members.²⁷⁶ As Table 2-1 demonstrates, more than 160 companies are listed on the Nigerian and Mauritian stock exchanges that would attract investors’ attention. To promote ESG investments, it is essential to report ESG information. In this regard, Nigeria, Namibia, and Zimbabwe have imposed ESG reporting obligations on their listed companies, which reflects a more advanced approach than other countries. As the SSE has published guidance on reporting ESG information, efforts to

²⁷² Examples of synonyms for ESG investment include impact investment, responsible investment, and sustainable investment. The definitions are not clear, which hinders promotion of ESG investment. In addition, there are concerns for ESG wash. Clear standards of ESG are required.

²⁷³ PRI, <https://www.unpri.org/pri/about-the-pri>.

²⁷⁴ Bertha Centre, “The African Investing for Impact Barometer,” 2017, <http://www.gsb.uct.ac.za/files/ImpactBarometer5.pdf>.

²⁷⁵ The Survey added countries to investigate based on whether the countries had joint Sustainable Stock Exchange Initiative, “Sustainable Stock Exchange Initiative,” <https://sseinitiative.org/>.

²⁷⁶ “Sustainable Stock Exchange Initiative.”

disclose such information are expected to spread increasingly among member stock exchanges.

Table 2-1 Status of SSE Membership, Number of Listed Companies, and Obligation to Publish ESG Information of Listed Companies

Country	SSE Partner Exchange	Number of Listed Companies	ESG Reporting Required for Listed Company
Kenya	●	62	●
Ghana	-	-	-
<u>Nigeria</u>	●	<u>167</u>	●
<u>Mauritius</u>	●	<u>168</u>	-
Rwanda	●	8	Not required. However, each listed company must issue a statement of main corporate governance practices.
Seychelles	●	24	-
Uganda	●	16	-
Tanzania	●	26	-
<u>Zimbabwe</u>	●	63	●
Tunisia	●	81	-
Botswana	●	24	Not required. However, each listed company must publish Integrated Reports, which is prescribed in the Corporate Code of Governance.
<u>Namibia</u>	●	43	●
Côte d'Ivoire	●	45	-

Source: prepared based on SSE's website

One of the critical criteria for the “society” aspect is the Guiding Principles on Business and Human Rights (GPBHR) approved by the UN Human Rights Council in 2011. In fact, the PRI has expressed its call for signatories to respect human rights based on GPBHR.²⁷⁷ Following the GPBHR’s establishment, the National Action Plan (NAP) on business and human rights has been formulated worldwide including Japan,²⁷⁸ with moves to formulate a NAP in Africa as well. In April 2021, Kenya’s Parliament approved a NAP for the first time in Africa.²⁷⁹ Subsequently, Uganda published a NAP in July and national-level efforts to implement GPBHR are spreading in other African countries.

Kenya's NAP sets out main issues: “Land and Natural Resources,” “Revenue Transparency,”

²⁷⁷ PRI, “Principles for Responsible Investment Sets New Human Rights Expectations for Investors,” <https://www.unpri.org/news-and-press/principles-for-responsible-investment-sets-new-human-rights-expectations-for-investors/6638.article>.

²⁷⁸ In Japan, an action plan on "Business and Human Rights" is being developed for October 2020.

²⁷⁹ Kenya National Commission on Human Rights, “Kenya National Action Plans on Business and Human Rights,” <https://globalnaps.org/country/kenya/>.

“Environmental Conservation,” “Labour” and “Access to Relief.” Revenue transparency, which is relevant to the scope of this study, is concerned with corruption in the process of tax collection and management of tax revenues, lack of disclosure of contracts that have significant economic and social implications, and lack of transparency of tax revenues from extractive industries.

In context of human resource management, the challenges include persistent sexual harassment in the workplace, lack of access to maternity and parental leave, low awareness of workers' rights, lack of effective legislation on recruitment agencies for migrant workers, lack of official data on discrimination in the workplace, lack of labor inspectors, and lack of effective grievance mechanisms to prevent workers from accessing redress, among other concerns. Kenya's NAP is unique in that it identifies government agencies as key actors in each action to meet these challenges.

Uganda's NAP identifies eight key issues: land and natural resources, environment, labor rights, revenue transparency, tax exemptions and corruption, private sector social welfare services, consumer protection, access to relief, and women and vulnerable groups. There is a need to strengthen the capacity of the government and to work in partnership with various actors.²⁸⁰

Workshops and discussions or baseline surveys have been held to formulate NAPs in Ghana, Nigeria, Mauritius, Tanzania, Rwanda, Tunisia, and Zimbabwe.²⁸¹ Based on GPBHR, Western countries have enacted laws to require companies to conduct human rights-related due diligence or disclose non-financial information, such as responses to human rights risks throughout an entire supply chain. It is anticipated that the movement of legislation toward GPBHR will spread to Africa soon.

The mining and extraction industry is considered a particular challenge in promoting ESG investments in Africa. While extracting industries are Africa's most prominent, human rights risks in the industry—such as the exploitation of workers, health hazards, and land deprivation—are also high. The African Commission on Human and Peoples' Rights has responded by establishing

²⁸⁰ Labour and Social Development Ministry of Gender, “The National Action Plan on Business and Human Rights,” 2021, https://globalnaps.org/wp-content/uploads/2021/08/uganda_approved-national-action-plan-on-business-and-human-rights_august-2021.pdf.

²⁸¹ United Nations Rwanda, “Second Training Workshop on Business and Human Rights | United Nations in Rwanda,” 2019, <https://rwanda.un.org/en/11536-second-training-workshop-business-and-human-rights>.
The Danish Institute for Human Rights, “Tunisia,” <https://www.humanrights.dk/where-we-work/tunisia>.
European Parliament Directorate-General for External Policies Policy Department, “Implementation of the UN Guiding Principles on Business and Human Rights,” 2017, [https://www.europarl.europa.eu/RegData/etudes/STUD/2017/578031/EXPO_STU\(2017\)578031_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2017/578031/EXPO_STU(2017)578031_EN.pdf).
International Labour Organization, “Business and Human Rights in Namibia,” 2014, https://www.ilo.org/africa/whats-new/WCMS_243067/lang--en/index.htm.
Business & Human Rights Resource Centre, “New Goals Set for Business and Human Rights [Zimbabwe],” 2013, <https://www.business-humanrights.org/en/latest-news/new-goals-set-for-human-rights-and-business-zimbabwe/>.

a working group for the industry to conduct consultations and investigations.²⁸²

2.4.2 Labor Issues

Workers' rights are at the center of societal issues. The Survey provides an overview of labor issues from four perspectives: (1) employment, (2) occupational health and safety (OHS), (3) the freedom of association and collective bargaining, (4) forced and child labor, and (5) examples of cooperation from other development partners.

(1) Employment

This section provides an overview of employment in ESG Target Countries by revealing data on the employment rate for those aged 15 and older, the unemployment rate, and the gender gap. Table 2-2 illustrates the employment rate, while Table 2-3 presents the unemployment rate.²⁸³

**Table 2-2 Employment Rate
of People Aged 15 and Older**

Country	Total	Male	Female
Kenya	69.75	74.67	70.02
Ghana	63.21	68.85	61.12
<u>Nigeria</u>	<u>48.61</u>	<u>57.22</u>	<u>44.90</u>
<u>Mauritius</u>	<u>52.33</u>	<u>68.12</u>	<u>40.80</u>
Rwanda	79.24	82.41	83.03
Seychelles	-	-	-
Uganda	65.25	72.47	65.45
Tanzania	81.37	85.95	77.70
Zimbabwe	76.28	84.95	73.79
<u>Tunisia</u>	<u>38.25</u>	<u>60.38</u>	<u>19.31</u>
<u>Botswana</u>	<u>57.10</u>	<u>65.64</u>	<u>51.93</u>
<u>Namibia</u>	<u>46.79</u>	50.09	45.44
<u>Côte d'Ivoire</u>	<u>50.97</u>	<u>60.86</u>	<u>42.90</u>

Table 2-3 Unemployment Rate

Country	Total	Male	Female
Kenya	2.98	2.43	2.76
Ghana	4.53	3.97	4.29
Nigeria	9.01	9.35	7.45
<u>Mauritius</u>	<u>7.11</u>	<u>4.35</u>	<u>9.42</u>
Rwanda	1.35	0.95	1.02
Seychelles	4.8	-	-
Uganda	2.44	1.24	2.21
Tanzania	2.16	1.46	2.69
Zimbabwe	5.73	4.46	5.55
<u>Tunisia</u>	<u>16.69</u>	<u>12.39</u>	<u>22.41</u>
<u>Botswana</u>	<u>17.70</u>	<u>14.05</u>	<u>20.51</u>
<u>Namibia</u>	<u>20.35</u>	20.94	18.53
Côte d'Ivoire	3.5	2.76	3.76

Source: prepared based on the ILO Website

²⁸² ESI Africa, "ESG Investing in Sub-Saharan Africa Linked to Sustainable Development," 2021, <https://www.esi-africa.com/industry-sectors/business-and-markets/esg-investing-in-sub-saharan-africa-linked-to-sustainable-development/>.

Business & Human Rights Resource Centre, "Business & Human Rights in Africa: Time for a Responsibility Revolution," 2014, <https://www.business-humanrights.org/en/latest-news/business-human-rights-in-africa-time-for-a-responsibility-revolution/>.

²⁸³ ILO, "Home - ILOSTAT - The Leading Source of Labour Statistics," <https://ilostat.ilo.org/>.

The total employment rate and the unemployment rate is data in 2020. Those of male and female is data in 2019. No information was available for Seychelles from the ILO database. See below for the unemployment rate in Seychelles. Seychelles News Agency, "Unemployment Rate Doubles to 4.8 Percent in Seychelles; Rise Attributed to New Graduates - Seychelles News Agency," 2020, <http://www.seychellesnewsagency.com/articles/13304/Unemployment+rate+doubles+to+.+percent+in+Seychelles+%3B+rise+attributed+to+new+graduates.>

Tunisia, Botswana, and Namibia have significant rates of unemployment, with low employment rates in Nigeria and Côte d’Ivoire. In such countries, institutional challenges might exist, such as the underdeveloped or ineffective employment policies and protection of workers engaged in informal sectors. In observing employment rates, it can be noted that women’s employment rates are lower than men in all the examined countries except Rwanda; Nigeria, Mauritius, Tunisia, Botswana, and Côte d’Ivoire have significant gender gaps. Among the other nations, women’s unemployment rates are significantly higher than those of men in Mauritius, Tunisia, and Botswana.²⁸⁴

As of 2017, all countries except Mauritius, Seychelles, and Tunisia have underdeveloped unemployment insurance systems.²⁸⁵ In Kenya, the government has proposed the establishment of a fund under the Ministry of Labor and Social Protection, commencing in 2022.²⁸⁶ As the number of unemployed people increases due to the COVID-19 pandemic, the development of an unemployment insurance system is an urgent issue.

As for the gender gap in relation to the labor issues, since 2009, the World Bank has surveyed the state of laws regulating women’s economic opportunities.²⁸⁷ The survey comprehensively rates countries from eight perspectives: mobility, workplace, pay, marriage, parenthood, entrepreneurship, assets, and pension. Table 2-4 summarizes the components most related to labor issues—or namely, the workplace, pay, parenthood, and entrepreneurship—through the overall evaluation of eight items.²⁸⁸ In particular, Nigeria, Tunisia, and Botswana are rated poorly overall, and seem to have challenges in labor laws from a gender perspective.

²⁸⁴ In Nigeria and Namibia, male unemployment is higher than female one. A detailed investigation is necessary to determine the cause, but the fact that few women are originally employed seems to have an influence on the number.

²⁸⁵ Social Security Office of Retirement and Disability Policy, “Social Security Programs Throughout the World: Africa, 2017,” 2017, <https://www.ssa.gov/policy/docs/progdsc/ssptw/2016-2017/africa/guide.html>.

²⁸⁶ IndustriALL Global Union, “Kenya Unions Support Proposals for Unemployment Insurance Fund,” 2021, <http://www.industriall-union.org/kenya-unions-support-proposals-for-unemployment-insurance-fund>.

²⁸⁷ World Bank Group, “Women, Business and the Law 2021,” 2021, <https://doi.org/10.1596/978-1-4648-1652-9>.

²⁸⁸ The criteria of “workplace” include such items as the existence of anti-discrimination provisions in employment and provisions on sexual harassment. Those of “pay” include the existence of a provision on equal pay for equal work. Those of “parenthood” include the existence of a provision on maternity and parental leave before and after childbirth. Those of “entrepreneurship” evaluate whether there are provisions for freedom and equality of contracts and business registration.

Table 2-4 Women, Business, and the Law Index

Country	Total	Workplace	Pay	Parenthood	Entrepreneurship
Kenya	80.6	100	100	40	50
Ghana	75.0	100	50	20	75
<u>Nigeria</u>	<u>63.1</u>	75	50	0	75
Mauritius	91.9	100	100	60	100
Rwanda	80.6	100	75	20	75
Seychelles	76.3	50	75	80	75
Uganda	73.1	100	100	40	75
Tanzania	81.3	100	100	60	75
Zimbabwe	86.9	100	75	40	100
<u>Tunisia</u>	<u>67.5</u>	100	25	40	75
<u>Botswana</u>	<u>63.8</u>	25	75	0	75
Namibia	86.3	100	100	40	75
Côte d'Ivoire	83.1	100	50	80	75

Source: prepared based on a World Bank report

(2) Occupational Health and Safety

Although all countries have legal provisions on occupational health and safety, they face enforcement challenges such as lack of human and financial resources. In particular, the informal sector, which includes the majority of the workforce, is not covered by labor law standards and has inadequate guarantees.

The status of legislation in Kenya, Ghana, and Nigeria is summarized below.

<Kenya>²⁸⁹

Kenya is under the jurisdiction of the Ministry of Labor, Social Security and Services, Directorate of Occupational Safety and Health Services, which oversees compliance by workplaces. It oversees the compliance of establishments. The National Council for Occupational Safety and Health is the advisory body for the formulation and revision of occupational safety and health laws and policies.

While Kenya has an occupational safety policy, a comprehensive Occupational Safety and Health Act (2007), and a Work Injury Benefits Act (2007) in place, challenges have been identified in the implementation arrangements. For example, duplication of roles with other relevant government agencies such as the National Environment Management Authority and the Ministry of Public Health and Sanitation, inadequate staffing and lack of expertise in the Occupational

²⁸⁹ ILO, "National Profile on Occupational Safety and Health Kenya," 2013, www.ilo.org/safework.

Safety and Health Department, and the lack of a national policy framework in place. For example, there is duplication of roles with other relevant government agencies such as the National Environment Management Authority and the Ministry of Public Health and Sanitation; the Occupational Safety and Health Authority is understaffed and lacks expertise; there is a weak prevention system; the informal sector is not well catered for; and there is a lack of analysis of reported occupational accidents.

<Ghana>²⁹⁰

The Ministry of Employment and Labor Relations Department of Factories Inspectorate is primarily responsible for this. The Ministry of Manpower Development and Empowerment has established the Labor Department and the Factory Inspectorate.

There is no comprehensive occupational health and safety legislation, and the Factories, Offices, and Shops Act 1970 (Act 328) is the main legal provision, but its detailed operation is complicated by the different laws and regulations that apply to different industrial sectors and different government agencies.²⁹¹

Workers' compensation is provided for in the Workmen's Compensation Law (1987), but it is not used much because it does not take into account the risks of work and the judicial process is very labor-intensive and time-consuming, leading some to argue that the law is a moot point.²⁹² This, combined with the fact that Ghana currently lacks a comprehensive occupational health and safety policy, highlights the need to raise awareness and strengthen the capacity of the government through international cooperation.²⁹³

<Nigeria>

On the basis of the Constitution and International Labor Organization (ILO) conventions, a new occupational safety policy was approved by the government in September 2020. It sets out specific roles for each relevant government agency.²⁹⁴

²⁹⁰ Zakari Mustapha, Clinton Aigbavboa, and Wellington Thwala, "Examination of Occupational Health and Safety Practices in Ghana," *Advances in Intelligent Systems and Computing* 604 (2018): 403–9, https://doi.org/10.1007/978-3-319-60525-8_42.

²⁹¹ These laws include The Labour Act No 651 of 2003, the Mining and Minerals Regulations 1970 LI 665, the Ghana Health Services and Teaching Hospital Act 526 (1999), the Radiation Protection Instrument LI 1559 of 1993, and the Environmental Protection Agency Act 1994 (Act 490). (Act 490). Joe Steve Annan, Emmanuel K. Addai, and Samuel K. Tulashie, "A Call for Action to Improve Occupational Health and Safety in Ghana and a Critical Look at the Existing Legal Requirement and Legislation," *Safety and Health at Work* 6, no. 2 (June 1, 2015): 146–50, <https://doi.org/10.1016/J.SHAW.2014.12.002>.

²⁹² Amponsah-Tawiah and Dartey-Baah.

²⁹³ Annan, Addai, and Tulashie, "A Call for Action to Improve Occupational Health and Safety in Ghana and a Critical Look at the Existing Legal Requirement and Legislation."

²⁹⁴ Healthwise, "FG Approves New National Policy on Occupational Safety," 2020,

The Occupational Safety and Health Department of the Federal Ministry of Labor and Employment is responsible for supervising workplaces and reviewing legislation relating to occupational safety and health. In addition to the Occupational Safety and Health Department, various government agencies are involved, including the Occupational Health and Safety Division of the Federal Ministry of Health and the Federal Ministry of Environment. In terms of legislation, there is the Factory Act.²⁹⁵

The Factories Act (CAP F1, Laws of the Federation of Nigeria (L.F.N) 2004) is the main basis for legislation, and the Employee's Compensation Act, 2010) is also in place. Furthermore, there is a need for a comprehensive occupational health and safety law and expansion of coverage for occupational accidents.²⁹⁶ There are also problems with the operational system, such as a lack of human resources with expertise and a lack of cooperation among relevant institutions.²⁹⁷ The judicial process is time-consuming and therefore not used as a means of resolution.²⁹⁸ In addition to strengthening the operational system of the law, there is a need to establish a quick and effective dispute resolution mechanism.

(3) Freedom of Association and Collective Bargaining

The International Trade Union Confederation (ITUC) reports that more than 95% of African countries have violated the worker's right to establish trade unions, the right to collective bargaining, and the right to strike.²⁹⁹ Table 2-5 presents the ratings by evaluating each country's performance using six levels; the higher the value, the more serious the infringement. For example, the ITUC rates Zimbabwe as one of the worst countries in the world for employment because workers have effectively no access to these rights and have been exposed to unfair labor practices. In Kenya, Nigeria, Uganda, Tanzania, Tunisia, Botswana, and Côte d'Ivoire, the ITUC reports that the government and companies actively engage in serious violations of workers' fundamental rights.³⁰⁰

<https://healthwise.punchng.com/fg-approves-new-national-policy-on-occupational-safety/>.

²⁹⁵ ILO, "Nigeria Country Profile on Occupational Safety and Health," 2016,

https://www.ilo.org/wcmsp5/groups/public/---africa/---ro-abidjan/---ilo-abuja/documents/publication/wcms_552748.pdf.

²⁹⁶ ILO, "Nnedinma Umeokafor, "Enforcement of Occupational Safety and Health Regulations in Nigeria: An Exploration," *European Scientific Journal* 3 (2014): 93–104,

https://www.researchgate.net/publication/276379242_ENFORCEMENT_OF_OCCUPATIONAL_SAFETY_AND_HEALTH_REGULATIONS_IN_NIGERIA_AN_EXPLORATION.

²⁹⁷ ILO, "Nigeria Country Profile on Occupational Safety and Health."

²⁹⁸ Nnedinma Umeokafor, "Enforcement of Occupational Safety and Health Regulations in Nigeria: An Exploration."

²⁹⁹ International Trade Union Confederation, "2020 ITUC Global Rights Index - The World's Worst Countries for Workers," 2020, <https://www.ituc-csi.org/ituc-global-rights-index-2020?lang=en>.

³⁰⁰ International Trade Union Confederation. ITUC comprehensively evaluated countries from the following four perspectives: (1) the right to strike, (2) the right to collective bargaining, (3) the right to establish or join a trade union, and (4) the right to judicial access.

Table 2-5 Rating of Freedom of Association and Collective Bargaining

Country	Score	Country	Score
<u>Kenya</u>	<u>4</u>	<u>Tanzania</u>	<u>4</u>
Ghana	2	<u>Zimbabwe</u>	<u>5</u>
<u>Nigeria</u>	<u>4</u>	<u>Tunisia</u>	<u>4</u>
Mauritius	3	<u>Botswana</u>	<u>4</u>
Rwanda	3	Namibia	2
Seychelles	-	<u>Côte d'Ivoire</u>	<u>4</u>
<u>Uganda</u>	<u>4</u>		

- 1: Sporadic violation of rights
 2: Repeated virtualization of rights
 3: Regular violation of rights
 4: Systematic violation of rights
 5: No guarantee of rights
 5+: No guarantee of rights due to the breakdown of rule of law

Source: prepared based on a report by ITUC

The following are some examples of the legislative situation and legal challenges identified by trade unions in Kenya, Ghana, and Nigeria.

<Kenya>³⁰¹

International Conventions	- The Right to Organize and Collective Bargaining Convention, 1949 (No. 98) has been ratified.
National legislation	- Labour Relations Act, 2007

<Ghana>³⁰²

International Conventions	- Ratified the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87) - Ratified the Right to Organize and Collective Bargaining Convention, 1949 (No. 98).
National legislation	- Labour Act 2003 - Labour Regulations 2007

<Nigeria>³⁰³

International Conventions	- Ratified the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87) - Ratified the Right to Organize and Collective Bargaining Convention, 1949 (No. 98).
National legislation	- Trade Unions Act - Trade Disputes Act

³⁰¹ ITUC, Kenya - Survey of Violations of Trade Union Rights," <https://survey.ituc-csi.org/Kenya.html?lang=en#tabs-1>.

³⁰² ITUC, "Ghana - Survey of Violations of Trade Union Rights," <https://survey.ituc-csi.org/Ghana.html?lang=en#tabs-1>.

³⁰³ ITUC, "Nigeria - Survey of Violations of Trade Union Rights," <https://survey.ituc-csi.org/Nigeria.html?lang=en>.

(4) Forced Labor and Child Labor

According to the Walk Free Foundation, an international human rights organization based in Australia, G20 countries collectively import at least USD 354 billion worth of products at the risk of forced labor.³⁰⁴ Forced labor is not only a domestic problem in a single country, but must also be addressed throughout the global supply chain.

The Walk Free Foundation reported that as of 2016, there were 40.3 million estimated victims of modern slavery and of these, 24.9 million were victims of forced labor worldwide. In Africa, an estimated 9.24 million people are engaged in modern slavery, and more than half are forced into debt-based labor. Table 2-6 indicates the number of victims in each country as reported by the Walk Free Foundation. Forced labor is assumed to be particularly widespread in Nigeria, Rwanda, and Uganda, where the estimated number of modern slavery victims per 1,000 citizens is relatively high.

Table 2-6 Number of Victims of Modern Slavery (Unit: people)

Country	Estimated prevalence (per 1,000 people)	Estimated absolute number of victims
Kenya	6.9	328,000
Ghana	4.8	133,000
<u>Nigeria</u>	<u>7.7</u>	<u>1,386,000</u>
Mauritius	1.0	1,000
<u>Rwanda</u>	<u>11.6</u>	<u>134,000</u>
Seychelles	—	—
<u>Uganda</u>	<u>7.6</u>	<u>304,000</u>
Tanzania	6.2	336,000
Zimbabwe	6.7	105,000
Tunisia	2.2	25,000
Botswana	3.4	8,000
Namibia	3.3	8,000
Côte d'Ivoire	5.9	137,000

Source: prepared based on a report by Walk Free Foundation

Table 2-7 notes the indicators rating the governments' responses to forced labor.³⁰⁵ The Walk Free Foundation evaluated the following five components: (1) survivors of slavery are identified and

³⁰⁴ Modern slavery includes victims of forced labor, human trafficking, and forced marriage. The list of products at risk of forced labor includes cotton, bricks, garments, cattle, sugarcane, gold, carpets, coal, fish, rice, timber, Brazilian nuts and chestnuts, cocoa, diamonds, and electronic devices.

Walk Free Foundation, "The Global Slavery Index 2018," 2018, <https://www.globalslaveryindex.org/resources/downloads/>.

³⁰⁵ Walk Free Foundation.

extricated from slavery, while ensuring they remain free; (2) criminal justice mechanisms function effectively to prevent modern slavery; (3) coordination occurs at the national and regional levels, and governments are held accountable for their response; (4) such risk factors as attitudes, social systems, and institutions that enable modern slavery are addressed; and (5) the government and businesses stop sourcing goods and services from organizations that use modern slavery.

Ghana and Zimbabwe have relatively low ratings and are likely to face significant policy challenges. All countries performed poorly in the procurement category, indicating that procurement practices must improve by conducting human rights-related due diligence.

Table 2-7 Government Response to Modern Slavery

Country	Total	1. Victim Support	2. Criminal Justice	3. Coordination	4. Risk Factor	5. Procurement
Kenya	36.5	35.7	38.9	37.5	59.5	0.0
Ghana	27.6	24.8	33.3	37.5	40.5	8.3
Nigeria	45.8	58.9	53.5	50.0	47.6	0.0
Mauritius	34.9	43.7	38.9	0.0	50.0	0.0
Rwanda	33.6	36.9	41.7	43.8	54.8	0.0
Seychelles	-	-	-	-	-	-
Uganda	42.0	48.1	51.7	37.5	54.8	0.0
Tanzania	32.8	37.2	41.7	25.0	47.6	0.0
Zimbabwe	19.0	11.7	17.2	43.8	35.7	0.0
Tunisia	44.3	53.0	31.7	43.8	57.1	0.0
Botswana	33.2	32.2	45.6	37.5	45.2	0.0
Namibia	33.3	34.1	27.8	18.8	54.8	0.0
Côte d'Ivoire	42.4	34.4	36.7	43.8	66.7	8.3

Source: prepared based on a report by Walk Free Foundation

According to ILO and UNICEF, child laborers in 2020 numbered 160 million, or an increase of approximately 8.4 million from four years ago. Sub-Saharan Africa accounts for about 24% of this total, with 86.6 million child laborers.³⁰⁶ Table 2-8 presents the percentage of child laborers in each country as studied by the US Department of Labor.³⁰⁷ In Kenya, Nigeria, and Zimbabwe, the problem of child labor is relatively serious.

³⁰⁶ ILO and UNICEF, "Child Labour: Global Estimates 2020, Trends and the Road Forward," 2021, <https://data.unicef.org/resources/child-labour-2020-global-estimates-trends-and-the-road-forward/>.

³⁰⁷ U.S. Department of Labor, "International Child Labor & Forced Labor Reports," <https://www.dol.gov/agencies/ilab/resources/reports/child-labor>.

Table 2-8 Percentage of Child labor (per child population)

Country	Proportion	Country	Proportion
<u>Kenya</u>	<u>35.6</u>	Tanzania	29.3
Ghana	13.0	<u>Zimbabwe</u>	<u>40.4</u>
<u>Nigeria</u>	<u>47.5</u>	Tunisia	3.0
Mauritius	-	Botswana	-
Rwanda	5.4	Namibia	-
Seychelles	-	Côte d'Ivoire	25.6
Uganda	22.2		

Source: prepared based on the U.S. Department of Labor website

Looking at the legal challenges, law enforcement problems have been identified outside Namibia. In Seychelles and Uganda, children are allowed to engage in hazardous work, depending on their age, and in Botswana, children under 14 are allowed to engage in light work, although it is noted that there is no legal definition of light work and that there are challenges to legal protection.³⁰⁸ The situation in Kenya, Ghana, and Nigeria is summarized below.

<Kenya>³⁰⁹

Kenya is governed by the Ministry of Labor and Social Protection, which formulated a national policy on the elimination of child labor in 2013. The enforcement agencies are the National Police Service and the Office of the Director of Public Prosecutions. In recent years, the National Steering Committee on Child Labor has also become more active, with the active involvement of specialized working groups and an increase in the number of prosecutions for the worst forms of child labor. There are also challenges in enforcing the law due to insufficient budgetary allocations to the Ministry of Labor and Social Security, lack of labor inspectors, and insufficient capacity of criminal investigators.

<Ghana>³¹⁰

The Child Labor Unit of the Ministry of Employment and Labor Relations has jurisdiction over this matter. In addition, the Ministry of Local Government and Rural Development's District Assemblies and the Ministry of Gender, Children, and Social Protection are also responsible for child labor and human rights. Social Protection is also involved in the detection of child labor and human trafficking.

³⁰⁸ U.S. Department of State, "2020 Country Report on Human Rights Practices," 2021, <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/>.

³⁰⁹ U.S. Department of Labor, "Child Labor and Forced Labor Reports - Kenya," <https://www.dol.gov/agencies/ilab/resources/reports/child-labor/kenya>.

³¹⁰ U.S. Department of Labor, "Child Labor and Forced Labor Reports - Ghana," <https://www.dol.gov/agencies/ilab/resources/reports/child-labor/ghana>.

The enforcement agencies are the Ministry of the Interior and the Ministry of Justice's Office of the Attorney General. The Government of Ghana has developed a National Plan of Action Phase II for the Elimination of Child Labor in Ghana 2017-2021, as part of which the Child Labor-free-zones in Ghana - Protocols and Guideline came into force in March 2020.³¹¹

Criminal proceedings for human trafficking will be transferred from the police to the Attorney General's Office, but a lack of funding, inadequate human resources in the Attorney General's Office, inadequate legal training for the police, and insufficient capacity to collect evidence have hindered the prosecution of complex crimes, particularly child trafficking. There is a need to increase the number of labor inspectors, review their powers and improve coordination between relevant agencies to ensure effective enforcement of the law.

<Nigeria>³¹²

The Labor Inspectorate, Ministry of Labor and Employment, has jurisdiction. Other government agencies dealing with human trafficking are the National Agency for the Prohibition of Trafficking in Persons and Other Related Matters, Nigeria Immigration Service and the State Taskforce Against Human Trafficking. Enforcement will involve the Nigeria Police. The Nigerian government has developed a National Social Behavioral Change Communication Strategy for Elimination of Child Labor in Nigeria (2020-2023) and has increased the number of labor inspectors.

However, although the Nigerian Government has increased the number of labor inspectors, it still falls short of the ILO standard of one inspector for every 15,000 people.³¹³ It is also hampered by budget cuts and limited resources to run supervisory offices, including offices and transport.

Child soldiers are also a persistent problem in Nigeria, and while there is a framework for addressing the issue of child soldiers- the National Action Plan for Preventing and Countering Violent Extremism- implementation challenges have been noted.

(5) Examples of Cooperation among Other Development Partners

Table 2-9 illustrates the development partners' efforts. As ILO's Decent Work Program encourages the promotion of basic labor rights, further research on the Program from business

³¹¹ As of January 2022, JICA is conducting the "Information Collection and Verification Survey on Child Labour, especially in the Cocoa Sector.

³¹² U.S. Department of Labor, "Child Labor and Forced Labor Reports - Nigeria," <https://www.dol.gov/agencies/ilab/resources/reports/child-labor/nigeria>.

³¹³ In 2020, the number of labor inspectors was 1,888. To meet ILO's standards, 4,005 will have to be deployed.

and human rights perspectives can provide useful information in considering JICA's future cooperation.

Table 2-9 Examples of Cooperation by Other Development Partners

Country	Cooperation by Other Development Partners
Kenya	<p>Germany: Promoting self-employment and entrepreneurship among young people (2020-2023)</p> <p>Germany: Promoting employment in Africa through public-private cooperation (2015-2023)</p> <p><u>ILO: Decent Work Country Programme (2013-2016)</u></p> <p><u>ILO: Labour Law and the Enabling Business Environment for MSMEs (2013-2016)</u></p> <p><u>ILO: Labour Law and the enabling business environment for SMEs (2011-2013)</u></p> <p>ILO: Global Action Programme on Child Labour Issues Project (2011-2017)</p>
Ghana	<p>ILO: Southern Africa Migration Management Project(2020-2023)</p> <p>ILO: Global Programme Employment Injury Insurance and Protection (2018-2019)</p> <p>ILO: Convening Actors to Develop and Implement Strategies to Reduce Child Labour and Improve Working Conditions in Artisanal and Small-Scale Gold Mining (2015-2019)</p> <p>ILO: Support to Free Movement of persons and Migration in West Africa (FMM) West Africa Technical Assistance Project (2013-2021)</p> <p>ILO: Global Action Programme on Child Labour Issues Project (2011-2017)</p> <p>ILO: Eliminating the Worst Forms of Child Labour in West Africa and Strengthening Sub-Regional Cooperation through ECOWAS – II (2010-2013)</p>
Nigeria	<p>ILO: Institutionalizing social protection for accelerated SDG implementation in Nigeria (2020-2022)</p> <p>ILO: Global Programme Employment Injury Insurance and Protection (2018-2019)</p> <p><u>ILO: Decent Work Country Programme II (2015-2018)</u></p> <p>ILO: Support to Free Movement of persons and Migration in West Africa (FMM) West Africa Technical Assistance project (2013-2021)</p> <p>ILO: Eliminating the Worst Forms of Child Labour in West Africa and Strengthening Sub-Regional Cooperation through ECOWAS – II (2010-2013)</p> <p>ILO: Enhancing the cooperation to fight trafficking in human being from Nigeria to Europe (2010-2012)</p>
Mauritius	<p>ILO: Southern Africa Migration Management Project (2020-2023)</p> <p><u>ILO: Decent Work Country Programme (2012-2014)</u></p>
Rwanda	<p><u>ILO: Decent Work Country Programme (2018-2022)</u></p> <p>ILO: Global Action Programme on Child Labour Issues Project (2011-2017)</p>
Seychelles	<p><u>ILO: Decent Work Country Programme (2019-2023)</u></p>
Uganda	<p><u>ILO: Decent Work Country Programme (2013-2017)</u></p> <p>ILO: Global Action Programme on Child Labour Issues Project (2011-2017)</p>
Tanzania	<p><u>ILO: Decent Work Country Programme (2019-2023)</u></p>

Zimbabwe	ILO: Southern Africa Migration Management Project (2020-2023) UNICEF: Social Protection Policy Framework Development (2016) <u>ILO: Decent Work Country Programme (2012-2015)</u>
Tunisia	<u>ILO: Decent Work Country Programme (2017-2022)</u> ILO: Strengthening Labour Governance in MSMEs and Supporting the Transition from the Informal to the Formal Economy in Africa(2016-2019) <u>ILO: Improving the governance of labour migration and the protection of migrant workers' rights (2013-2016)</u>
Botswana	<u>ILO: Decent Work Country Programme (2020-2024)</u> ILO: Southern Africa Migration Management Project (2020-2023)
Namibia	ILO: Southern Africa Migration Management Project (2020-2023) ILO: Global Action Programme on Child Labour Issues Project (2011-2017) <u>ILO: Decent Work Country Programme (2010-2014)</u>
Côte d'Ivoire	ILO: Strengthening Labour Governance in MSMEs and Supporting the Transition from the Informal to the Formal Economy in Africa (2016-2019) ILO: Eliminating the Worst Forms of Child Labour in West Africa and Strengthening Sub-Regional Cooperation through ECOWAS – II (2010-2013) <u>ILO: Decent Work Country Programme (2008-2013)</u>

Note: The projects shown in red are related to the law in the above table.

2.4.3 Consumer Protections

A growth in Africa's middle-income class has accelerated the development of consumer protection policies. However, UNCTAD anticipates that the market's concentration and cartel activities are likely to increase given the COVID-19 pandemic. Therefore, consumer protection measures are an urgent issue, both during and after this crisis.³¹⁴ Additionally, the issue of consumer protection in e-commerce is significant, as digitalization has progressed.

This section (1) outlines the status of laws on product safety, product liability, misrepresentation, and the protection of personal information and (2) observes examples of cooperation of other development partners in ESG Target Countries.

(1) Status of Consumer Protection-Related Laws

The status of consumer protection laws in the Initial Survey Countries is as follows. The survey team also summarizes the situation in Uganda, where there seems to be a need for support in terms of the status of consumer protection laws and the interest of Japanese companies.

³¹⁴ UNCTAD, "Competition and Consumer Protection Priorities for Regional Integration in Africa," 2020, <https://unctad.org/osgstatement/competition-and-consumer-protection-priorities-regional-integration-africa>.

<Kenya>

	Category	Status
1	Consumer Protection	- Consumer Protection Act No. 46 of 2012 Kenya Consumers Protection Advisory Committee was established.
2	Product Safety	- Standards Act The Kenya Bureau of Standards was established. - Competition Act Article 59-63 Investigation is under the jurisdiction of the Competition Authority of Kenya.
3	Product Liability	- There is no comprehensive product liability law. - Competition Act Article 64 - The remedy can be obtained through contract- and tort-based remedies.
4	Misrepresentation	- Consumer Protection Act Article 12 - Competition Act Article 55
5	Personal Information	- Data Protection Act of 2019 Data Protection Commissioner was established.

Although there is a legal framework for consumer protection, a research paper has shown concern that the Consumer Protection Act lacks provisions with respect to product liability and product safety³¹⁵.

<Ghana>

	Category	Status
1	Consumer Protection	- There is no comprehensive consumer protection law. The Ministry of Trade and Industry has overseen the development of the Consumer Protection Bill since 2015.
2	Product Safety	- The Ghana Standards Authority is responsible for standardization and conformity assessment. - The Food and Drugs Authority, under the Public Health Act, employs enforcement procedures.
3	Product Liability	- There is no comprehensive product liability law. - The Sale of Goods Act 1962 (Act 137) Article 13 - The Hire Purchase Act 1972(N.R.C.D. 292) Section 14 - Consumer claims can only be made based on the common law tort of negligence.
4	Misrepresentation	- Protection Against Unfair Competition Act 2000 - The Ghana Standards Authority has established General Labelling Rules, 1992 (L.I.1541). - The Food and Drugs Authority issues labelling guideline.
5	Personal Information	- In 2012, the Data Protection Act (Act 843) was enacted, and The Data Protection Commission was established.

³¹⁵ Joy. Malala, "Consumer Law and Policy in Kenya," *Journal of Consumer Policy* 41 (2018): 355–71, <https://doi.org/10.1007/S10603-018-9390-3>.

Regarding safety standards, enforcement by the Ghana Standards Authority and Food and Drugs Authority is weakened due to the overlapping mandates of both agencies as well as their limited capacity.

In Ghana, there is a need for comprehensive legislation that would impose clear obligations on manufacturers and sellers of consumer goods to protect consumer rights and establish a process of functional consumer dispute resolution.³¹⁶

<Nigeria>

	Category	Status
1	Consumer Protection Act	- Federal Competition and Consumer Protection Act, 2019 - Federal Competition and Consumer Protection Commission
2	Product Safety	- The Standards Organization of Nigeria has established safety standards.
3	Product Liability	- There is no comprehensive product liability law. - Federal Competition and Consumer Protection Act, 2019 Article 136
4	Misrepresentation	- Federal Competition and Consumer Protection Act, 2019 Article 125,134,140
5	Personal Information	- In 2019, the National Information and Technology Development Agency formulated the rules.

There is a concern that provisions in the Federal Competition and Consumer Protection Act overlap with the statutory powers of some regulatory agencies such as the Standards Organization of Nigeria, the National Agency for Food and Drug Administration and Control and other sector-specific regulators.³¹⁷ This raises questions about the effectiveness of enforcement by the Federal Competition and Consumer Protection Commission. Currently, the Federal Competition and Consumer Protection Commission (FCCPC) is negotiating with various government agencies on collaboration and jurisdictional classification to resolve this issue.³¹⁸

³¹⁶ Christine Dowuona-Hammond, “Consumer Law and Policy in Ghana,” *Journal of Consumer Policy* 2018 41 (2018): 333–54, <https://doi.org/10.1007/S10603-018-9379-Y>.

³¹⁷ Enyinnaya C Uwandi, “The Nigerian Federal Competition and Competition Protection Act 2019: Lessons from South Africa | Afronomicslaw,” 2019, <https://www.afronomicslaw.org/index.php/2019/09/25/the-nigerian-federal-competition-and-competition-protection-act-2019-lessons-from-south-africa>.

³¹⁸ Federal Competition and Consumer Protection Act 201, Article105 Paragraph 4.

<Uganda>

	Category	Status
1	Consumer Protection Act	- There is no comprehensive consumer protection law; a bill was introduced to the Ministry of Trade, Industry and Cooperatives in 2004. The proposed Consumer Protection and Competition Act was also introduced in Parliament in 2015.
2	Product Safety	- The Sale of Goods Act - The Occupational Safety and Health Act 2006 sets out obligations for the disclosure of information on the safety of goods, together with the objective of ensuring safety in the workplace. - Uganda National Bureau of Standards Act - Establishes the Uganda National Bureau of Standards to set safety standards.
3	Product Liability	- There is no comprehensive product liability law and no express regulation. Remedies through civil tort and criminal liability.
4	Misrepresentation	- No explicit regulation. The Consumer Protection Bill contains provisions.
5	Personal Information	- Data Protection and Privacy Act 2019 - The Personal Data Protection Office has been established within the National Information Technology Authority.

The status of consumer protection legislation in Uganda is fragmented, and there are challenges in enforcement. As consumer protection is a key issue for the NAP, there is a need for a comprehensive legal system for consumer protection, together with the enactment of competition laws.³¹⁹

(2) Cooperation of Other Development Partners

Table 2-10 presents the developmental partnerships so far; cooperation in the consumer protection field seems to be less active than in other areas. Among other things, the Federal Competition and Consumer Protection Commission (FCCPC) responded that U.S. authorities are providing assistance to Nigeria, which just enacted the law in 2019, on information sharing and cross-border consumer protection investigations.

³¹⁹ Flavian Zeija, “Consumer Protection in Uganda: The Law in Theory and Practice,” *Journal of Consumer Policy* 2018 41 (2018): 455–71, <https://doi.org/10.1007/S10603-018-9382-3>.

Table 2-10 Examples of Cooperation of Other Development Partners

Country	Cooperation of Other Development Partners	Country	Cooperation of Other Development Partners
Kenya	-	Tanzania	UNCTAD: Reform Project (2017-2019)
Ghana	Standards Alliance: Workshop (2018)	Zimbabwe	UNCTAD: Reform project (2017-2019) China (2018-)
Nigeria	US Federal Trade Commission (2020-)	Tunisia	Germany: Support for Banking and Food Sector (2021-)
Mauritius	India (2018-)	Botswana	UNCTAD: Review of the Consumer Protection Act (2004) UNCTAD: Training Course (2007) UNCTAD: Seminar (2018)
Rwanda	-	Namibia	UNCTAD: Peer review (2014) UNCTAD: Assistance in implementing consumer protection laws (2015)
Seychelles	UNCTAD: Review (2013) South Africa (2017-)	Côte d'Ivoire	UNCTAD: Assistance in implementing consumer protection laws (2015) Standards Alliance: Workshop (2018)
Uganda	-		

2.4.4 Corruption

Based on research by RBC Global Asset Management, corruption is one of the most important concerns for investors; hence, promoting anti-corruption preventive measures will be key to facilitating ESG investments.³²⁰ This section provides (1) an overview of the situation of corruption in the ESG Target Countries, (2) information and communication technology (ICT) as an anti-corruption measure, and (3) examples of cooperation with other development partners.

(1) Situation of Corruption

Table 2-11 notes the situation of corruption in the ESG Target Countries: Kenya, Nigeria, Uganda, Tanzania, Zimbabwe, and Côte d'Ivoire are poorly rated.³²¹

³²⁰ RBC Global Asset Management, "An Evolving Landscape," 2019, <http://go.pardot.com/l/441592/2019-10-14/qbhs24>.

³²¹ Transparency International, "Corruption Perceptions Index," <https://www.transparency.org/en/cpi/2020/index/nzl>.
World Justice Project, "WJP Rule of Law Index 2020," n.d., <https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2020>.
The Heritage Foundation, "2021 Index of Economic Freedom," 2021, <https://www.heritage.org/index/ranking>.

Table 2-11 Corruption Situation

Country	Corruption Perception Index	Rule of Law Index	Absence of Corruption Index	Corruption Situation
<u>Kenya</u>	<u>31</u>	<u>0.45</u>	<u>0.27</u>	Although an inclusive anti-corruption act was enacted, anticorruption reforms have had limited success.
Ghana	43	0.72	0.57	Enforcement of an anticorruption legal framework remains a major challenge.
<u>Nigeria</u>	<u>25</u>	<u>0.35</u>	<u>0.43</u>	Corruption is pervasive, especially in customs and the oil and security sectors.
Mauritius	53	0.75	0.59	Bribery and nepotism have become a problem.
Rwanda	54	0.84	0.63	Although there are problems of bribery, the reputation is good in Africa.
Seychelles	66	-	-	Government corruption stems from a lack of transparency in the privatization and allocation of government-owned land and businesses.
<u>Uganda</u>	<u>27</u>	<u>0.40</u>	<u>0.26</u>	Corruption is endemic and often practiced with impunity.
<u>Tanzania</u>	<u>38</u>	<u>0.47</u>	<u>0.42</u>	Corruption is pervasive, and reforms are being undertaken.
<u>Zimbabwe</u>	<u>24</u>	<u>0.39</u>	<u>0.39</u>	Endemic corruption throughout government remains a serious challenge.
Tunisia	44	0.54	0.54	Corruption is endemic at all levels of government and law enforcement.
Botswana	60	0.71	0.60	The evaluation is good, but the capacity of the officials needs to be strengthened.
Namibia	51	0.74	0.63	In 2019, a multibillion-dollar corruption scandal resulted in convictions of high government officials and senior business leaders.
<u>Côte d'Ivoire</u>	<u>36</u>	0.68	<u>0.46</u>	Corruption in many forms is deeply ingrained in both the public and private sectors.

Source: prepared based on the Transparency International, World Bank, and Heritage Foundation websites

(2) Possibility of Using ICT

The use of ICT can effectively increase the government's transparency and accountability, and

the expectations for ICT from the anti-corruption perspective are increasing.³²² Table 2-12 illustrates the categories and some examples of digital technologies that can be used to prevent corruption.³²³

Table 2-12 Examples of Use of ICT

	Category	Example
1	Establishment of e-government system and provision of digital public services	Argentina, Portugal, Ukraine, Singapore, Israel
2	Development of tools for corruption detection	Ukraine: The electronic register of financial statements of political parties Singapore: Report of corruption
3	Open access to public information through Internet	Mexico: Open budget data Ukraine, Romania, Spain and Brazil: Utilizing big data and introducing electronic public procurement USA: Electronic voting

The United Nations’ Department of Economic and Social Affairs provides a database for a comparative assessment of e-government development, or specifically, an e-Government Development Index (EGDI).³²⁴ Table 2-13 presents the ESG Target Countries’ EGDI rating. Mauritius and the Seychelles stand along with South Africa as the most highly ranked in Africa. Nigeria, Rwanda, Uganda, Tanzania, and Côte d’Ivoire currently face challenges in government digitization.

³²²UNODC, “Embracing Digitalization: How Can Anti-Corruption Agencies in ASEAN Apply Innovative Tools in the Fight against Corruption?” 2018, https://www.unodc.org/southeastasiaandpacific/en/what-we-do/anti-corruption/topics/27-embracing-digitalization_-how-can-anti-corruption-agencies-in-asean-apply-innovative-tools-in-the-fight-against-corruption.html.

Andrii Halai, et al., “Digital Anti-Corruption Tools and Their Implementation in Various Legal Systems Around the World,” *SHS Web of Conferences* 100 (2021), <https://doi.org/10.1051/shsconf/202110003005>.

World Economic Forum, “Africa Must Use Tech to Chase Corruption out of the Shadows | World Economic Forum,” 2019, <https://www.weforum.org/agenda/2019/08/africa-must-use-tech-to-chase-corruption-out-of-the-shadows/>.

³²³ Halai et al., “Digital Anti-Corruption Tools and Their Implementation in Various Legal Systems Around the World.”

Koh Teck Hin, “Corruption Control in Singapore,” 2013, https://www.unafei.or.jp/publications/pdf/RS_No83/No83_17VE_Koh1.pdf.

³²⁴ EDGI measures three dimensions, provision of telecommunication connectivity and human capacity. United Nation Department of Economic and Social Affairs, “Country Data,” <https://publicadministration.un.org/egovkb/en-us/Data-Center>.

Table 2-13 EGDI Status

Country	EDGI	Country	EDGI
Kenya	0.5326	<u>Tanzania</u>	<u>0.4206</u>
Ghana	0.5960	Zimbabwe	0.5019
<u>Nigeria</u>	<u>0.4406</u>	Tunisia	0.6526
Mauritius	0.7196	Botswana	0.5383
<u>Rwanda</u>	<u>0.4789</u>	Namibia	0.5747
Seychelles	0.6920	<u>Côte d'Ivoire</u>	<u>0.4457</u>
<u>Uganda</u>	<u>0.4499</u>		

Source: prepared based on the United Nations Economic and Social Affairs website

From a business and human rights perspective, restricted access to the internet and social media violates workers' freedom of expression and freedom of association as enshrined in the GPHRB, and the human rights challenge of digital freedom must also be addressed in the digitalization of government.

(3) Examples of Cooperation with Other Development Partners

Table 2-14 shows some examples of past cooperation by other development partners. The Commonwealth Secretariat provides active, constant support to prevent corruption.

Table 2-14 Examples of Cooperation of Other Development Partners

Country	Cooperation of Other Development Partners
Kenya	UNODC: Blue Company Initiative Project UNDOC: Fast Tracking UN Convention Against Corruption Project EU: Programme for Legal Empowerment and Aid Delivery Switzerland: Cooperation in investigating and prosecuting international corruption and other financial crimes (2017-)
Ghana	UK: Strengthening Action Against Corruption in Ghana (2015- March 2021) The Commonwealth Secretariat
Nigeria	UK: Anti-Corruption in Nigeria (2017- April 2021) The Commonwealth Secretariat
Mauritius	Egypt: Training Mauritian cadres on fighting corruption (2020-) The Commonwealth Secretariat
Rwanda	United Nations Institute for Training and Research: Capacity building in anti-corruption (2019-) The Commonwealth Secretariat
Seychelles	EU: Technical Assistance Programme for the Department of Legal Affairs (2019) The Commonwealth Secretariat
Uganda	UK: Strengthening Uganda's Anti-Corruption and Accountability Regime Anti-Corruption Chain Programme (2014 - April 2021)
Tanzania	UK: Strengthening Tanzania Anti-Corruption Action (2012-2018) Basel Institute on Governance: Prevention and Combating of Corruption Bureau (2016-2019) Basel Institute on Governance: Capacity building and mentoring interventions (2021-) The Commonwealth: Access to Justice
Zimbabwe	Basel Institute on Governance: Assistance for Recovering Assets Stolen Through Corruption
Tunisia	GIZ: Supporting the Transformation Process in Tunisia: Preventing and Fighting Corruption (2017-2020) OECD: Good Governance and Anti-Corruption (2017-2020) EU: Project to support independent bodies in Tunisia (2019-2021)
Botswana	The Commonwealth Secretariat
Namibia	The Commonwealth Secretariat
Côte d'Ivoire	UNECA Coalition: Réseau Ivoirien Pour La Lutte Anti-Corruption

3. Conclusion

In this report, we made a detailed analysis on the current challenges and the possibilities of the cooperation in the areas of intellectual property law, competition law, and insolvency law mainly in Kenya, Ghana and Nigeria. In addition, we overviewed the current status and challenges of the legal system related to the promotion of the ESG investment.

In this survey, we identified a number of practical issues in all areas of law through an internet-based literature survey, questionnaires sent to local government agencies and other organizations, interviews at online meetings, direct interviews during field surveys, and workshops attended by local stakeholders.

Although it differs by country and legal field, the major challenges observed is that laws and regulations are in place, but they are not operational. In other words, the laws and regulations themselves have progressed to a certain extent, but there are still many issues in terms of operation.

Business laws, such as intellectual property law, competition law, and insolvency law, have legislative objectives that are highly common across countries, and while keeping pace with the development of business, the development of the law is being led mainly by the European countries and the United States. In Kenya, Ghana, and Nigeria, laws and regulations are enacted, and the administrative officials, judges, and lawyers involved in legislation and law enforcement are fluent in English, as many of them were educated in Europe and the United States. Therefore, it appears that there is no great difficulty in transferring the latest foreign laws and regulations to their countries and enacting them.

However, in the actual implementation of such laws and regulations in society, it is necessary to respond to various circumstances originating from the country's unique socio-economic structure and historical and cultural contexts. Such efforts must be carried out by mobilizing limited human and material resources. In the course of this survey, we came into contact with many challenges in the implementation of such laws in society and found cases where only laws and regulations existed in a skeleton form, without long-term support from international donors, without truly fulfilling the original purpose of the law. Many African countries are strongly influenced by the legal systems of their former sovereign states, but it seems they do not have the social and economic conditions and sufficient environment to operate the legal systems developed outside the countries.

Japan has a long history of learning from the laws and regulations of other countries, including Europe and the United States, and has been able to mold them to suit its own unique society and

culture. In the fields of intellectual property law, competition law, and insolvency law, which were the subject of this survey, Japan has built up an elaborate system over the years, and its operational performance is highly regarded worldwide. It is an area in which Japan excels in providing support in accordance with the actual conditions of each country to breathe life into laws and regulations and ensure that they are properly implemented. It would be beneficial to add a new direction to legal assistance in Africa from a unique perspective based on Japan's experience by actively collaborating with international organizations and other donors that have substantial support systems in Africa such as WIPO in the field of intellectual property law and UNCTAD in the field of competition law.

On the African counterpart side, there are cases where officials who studied or received training in Japan with Japanese assistance in the past have been appointed to high-level positions, and even those who have had little contact with Japan have a certain level of recognition that Japan has a fair and transparent system. Expectations for Japan's cooperation for legal and judicial development are high. This was recognized by the survey team through the various stages of the survey, specifically through the active responses to the questionnaires and the participation of high-level officials and a large number of officials during the field survey, but it was especially clear from the participation in the workshop held at the end of the survey.

As mentioned above, in this survey, workshops on intellectual property law, competition law, and insolvency law were held by inviting African officials, and on January 25, 2022, a workshop was held in relation to intellectual property rights, especially focusing on anti-counterfeiting measures, which was attended by more than 100 people, including dozens of officials from the Kenya Revenue Authority.

In relation to the Insolvency Law, a workshop focusing on the development and practical application of the Japanese Restructuring Insolvency Proceedings was held on January 27 of the same year, which was also attended by more than 100 people, including many officials from Kenyan courts, including 34 judges.

At the workshop on competition law held on February 3 of the same year, the Kenyan competition authority, CAK, the Ghanaian Ministry of Trade and Industry, which is drafting a draft competition law, the Ministry of National Communications, which is responsible for competition policy in the telecommunications industries, and the Nigerian competition authority, FCCPC, as well as the Gambian competition authority participated in the workshop. The FCCPC and

Gambia's competition authority were represented by their top secretaries. There were also attendees from the regional communities of ECOWAS and EAC.

In this way, it can be said that there is significant interest on the part of the African side in Japan's legal system and its operation in all legal fields of intellectual property law, competition law, and insolvency law. There are extremely high expectations for cooperation for legal and judicial development not only from European countries, from which many laws and regulations of African countries originate, but also from Japan, which has a wealth of experience in law enforcement.

This survey has revealed that African countries are good candidates for Japan's partners for the cooperation for legal and judicial development that respects local ownership, which Japan has cultivated through its cooperation in Asia. Such collaboration between Japan and Africa can significantly enhance the promotion of the rule of law and the development of a fair business environment in Africa.