Intellectual Property Laws Amendment Bill [B8-2010]: Department of Trade and Industry briefing and formal consideration

Trade and International Relations [1]

Meeting Report Information

Date of Meeting: 15 Nov 2011
Chairperson: Mr D Gamede (ANC; KwaZulu-Natal)
Documents handed out:
Department of Trade and Industry Intellectual Property Laws Amendment Bill presentation [2]

Relevant documents:
Intellectual Property Laws Amendment Bill [B8B-2010] [3]

Audio recording of the meeting:
SC Trade: Department of Trade and Industry on the Intellectual Property Amendment Bill [B8B-2010] [4]

Summary:
The Department of Trade and Industry briefed Members on the Intellectual Property Laws Amendment Bill [B8-2010] in order to appraise the Committee about the existing Intellectual Property laws and identify areas that needed to be amended to factor in Indigenous Knowledge imperatives. The rationale for regulation of Indigenous Knowledge was that legal protection should be considered in an inclusive manner and not as an end in itself. The policy objectives among others were to empower communities to commercialise and trade on Indigenous Knowledge, to conserve the environment and prevent exploitation without recognition. The legal options were amending existing Intellectual Property laws, Sui generis legislation and South African Policy which would use both systems to protect Indigenous Knowledge (Indigenous Knowledge Systems Policy of 2004/ Biodiversity Act of 2004/Patents Amendment Act of 2005).

The Committee was informed that the some of the key provisions of the Bill included registration and identification which would facilitate registration of Intellectual Property component of Indigenous Knowledge for protection from unlawful use. In addition all Intellectual Property/Traditional Knowledge might be recorded or be placed into the Intellectual Property database/register and should be identifiable and where applicable confidentiality would be respected. Under the Bill there would also be compensation for use which provided for negotiation of benefit sharing agreement regime on Intellectual Property embedded on Indigenous Knowledge in order to fairly compensate and/or recognise the Indigenous Knowledge owner. The enforcement structures established for purposes of the Bill would be the National Council which would be established and its role would be to advise the Minister on Indigenous Knowledge and the registrars of Intellectual Property in relation to the registration of Intellectual Property/Indigenous Knowledge. Other enforcement structures were the Alternative Dispute Resolution and finally the Community Trust and collecting societies which would negotiate for licensing of Indigenous Knowledge on behalf of the communities or any business enterprise. The Department of Trade and Industry concluded by stating that it was not re-inventing the wheel; some countries such as Brazil, India, and the United States of America also used Intellectual Property systems to protect Indigenous Knowledge. There was need to protect Indigenous Knowledge using the Intellectual Property system urgently as the Intellectual Property system was the one that was being used to misappropriate and not recognise Indigenous Knowledge.

The Committee asked what the fear was in relation to taking the Bill to the House of Traditional Leaders and if there was enough consultation on the Bill. Members also asked why the Bill could not be tagged as a Section 76 Bill. In response the Department responded that it was not a question of whether it was wrong or right to refer the Bill to the House of Traditional Leaders. The question was whether there was a legal requirement that compelled Parliament to refer the Bill to the House of Traditional Leaders. The Bill did not pertain to customary law and should therefore not be referred to. The Department assured the Committee that there was wide consultation on the Bill from 2006 to date. The Department had virtually covered the whole country in terms of consultation. On tagging of the Bill the State Law Advisor replied that guidance was provided by the Constitution which stated

that 'if a matter falls within the functional area of Schedule 4 of the Constitution then that Bill should be tagged as a Section 76 Bill'. The provisions of the Bill did not fall in any of the functional areas contained in Schedule 4 of the Constitution wherein a bill must be tagged as a Section 76 Bill.

In the formal consideration of the Intellectual Property Amendment Bill, five Members (all from the African National Congress) voted in favour of the Bill while one voted against (Democratic Alliance) and one abstained (Congress of the People). Congress of the People abstained because it had a problem with the process. Permission had been requested for adjournment to allow for consultation but the decision was overruled. That was why the Party decided to abstain.

Minutes:

Intellectual Property Amendment Bill [B8-2010] Department of Trade and Industry briefing
Mr MacDonald Netshitenzhe, Chief Director: Policy & Legislation; Consumer Corporate Regulation Division, Department of Trade and Industry (DTI), sought to appraise the Committee about the existing Intellectual Property (IP) laws and identify areas that needed to be amended to factor in Indigenous Knowledge (IK) imperatives. The rationale for regulation of IK was that legal protection should be considered in an inclusive manner and not as an end in itself. The policy objectives among others were to empower communities to commercialise and trade on IK, to conserve the environment and prevent exploitation without recognition. The legal options were amending of existing IP laws, Sui generis legislation and South African Policy which would use both systems to protect IK (Indigenous Knowledge Systems (IKS) Policy of 2004/ Biodiversity Act 2004/Patents Amendment Act 2005). There were generally four forms of IP, namely patents, trademarks, copyright and designs.

Some of the key provisions of the Bill included registration and identification which would facilitate registration of the IP component of IK for protection from unlawful use. Registration would be done through the Companies and IP Commission established in terms of the Companies Act 2008. In addition the definition of "community" should be flexible but allow improvements by courts and should be informed by other relevant legislation. The definition should not be static. Also all IP/Traditional Knowledge (TK) might be recorded or be placed into the IP database/register and should be identifiable and where applicable confidentiality would be respected. Under the Bill there would also be compensation for use which provided for negotiation of benefit sharing agreement regime on IP embedded on IK in order to fairly compensate and/or recognise the IK owner. The enforcement structures established for purposes of the Bill would be the National Council (NC) which would be established and its role would be to advise the Minister on IK and the registrars of IP in relation to the registration of IP/IK. Another enforcement structure was the Alternative Dispute Resolution (ADR) and finally there were the Community Trust and collecting societies which would negotiate for licensing of IK on behalf of the communities or any business enterprise;

Mr Netshitenzhe concluded by stating that the DTI was not re-inventing the wheel; some countries such as Brazil, India, and the United States of America (USA) also used IP systems to protect IK. Internationally there was no international agreement to protect IK. The World Intellectual Property Organisation (WIPO) had established the Intergovernmental Committee (IGC) on Protection of Genetic Resources, Traditional Knowledge and Folklore in 2000 but a solution had not yet been reached. There was need to protect IK using the IP system urgently as the IP system was the one that was being used to misappropriate and not recognise IK.

Discussion
Ms M Dikgale (ANC, Limpopo) asked how the Bill would protect the knowledge of South Africans who were using indigenous plants for medicinal purposes.

Mr Netshitenzhe replied that the Bill did not protect the plant. It protected individuals or groups with knowledge on how to use the plants for medicinal purposes. The plants were protected by the Biodiversity and Environmental Acts.

Ms L Abrahams (DA, Gauteng) asked what the fear was in relation to taking the Bill to the House of Traditional Leaders.

The State Law Advisor replied that it was not a question of whether it was wrong or right to refer the Bill to the House of Traditional Leaders. The question was whether there was a legal requirement that compelled Parliament to refer the Bill to the House of Traditional Leaders. The Bill did not pertain to customary law and should therefore not be referred as guided by the Tongwani judgement. Much as that might be Parliament had a right to consult anyone on any Bill or any law that it was processing.

Mr K Sinclair (COPE, Northern Cape) asked if there was enough consultation in relation to the Bill.

Mr Netshitenzhe replied that in reality the Bill was a 2007 Bill. To be fair there was wide consultation on the Bill from 2006 to date. DTI had virtually covered the whole country in terms of consultation.

Mr Sinclair asked about the cost implications of the Bill and for the department responsible for carrying the responsibility.

Mr Netshitenzhe replied that there was a regulatory impact assessment which was conducted on the Bill. DTI did a regulatory impact assessment assisted by the Presidency, National Treasury and a consultant. The consultant was supposed to do a cost benefit analysis but in many cases the advice was that the consultant did not know what the cost would be. The value chain of rooibos alone was R160 million: this was an indication of the benefit. The cost of implementing the Bill would be lower.

Mr Sinclair asked why the Bill could not be tagged as a Section 76 bill.

The State Law Advisor replied that guidance was provided by the Constitution which stated that 'if a matter falls within the functional area of Schedule 4 of the Constitution then that Bill should be tagged as a Section 76 Bill'. The provisions of the Bill did not fall in any of the functional areas contained in Schedule 4 of the Constitution wherein a bill must be tagged as a Section 76 Bill.

Mr Sinclair cautioned that there was need to be careful on how an 'indigenous' community was defined as South Africa was a unity state.

Mr Netshitenzhe replied that a consideration was made that the definition should not be static. The Portfolio Committee had also sought advice. An agreement was made on one workable definition. The International Labour Organisation advised that the definition should be left to the courts to progressively define so as to avoid political conflict when deciding who was indigenous or not.

Ms Dikgale asked at what level the Congress of Traditional Leaders of South Africa (CONTRALESA) was consulted. Was it at provincial or national level.

Mr Netshitenzhe replied that CONTRALESA was consulted in the provinces and also at national level where it was engaged by DTI and further invited to the Portfolio Committee when public hearings were held.

The Chairperson pointed out that of late Parliament was losing cases in Court. That was why Members were asking about consultation.

Mr F Adams (ANC, Western Cape) pointed out that he was still worried about tagging of the Bill. Would the Bill hold up in the Constitutional Court if challenged.

Adv Johan Strydom, Legal Advisor; Department of Trade and Industry, replied that the essence of the Bill was not to deal with customary law. The Bill dealt with Intellectual Property rights and the protection thereof. Without fear of contradiction he was satisfied that the Bill was a Section 75 Bill.

The Parliamentary Legal Advisor and State Law Advisor agreed with Adv Strydom's position.

The Chairperson invited the Department of Trade and Industry to give its concluding remarks before the formal consideration.

Mr Netshitenzhe concluded by stating that the DTI had stated its case and that the decision was with the Committee. DTI did not legislate in order to go to court but there were sufficient dispute resolution mechanisms to deal with disputes.

Formal Consideration of the Intellectual Property Amendment Bill
The Chairperson invited Members to vote on the Intellectual Property Amendment Bill.

Mr K Sinclair requested that the meeting be adjourned to allow for consultation with his party.

The Chairperson put the decision on whether the meeting should be adjourned to a vote.

Five Members (all from the ANC) voted in favour of proceeding without adjournment while two Members from the DA and COPE voted in favour of adjournment. The meeting proceeded to formal consideration.

The Committee decided to approve the Intellectual Property Amendment Bill page by page. Pages 1 to 35 were approved without amendment.

The Committee proceeded to vote on the Bill as a whole. Five members (all from the ANC) voted in favour of the Bill while one voted against (DA) and one abstained (COPE). COPE abstained because it had a problem with the process. It had requested for adjournment to allow for consultation but the decision was overruled. That was why the Party decided to abstain.

The meeting was adjourned.

Links:
[1] http://www.pmg.org.za/minutes/585
[2] http://d2zmx6mlqh7g3a.cloudfront.net/cdn/farfuture/F9ABKA-DifO4nSLziW5VNIWle_A3cozX9U78Eq7LLmk/mtime:1321608866/files/docs/111116dti.PPT
[3] http://www.pmg.org.za/../../../../../../files/bills/110916b8b-2010.pdf
[4] http://www.pmg.org.za/node/29711