

Indigenous Knowledge protection policy using the Intellectual Property System

[Trade & Industry](#) [1]

Meeting Report Information

Date of Meeting: 16 Feb 2010

Chairperson: Ms J Fubbs (ANC) Co-Chairperson: Mr D Gamede (ANC, KwaZulu-Natal)

Documents handed out:

 [Presentation by Department of Trade and Industry](#) [2]

[Intellectual Property Laws Amendment draft](#) [3]

Audio recording of the meeting:

[PC Trade: Consideration of Minutes: Joint Briefing with the Select Committee on Trade & International Relations](#) [4]

Summary:

The Department of Trade and Industry briefed the Portfolio Committee on Trade and Industry and the Select Committee on Trade and International Relations on its policy on the protection of Indigenous Knowledge using the Intellectual Property system. Their presentation provided an overview as well as the rationale for the legal protection of Indigenous Knowledge Systems (IKS) linked to its role in promoting social and economic development. The major challenge was in balancing the benefit of an intellectual property rights regime for IKS against adverse consequences that could result from the legal recognition of Indigenous Knowledge in the public realm. Whilst other countries had created a special dispensation for the recognition and protection of IKS, there was a need to consider whether this would be appropriate in a South African context.

Ms Zodwa Ntuli: Deputy Director-General: Consumer and Corporate Regulation Division Department of Trade and Industry submitted that their presentation would assist the Committee to locate Indigenous Knowledge Systems within the context of the economic development.

Mr MacDonald Netshitenzhe: Director: Commercial Law and Policy, CCRD explained that a series of international conventions had culminated in several international agreements that informed the DTI's policies on IP, particularly the Berne Convention of 1967, the WIPO Performances and Phonograms Treaty of 1996 and the 1997 WIPO-UNESCO World Forum on Protection of Folklore.

Ms Nomfundo Maseti: Chief Director: Policy and Legislation, CCRD emphasized the importance of IK and what would be achieved by its legal protection in terms of encouraging innovation and contributing to social and economic development.

The discussions on the policy brief with the Committee focused on the issue of its compliance with relevant trade and intellectual property treaties to which South Africa was a signatory. The meeting was attended by the Chairperson of the Science and Technology Committee, who raised an issue about the relationship between IP creators and research institutions to which they were attached vis-à-vis IP ownership and control. Members also expressed concerns about the status of Indigenous Knowledge in South Africa with some Members concerned that it was seriously undermined and regarded as inferior to other kinds of knowledge such as modern science. There was also discussion on the role of the National Indigenous Knowledge Systems Office (NIKSO) which had been established to promote Indigenous knowledge.

In other business, the Portfolio Committee on Trade and Industry considered and adopted the draft report on the Annual Report of the Department of Trade and Industry and outstanding minutes of the Committee to date.

Minutes:

Policy briefing by the Department of Trade and Industry

Ms Zodwa Ntuli: Deputy Director-General: Consumer and Corporate Regulation Division (CCRD), Department of Trade and Industry (DTI) informed the Committee that the presentation was aimed at providing an overview of the policy. This would assist the Committee to locate Indigenous Knowledge Systems (IKS) within the context of the economic development. It would also help explain why this policy had been presented to Parliament in 2007. Another objective would be to define the concept of Intellectual Property (IP) in technical terms so that the Committee would understand things such as trademarks, copyright and patents for instance. Focus would be made on the trends in other countries with respect to the protection of Indigenous Knowledge. This was not a completely new policy. In 2005, amendments had been made to the Patent laws which sought to protect traditional knowledge systems in the context of innovation and patents. The policy was now being extended to cover other areas of intellectual property such as copyright, designs and trademarks for instance. South Africa already had a framework that was working very well in terms of legislation on Intellectual Property. However, there was still much to be done regarding enforcement of the law to afford real protection of IP. The increasing use of traditional medicines as direct medicine and less as an alternative necessitated protection of such products as they became more and more commercialised.

Mr MacDonald Netshitenzhe: Director: Commercial Law and Policy, CCRD explained that the presentation was intended to brief the Portfolio Committee on Trade and Industry and the Select Committee on Trade and International Relations about the Policy on Protection of Indigenous Knowledge using the Intellectual Property (IP) System. The background to the policy was that it was an initiative of the World Intellectual Property Organisation (WIPO), a United Nations (UN) agency (see document). A series of international conventions had culminated in several international agreements that informed the DTI's policies on IP, particularly the Berne Convention of 1967, the WIPO Performances and Phonograms Treaty of 1996 and the 1997 WIPO-UNESCO World Forum on Protection of Folklore.

The legal protection of indigenous knowledge was intended to provide a legal framework for the protection of the rights of holders of Indigenous Knowledge (IK). This would empower communities to commercialise and trade on IK bringing them into the mainstream of the economy. Legal protection would also improve the livelihoods of IK holders and communities and benefit the national economy. [See document]

Ms Nomfundo Maseti: Chief Director: Policy and Legislation, CCRD emphasized the importance of IK and what would be achieved by its legal protection in terms of encouraging innovation and contributing to social and economic development. IK was a pathway for encouraging better social and economic development for many rural communities. Legal protection introduced the principle of benefit so that the benefits of IK would accrue to the owners of IK as opposed to being exploited by outsiders. It was important to develop a tool to safeguard the interests and values of communities vested in IK to empower them and protect them from exploitation. Although there were various approaches in the international arena to devising ways of protecting IK, South Africa had to decide on an appropriate legislative approach that ensured that IK protection was strengthened and that such protection was enforced. The concept of a special dispensation or "sui generis" approach required one to ask whether it would provide the requisite level of protection.

Discussion

Mr M Oriani-Ambrosini (IFP) asked whether the policy complied with international treaty law on the recognition of IP rights. The presentation boiled down to the issue of protecting indigenous performances and indigenous works in terms of their IP content. However, there seemed to be an outcry, for instance, if one decided to invoke IP protection of the Spanish tango for example. There was a pool of works that was traditional but was not the object of IP rights protection. South Africa was therefore doing something, which in his limited experience, was novel. That is why he wanted to know if that was consistent with the Treaty on the Recognition of Intellectual Property Rights particularly the clause on disallowing the use of IP as a restraint on trade of the recognized work.

Mr. Netshitenzhe responded to the issue of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) which was a part of the Marrakesh Agreement that had established the World Trade Organisation (WTO) in 1994. In his view TRIPS was a combination of agreements coming from WIPO and was part of the General Agreement on Trade and Tariffs (GATT) system. However, IP had not been a component in these agreements. The United States had been pushing the issue of trading in IP since 1947 or even before. This culminated in an agreement in Marrakesh in 1994 on IP which took into account the Rome Convention as well as the Berne Convention, Integrated Circuit Convention and the Paris Convention. It was therefore a constellation of agreements. So what the department had done had been to consider certain articles of certain conventions to determine compliance of the policy with the treaties. However, there was no international agreement that regulated issues of Indigenous Knowledge. The issue of Indigenous Knowledge was dead within the WTO system and it was only WIPO that was actively pursuing the matter. There were some areas where the law was silent on these issues and South Africa would go on with creating policies without contradicting international treaties that spoke to this issue. South Africa would have to go bi-lateral in those situations where treaties were silent. This brought the issue of reciprocity to the fore of such negotiations.

Mr Ambrosini asked to clarify his question. He stated that TRIPS was a specific treaty as was the Berne Convention, it was not a paramount treaty on the subject of IP. His question required a legal analysis of how the policies that had been put forward to the Committee complied with the various international agreements to which South Africa was a signatory.

Mr. Netshitenzhe responded that in short therefore, one could say that they had these international obligations which they did not want to contradict. If an agreement existed such as TRIPS or the Berne Convention they would comply with it. But where

international law was silent on these issues then South Africa was allowed to address national policies accordingly.

Mr X Mabaso (ANC) commented that there was a need to encourage the nurturing of innovation at an early stage by targeting the youth and providing opportunities for them when they were still young in schools. There was a need as a developing country to accelerate innovation so that they could compete effectively with developed nations. He asked whether there was any way that innovation by workers in factories could be recognized to prevent the exploitation of their ideas by their employers. He knew of a certain worker in an international IT company who had come up with an innovative product. The company took ownership of the innovation and all that he had been given was a watch.

Mr. Netshitenzhe responded that he could not agree more that awareness had to start at schools as opposed to universities. On the issue of employer-employee relationships, if someone would have made a discovery whilst working for a particular company, as an example, then they would be using that company's resources. Thus the IP would be vested in the company who would have a right to that IP. In situations where there was an agreement such as a consultancy agreement or any other binding contract then perhaps the IP would be vested in the employee.

Mr Mabaso asked a question regarding songs or performances that related to geographic areas or communities. He wanted to know to whom the benefit of such IP would go to since this was property owned by a community.

Mr. Netshitenzhe responded by giving an example of "rooibos" which was a registered trademark which referred to a particular geographical area in the Western Cape and the use of the word "Champagne" to indicate a geographical region in the South of France where sparkling wine was manufactured.

Ms Ntuli added that recognition could also take various forms through royalties, contributions to a particular fund or charitable cause to mention some examples. There were many creative ways of doing this, including building churches or schools. Communities could always find ways and come to an agreement with respect to the way in which they could benefit from their communally owned IP. In many instances one could find that people were not interested in financial gain but simply wanted recognition for their IP.

Mr E Ngcobo (ANC) thanked the presenters from the department for their input to the two Committees. The question of patents was a very important question for South Africa. The Department of Science and Technology (DST) had established the Technology Innovation Agency (TIA) for this same purpose. The Portfolio Committee on Science and Technology had conducted an oversight tour, where they found that at PlantBio many of the workers faced certain problems because of their attachment to academic research institutions such as universities. Universities were more interested in publication of research so that they could raise the profile of their reputations rather than the protection of IP. These workers had asked what Government did to promote copyright rather than publication. For instance, the National Research Foundation (NRF) promoted publication more than it did copyright. This resulted in the publication of research in journals that were read by international companies who ended up appropriating such research for their own benefit. He asked what was being done therefore, to do something about that dilemma.

Mr. Netshitenzhe responded that the simple fact that research was being conducted did not mean that there would be IP. There had to be an appreciation that IP would arise at some stage of the research process. Therefore, if that regime was consolidated well enough, TIA had to be able to come up with contracts that prevented the publication of stage two information during stage one for instance. However, the problem was that people wanted celebrity status and fame whereas institutions wanted to own that IP. It was therefore an issue of control with researchers desiring fame and revealing information that was still secret. There was a need therefore to inculcate a culture of silence. There had to be a balance, they were not saying people did not have to publish but efforts had to be made to ensure the protection of any IP that would bring benefit to the institute or government.

Mr Ngcobo asked what the status was regarding the National Indigenous Knowledge Systems Office (NIKSO) which was designed to deal with issues about IKS. He wanted to know to what extent they were working with that office.

Mr Netshitenzhe responded that the department worked together with the DST. With respect to NIKSO they had coordinated with the DST. The NIKSO mandate was to promote Indigenous Knowledge and the DST was responsible for awareness-raising through events such as Science Week whilst the DTI handled the policy component.

Mr Ngcobo referred to the Chief Director's submission regarding the challenges faced in the commercialization of Indigenous Knowledge. However, the UN had signed a declaration in 1994 which actually established the patenting and commercialisation of IKS. He asked how far the department was working with that UN arrangement in promoting IKS in South Africa.

Mr. Netshitenzhe responded that the department attended events organised by WIPO, which was a UN agency as was the International Labour Organisation (ILO). The department worked with them and participated in their events. However, they were saying that it was no longer a matter of promoting things, there was a need to derive benefits as well. The problem was that in the past a lot of work had been done to promote Indigenous Knowledge and outsiders would then come and poach things. The WIPO founding documents encouraged protection and the department was working with them.

Mr Ngcobo also referred to the reciprocity agreement that had been mentioned in the presentation. He was worried that there could be some countries that could take advantage of such reciprocity to exchange worthless or useless IP for valuable IP from South

Africa.

Mr. Netshitenzhe responded that the Berne convention spoke about “quid pro quo” to encourage a spirit of reciprocity. However, the TRIPS agreement spoke about non-discrimination so that if in one country another country’s laws were not respected that country could not discriminate against them on that basis. What they could do was to approach that country and enter into a reciprocity agreement.

Ms Ntuli responded that one had to understand reciprocity within the concept of saying that under normal circumstances, if there was an international treaty that countries were bound to, it would bind those countries to respect its principles and the duties and obligations that flowed from it. However, where a matter was not a subject of a treaty, then each country enacted its own legislation, it became each country’s prerogative to decide whether or not they wanted to recognize foreign law. For trade purposes, countries would often negotiate with each other as partners to recognize the protection of Indigenous Knowledge in each country. This did not, however, replace the need for an international instrument that was binding on these countries. The debates which had been alluded to in the presentation under background were debates that were intended to lead to an international agreement on Indigenous Knowledge.

Mr Ngcobo also asked for a clarification of the concept of IP with respect to copyright.

Ms M Dunjwa (ANC, Eastern Cape) was interested in knowing who would be responsible for empowering communities on this matter considering the complexity of IP. South African communities had been victims of robbery of their IP by people who came under the guise of assisting them. It would be important therefore, especially in the context of socio-economic and rural development in particular to develop a simplified empowerment programme.

Ms Dunjwa commented that there had been a young boy at Rhodes University who had drawn a sketch which then became a famous design but he had not received any recognition for it. He asked if the department could follow-up on the matter.

Mr. Netshitenzhe responded that those people who had traditional knowledge had a choice of using their trade secrets without forcing them to reveal things using the patent system. That trade secret had to be prevented from entering the public domain. The issue of empowerment was a national issue and South Africans had to take it upon themselves to teach each other. Another important issue was that if one was working on an innovation it was preferable not to divulge this to anyone so that the requirements for patent registration could be met. It would have been preferable for the boy concerned to have gone public after registering the design concerned.

Ms Ntuli responded that the department would take this up and provide feedback before their next presentation to the Committee on how to ensure that people were educated about the need to protect their IP.

Ms Dunjwa asked if the department would arrange for more frequent sessions with Members to educate them on IP issues.

Ms T Tshivhase (ANC, Limpopo) commented that one of the problems faced by South Africa with respect to IP was that there was no acknowledgment from within SA. There were certain people who had an attitude of undermining others who came up with innovative ideas as had been shown with the issue of the use of traditional medicine to treat HIV and AIDS. In her home town in Venda, there had been a man who had developed a radio but he had not been recognized because there was someone who thought he was not qualified to do that sort of thing. She asked how the department could eradicate such an attitude in people.

Ms Tshivhase also raised the controversial issue of spiritual healing to cure AIDS for instance. She submitted that people who possessed such powers were criticized by people who had no idea what they were talking about when traditionally it was possible to cure the disease. Despite the existence of such knowledge, these people were constantly discouraged and yet they would later on claim to be the ones who had discovered knowledge to cure this disease.

Mr Netshitenzhe responded that the process with traditional medicine was that a patent was obtained first before trials with the Medicines Control Council (MCC) were conducted. It happened that some medicines were patented but then were not approved by the MCC because they were deemed unsafe for use.

Ms M Nxumalo (ANC, Gauteng) asked what they had to do as the Portfolio Committee or as South Africans to empower communities to recognize and protect their IKS. She commented that she agreed with the previous Member who had said that there was a need to transfer knowledge to the younger generation to encourage innovation in South Africa.

Ms Nxumalo asked a question regarding ownership of IKS. She had been informed that in one community in the Northern Cape, if persons were caught digging up a certain type of medicinal herb, they would be arrested. It appeared therefore that IKS were control by a few who thought they were powerful simply because they had knowledge. This knowledge had been in existence for many years within the community but now it seemed that only certain people could access it. This was exploitation by people who possessed scientific knowledge. The same was true when South Africa exported raw materials and imported finished goods. Those products that were made from South African raw materials were imported back at a higher price. The country needed to ensure that they were ways to ensure that imported goods were manufactured locally.

Ms M Shinn (DA) asked if indication could be given of the timeline regarding when public hearings would be conducted.

Ms Ntuli responded that this was a framework for the protection of Indigenous Knowledge in South Africa. They were various options that could be considered in that regard. Some people would say that a special law was required to deal with that, but having discussed that and taken into account South Africa's unique circumstances, the proposal which had been tabled was to amend South Africa's IP law framework so that it accommodated traditional knowledge. In that sense, therefore, they were not creating a new law because they believed that it was possible to protect traditional knowledge using the existing IP regime.

Ms Shinn asked for a specific example to be provided of when a university had stolen someone's indigenous idea and exploited it for commercial benefit.

Ms Shinn asked how it would actually be determined who the originator of the indigenous knowledge was, whether this could be a person or a community. Her fear was that depending on the criteria there could be a race for who would register the IKS first. She also wanted to know what protection there was for an individual within the community.

Ms Ntuli responded that one had to look at things broadly in the sense that they were talking about traditional knowledge for which there was no question about its origins. There could be aspects where the line was very thin and the policy in those cases had to give direction as to how they dealt with that. The department expected the community to provide that guidance as well. The laws that were made by Parliament were not static and they could be amended to take into account changes in policy so that the law was relevant to the needs and circumstances of a particular generation.

Ms Ntuli also emphasised that it was important to differentiate between promotion and protection. The policy tabled today referred to protection more than anything. There was often talk about promoting this and that in international fora and there was never sufficient discussion on protection and this was a problem.

Mr. Ambrosini asked on a point of procedure, why the Bill was a section 76 Bill. He commented that he had difficulty understanding why it was an s76 Bill if all they were doing was making amendments to some Acts on IP.

Ms Ntuli commented that when they had tabled the policy before Cabinet, concerns had been raised about fragmentation as it affected other portfolios such as Agriculture for instance. However, in the department's view, there was no fragmentation but it was only that this issue had a cross-cutting effect. What they had agreed with Cabinet, therefore, was that the department needed to come up with a policy that was going to indicate how things would be co-ordinated.

Mr Ngcobo responded that he understood that the DST was chosen to coordinate the various departments around this issue when NIKSO was established.

Ms Ntuli responded that she was saying that there was coordination but what Cabinet had alluded to was that there had to be a policy so that everyone could know what form the coordination took. At the moment they could not refer to a particular policy to say how they coordinated a particular matter.

Mr P Smith (IFP) asked about the consequences on jurisdiction of the new regulatory regime and whether there could be any unforeseen consequences. This was considering the existence of communities who transcended geographic boundaries.

Mr Netshitenzhe responded that it was envisaged that South Africa's laws would have repercussions outside of the country's borders. For instance, the Khoisan people were a transboundary community. This kind of situation called for regional cooperation and dispute resolution mechanisms that catered for the indigent.

Another member asked that if the policy was aimed at protecting, then what would happen to those persons who did not comply.

Mr Netshitenzhe responded that the department was urging people to go and register their IP so that it could be managed. If their IP was infringed they could then access court remedies and there was criminal action available as well. The DTI also had an inspectorate for such things as copyright infringement.

Mr Ngcobo followed up on his earlier enquiry. The most important part of his question which had not been addressed with respect to the competition between publication and patents was the area of the conflict between regulation and policy. The NRF pre-requisite was that for people to be rated, and therefore, to be funded, they had to attain a certain number of publications. There was also a departmental requirement in Higher Education, whereby professors and researchers had to publish to add value so that research funds could be allocated to them. However for patenting purposes, information had to remain hidden for as long as required to ensure the protection of IP. There had been situations where academics were famed for their work but companies would have taken patents over their work. This was therefore an important matter of policy that they needed to strike through. He asked therefore how they would develop a documented policy on coordination in light of the rules for the publishing of research in order to acquire funding by both the NRF and the Department of Higher Education.

The Chairperson commented that it was not very clear whether the issue of retrospectivity would apply and whether this had effectively been taken into account. The Chairperson also wanted to know the criteria for determining community with respect to

ownership of IP.

The Chairperson remarked in closing that that the amendment Bill went to the heart of addressing so much of what had happened in South Africa as a result of apartheid. What was at the heart of this matter was not only about economic reality but also the issue of culture which played a pivotal role in shaping the identity of being South African. She remarked that even countries such as China were showing a keen interest and appreciation of Indigenous Knowledge. The pro-active protection of Indigenous knowledge in New Zealand was a welcome approach.

The Committee would consider holding an additional briefing session that would also involve the Department of Agriculture.

Committee Report on Annual Report of Department of Trade and Industry and its Entities

The Committee adopted the minutes of 28 January 2010 with amendments.

The meeting was adjourned.

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