Policy and Draft Bill on Protection of Indigenous Knowledge Systems: Department briefing

Trade & Industry [1]

Meeting Report Information

Date of Meeting: 23 Jan 2008
Chairperson: Mr B Martins (ANC)
Documents handed out:

Department of Trade and Industry presentation [2]
Audio recording of the meeting:
Policy and Draft Bill on Protection of Indigenous Knowledge Systems: Department briefing [3]

Summary:

The Department of Trade and Industry noted that the Patents Amendment Act, passed in 2005, had dealt with protection of traditional knowledge through the patent system. However, this did not apply as yet to other intellectual property issues, and thus the Policy and draft Bill on protection of indigenous knowledge systems had been prepared. Before these would be published for wider consultation there would be discussions on the matters with relevant departments and Portfolio Committees. The Department summarised the definition problems around indigenous knowledge systems, the current situation at international forums, the need for a more holistic review of the protection, and the sectors that needed to be covered. Currently the lack of a system to identify use of indigenous knowledge led to misappropriation of that knowledge without benefit to the real owners. The draft Bill and policy would provide for defensive protection and benefit sharing arrangements. A National Council would be created, and business enterprises could be formed by communities, as well as a national trust to manage the Intellectual property where owners could not be identified. There would be development of databases, the formation of an inter-departmental task team, and harmonisation of national and international policy.

Members raised questions in regard to definitions, the recognition of different groups' knowledge, practical implementation, liaison with other international governments and non-government organisations, the use of trademarks from other countries, and geographical indicators. The question of retrospectivity of rights was extensively debated. The Department was requested how it would curb the malpractices, and whether it would be taking legal action against those not compensating communities. The diversity of the sectors who could claim protection, the capacity of the Department to administer the legislation, the need for awareness campaigns, the question of indigenous knowledge being included in the education system, and the necessity to recognise the diversity in the whole Southern African region were raised. The powers of the Council were outlined, and the question of whether legal action was possible in relation to past exploitation was raised.

The Committee adopted its Brussels Study Tour Report, its Annual Report for 2007, and the Minutes from the 4th term of 2007.

Minutes:

Intellectual Property: Protection of Indigenous Knowledge Systems using the Intellectual Property System: Department of Trade and industry (dti) briefing
The Chairperson explained that the Department would be briefing the Committee on the policy and Bill on the Protection of Indigenous Knowledge (the Bill).

Mr Fungai Sibanda, Acting Deputy Director General, dti, noted that Cabinet had requested an initial briefing to be made before the Bill was formally introduced into Parliament.

Mr McDonald Netshitenzhe, Director, commercial Law and Policy, dti, reminded that Committee that in 2005 the Patents Amendment Act had been passed, and this dealt with he protection of traditional knowledge through the patent system. This did

not apply at the time for copyright or trademarks or designs, and the new Bill would complete this process. Extensive consultation had been held already, with a closing date of 28 February, whereafter the Bill would be published for public consultation.

Mr Netshitenzhe gave a definition of indigenous knowledge systems (IKS) and noted that the Khoi and San were the main beneficiaries. In South Africa it was intended to protect traditional knowledge of the local people, whether or not this belonged to "indigenous" people. This would allow for wider protection. Protection of traditional or indigenous knowledge had been debated in various forums.

Mr Netshitenzhe noted that the dti would be consulting also with other Departments, including the Department of Agriculture. At United Nations Education and Scientific Conference (UNESCO), cultural issues were included, and the Department of Arts and Culture would also, as a lead department, be consulted.

At United Nations level, developed countries had indicated that they were not interested in protecting traditional genetic resources. Developed countries had a well-developed and powerful pharmaceutical industry, and bio-piracy was a problem, whereby patents were registered on traditional knowledge without benefiting local communities. As a result, many countries were legislating individually. The Convention on Intellectual Property (IP) could be ideal to protect some, but not all, traditional knowledge, and commercial exploitation could take place in the cultural, pharmaceutical, agricultural and health sectors. A good example would be rooibos tea, which was not trademarked in South Africa, although there was a geographical protection in regard to its growth. In addition there were time limits to this type of protection, whereas South Africa wanted to ensure continued protection.

Under the new legislation, it would be possible to register IP rights to achieve defensive protection. Any commercial exploitation of those rights must then benefit the traditional owners. Although such protection was already in place in respect of patents, dti now wished to complete the process.

The Bill envisaged the setting up of a National Council to advise the Minister and IP Registrar. Business enterprises such as Section 21 companies, close corporations and trusts could be formed by communities. A National Trust would manage the IP where the owners could not be established immediately. There would be databases set up. Interdepartmental task teams and inter-Parliamentary committees would coordinate implementation of the policy and legislation, which would in turn inform all national and international policy around these issues.

Mr Netshitenzhe noted that the Consumer and Corporate Registration division would be handling the issues at the dti.

Discussion
Mr L Labuschagne (DA) thought that this legislation would be complex both to write and manage. He felt that it would be necessary to define the terms carefully. He hoped that other groups in addition to the Khoi and San would be recognised, including the old Boer health remedies, and whether the specific South African English would be covered.

Mr S Rasmeni (ANC) asked whether Cabinet preferred the term "traditional" or "indigenous" knowledge, or whether this would only be clarified in the consultations still to be held.

The Chairperson indicated that Cabinet could not yet take a final view, and that the consultation process would give rise to more discussions. At this stage this was still a draft, or provisional, policy.

Mr Labuschagne asked which community would get the royalties. There might be a system where there were several chiefs and there could be competing claims. He wondered if the Cultural Council would address this and who would speak for which community. He asked for comment on the practical implementation.

Mr Sibanda agreed that this was complex legislation, but this was not only about royalties or money. At greater stake was the protection of indigenous knowledge systems, and ensuring that they were conserved. There would be commercialisation, but this would not be the major focus area. It was correct that there were "shared" cultures, but there were also distinct areas that could be separated. Ndebele art, for instance, resided strictly in that community, and it was unlikely that another community could claim ownership. He said that dti would try to have a system of authenticating the artwork, so that imitations could be picked up. The hoodia plant was known to belong with the San community, but the CSIR had licensed it to a foreign pharmaceutical company, without their knowledge or benefit sharing.

Prof B Turok (ANC) noted that the developed countries had long since benefited from taking natural resources and knowledge. There was wide interest in protection of traditional knowledge. He asked if dti had liaised with other countries, and what international opinion was held on the matters. He felt that there was a need to identify allies worldwide.

Mr Sibanda noted that South Africa was a member of World Intellectual Property Organisation (WIPO) and had participated in discussions at that forum, as well as non-governmental organisations. There were differences of opinion, but it was important to note that there were other challenges. Protection of indigenous knowledge according to the conventional IP systems would have to take into account the difference between the systems. An indigenous knowledge system would reside in a community, not an individual. Conventional IP would grant rights only for specific periods, whereas indigenous knowledge was passed on from generation to generation. As yet, there were no agreed grounds or definitions. dti would be investigating what came out of all

discussions to decide what could usefully be incorporated into the legislation.

Mr Netshitenzhe indicated that dti could provide a list of organisations who had been involved in the discussions. On the collective issue, he noted that rooibos and hoodia plant would be concerned with "paternity" of genetic resources. The State would own the plants, but the communities could own the knowledge of how to exploit the plant. Kwazulu Natal government had indicated that South African Indian cuisine now differed widely from Indian cuisine, and that was another indicator of how how matters could develop.

Prof Turok agreed that there were indeed many traditional Afrikaaner health and foods, as well as those of other groups, and he thought that this legislation should be as wide as possible to cover all knowledge. .

Prof Turok asked how this legislation would impact upon or tie into international complaints with South African use of terms such as "camembert" or "grappa".

Dr P Rabie (DA) believed that this was important legislation. He agreed that this had been abused already by some of the developed countries. South Africa had, he believed, a distinct character to the products which had been produced, perhaps under foreign names, for many years and that distinctiveness must be protected.

Mr Netshitenzhe noted that the previous agreements had been based on political decisions, not on intellectual property. If a term had been used for ten years or more in a country, that country would be permitted to continue using them. There were other matters still under contention, such as "Nederburg", which was a geographical area in Germany, although it was not a wine-producing region. However, the term "Champagne" had been recognised world-wide as a geographical indicator relating to the particular type of wine.

Ms D Ramidobe (ANC) asked at what stage the community would be involved. Use of Ndebele designs, for instance, must benefit the Ndebele people, and she asked whether there would be retrospective recognition.

Mr Brian Muthwa, Director, Legislative Drafting, dti, indicated that the dti would be holding a roadshow in all provinces, to meet with all stakeholders, including universities, right down to traditional communities. This would take at least a month. The benefits would only be able to accrue once the legislation had been passed, but it would cover and recognise community practices over the centuries.

Mr Netshitenzhe agreed that benefits could not accrue retrospectively. However, if there was awareness, nothing would prevent any community from challenging commercial profits given to other companies without their knowledge. He would foresee claims, but the legislation itself would not provide for retrospective payments.

Mr Rasmeni noted that this was an initial briefing, and that this Committee would have to interact with other portfolio committees. He enquired what was the magnitude of the exploitation of traditional knowledge. He assumed that Cabinet would have been briefed on this issue. He also asked if there had been any attempts to curb the malpractice of exploitation, and he was concerned that some universities had been selling indigenous knowledge without involving communities.

Mr Sibanda said that some of the problems encountered had been cited already, such as issues around hoodia, names for wines, and rooibos tea. The policy document provided to the Committee previously outlined how the sectors could benefit.

Mr Netshitenzhe noted that dti was not currently curbing the exploitation. Although it was aware of the hoodia saga, dti was not taking action, although he suggested that the Portfolio Committees could no doubt address these matters. The forthcoming legislation would act to curb the exploitation.

Ms F Mahomed (ANC) wondered if the categories should not also include media and literary discourse. The media had an important role, and she would like this sector to be included.

Mr Sibanda noted that the list given was not exhaustive. Indigenous knowledge systems would cut across several sectors, including the media. There was no intention only to focus on those sectors named in the presentation, and all sectors had the ability to claim protection, as long as the relevant IP protection could be identified.

Ms Mahomed noted that capacity was a very important issue. She had experienced some problems in trying to ascertain the position on ordinary intellectual property matters. She also wanted to know what advocacy campaigns would be held, and how the plans would be rolled out.

Mr Sibanda agreed that there was a need for considerable awareness education, including the need for buy-in from other departments and groupings.

Mr Muthwa noted that the Council would have the power to delegate tasks to committees and to appoint others to assist. dti had indicated in the submission to Cabinet that the Companies and intellectual Property Registration Office (CIPRO) would be implementing the legislation and would need its capacity bolstered to execute these additional tasks. A budget would be set for this

purpose.

Mr D Olifant (ANC) indicated that he had not heard anything about education; there was no inclusion of traditional knowledge in the schooling system.

Mr Sibanda agreed this was a valid point, and the dti would engage with the Department of Education to try to build this in to the mainstream education system.

Dr Rabie said that a distinct trademark was Amarula liqueur, although the amarula tree was not geographically confined to South Africa. The Shone and Nguni people were in a number of countries, and the legislation should be able to take into account the diversity across Southern Africa.

Mr Netshitenzhe noted that developing nations were in agreement with South Africa but had not put in place systems. The draft legislation was intended to be trans-boundary. The Shona people, for instance, would be entitled to say that at the time the traditional knowledge began, there were no colonial boundaries. The issues would go beyond South African borders. Any person would be able to exercise their rights. Assuming that communities had moved boundaries, they would still be able to lodge a claim. There would be recognition of the need for a regional arrangement. A community could include both an indigenous group currently or formerly residing in South Africa.

Mr Muthwa added that the Bill would provide that the Council would have the power to refer matters for investigation, to try to reach a decision on the proper beneficiaries. The Council would be constituted widely, and include those with expertise in traditional knowledge systems. The national Trust would also be able to handle royalties for as-yet-unidentified beneficiaries, pending final establishment of the beneficiaries. Tribes may have been split during demarcation processes, so it was possible that more than one community may have ownership.

Ms M Ntuli (ANC) said that the Council would have powers of investigation. She indicated that there were three groupings of Ndebele, all of whom undertook similar art, but there were distinct dialects and customs for each. She hoped that these would be taken into account.

Mr Netshitenzhe noted that all cultures could have groupings, and perhaps the draft Bill could include a trust fund for the Ndebele nation, allowing for subcategories. The Council would be able to determine where the dominant features of, for instance, the art, had emanated, but there would be further developments.

Ms Ntuli wondered if the traditional games played had been included in the investigations.

Mr Netshitenzhe said that the system currently did not protect these games; a person could take the game and change it slightly, then market it. Some games may have been protected through preservation. However, this was different from intellectual property, which required ownership.

Ms Ntuli thought that the dti's suggestion that matters would be challenged in court was not taking into account the realities of how the communities, many of whom were poor, could effectively challenge the major pharmaceutical giants.

Mr Oliphant and Mr Rasmeni agreed with these concerns. The poor people were suffering and the dti's attitude was incorrect. He believed that a way should be found for people to get restitution and compensation for the losses they had already suffered.

Mr Netshitenzhe clarified that the legislation would not be retrospective, so that the rights would be enforced only from passing of the legislation. If people were aware what was at stake, they might be able to get assistance to pursue claims, although it was not in the province of the dti to run a public interest case, nor to comment upon the accessibility of the courts.

Mr Sibanda added that the Bill did not envisage that indigenous knowledge systems would be protected through the ordinary courts. the existing IP system would be used as a basis, but additional structures would attempt to protect communities. The Council would be able to rule on the tribe to benefit. However, a person's options could not be limited. If a person wanted to challenge the non-retrospectivity of the legislation, he would be able to make a case. However, the dti envisaged rather that the route to be followed would be through the Council.

Mr Rasmeni said that as the protection and legislation was being developed, there would surely be gaps identified. Some groups might claim exploitation since 1652, and others claim exploitation since 1990. The public representatives would be faced with these issues. This Committee would be discussing matters with other departments. He requested that dti should take these problems into consideration.

Ms Ramodibe noted that it was interesting that any international negotiations that would favour underdeveloped countries always tended to collapse. She would like to know the true reasons, particularly when WTO was involved.

Mr Netshitenzhe noted that countries went to international bodies with differing agendas and attitudes. Currently it was difficult to reach agreement without consulting developing countries, but the competing attitudes often led to a collapse in the WTO. The

developing nations were also tending to work outside the WTO framework and sign bilateral agreements, perhaps to access aid from a developed country. Perhaps politicians needed to be brought into the equation. The African Union, the European Union and developing countries were divided. South Africa was trade-dependent, but other developing countries were aid-dependent. Developed countries were finding it increasingly difficult to cajole developing countries; hence the bilateral arrangements.

Mr Sibanda added that this was a question of the balance of economic power. Brazil, India and others were going ahead to legislate individually as they felt that decisions at international forums would be long delayed. South Africa had now taken a similar decision. When this was done, it would then be easier to strike an international agreement.

Mr Rasmeni noted that a database would be set up. He noted that there were communities who were unaware of exploitation against them, and agreed that this data would be vital.

Mr S Njikelana (ANC) believed that South Africa should be interacting also with the inter-parliamentary union.

Mr Njikelana noted that the current IP system did not allow communities to protect their interests and asked for confirmation that the draft legislation would cover this.

Mr Sibanda noted that the proposed policy and Bill were attempting to close the loopholes to provide protection.

Mr Netshitenzhe added that trade secrets may not necessarily be covered. If traditional healers chose not to reveal their trade secrets, they would nonetheless be protected. There were some limitations.

The Chairperson noted again that this was the initial engagement with the draft Bill and that during the cycle there would be involvement of other Portfolio Committees. It might be necessary for this Committee to conduct public hearings, whereafter the Committee would be able to table its views. At this stage all the complexities of the matter could not be exhaustively debated. However, this had been a useful opportunity to articulate the major issues.

Committee Business: Adoption of Brussels Study Tour Report and Annual Report for 2007
The Committee adopted the two Reports.

Adoption of Committee Minutes for the Fourth Term 2007
The Committee's Minutes for the 4th term Minutes of 2007 were adopted, subject to technical amendments in regard to the record of attendance.

The meeting was adjourned.

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