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Department:
Trade and Industry
REPUBLIC OF SOUTH AFRICA

**RIA ON THE IP LAWS AMENDMENT
BILL**



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Introduction

- The presentation relates to the Regulatory Impact Assessment (RIA) on the Intellectual Property Laws Amendment Bill, 2007 (IP Bill), conducted during 2009.
- In addition to the RIA exercise, there were on-going consultations with stakeholders and the NEDLAC process.

Risks & Challenges

A number of risks and challenges were identified, including solutions thereto:

- **Inadequate definition of key concepts contained in the Bill.**
 - * Acknowledged and to be rectified in the second version of the Bill.
- **Litigation costs to be incurred in fighting for ownership of IK**
 - * Alternative Dispute Resolution, as suggested by public comments and the NEDLAC process will ensure that dispute resolution is very accessible to indigent people i.e. the National Council will have dispute resolution powers.
- **The risk of duplication of effort and overlapping of legislative jurisdiction (i.e. Scope of the Bill)**
 - * The mandate of the dti extend as far as Intellectual Property is concerned and issues relating to bio-diversity (DEAT), Nguni Cattle (Agric); and other issues of preservation of TK remain under the domain of relevant departments.

Risks & Challenges (continued)

- **The scale of successful commercialisation of IK is relatively small.**
 - * In terms of the authors of the "Economics of Intellectual Property in SA, June 2009" commercialization of IK may lead to benefits, Rooibos value chain was quoted as an example, turnover of this industry was estimated at 180 million in 2004 (TISA, 2004)
 - * The trade in traditional medicines is estimated to be worth R2.9 billion per year, representing 5.6% of the National Health Budget (Economics of Traditional Medicine Trade in SA)
- **Possible breach of South Africa's obligation under international law.**
 - * The principle of reciprocity provides that whatever one country does to its nationals it can ask other countries to confer such benefits to its nationals so that such benefits can also be extended to nationals of those other countries.

Overall the risks and challenges as identified, were prior to further consultations with key stakeholders and the conclusion of the NEDLAC process. A number of these risks and challenges were in fact resolved at the same time that RIA process was underway and could not be captured in the report.

The following relates to the cost and benefits of the proposed solutions to the identified problems:

Problem

- Limitations of the current IP system to enable communities to collectively protect their knowledge in all areas as opposed to individuals.

Proposed Solution

- To amend the IP Law System so as to incorporate mechanisms aimed at enabling communities to protect their Indigenous Knowledge.

Expected Benefits

The proposed law review would benefit various sectors like -

- Pharmaceutical and Chemical sectors: This sectors work closely with genetic, chemical and biotechnological resources in formulating inventions and local communities could benefit by means of benefit sharing agreements in terms of the Patent Amendment Act.
- Agriculture: Geographical indications may be used to protect and commercialize plants and animals which are peculiar to geographic areas, e.g. Nguni cattle, Fauna and Flora of South Africa & Southern Africa.

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- Medical or Health Sector: Traditional healers may use laws of trade secrets or patents to protect and commercialize their Indigenous Knowledge. Most medicines produced by traditional healers are being used as complementary medicines by various role players in the health sector and the healers could derive benefits from such usage.


Trade in traditional medicines is estimated to be **R2.9 billion** with **27 million** consumers and employment of about **133 000** (Economics of Traditional Medicine Trade in SA)

Expected Costs

- Various industry players who will be expected to register and comply with new clauses introduced by the Bill, will bear minimal costs of compliance, e.g. R60, 00 (US\$8) for a provisional patent application, R590,00 (US\$79) for a full patent application and annual renewal fees R130, 00 (US\$17); trademark R590, 00(US\$79) and a new copyright application for films and videos R510, 00 (US\$68), people (CIPRO 2008, Economics Intellectual Property in SA, p2).

These scales/fees are relatively low by international standards

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Misappropriation of IK using IP

Problem

- Due to the limited nature of protection afforded in the existing IP System, other users continue to poach or misappropriate IK under the auspices of IP

Proposed solution

- To make it a requirement for a registrant to acknowledge holders of indigenous knowledge and to also enter into benefit sharing agreement with them in terms of the Patents Amendment Act, before any registration can be approved.


Expected Benefits

- Holders of indigenous knowledge will benefit from the acknowledgement accorded and will be entitled to benefit from proceed made in using their IK.

Expected Costs

- No costs can be associated with this requirement except in cases where third parties previously benefited without acknowledging or sharing their spoils with the holders of IK and might view this new arrangement as a cost to them due to loss of previously generated income.

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International Resistance

Problem

- Many developed countries do not support treaties and debate which will lead to the protection of indigenous knowledge at international forums such as WTO and WIPO.

Proposed Solution

- To incorporate IK into the existing IP system to protect collective ownership of such knowledge, against exploitation and to afford legal redress to owners in the event of an infringement by multinationals.

Expected Benefits

- Any extrusion of resources will be curtailed by requiring that the owners of indigenous knowledge should be acknowledged by registrants.
- Holders of IK will benefit by signing benefit sharing agreements and therefore acquire shares in the proceeds made, which will be in line with international treaties, and this will be afforded the same rights in other countries as would be the case in SA.

Expected Costs

- Costs will be minimal as they will entail the normal travelling costs by government officials to present SA's position on protection of IK.

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Implementation Costs

This section relates to the cost of implementing newly introduced institutions contained in the Bill.

National Council

The council will be responsible for the protection and promotion of IK.

• Costs

- * Costs associated with the creation of the council will be minimal, since it will consist of part-time members who will meet at least four times per year.
- * The estimated cost is between **R876 000 to 1,4m** (a comparison to NERSA spending - March 2008-SBP report).
- * However, the Minister of Trade & Industry in consultation with the Minister of Finance will determine remuneration and allowances to be paid to Council members ranging from a high of **R942 759 p.a** for a chairperson and to a low of **R220 279 p.a**, for an ordinary member (2009, Remuneration Adjustments-NT), dependent on the chosen category e.g. **A, B or C**.

National Database

The proposed database will be in the office of the Registrars.

• Costs

- * Costs will be minimal, since software already exist at CIPRO and will accommodate the proposed database, which will only form part of the subset within the existing database. 9



Implementation Costs (continued)

National Trust Fund

The proposed trust fund will be responsible for:

- * Receiving income derived from use of indigenous knowledge in terms of e.g. royalties or license fees.
- * Benefiting the communities from income generated
- * Facilitating commercialization of indigenous intellectual property.

• Costs

- * Costs will only be in the form of capacitating members of the council to manage the trust fund.

The fund will vest and be administered by the council and all funds generated or acquired will be held in trust by the council.



Compliance Costs

- Firms will have to enter into benefit sharing agreements with communities and share in the profits emanating from the use of their indigenous knowledge. Costs of drafting benefit-sharing contracts might be more or less **R700 per hour**
- Some firms might be reluctant to utilize indigenous knowledge from South Africa, but due to SA having rich bio-diversity there is confidence that companies or research institutions will adhere to the legislation.
- The concept of joint ownership of IK may not be acceptable to some companies.
- Communities will have to bear the cost of registration of IK, which may be a burden particularly to poor communities.



Enforcement and Sanctions

Enforcement and Sanctions

- The Companies and Intellectual Property Commission (Commission) to be established will be responsible for enforcement and will also have the competency to apply sanctions as contained in the legislation.
- The commission will also have the competency to refer matters to the proposed tribunal

Monitoring and Review

- The commission will be responsible for developing mechanisms for monitoring and review of the proposed regulatory measure and the performance of the newly established institutions.

Consultation

Consultations were conducted with:

- * Government (Departments & Regulatory Agencies)
- * Private Sector
- * Various Communities

Conclusion

- There are various means of protecting IK as evidenced in the literature review and WIPO reports.
- Various views also exist regarding the best approach to protect IK, i.e.
 - * using existing IP systems
 - * establishment of new, specific measure or statutory systems to either complement the existing IP system or to act as its substitute, “Sui Generis” or
 - * use of discreet, stand-alone sections/chapters specific to IK within each IP act
- The amendment of the existing IP system to protect IK has been adopted by the dti as a vehicle to achieve its objectives.
- This option will enable the dti to finalise the cycle of amendments aimed at protecting IK, as already commenced with the Patents Amendment Act.

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Recommendations

It is recommended that:

- The dti should continue with the process of amending the existing IP Law System, to protect IK as already commenced with.
- The risks and challenges identified in the report should be addressed.
- All agreements and trade-offs concluded via the NEDLAC process and any other consultation process, be reflected in the second version of the Bill.

It should be stressed that;

- The value system aimed at protecting IK is crucial for SA and cannot be left unattended.
- The RIA report has raised a number of costs associated with the implementation of the proposed amendments, even though conclusive monetary values could not be ascertained in some instances.
- The intention of the bill far outweighs the costs with which it is associated.
- Of utmost importance is the Bill's intention to curb misappropriation of IK, to benefit communities and reduce poverty in line with Government's strategic objectives.

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THANK YOU