GENERAL NOTICE

NOTICE 918 OF 2013

DEPARTMENT OF TRADE AND INDUSTRY

DRAFT NATIONAL POLICY ON INTELLECTUAL PROPERTY, 2013

INVITATION FOR THE PUBLIC TO COMMENT ON THE NATIONAL POLICY ON INTELLECTUAL PROPERTY, 2013

I, Dr Rob Davies, Minister of Trade and Industry, having obtained Cabinet approval, hereby publish the National Policy on Intellectual Property for broader public comments.

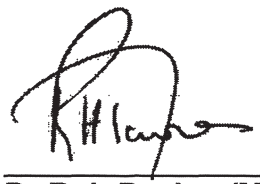
Interested persons may submit written comments on the proposed policy not later than thirty (30) days from the date of publication of this notice to:

Director-General, Department of Trade and Industry
Private Bag X84
Pretoria
0001

Or hand deliver to:

77 Meintjies Street
Block B, 1st Floor
Sunnyside
Pretoria

Tel : 012 394 3569
Email : MPadayachy@thedti.gov.za
For Attention: Ms. Meshendri Padayachy



Dr Rob Davies (MP)
Minister of Trade and Industry
Date: 29 / 8 /2013

the dti

Department:
Trade and Industry
REPUBLIC OF SOUTH AFRICA

DRAFT NATIONAL POLICY ON INTELLECTUAL PROPERTY (IP) OF SOUTH AFRICA

A POLICY FRAMEWORK

CONTENTS

Executive Summary

The IP Policy Document (Policy) broadly outlines the Objectives in the Policy and gives a background/introduction of issues that the Policy should address. A Problem Statement is well stated so that it should be known in advance what the problems are and how such problems would be resolved.

1. **Chapter 1** deals with various forms of IP so as to enable areas of intervention through this Policy.

2. **Chapter 2** deals with IP and health matters and recommendations in relation to possible interventions.

3. **Chapter 3** deals with Agriculture and Genetic Resources and recommendations are made.

4. **Chapter 4** deals with IP and indigenous knowledge. It shows how the IP system can protect and commercialise indigenous knowledge. However, a separate Policy on Indigenous Knowledge already approved by Cabinet in 2007 forms part of this chapter.

5. **Chapter 5** deals with IP and Competition, and IP and Public Policy options such as Compulsory Licensing and Technology Transfer. Various ways of dealing with these issues are discussed and appropriate recommendations are made.

6. **Chapter 6** deals with copyright, internet and software issues and necessary interventions.

7. **Chapter 7** deals with Patent Law Reform and interventions are recommended.

8. **Chapter 8** deals with Institutional Capacity and recommendations are made.

9. **Chapter 9** deals with International Architecture of IP and interventions are recommended.

10. **Chapter 10** deals with IP and Development at the World Intellectual Property Organisation (WIPO) and the World Trade Organisation (WTO) levels and recommendations are made.

11. **Chapter 11** deals with IP and Sporting Events and how this sector can be fully exploited. Necessary recommendations are made.

12. **Chapter 12** deals with how IP and State Emblems can be protected and commercially exploited. Necessary interventions are recommended.

13. **Chapter 13** deals with IP and Outreach Programmes and recommendations are made.

14. **Chapter 14** deals with Drivers of the IP Policy and recommendations are made.

15. **Chapter 15** deals with IP and Enforcement and recommendations are made.

16. **Chapter 16** deals with Overall Recommendations.

17. **Chapter 17** deals with the Conclusion.

Objectives

The broader objectives of the Policy can be stated as follows:

1. To develop a legal framework on IP that should empower all strata of the citizens of South Africa.
2. To create an environment conducive to economic opportunities aimed at empowering South African citizens.
3. To efficiently apply an IP system alongside other Government policies to contribute to development.
4. To develop an IP Policy that interfaces with other new emerging issues in the area of IP.
5. To improve and strengthen an enforcement mechanism on IP that will suit all sectors of the IP community.
6. To improve access to IP-based essential goods and services, particularly education, health and food.
7. To increase access to foreign and local technology by local firms and research institutions.
8. To promote research, development and innovation throughout the South African economy by private and research institutions and individual members of society.
9. To enhance and strengthen the function and capacity of IP regulatory and registration departments so as to improve public service delivery.
10. To improve national compliance with international treaties of which South Africa is a member.
11. To promote public education and awareness on IP.
12. To improve the effective protection of IP of South African origin in South Africa and its trading partners through reciprocal arrangements for the benefit of national economic growth.
13. Introduce a public health perspective into national IP laws and adopt a common and united stand among different government agencies on improving access to medicines.
14. National IP laws must be appropriate to the level of development and innovation of the country.
15. An overall transfer of technology strategy should be developed that is aimed at building domestic capacity and skills, enabling stakeholders (industry and academics, but also the general public) to better absorb knowledge and use it in their particular environment.
16. Engender confidence and attract investment.
17. Promote research, development and innovation in all sectors of the South African economy.
18. Promote public education and awareness on IP in South Africa and the region.The policy should consider other national policies and provide a way forward for South Africa to improve its IP and contribute to economic development.

Background

South Africa does not have a written national IP policy. As a result, departments that deal directly or indirectly with IP approach the system differently. To ensure coherence, there is a need for a co-ordinated approach. International policies such as those of the United Nations (UN) are geared towards development and poverty eradication. In this regard, the Millennium Development Goals (MDG) of the UN can be cited as they provide for halving poverty and hunger by 2014 and improving health and education.

This IP Policy needs to take into account the fact that South Africa is a developing country with the bare minimum of a technological, economic and social base.

The IP system as contained in the Trade Related Aspects of IP Agreement (TRIPS) Agreement does not per se recognise IP flowing from genetic materials and indigenous knowledge. Developing countries are demanding that benefits that flow from exploitation of these genetic materials and their indigenous knowledge should be shared. Policy makers need to consider available empirical evidence before extending IP rights since the interests of the "producer" dominate in the evolution of IP policy, while the interests of "consumers" are ultimately compromised (Commission and Articles 6, 7 and 8 of the TRIPS Agreement).

A well-moulded IP system must suit the economic, social and technological environments of developing countries. It can contribute to the eradication of poverty, the enhancement of technology development and transfer, the promotion of access to medicines, and education and learning materials.

Problem Statement

The South African IP system/"IP Policy" is not informed by other national policies that seek to address national objectives and there is no co-ordinated approach on IP matters by various government departments and other organs of state. The private sector also exploits this lacuna in the public service and may be exporting IP without following a well-co-ordinated approach.

- The IP legal framework does benefit and empower relevant citizens of the Republic.
- The existing IP system creates a conducive environment for economic opportunities aimed at empowering South African citizens.
- The existing IP system is efficiently applied alongside other government policies to contribute to development.
- The existing IP system interfaces with other policies of Government that are geared towards economically benefiting and empowering relevant stakeholders.
- The existing IP system interfaces with new emerging issues in the area of IP.
- The existing IP system is geared towards improving and strengthening the enforcement mechanism on IP that suits all sectors of the IP community.
- South Africa influences regional and international formulation of treaties in the best interest of South Africa.

Explaining Issues Identified in the Problem Statement

What may be achieved by the IP Policy?

The purpose of the IP Policy is to argue for the Policy to talk to other relevant national policies and international agreements that advance the aspirations of a developing nation and to co-ordinate the national and international approaches on various IP matters. South Africa does not have an IP Policy and, therefore, its approach to IP matters is fragmented and not informed by national policies. Due to this, international obligations are attracted, even if their costs of implementation outweigh the benefits. The lack of co-ordination also leads to the national approach being weakened on IP matters.

Note:
IP is cross-cutting in nature, e.g. trade, science, agriculture and health. Therefore, there is a need for a one-policy approach at national and international level from Government. Government's approach should balance the interests of producers, consumers and users of IP for the benefit of all stakeholders (TRIPS Agreement), primarily for the benefit of the country and its citizens.

- **To complement other progressive economic national policies**

IPRs are trading tools and, therefore, the IP Policy and legislation should be dovetailed with other national policies.

- **To encourage co-ordination within all spheres of Government**

As mentioned above, IP is cross-cutting nationally and internationally, e.g. agricultural IP and IP that is dealt with by international organisations including WTO, WIPO and UNESCO (United Nations Educational, Scientific and Cultural Organisation). Other national policies should inform this IP policy and vice versa, both nationally and internationally. The Department of Trade and Industry (**the dti**) as the lead department on IP will foster the co-ordination of government departments on IP Policy.

This policy should inform all spheres of Government on how to deal with IP matters, both nationally and internationally.

- **To encourage the IP policy to interface with all sectors of the economy**

Commercialisation of IP is mostly regulated by international rules such as the TRIPS; bilateral agreements and bilateral investment treaties (BITS) and other economic relations. This IP policy should be applicable to all agreements that have an IP component. The Policy should also give direction on other sectors, such as technology transfer, health, agriculture and culture.

- **To influence regional and international formulation of treaties to be in the best interests of South Africa**

The co-ordinated approach of South Africa should then be used to influence the national, regional and international arenas on IP matters. This IP Policy should be communicated to all departments through a consultative process.

CHAPTER 1: FORMS OF IP

Basically there are four types of IP: Trade Marks, Copyright, Patents and Designs. However, geographical indications (GI), trade secrets and regulatory data protection can also be forms of IP. Business methods are types of IP in certain jurisdictions and patentable in others such as the United States (US) and Europe. IPRs are territorial in nature and moulded by policies of the countries that granted them

Below follows a brief description of each form of IP.

a) PATENTS

A patent is associated with technology transfer, public health and substantive search and examination.

i) Technology

The form of IP associated with technology is the "patent" (F.A. Abbott: International Centre for Trade and Sustainable Development (ICTSD), Volume 24, Innovation and Technology Transfer to Address Climate Change: Lessons from the Global Debate on IP and Public Health", p4, Geneva, Switzerland). Due to this, there is an outcry by users of the patent system that South Africa needs strong patents that can survive the test of competitiveness throughout the world. This can be achieved if a substantive Search and Examination of Patents system is followed.

Licensing approval for technology-transfer contracts are subjected to rules that are not so strong, even if some are heavily regulated ("restricted"/"prohibited") technologies. Certain technologies may be subject to export controls and maximum cap for percentages, e.g. not more than 5%.

There is no good model for technology transfer relating to capacity building in the area of human resource.

Recommendations

- Cabinet should consider approving the establishment of a substantive Search and Examination of Patents to have strong technologies.
- Technology Transfer Contracts should be standardised to regulate restricted/prohibited technologies subjected to export controls and maximum percentages.
- Human-resource capacity relating to the handling of technology, including technology transfer, should be developed.

ii) Patent and Access to Public Health

A patent in the area of medicines is important since drugs are approved after clinical trials have been conclusive. Drugs, therefore, are based on a valid patent. It is contended that if "weak" patents are granted, its stifles the possibility of having access to public health. This means that if a patent is granted, even if there is no innovation on the original or dependent patent, access to public health may be difficult

to attain. This also means that South Africa may need to create a Substantive Search and Examination since it is using a depository system that inherently grants weak patents.

iii) Doha Declaration and Decision 6

The WTO administers the TRIPS Agreement, which has patent flexibilities suitable to cure access to public health, in particular by developing countries such as South Africa. Further, the WTO Doha Development Agenda process resolved to allow TRIPS to have further patent flexibilities. South Africa has a massive disease burden, e.g. AIDS, HIV, TB, Hepatitis, Cancer and Heart Diseases. Patent flexibilities can easily alleviate access to medicines.

Recommendations

- South Africa must change the Patents Act to incorporate patents flexibilities as contained in the TRIPS Agreement after the Doha Decisions.
- The Patents Act should be amended to be amenable to issues related to access to public health.

iv) Bilateral Trade Agreements stifling Multilateral Agreements

The TRIPS agreement is a multilateral agreement and mostly bilateral trade agreements/investments undermine the multilateral arrangements. A good example is where certain developing countries are forced to concede and agree to renounce patent flexibilities allowed in TRIPS in exchange for economic benefits not related to IP and public health. By so doing, the provisions of a multilateral system for the benefit of developing countries are compromised.

The TRIPS allows member states to resort to compulsory/voluntary licensing/parallel importation and the application of competition laws to cater for public health access.

Recommendations

- South Africa should not enter into bilateral agreements that may negate the gains attained in multilateral agreements such as the TRIPS Agreement on patent flexibilities.
- South Africa should encourage other developing countries at international fora not to enter into bilateral trade agreements that undermine flexibilities. This is so as South Africa may not be able to defend these gains alone at international fora.

v) Pre- and Post-Opposition of Patents

A country like India resorted to pre- and post-grant opposition to facilitate a possibility of opposing weaker patents as described above. The South Africa Patents does not prescribe for such. This procedure has been a success to challenge “weaker” patents or patents that do not meet the requirements of “newness”, “novelty”, “obviousness” and “usefulness for trade/agriculture”.

Recommendation

- The Patents Act should be amended to have both pre- and post-grant opposition to effectively foster the spirit of granting stronger patents.

vi) World Patent Harmonisation

Although WIPO is no longer pursuing the issue of harmonising the patent agenda to produce a "world patent", it is important that South Africa not renounce "sovereignty" over a patent grant. This means that flexibilities in TRIPS and issues of national interest can no longer be pursued as South Africa will be dictated by the interests of other member states. The "World Patent" suggested that patent examination will be conducted by the European Patent Office (EPO), US Patent and Trade Marks Office and the Japanese Patent Office. If within a certain set time frame, where a country has been designated for patent protection and the country does not process the patent to registration level, then the patent as applied for will automatically enjoy protection in the designated country. The shortcoming of this approach is that the country may be denying itself a policy space under the TRIPS for flexibilities and that technical person may end up accepting patents that are not supposed to be acceptable in South Africa.

Recommendation

- Although WIPO is no longer pursuing the concept of the "World Patents", South Africa should guard against this concept as it may rear its head in future and compromise policy space as granted in the TRIPS Agreement.

vii) Data Protection

In terms of Article 39 of TRIPS, data protection is guaranteed and South Africa laws comply with this provision. However, multinational pharmaceutical companies have lobbied their Governments, such as in the US, to put pressure on the governments of developing countries (Regulatory Authorities) not to disclose information from clinical trials to third parties such as generic companies. The information from clinical trials (dossier) is part of the research that does not need to be repeated by generic companies when they develop their generic medicines. If that is so, the costs for developing generics will be so high that it will frustrate access to public health.

Recommendation

- South Africa should remain committed to the protection of data in terms of Article 39, but not to the extent that multinationals are demanding as per their Governments as this could compromise access to health.

viii) Substantive Search and Examination of Patents

As mentioned earlier, South Africa uses a registration system that is not *per se* able to scientifically critique "newness", "obviousness", "novelty" and "usefulness in trade or agriculture". Due to this, weaker

patents are granted. Coupled with the fact that the South African Patent Act does not have "pre-opposition" and "post-opposition" procedures as described earlier, the registration is allowing "weaker" patents that are pliable to frustrate access to public health. Similar economies such as Brazil, India and Egypt are granting fewer patents due to the fact that they use the Substantive Search and Examination of Patents. India, in particular, has a pre-opposition and post-grant opposition. In Brazil, the regulatory authority dealing with the approval of medicines (equivalent to Medicines Control Council – MCC) has to vet the granting of patents related to access to medicines before they are granted by the patent office.

Recommendations

- South Africa should consider adopting the Search and Examination of Patents to co-exist with the current registration of patent system.
- A cost and benefit analysis should be conducted through the Regulatory Impact Assessment (RIA) process and benchmarks should be based on similar economies such as India, Brazil and Egypt. In this regard, benefits should not only be calibrated in monetary terms as access to public health does not necessarily translate into monetary value.
- The Search and Examination should be accepted with other complementary systems such as pre- and post-opposition processes and capacity-building for an efficient system.

ix) Connectivity of Databases of MCC and Companies and IP Commission (CIPC)

The experience of Brazil in the regulatory authorities of medicines and patents sharing information before patents are granted may shed some light on the CIPC and MCC. This can also assist in aligning the lifespan of a patent and the commencement of a generic medicine. This means that even if a generic medicine is granted over a patent that is still active due to the "Bolar" provision, stockpiling or marketing of the generic medicine may need curtailment of some sort. This database connectivity may need to be extended to databases of agriculture, such as the wines and spirits and Plant Breeders Rights.

Recommendation

- Government departments should integrate their databases for the purposes of sharing information so as not to grant patents on medicines that may be expiring as this may undermine access to public health.

x) Patent Extension/Restoration

There is no harmonised approach regarding the timelines internationally in relation to the registration or approval of medicines. However, there seems to be an unwritten agreement among users of the system that the time for approval should be "reasonable". Without going into merits or demerits, in South Africa the argument that there are (the user's point of view) or are not backlogs (the regulator's point of view) are incessant. Due to this, the South African Government is under pressure to amend the Patents Act to allow for patent extension or restoration to compensate for the time lost due to regulatory delays at the MCC. The users of the system, both innovators and generics, aver that there are regulatory delays (NAPM, Liaison, Issue 1 2012, "Real Change or a Cosmetic Makeover for the MCC?"p6).

The extension of patents by its nature is not good as it extends the lifespan of a patent and delays the entry into the market of generics. In an ideal world, patent extension should not be allowed in developing countries as it may hinder access to medicines.

Recommendations

- Cabinet should consider approving the establishment of a Search and Examination Office to have strong technologies.
- Technology Transfer Contracts should be standardised to regulate restricted/prohibited technologies subjected to export controls and maximum percentages.
- Human-resource capacity relating to the handling of technology, including technology transfer, should be developed.
- South Africa should not support a patent reform at international level that would undermine its public policymaking options.
- South Africa should amend its legislation to address issues of parallel importation and compulsory licensing in line with the Doha Decision of the WTO on IP and public health.
- South Africa should develop incentive schemes in the area of IP in general to achieve its developmental goals, particularly poverty alleviation and health.
- Regulations/guidelines on licensing should be developed and encourage the utilisation of patents in the country. The minister can issue such code of good practice as guidelines/regulations.
- The MCC should encourage transparency in its registration system as allegations of regulatory failures are putting strenuous pressure on **the dti** to amend the Patents Act to accommodate patent extension that may prejudice access to public health.

In this regard, a country is allowed in terms of the TRIPS Agreement to take a policy position around issues such as "compulsory and voluntary licensing" and "parallel importation". These issues are relevant for the accessibility and affordability of medicines.

Patents are granted procedurally at a regional and international basis, but still the "sovereignty" of member states is not negated. The EPO and African Regional Intellectual Property Office (ARIPO) grant a regional patent that is effective in the whole region.

ii) Disclosure of information in patents

Historically, the inventor of a patent used to request the authorities for exclusive rights on the patent, provided such an invention is for the public good and, if there is a pandemic, the authority will have a right to use the patent on agreed terms. As part of the patent bargain, the inventor is required to disclose the relevant technology in the patent application. The disclosure must allow a person reasonably acquainted with the technical field to practise the invention with no hassle (Abbott, F. M, above, p4). If South Africa was a substantive search and examination country, it should have strict rules that frustrate granting weak patents. Weak patents frustrate the accessibility and affordability of medicines and technologies.

Civil remedies are available to the owner/holder of the patents if the patent is infringed. The police and members of the Medical Regulation Authority (MRA) in South Africa are involved in proving if a "formula" of a patent has been copied or purported to have been copied.

Recommendation

- In the main, on expiry patent information must be disclosed for use by the public. However, generics can use the Bolar provision before patent expiry.

iii) Generic medicines

Generic medicines are manufactured based on a patent that is no longer under protection. Due to the public policy option available to the state, the state may allow the working on the patent before its expiry for the purposes of allowing the development of generic medicines. South Africa's Patents Act allows generic medicines to be developed before an expiry of the patent.

Generic medicines may contribute to the reduction of prices of medicines as they are not involved in research and development. Generic medicines should not be confused with counterfeit medicines and the law enforcement agencies, in particular SARS, should not confiscate when in transit.

Recommendations

- Generic companies should optimally use the Bolar provision without resorting to stockpiling and competing with the owner of the patent before expiry.
- Education and awareness must be intensified among law enforcement agencies that generics are not counterfeited medicines.
- Law enforcement agencies should not confiscate/seize generics/goods in transit under the pretext that they are counterfeit.

iv) Patents affected by Competition Law

Article 40 of the TRIPS Agreement empowers member states of the WTO to curtail IP through competition laws if there are any abuses. The South African Competition Act seems to be in line with Article 40 of TRIPS.

Recommendations

- South Africa should not support a patent reform at international level that would undermine its public policymaking.
- South Africa should amend its legislation to address issues of parallel importation and compulsory licensing in line with the Doha Decision of the WTO on IP and public health.
- South Africa should develop incentive schemes in the area of IP in general to achieve its developmental goals, particularly poverty alleviation and health.

- Regulations/guidelines on licensing should be developed and encourage the utilisation of patents in the country. The Minister can issue such code of good practice as guidelines/regulations.

b) TRADEMARKS

A trademark is a name, logo or mark that distinguishes goods or services of the entrepreneur from that of others. Trade Mark protection applies for 10 years and can be renewed as long as trading takes place. The licensing/franchising of trademarks can be effective in facilitating investment. This means that like patents, trademarks are territorial.

In view of this, the trademarks system can be used for:

- Empowerment of BEE and SME enterprises; and
- Ensuring geographic spread in rural areas to stimulate economic activities in line with business decisions.

The "Madrid Agreement"/Madrid Protocol that deals with the International Registration of Marks is managed by WIPO. A country is given the right to "reserve" certain provisions during the ratification process. This type of registration fast-tracks the process of "access" to foreign markets. Registration of trademarks in general must be informed by business rationale. It is advisable to also register in the regional bloc or countries where South Africa has trade relations.

Where indigenous knowledge is used in the developing or devising of trademarks, it is important that there should be disclosure of the origin of the knowledge, prior informed consent, benefit-sharing agreements or co-ownership of the trademarks, where applicable.

Recommendations

- Licensing of franchising activities should be intensified for empowering B-BBEE and other small and medium enterprises (SMEs), in particular, informed by geographical spread.
- South African enterprises should be assisted to register their trademarks nationally and internationally, where South Africa has a footprint.

c) COPYRIGHT

Copyright is not an absolute right, but is limited in terms of the Berne and Paris Conventions of which South Africa is a member. Most developed countries are extending the period of 50 years to 70 or 75 years after the death of the author. The change needs policy intervention. There is no need to extend the 50-year period after the death of the author, since this is enough to recoup the benefits before it goes to the public domain.

Where indigenous knowledge is used in the development of derivative works, it is important that there should be disclosure of the origin of the knowledge, prior informed consent, benefit-sharing agreements or co-ownership of the works, where applicable

In international and foreign laws, it has emerged that the best way to control ownership and exploit copyright is to be a member of collecting societies. Collecting societies are fragmented. This not only leads to unsustainability because of the inability to negotiate with powerful users of that right, but also disadvantages the artist, in particular the performer.

In the area of broadcasting, the broadcasters want to own the content of their broadcasts. This means that if the SABC broadcasts a song such as *Mbube* to the Russian counterpart, the SABC would like to be the copyright owner of *Mbube*. There is an outcry against this proposal at an international level (WIPO), where formulation of a treaty is taking place. South Africa is not supporting the proposals by the broadcasters. The means of communication should not affect the ownership of rights, and rights must always reside with the original owner unless they are sold/transferred/assigned legally.

Contracts between recording companies, promoters, producers and artists should contain the bare minimum condition as prescribed by the Minister. Should the conditions be too stringent and unfair against the artist, then such contracts must be void.

d) INDUSTRIAL DESIGNS

There are three-dimensional (attractive shapes) or two-dimensional features such as aesthetical textile prints. In South Africa, there are two forms of design, namely aesthetic (international arrangements) and functional (national arrangements).

The functional design is defined in terms of "its functionality", sometimes referred to as a "petty patent" and small businesses are not per se making use of this type of design.

This type of patent and the functional/utility design should be encouraged among innovators and entrepreneurs.

Where indigenous knowledge is used in developing designs, it is important that there should be disclosure of the origin of the knowledge, prior informed consent, benefit-sharing agreements or co-ownership of the designs, where applicable.

The Hague system for the International Deposit of Designs deals with international deposit of designs. To fast-track market access of foreign jurisdictions, South Africans have to utilise this system of registration. Parliament has approved ratification of the Madrid Protocol on International Registration of Marks and the Hague System on the International Deposit of Designs. However, the Instruments of Ratification were not deposited with the Director-General of WIPO due to other policy considerations, e.g. backlogs at IP offices.

Recommendations

- South Africa should develop awareness campaigns on the use of designs to promote their products, both culturally and otherwise.
- The Designs Act should be amended to allow the competition laws to combat anti-competitive practices as already recommended in the area of patents and trademarks.

- Designs law must not allow for the registration of indigenous and/or state symbols without consent from the relevant authorities.
- Fashion designers should be allowed to make use of the design system.

e) GEOGRAPHICAL INDICATIONS (GI), CERTIFICATION AND COLLECTIVE MARKS

These types of marks are referred to as "shared" marks. "Collective marks" are marks with certain valued characteristics common to goods or services of a number of enterprises using that mark, for example their geographical origin, material and mode of manufacture. The owner may be either an association of which those enterprises are members or any other entity, including a public institution or a co-operative (WIPO Publication 794 (E): "Stitch in Time, Smart Use of IP by Textile Companies", p11, Geneva, Switzerland).

Products from a particular geographical origin may in many countries use GIs. The well-known certification mark is Wool Mark in the wool industry.

Recommendations

- South Africa should embark on awareness campaigns in the usage of GI, certification marks and collective marks. Co-operatives must be assisted to register nationally and internationally.
- Regulations and Guidelines should be prepared by **the dti** for simplification and utilisation of these items.
- The state should play a major role in creating associations or boards to conduct certification/quality control on goods and services where certification/collective marks and GI are concerned, e.g. in the agricultural or services sector.
- At an international level, South Africa should not agree to join a treaty without following the process of ratification/accession and regulatory impact assessment should be conducted prior to ratification.

f) EXTENSION OF RIGHTS GRANTED BY THE ACT

The US Digital Millennium Copyright Act and Fair Dealing/Fair Usage

Digitally, the Copyright Act is outdated. There is, however, a need to join WIPO treaties. It would be dangerous to join without infrastructure. The DOC does not have an inspectorate to deal with cyber counterfeiters. **the dti** and DOC should, therefore, co-ordinate their activities so as to have a conducive environment in relation to the ratification of digital treaties.

No innovation will occur without the principle of fair use/fair dealing. The only issue is one of monitoring rather than principle.

Collective Administration of Rights

State intervention is necessary only to the extent that it guarantees transparency, corporate governance and fair distribution. It is also necessary to avoid the Boards of such collecting societies being constituted by members of one sector, usually the one that has the financial power. Collecting societies must be administered by the Government (Copyright Review Commission recommendations).

The WIPO Internet Treaties

The WIPO Internet treaties must be viewed in the context of the country's needs and requirements.

Recommendations

- The collective management of copyright must be introduced into the copyright regime as a whole. The Farlam Commission on Copyright Review recommends that one collecting society must be administered by one powerful collecting society. There may be competition and constitutional issues; however, this is the preferred route.
- The licensing regime of copyright should be legislated for in the copyright regime. Rights must not be lost by owners unnecessarily. The Copyright Tribunal should play a key role in the determination of fair royalties and creating a framework in which new users are able to easily determine the full business entry costs.
- South Africa should not support the development of a treaty that seeks to give ownership of contents of broadcasts/webcasts to broadcasters.
- Copyright law must not allow for the use of "registration" symbols of indigenous peoples and/or state without permission.
- Contracts must contain only minimum conditions as per contract law.

g) PLANT VARIETY PROTECTION (PATENTS IN PLANT VARIETIES)

Plant varieties enjoy "patent" protection in South Africa in terms of the UPOV regime. Plant variety protection is relevant to "alternative energy resources" (AER) and mitigating technologies (MT) because new varieties of plants may be developed for use in generating energy and to mitigate the impact of climate change, e.g. plants that exhibit improved drought-resistance features (Abbott FM above p 6).

Recommendations

- South African legislation such as the Patents Act and Plant Varieties Act should not be averse to "access to technology" for technological advancement and climate change.
- Plant Breeders Rights should not be at the expense of other traditional agricultural systems or natural seeds and plants.

h) TRADE SECRET

"Trade secret" is the customary form of protecting technological innovation. It protects confidential commercially valuable information that the holder has taken reasonable steps to protect from disclosure. As long as trade secret subsists, trade secret endures (WIPO: A Stitch in Time (above) p 15, Abbott (above), p4).

Recommendations

- South African IP laws should not undermine the principles of trade secret, i.e. trade secret principles should be allowed to co-exist with the IP system and be a choice of users which system to use.
- Awareness campaigns on advantages and disadvantages on this system should be embarked upon.
- IP or health legislation should not be used to destroy the trade "secrecy".
- Protection of "confidential information" from clinical trials on indigenous medicines should be protected through the law of data protection in terms of Article 39.3 of the TRIPS Agreement.

i) REGULATORY DATA PROTECTION

This relates to the protection of undisclosed data submitted in the course of seeking regulatory approval of new chemical entities. Article 39.3 of the TRIPS Agreement provides for mandatory data protection for pharmaceutical and agricultural chemical entities. In South Africa, there are various laws that protect information that is confidential for business competitive purposes.

There is no prescribed period of such protection. In the US, protection is for a five-year period, while in the European Union it is for a period of 10 years of "marketing exclusivity" as it is deemed to reduce generic competition in the pharmaceutical sector (Abbott, above, p5). This matter should be understood on the basis of "access to knowledge". A good example is where a generic company would like to have the information for the purposes of developing a drug based on the patent that is not yet expired or the previous clinical trial information that is in the hands of the regulatory authority. Such information may or may not qualify to be protected. A determination has to be made whether this information should be kept secret or not. A blanket "protection" will not serve any purpose other than to "repulse" competition from generic companies.

In this regard, it is submitted that the protection of "confidential information" from clinical trials on indigenous medicines should be protected through the law of data protection in terms of Article 39.3 of the TRIPS Agreement.

Recommendations

- South Africa should invoke the law of Data Protection in terms of Article 39.3 of the TRIPS Agreement in relation to the protection of indigenous knowledge in traditional medicines.

Legislative amendments to the Medicines and Substances Control Act, the Health Practitioners Act and related health legislation are required in this regard.

- There should be no general or blanket data protection of information that is at the disposal of medicines regulatory authority, but unfair trade practices and protection of confidential information relevant for competitiveness should be in place.
- Entry of generic medicines in the South African market should not be frustrated *per se* due to the law of Data Protection.

j) ALTERNATIVES TO IP

There are alternative policy mechanisms for encouraging innovation. Abbott submits that the principal alternative is the subsidy that involves payment, direct/indirect, by Government to the innovator for pursuing new technologies for example. The risk of loss in the case of subsidy is shared by the innovator and Government (Abbott, above, p7).

Governments routinely subsidise certain disciplines such as the development of military technologies. Virtually all development in the US of vaccines and treatments to address bio-weapons threats are undertaken pursuant to government subsidy.

Another alternative mechanism for promoting innovation is the "prize". The prize mechanism involves the establishment of a pre-determined award for the person that achieves the goal. The prize mechanism contemplates that the person seeking the prize will expand his/her own resources in that endeavour. There is a dearth of authority that proves that "prizing" encourages innovation, but this may be worth a try (Abbott, above, p 7).

Recommendations

- This form of approach should be pursued, but residence of ownership of IP should be ascertained.

CHAPTER 2: IP AND PUBLIC HEALTH

The IP system is one of the factors that directly and negatively/positively impacts on access to healthcare. Other constraints to access to medicines/drugs in developing countries are, among others, lack of resources (skilled personnel, funds and time) and the absence of a suitable health infrastructure, e.g. hospitals, clinics, health workers, equipment and adequate distribution/supply of drugs to administer medicines safely and efficaciously. Nevertheless, a developing country like South Africa may develop and adopt other national policies that can directly affect the direction of access to medicines, e.g. taxes on medicines [Kunst and the Commission]. Developing countries do not have the capacity of developing generic industry and a conscious decision should be taken as generic medicines do promote competition [Industrial Policy, **the dti,** 2007]. This shows that patent protection that has an impact on prices and countries with strong generic competitors cause prices to fall drastically [Commission, p13].

A developing country like South Africa can access medicines at lower prices via a mechanism called "compulsory licensing". Compulsory licensing allows a country to license the manufacture of patented medicines to a third manufacturer when there are good reasons to do so, e.g. when the Government considers the price of medicines to be astronomically high [Kunst, Rimmer, Commission]. Compulsory licensing may be of assistance as a bargaining tool in price negotiations with producers of patented medicines e.g. the US envisaged this possibility when negotiating the price of Cipro (a drug) following the anthrax attack after "9/11/2001" (9/11).

There should be a balance between trade and health issues in relation to patents and IP protection. During the Doha trade negotiations, access to public health and IP was high on the agenda. A major issue at Doha was how countries without capacity to manufacture medicines could procure them under the realm of compulsory licensing.

Developing countries could also adopt IP policies in their legislation that limit the extent of patenting and facilitate the introduction of generic competition. Another means of accessing medicines is through the process of parallel importation and compulsory licensing as per decision 6 of Doha on public health. Counterfeited medicines should be properly monitored and the deflection of medicines to unintended destinations should be avoided.

South Africa seems to be having a problem with manufacturing capacity, whether for generic or innovative medicines, and should be enabled to resort to compulsory licensing and parallel importation in the context of Decision 6 of the Development Agenda on Public Health.

Where indigenous knowledge is used in developing patents, it is important that there should be disclosure of the origin of the genetic resources/knowledge, prior informed consent, benefit-sharing agreements or co-ownership of the patents, where applicable.

Recommendations

- Compulsory licensing should be introduced in South Africa in line with international treaties, such as the Doha Decision 6 of the WTO negotiations on Trade and Public Health.
- For the IP and health policies to be in tandem, **the dti** and the Department of Health should reconcile policy stances. In this regard, there is a need to address the pricing of drugs as it may frustrate issues of access to public health.
- South Africa should facilitate in its legislation the ability to import patented products if it can get them cheaper in other jurisdictions (parallel importation). Parallel importation of IP can also be made at a regional arrangement and, in this regard, South Africa may wish to influence regional integration for the purpose of access to medicines.
- Other economic policies such as IP, competition and trade policies must be in harmony with health policy objectives.
- Health infrastructure, such as the distribution of medicines and manufacturing capacities, must be enhanced as lack of them may impede affordability of medicines.
- Where indigenous knowledge is used in developing patents, it is important that there should be disclosure of the origin of the genetic resources/knowledge, prior informed consent, benefit-sharing agreements or co-ownership of the patents, where applicable.
- Due to the fact that the IP system hardly stimulates research on diseases that affect poor people, public funding for research on health problems in South Africa should be directed and increased. Existing capacities must be enhanced and IP derived from this type of research must be controlled, e.g. through licensing, for the benefit of the country.
- IP protection regimes must not contradict public health policies and the two should be balanced.
- South Africa should make provisions in its laws that will facilitate the entry of generic competitors as soon as the patent has expired on a particular medicine. The Bolar provision is already in the Patents Amendment Act 2002. Quick generic approval by the MCC (predecessor of the Medicine Regulatory Authority, which used to be imbued with backlogs of some sort).
- South African legislation should allow strict rules to apply to patenting as competition principles may be undermined. This should exclude diagnostic, therapeutic and surgical methods from patentability, including new uses of known products, as is the case under the TRIPS Agreement.

CHAPTER 3: AGRICULTURE AND GENETIC RESOURCES

Private sector research budgets relevant to poor farmers have increased, while those of the public sector have decreased. Private sector research is incentivised by the protection of IP they claim over genetic resources. The Kunst Rimmer Commission found that the decrease in research budgets also threatens the maintenance of both national and gene banks (p16). It further found that "while in recent years the IP of breeders have been increasingly strengthened, as required by TRIPS, little has been done in practice to recognise the services of farmers in the selection, development and conservation of their indigenous varieties on the basis that modern breeding techniques have built" (Commission). It should be noted that the objective of the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGR) of the Food and Agriculture Organisation (FAO) is to protect the material in gene banks and farmers` fields covered by the treaty from being directly patented. The ITPGR also encourages countries to protect the rights of farmers.

The TRIPS Agreement provides that member states must apply some sort of IP protection to plant varieties either as patents or other kinds of protection, namely *sui generis.* It has been found that the *sui generis* of plant varieties protection (PVP) have not been effective at encouraging research on crops in general and the kind of crops grown by poor farmers in particular. The PVP is designed for commercial farmers from developed countries and poses a threat to the practices of many farmers in developing countries of reusing, exchanging and reselling seeds. UPOV is not suitable for developing countries that do not have significant commercial agriculture. Patents are usually used to protect both plant varieties and genetic resources in plants. Due to patents offering a stronger form of protection than PVP, patents offer greater incentives to research in developed countries, in particular those with biotechnological industries (Commission). However, like PVP, patents are also a threat to the reuse, exchange and reselling for poor farmers. Further, patents protection may in this area lead to overconcentration of IP ownership, which may again frustrate access to agricultural biotechnology. Nevertheless, this can be remedied by strong competition laws.

Recommendations

- Generally, developing countries should not provide patent protection for plants and animals as is allowed under the TRIPS Agreement. This is due to the fact that patents, including the PVP system, impose restrictions on the use, exchange or resell by farmers and researchers. However, since South Africa has a growing biotechnology-related sector, it must allow certain types of patents protection in this area. In this regard, specific exceptions to the exclusive rights of plant breeders and research must be provided for. It is important that a clear exception to the patent right is included in the legislation to allow farmers to reuse the seed.
- The PVP system that South Africa follows should be amended in the context of the recommendation above, i.e. the Plant Varieties Act be amended to allow farmers to reuse, resell and exchange seeds in the spirit of the ITPGR and to suit the South African conditions.
- Due to the increased concentration in the seed industry, it is important that public sector research on agriculture be funded so as to introduce competition with the private sector.
- Due to the high level of concentration in the private sector, South Africa should amend the Competition Act to deal with this phenomenon.

CHAPTER 4: IP AND INDIGENOUS KNOWLEDGE

The Protection of Indigenous Knowledge through the IP System Policy framework deals with the protection of traditional knowledge using the orthodox IP system. It must, however, be highlighted that in many circumstances the IP system is not the best vehicle for the protection of traditional knowledge, particularly if not adapted or used in conjunction with other mechanisms.

In this regard, the Indigenous Knowledge Policy of 2006, which deals with the protection of indigenous knowledge using the IP system, and the IP Laws Amendment Bill 2010 form part of this chapter.

CHAPTER 5: IP, COMPETITION, PUBLIC POLICY-MAKING, COMPULSORY LICENSING AND TECHNOLOGY TRANSFER

Most of what is going to be said is from a perspective of the IP rights under Bilateral Investments Treaties (BIT) that translate into a TRIPS-plus and, therefore, undermine the public policy-making of a member state.

TRIPS provides for the promotion of technological innovation, transfer and dissemination of technology in a manner conducive to social and economic welfare. Member states of the WTO may also adopt measures necessary to promote the public interest in sectors of vital importance to the socio-economic and technological development (Biadgleng E.T: South Centre, Research Papers vol 8 2006, IP Rights Under Investment Agreements: the TRIPS-plus Implications for Enforcement and Protection of Public Interest, p 15).

i) IP and Competition and ii) Compulsory Licensing

Article 40 of TRIPS provides that certain licensing practices regarding IP that restricts competition may have adverse effects on trade and impede the transfer and dissemination of technology. As a consequence, TRIPS permits countries to take measures against such practices that constitute an abuse of IP with an adverse effect on competition in the relevant market (Biadgleng ET: South Centre, Research Papers Vol. 8 2006, IP Rights Under Investment Agreements: the TRIPS-plus Implications for Enforcement and Protection of Public Interest, p16).

Furthermore, members are free to determine what constitutes restrictive practices. Good examples of restrictive practices are:

- Arrangements requiring the licensee to return all improvements of the licensed technology exclusively to the licensor;
- Waiver of the rights by the licensee to challenge the validity of the licence; and
- Packaging of different technologies for the licensing purpose of one or some of the components of technology.

BITS provide a different regime to the regulation of competition and others exclude it completely, while some are silent on the matter. Examples include the following:

- The Canadian Model BIT provides that parties shall not require the transfer of technology except when required by a court, administrative tribunal or competition authority to remedy an alleged violation of competition laws or enforcement or undertaking [(DFA, (2004), Model BIT of Canada, Article 10(1)(b), (Biadgleng ET: South Centre, Research Papers Vol. 8 2006, IP Rights Under Investment Agreements: the TRIPS-plus Implications for Enforcement and Protection of Public Interest, p 16)]
- Japanese Model BIT has similar provisions.
- The US Model BIT and its FTAs incorporate a similar approach. In their FTAs investment sections, there are annexures confirming the understanding of governments that "except in rare circumstances, non-discriminatory regulatory actions by a party that are designed to and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations" [US-Chile FTA (2003), Annex 10-D (4), US-Singapore FTA (2003)].

It is clear that BITs "may frustrate the flexibilities and regulatory discretions under TRIPS with additional requirements and limitations on their application. Biadgleng submits that "further delineation of the effect of investment agreements in squeezing the space for regulatory discretion requires the examination of compulsory licences under investments agreements" (Biadgleng ET: South Centre, Research Papers vol 8 2006, IP Rights Under Investment Agreements: the TRIPS-plus Implications for Enforcement and Protection of Public Interest, p 17). It is, therefore, safe to conclude that BITS are TRIPS-plus in many respects.

It is submitted that one of the important components of competition policy and regulations involves the use of a compulsory licence, which is an authorisation by a government for the use of a protected IP by a third party without the consent of the right owner under prescribed restrictions, conditions and subject to the payment of remuneration. In this regard, it is worth mentioning that these types of licences can also be issued under TRIPS and WIPO treaties under different objectives including public interest, such as health and emergency situations, and as a remedy for the non-working of protected rights [WTO Doha Decision 6 on Public Health and IP read together with Articles 30 and 31, WIPO treaties, Biadgleng, (Biadgleng ET: South Centre, Research Papers Vol. 8 2006, IP Rights Under Investment Agreements: the TRIPS-plus Implications for Enforcement and Protection of Public Interest, p 17).

The compulsory licence does not deprive ownership to rights over the protected IP or technology. It is just an exception to the exclusive right. This is the reason why it is not treated as direct expropriation.

Where the compulsory license is in violation of the fair and equitable standard of treatment, BITS protects the IP that is the subject of such measures. In cases of dispute on the amount of remuneration subsequent to the issuance of the compulsory licence, the standard for payment and assessment of the amount varies between TRIPS and BITS. TRIPS provides for a different standard of compensation to those applicable to BITS during compulsory licensing of medicines/technology. TRIPS requires only the payment of adequate remuneration, taking into account the economic value of the authorisation for a compulsory licence. The economic value relates to the authorisation and not to the value of the IP. It is

submitted that the compulsory licence granting authority determines the royalty payment commensurate with the expected economic value that the implementation of the specific compulsory licence could bring and the objective of that licence, e.g. affordability and accessibility of essential medicines, but not to the market value of the patent that could be higher, particularly under the restrictive licensing practice that exactly triggered the compulsory licence (Biadgleng, above, p 18).

There are many options for determining payment in cases of licences. Since the objective is to remedy anti-competitive practices, it is submitted that the preferable means is to determine the royalty fee payable by the licensee. Examples in the US are the Novartis and Dell cases. In the Novartis case, a compulsory licence was issued against its patent relating to cytokines protein against a royalty or its equivalent of no greater than 3% of the net sales price of the licensed products [FTC (1997) in the matter of Ciba-Geigy Ltd, et al, p 20]. In the Dell case, the FTC required that Dell licence its 481 patents to anyone using the VL-bus standard of Dell (Muller, JM, (2002), "Patent Misuse through the Capture of Industry Standards" 17 Berkley Technology Law 3 as cited on 10 March 2006 from http://btij.boalt.org by Biadgleng E.T: South Centre, Research Papers Vol. 8 2006, IP Rights Under Investment Agreements: the TRIPS-plus Implications for Enforcement and Protection of Public Interest, p 18).

BITS provides for payment of compensation to the fair market value of the expropriated investment asset itself, e.g. IP payment must be prompt. Where there is a dispute as regards "fairness" of the issuance of the compulsory licence, the payment and the amount of the remuneration for the compulsory licence against the IP of the covered investment, BITS can result in a TRIPS-plus standard. It is clear, therefore, that payment of royalty or fairness as to the value of an investment asset results in TRIPS-plus standard in BITS (Biadgleng, above, p19).

Recommendation

- Technology transfer should be conducted within the rules of TRIPS as BITS maybe TRIPS-plus.

iii) Technology transfer under BITS

As stated above, TRIPS provides for the promotion of technological innovation, transfer and dissemination of technology. This must be done in a manner conducive to the social and economic welfare of member states. In this regard, the WTO Panel found that TRIPS would want to require governments to apply exceptions in a non-discriminatory manner to ensure that they do not succumb to domestic pressure to limit exceptions to areas where the right holders tend to be foreign producers [Canada-Patent Protection of Pharmaceutical Products (2000), read together with articles 40 of TRIPS on competition]. WTO members are entitled to use their discretion to determine the scope of measures to promote public interest if such measures are consistent with TRIPS (Article 8).

Further, sectors that are of vital importance to socio-economic and technological development are also to be determined by each member state using their own discretion. Furthermore, Article 66 of TRIPS accords least developed countries (LDCs) a transition period, with the objective of providing flexibilities to create a viable technological base, and requires developed countries to take measures that would encourage technology transfer to LDCs.

Under the WTO regime, there are other agreements that regulate the manner for the adoption of measures that promote research and development (R&D) and technology transfer. In this regard, it is worth noting the provisions of the Agreement on Technical Barriers to Trade (TBT), which provides flexibilities for developing countries to maintain indigenous technology and production methods and processes compatible with their development needs. Further, the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) requires members to facilitate the provision of technical assistance in the areas of processing technologies, research and infrastructure. IP and BITS interplay takes place in the context of provisions on performance requirements under BITS. Performance requirements include the measures by a country requiring foreign investment to undertake certain activities related to the investment (Biadgleng ET: South Centre, Research Papers Vol. 8 2006, IP Rights Under Investment Agreements: the TRIPS-plus Implications for Enforcement and Protection of Public Interest, p 19). A good example in this regard is where a country would like to purchase local raw materials as an input to the production process and such are imposed as conditions of entry of foreign investment or the receiving of incentives or any other advantage from the Government. Performance requirements that have a direct bearing on the IP of covered investment are permissible under TRIPS as long as they are consistent with TRIPS. This means that flexibilities/exceptions and limitations under TRIPS are available and not frustrated by BITS.

BITS that mimic the 1994 model BIT of the US restrict technology transfer and R&D requirements. Such outright prohibitions under the BITS regime undermine the utilisation of any flexibility/limitations or implementation of measures consistent with TRIPS. Many BITS, including those of Canada, the US and Japan, fall under categories that:

- Restrict requirements to the transfer of technology, production process or other proprietary knowledge and to undertake R&D, except where such requirements are imposed as a condition to receive advantages offered by Government; and
- Restrict the imposition of a technology-transfer requirement except in accordance with TRIPS or the implementation of competition laws and government procurement.

Biadgleng submits that although mandatory technology transfer and R&D requirements could be consistent with TRIPS and TRIMS, the review of investment agreements indicates that many BITS permit only voluntary technology transfer and R&D requirements (Biadgleng ET: South Centre, Research Papers Vol. 8 2006, IP Rights Under Investment Agreements: the TRIPS-plus Implications for Enforcement and Protection of Public Interest, p 21). The same author on p21-22 further notes that BITS tend to be TRIPS-plus or undermine the regulatory discretion of countries in relation to measures regulating practices of the IP right holders and inducing the transfer of technology and know-how when they:

- Add additional requirements and limit the scope of discretion to regulate practices of foreign investment related to IP and protected technologies;
- Apply investment standards for the protection of IP asset of investment, in particular for a compulsory licence in determining public purpose; and
- Expand the scope of prohibition on performance requirements that curtail the use of technology transfer, R&D and know-how.

It can safely be said that BITS specialise in laws, regulations and practices specifically designed by governments to regulate investment, but not IP or trade. It is, therefore, not proper that the standards of

investment protection should not be applied to or derive substantive interpretation from other unrelated domains of international law as it may lead in the case of IP to protection higher than under-specialised TRIPS. State parties to BITS should fully consider the implications of the provisions BITS in relation to obligations and discretionary powers that they can exploit under other multilateral instruments such as TRIPS and WIPO dispensation. There should be a concerted action by developing countries like South Africa to determine the impact on public interest, industrial development, innovation and technology transfer and competition policies. Instruments may have to be devised to provide greater clarity to scope and application of provisions, in particular those that deal with the enforcement of IP. In the same vein, the taking up of IP disputes to investment arbitration will worsen the imbalance of interest in IP and significantly affect the global governance structure on negotiation, implementation and dispute settlements with respect to IP (Biadgleng ET: South Centre, Research Papers Vol. 8 2006, IP Rights Under Investment Agreements: the TRIPS-plus Implications for Enforcement and Protection of Public Interest, p 33)).

Case Study on Whether Article 66.2 Encourages Technology Transfer

Although Article 66.2 is designed to deal with technology transfer between developed countries and LDCs, the approach may be informative for the technology-transfer regime in general terms. The successes and failures that have taken place under Article 66.2 may be informative to a country that wants to encourage technology transfer within its trading regime with other countries or among its sectors and industries.

It may be recalled that TRIPS provides for the promotion of technological innovation, transfer and dissemination of technology in a manner conducive to social and economic welfare. It is submitted that one of the objectives of TRIPS is that "the protection and enforcement of IP should contribute to the promotion of technological innovation and to the transfer and dissemination of technology" [Moon, S, ICTSD, Policy Brief 2, "Does TRIPS Article 66.2 Encourage Technology Transfer to LDCs", p2 (2008), Article 7]. Article 66.2 provides that "Developed country members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to LDCs members in order to enable them to create a sound and viable technological base" [Article 66.2 of TRIPS and Moon (above) p 2]. Moon submits that the importance of Art 66.2 was underscored on several occasions in 2001 with the WTO Doha Decision on Implementation-Related Issues and Concerns and in 2003 with the creation of the WTO Working Group on Trade and Transfer of Technology and, again, the TRIPS Council decision requiring developed countries to submit detailed annual reports on their Article 66.2 activities (Moon p2). The importance of this should be equated to Doha Decision 6 on IP and Public Health.

It is submitted that recent analysis of 2006 country reports to the TRIPS Council concluded that developed countries have generally failed to meet their obligations in relation to Article 66.2 (Correa, C: IP in the LDCs: Strategies for Enhancing Technology Transfer and Dissemination. Background Paper No. 4: UNCTAD: The LDCs Report, 2007, Moon p2). The data generated by the existing reporting mechanisms has a number of flaws, making monitoring of technology transfer to LDCS impossible. Moon on p6 submits that if technology transfer is to be enhanced and take place effectively, certain elements need to be in existence such as:

- Agreement on a common definition of what constitutes "technology transfer" and a list of programmes or policies that enhance technology transfer;
- There is a need to agree on common, comparable metrics for measuring the extent to which incentives on technology transfer have their intended effect;
- Use a uniform reporting format that will be comparable across countries and time periods; and
- Indicate whether and how reported incentives are additional to "business as usual".

The system could further be strengthened with the active participation of the LDCs, in particular to:

- Assess and report on the extent to which effective technology transfer is contributing to building a sound and viable technological base. In this regard, gaps that make technology transfer impossible should be identified; and
- Submit regular reports detailing successful and unsuccessful developed country incentives relating to technology transfer from the perspective of technology transferees.

Moon on p9 also recommends concerns regarding technology transfer from the perspectives of international organisations, NGOs and/or academics. They can contribute by:

- Developing a "toolkit" for assessing best practice in both the reporting and functioning of incentives. Consultation with various stakeholders such as LDCs governments as demanders of technology transfer will be required in this regard;
- Drawing lessons from the experience of monitoring technology transfer clauses in other treaties such as the UN Framework Convention on Climate Change (UNFCC). For ease of reference, the UNFCC Art 4.5 provides that developed country parties not only promote and facilitate, but also finance the transfer of environmental technologies to developing countries to enable them to implement the provisions of Convention. In the process, the developed country parties shall support the development and enhancement of endogenous capacities and technologies of developing country parties. Other parties and organisations in a position to do so may also assist in facilitating the transfer of such technologies; and
- Monitoring the annual submission of reports.

Recommendations

- South Africa must not support the WIPO Patent Road Map as it has the potential of undermining sovereignty to decide on public policymaking allowed under TRIPS and other multilateral agreements.
- IP and health legislations must be amended to allow competition laws to apply.
- South Africa must not enter into BITS that would undermine discretionary measures that are allowed in multilateral agreements such as TRIPS.
- South Africa should strive to achieve technology transfer models that should encourage technology transfer to LDCs.
- South Africa must develop models that encourage technology transfer intra-industry/sector/firm and intra-public and private sectors. Common definitions should be developed on what constitute technology transfer and a list of programmes or policies that enhance technology transfer must be put in place. There is a need to agree on common, comparable metrics for measuring the extent to which incentives on technology transfer have their intended effect.

- South Africa must put systems in place that encourage foreign companies to transfer technology to domestic companies. Incentives/tax breaks may be devised to achieve this.

CHAPTER 6: COPYRIGHT, SOFTWARE AND INTERNET

While some developing countries have benefited from the copyright regime, others have not (WIPO Studies and Commission). Many developing countries have joined international treaties in the copyright area, but can hardly show benefits that flow from such treaties. Equally, other developing countries have shown that they enforce strictly copyright regime and their resources (finance, police, border policing, restrictive internet/technological devices), but they are unable to quantify whether the costs of enforcement outweigh economic benefits that flow from the copyright-based industries. There are treaties or conventions that give nations flexibilities in copyright to allow copying, in particular for education and personal use. These flexibilities are commonly known as "fair use" or "fair dealing" in various jurisdictions. Notwithstanding the availability of these flexibilities, developing nations are of the view that these flexibilities do not cover their needs, in particular in the area of education.

It is submitted that an inevitable impact of stronger protection and enforcement in terms of the TRIPS Agreement leads to reducing access to knowledge-related products in developing countries, thus poor people are exposed to damaging consequences.

Access to the internet in developing countries is limited and impacted upon by various factors. In this regard, the "fair use" principle under copyright regime may be limited or severely restricted by forms of technological protection, e.g. encryption that restricts access more severely than that under copyright principles. This is clearly demonstrated by the EU and US jurisdictions. The 1996 WIPO Copyright Treaty (WCT) contains elements that restrict access of developing countries to information.

The Department of Communications (DOC) is responsible for electronic commerce regulation in the country. Principles of IP per se should not change just because the medium has changed. In this regard, where TRIPS allows exceptions or limitations or fair dealings in copyright, such should not be abrogated or diminished in the electronic commerce environment. The WCT and foreign jurisdictions such as those of the US and EU seem to abrogate this policymaking option available to member states. It is submitted that the Electronic Communications and Transactions Act, 2002, which is administered by DOC, contradicts this principle in Section 86 (Research Studies of **the dti** conducted on "Copyright TRIPS Exceptions in South Africa, Access to Education, Learning Materials", Prof. Pouris, Business Enterprise, University of Pretoria, 2009). This emphasises the point that government departments should follow one policy, both nationally and internationally, that is guided by developmental objectives.

Government has adopted an open-source policy to encourage access to information, in particular Information and Communications Technologies (ICT). The Policy is called Free and Open Source Software (FOSS). Government departments are encouraged to procure computers (IT) that are compatible with FOSS. In this regard, there seems to be slow progress.

Article 1 of FOSS provides that "the South African Government will implement FOSS unless proprietary software is demonstrated to be significantly superior. Whenever the advantages of FOSS and proprietary software are comparable, FOSS will be implemented when choosing a software solution for

a new project. Whenever FOSS is not implemented, then reasons must be provided in order to justify the implementation of the proprietary software."

Article 2 provides that "the South African Government will migrate current proprietary software to FOSS whenever comparable software exists".

Article 3 provides that "all new software developed for or by the South African Government will be based on open standards, adherent to FOSS principles and licensed using a FOSS licence where possible".

If the principles of FOSS are adhered to, use, production and dissemination of open and access to material such as textbooks can be regarded as an incentive. However, the copyright regime needs to be in line with the Policy.

Recommendations

- To enhance access to copyrighted materials and achieve developmental goals for education and knowledge transfer, South Africa must adopt pro-competitive measures under copyright legislation. The legislation must provide the maintenance and adoption of broad exemptions for educational, research and library uses.
- South Africa should *per se* not join international copyright treaties that may compromise its stance on social and economic developmental goals.
- South Africa must adopt a policy and amend copyright legislation in relation to the procurement of computer software programs, with a view to ensuring that options for using low-cost and/or open-source software products are considered and their costs are properly evaluated (FOSS policy) and supported.
- South Africa should allow software to be adapted to local needs through copyright legislation that allows reverse engineering of computer software programs consistent with its international treaty obligations.
- South Africa internet users must be entitled to fair use rights such as making and distributing copies from electronic sources in reasonable numbers for educational and research purposes and using reasonable excerpts in commentary and criticism.
- South Africa should consider carefully before acceding to the WIPO Copyright Treaty and should not follow the path of the US Digital Copyright Management Act (DCMA) and EU (database Directive) as these instruments are restrictive and, therefore, bad models for copyright legislation of a developing country like South Africa. The DCMA and EU Directive restrict the number of downloads, whether for commercial or personal/research use.

CHAPTER 7: PATENT REFORM

From the onset, it would be fair to mention that WIPO and the WTO are the two organisations that are claiming to have an exclusive right to IP matters. Except for the fact that WIPO and the WTO share, to a large extent, the same member states as the general membership, WIPO and the WTO do not derive their mandates from the same principals. WIPO is a UN Agency responsible for IP, while WTO is an organisation that comes from the GATT system. In 1995, the WTO was established and the TRIPS Agreement formed the basis of the trading tools (Trade Related Aspects of Intellectual Property Rights-TRIPS) under the WTO arrangement. Industrialised nations in the main from the GATT system days used to control the system and this is no exception to the WTO system. In this regard, developed member states of the WTO emphasise enforcement and harmonisation of IP since they understand the relevance of IP in relation to innovation.

Recently, the WIPO Secretariat introduced the "WIPO Roadmap" that seems to lead to a Harmonised World Patent Regime (Li X: South Centre, Vol. 41, September 2009, "Suggested PCT Reforms Could Lead to a System of World Patents" p6). Under the "world patent system" an application for a patent should be filed only to a central agency and, if approved, the patent would be in force in all member states of the system. In this regard, there is a danger that the national "sovereignty" that allows granting of patents will be corroded. Flexibilities under the patent system that are allowed may disappear as policy imperatives of a particular country may not be considered by the central agency. Further, this issue is dividing nations as it would now be possible to "accede" to an international arrangement without subjecting such a process to internal constitutional mechanisms, e.g. if a country does not object to a patent report within a certain period, the patent will be binding on the member states. In South Africa, Parliament ratifies international agreements and ratification is accompanied with reservations to the treaty due to policy considerations. This function may be taken away if the Patent Roadmap is adopted as envisaged. The Development Agenda of WIPO and flexibilities allowed in terms of TRIPS Agreement are also in danger if the PCT Roadmap is adopted.

Recommendation

- South Africa must align itself with other developing countries and reject the Roadmap on the PCT as it may lead to policy compromise and introduce TRIPS-plus requirements that are beyond the checks and balances of national sovereignty.

CHAPTER 8: INSTITUTIONAL CAPACITY

Most developing countries are still grappling with the implementation of the TRIPS Agreement, but the IP system is developing at a faster pace and, therefore, no appropriate infrastructure of developing countries is well-suited to deal appropriately with the IP system. There are no co-ordinated IP and economic policies geared towards the promotion of development objectives (Commission). Many developing countries, including South Africa, have weak institutional capacity and hardly have experienced and skilled personnel. The Commission states that a country has to choose between the registration (depository) or search and examination for the patents system. South Africa uses a depository system instead of the substantive search and examination. However, there are various options to attain substantive search and examination results such as contracting out to international,

regional and offices of trading partners. In this regard, South Africa contracts out substantive search and examination for patents registered under the Patent Co-operation (PCT) system. Other government departments or universities with capacity to evaluate patents substantively can assist in this regard.

Legal systems must have the capacity to reject IP rights that are invalid and, therefore, difficult to attain that if the depository/registration system is used, not the search and examination. Enforcement of IP is expensive and judicial systems are under severe strain. Due to this, the "private" nature of IP favours the introduction of dispute resolution mechanisms under civil law or alternative dispute resolution (ADR) to reduce the enforcement burden (Commission). WIPO also uses ADR in disputes that involve private disputants, not states. It is stated that enforcement of IP rights from developing countries is difficult to enforce in developed countries since legal costs are prohibitive.

Developing countries are also establishing the utility patent model or petty patent system. This system provides for the lower threshold that is required by the proper patent system. It is possible to use the utility patent system, the registration system and the substantive search and examination system. In this regard, Kenya uses both the utility patent model and the substantive search and examination system.

Most of the IP comes from foreign companies and developing countries should not per se overstretch their meagre budgets for health and education to subsidise IP administration. It is also allowed to introduce a differentiated or tiered fee structure to recoup expenses related to enforcement. This should be done carefully as it may undermine service delivery and value for money should not be compromised.

In developed countries, IP systems or policies are fused with other regulatory framework, e.g. competition policy. Competition law intervenes where there are anti-competitive behaviours in the market, including those of IP. Developing countries are failing to strengthen competition policies that should complement the IP regime.

South Africa needs to co-ordinate, monitor and evaluate assistance on IP that it receives from donor countries or international organisations such as the US, United Kingdom, OECD and WIPO.

It also needs to build capacity to deal with the implementation of the policy, e.g. trade negotiators and policy makers should be able to fuse the IP policy with other Government policies, in particular developmental policies.

Recommendation

- South Africa should co-ordinate the IP policy with other national developmental policies. Technical assistance from developed countries and international intergovernmental organisations must be co-ordinated to contribute to IP policy that is fused with other national developmental policies.
- South Africa should adopt a multifaceted approach in as far as registration of patents is concerned; that is, use the depository (registration), substantive search and examination and the utility patent systems.

- Government must co-ordinate departments/universities/research institutions that have competencies in evaluating patents and must be involved in kick-starting the patents evaluation process.
- South Africa should adopt a multi-tiered or differentiated fee structure on IP matters without compromising service delivery and value for money.
- South Africa must build capacity to deal with the implementation of the policy, e.g. trade negotiators and policy makers should be able to fuse the IP policy with other government policies, in particular developmental policies.
- South Africa should assist member states of the African Union in building capacity on various IP matters, lest they will mimic the IP systems of developed countries. This will not be good for South Africa in many respects.

CHAPTER 9: INTERNATIONAL ARCHITECTURE

From the onset, it would be fair to mention that WIPO and WTO are the two organisations that are claiming to have an exclusive right to IP matters. Beside the fact that WIPO and WTO share, to a large extent, the same member states as the general membership, WIPO and WTO do not derive their mandates from the same principals. WIPO is a UN agency responsible for IP, while WTO is an organisation that comes from the GATT system. In 1995, the WTO was established and the TRIPS Agreement formed the basis of the trading tools under the WTO arrangement. "The WTO is not required by its articles to consider both the benefits and the costs of IP protection in developing countries, the complex links between IP protection and Development (Commission).

Preferably, WIPO should have been concentrating on dovetailing the relevance of IP and the objectives of the UN, such as development. Unfortunately, WIPO seems to be concentrating on the promotion of IP protection and technical assistance to developing countries. Nonetheless, two years ago WIPO concluded the IP and Development Agenda and this may go a long way in addressing the needs of developing countries.

There are other organisations that directly or indirectly deal with IP, making IP transversal across many sectors of the economy. Examples of organisations affected by IP include:

a) The World Health Organisation (WHO) deals with public health issues at an international level and if patents are too restrictive in the area of trade, they may frustrate access to medicines. There is a need for a balancing act between trade and health matters. Seizures of generic drugs in transit from one developing country to others are taking place under the pretext of seizure of counterfeiting. If this is not well managed, it will be a threat to public health and trade under the GATT system and free movement of goods. The EU countries are the main culprits, in particular The Netherlands (Syam S: Seizures of Drugs in Transit: Why Europe's Law and Actions are Wrong, South Centre, Issue 41, p3). The WHO is grappling with issues of counterfeiting in connection with medicines. There is a danger that unintended consequences may emerge as said above. The Universal Postal Union (UPU) is being persuaded to deal with IP enforcement that is TRIPS-plus (Valdivieso, LV: Need to Guard against TRIPS-Plus Enforcement Agenda, South Centre (supra), and p14).
b) The World Customs Union (WCU) is being persuaded to deal with the enforcement of IP. WCU is not an enforcement agency on IP matters, but the private sector of the developed countries are

initiating a decision-making body in an undemocratic way to deal with IP issues (Valdivieso, supra). Due to this, SARS finds itself being lobbied to implement IP enforcement regime that is outside the context of minimum standards of TRIPS (attempts were being made to amend the Customs and Excise Bill, 2007 and the Counterfeit Goods Act to empower customs officials to seize goods in transit). It is submitted that the enforcement of IP should be understood within the context of the right to development that should not be compromised (Valdivieso, p9).

c) The UN Environment Programme (UNEP) deals with environmental issues and its convention is known as the Convention on Biological Diversity (CBD). The CBD secretariat requested all international organisations dealing with IP to consider disclosing the origin of genetic material used towards patent invention, origin of indigenous knowledge, prior informed consent and benefit-sharing arrangements. WIPO and WTO are still grappling with these issues and solutions on the side of WIPO may be found as per the recent decision of the WIPO General Assembly of September-October 2009.

d) The Food and Agriculture Organisation (FAO) deals with agricultural issues on behalf of the UN. FAO has already developed the International Treaty on Plants Genetic Resources (ITPGR) that recognises indigenous knowledge protection in relation to IP. It is up to member states to accede to the ITPGR.

e) The UN Conference on Trade and Development (UNCTAD) deals with trade and economic issues, including the relevance of IP to trade and development. UNCTAD *per se* is not convinced that the IP system is working for the good of trade and economic development for developing countries.

f) The UN Educational, Scientific and Cultural Organisation (UNESCO) has adopted conventions that are friendly to the protection of traditional knowledge through the IP system. The WIPO-UNESCO Model Legislation of 1982 is a good example.

g) The list of organisations that deal with IP directly or indirectly is not exhaustive.

The salient point for dealing with these organisations above is to show that lack of co-ordination at national and international organisations in relation to IP that is cross-cutting in nature is bound to lead to disastrous consequences. Developed countries are well co-ordinated to introduce TRIPS-Plus enforcement agenda in other forums such as the G8, G20 and harmonisation of IP system such as the patent law reform at WIPO.

At national level, contact departments may vary from each international organisation and if there is no national policy on IP different positions may be taken by different departments on similar issues.

At an international level, it has been shown that UN agencies approach to IP is sympathetic to the developmental needs of developing countries, whereas there is no obligation on the side of the WTO to do so. The approach of the WHO in relation to IP and medicines needs to be cautiously monitored as it may flounder the needs of developing countries.

The TRIPS Agreement provides for developing countries flexibilities and exceptions, but these have not been fully utilised. Generally bilateral trade agreements undermine the inclusion of these flexibilities/exceptions. Bilateral trade agreements may provide that a trading partner (developing country) must not resort to the compulsory licensing of medicines or parallel importation of IP-related products.

WIPO gives technical advice on the drafting of legislation, but it is disturbing to find that such legislation does not provide for such flexibilities/exceptions. In this regard, WIPO seems not to be guarded by UN goals on development. Promotion of IP protection at the expense of development is not good for developing countries.

Developed countries and other regional economic blocs demand that developing countries should adopt TRIPS-plus requirements even if TRIPS requires countries to comply with bare minimums. This in reality undermines the multilateral arrangements that flexibilities should be retained in IP legislation. This is due to the fact that developed countries have adopted the "IP enforcement agenda" and "IP harmonisation agenda". These agendas are complemented by "bilateral/trilateral/regional" trade agreements and undermine the multilateral agreement such as the TRIPS, which provides for the bare minimum provisions and flexibilities as well as public policy options [Martin Khor: South Centre, Issue 41, 22 September 2009, IP and Wrongs, Shasikant Sangeeta: Third World Network, Brief 51, 8 December 2008, US Academic Exposes IP Maximalists` TRIPS-Plus-Plus Agenda, Vivas-Eugui D: Quaker United Nations Office (QUNO), 2003, Regional and Bilateral Agreements and a TRIPS-Plus World: Free Trade Area of the Americas (FTAA)].

Institutions from developed countries provide advice on IP. It is, however, advisable to cautiously filter such advice as it may undermine the multilateral arrangements and may not be sensitive to IP and development.

National and international NGOs may assist developing countries at international forums to formulate treaties that are sensitive to the developmental needs of developing countries. Relations with such NGOs should be fostered with care and their advice may be sought before engaging on treaty formulations or trade agreements. The Non-Aligned Movement (NAM) needs to raise its voice on IP matters.

Impact assessment, costs and benefit analysis is hardly carried out before resorting to treaty formulation. This has an impact when accession to international treaties by a developing country has to take place. Many developing countries are acceding to international treaties that attract more obligations/costs than benefits. This is contrary to the needs of a developmental state.

Recommendations

- International bodies, including WIPO, WTO and the WHO, when addressing IP-related issues and/or formulating instruments dealing with IP-related matters, should take into account the developmental stages of member states and promote the developmental role of IP.
- South Africa, through **the dti**, must cautiously filter advice coming from these developed nations and their institutions as they may undermine the multilateral arrangements or may not be sensitive to IP and development. South Africa, through **the dti**, must foster relations with national and international NGOs that can be consulted before engaging on trade agreements or international treaty formulations. However, such relations should be in the best interest interests of South Africa.
- South Africa must not enter into trade agreements that undermine exceptions and flexibilities contained in the TRIPS Agreement. South Africa must not enter into trade agreements that are TRIPS-plus in nature. Many BITS deal with IP issues and introduce TRIPS-Plus, TRIMS-Plus and

SCM-Plus in many respects. There is a need for an exact determination of an extent of the impact analysis of the interface between investment agreements and IP instruments, in particular the TRIPS Agreement, with respect to the enforcement of IP in the context of the additional layers of protection (Biadgleng ET: South Centre, August 2006, Vol. 8, "IP under Investment Agreements: The TRIPS-Plus Implications for Enforcement and Protection of Public Interest", p20-22). South Africa, through **the dti** in consultation with other relevant departments, should analyse, consider and assess the implications of international proposals before entering into any agreements or other binding relationships, taking into account the best interests of South Africa and its people.

- South Africa should encourage international intergovernmental organisations such as WIPO and WTO to formulate IP treaties after impact assessment on costs and benefits analyses have been conducted. Benefits must always outweigh costs.
- South Africa should always seek the advice of UNCTAD whenever it wants to be involved on trade negotiations with developed countries or in treaty formulations at regional and international levels. The first and second recommendations appear to have the same objective and should be combined. Further, the reference to WTO in the first recommendation would appear to apply to WIPO rather than to WTO, inasmuch as WIPO is involved in the formulation of IP treaties; also the WTO did, in fact, differentiate in the TRIPS agreement between developed, developing and least-developed countries. Furthermore, other international bodies, such as the WHO, from time to time address IP issues.

CHAPTER 10: IP AND DEVELOPMENT

The Commission submits that "patents and copyright inherently confer both costs and benefits to individuals and companies and to the society at large". They provide (patents, copyright, designs and trademarks, emphasis mine) incentives for inventions or creations that may benefit the society at large, as well as the rights holder, however, they (patents, copyright, designs and trademarks, emphasis mine) also impose costs on the users of the protected works. In historical terms, the now developed countries used IP protection as a flexible tool that propelled them to industrialisation. In this regard, prices for registration for foreigners were astronomical and weak patents were granted deliberately as a source of developing technical capabilities. Due to this, it would be difficult for developing countries to reach a stage of development if flexibilities and exceptions are entirely wiped from the international harmonisation of the IP system.

Developed countries are demanding that harmonisation of IP standards should occur worldwide. In this regard, developed countries are demanding that "IP enforcement and harmonisation" should take place without delay. This should be so whether or not benefits accrue to developing countries. IP and innovation has a potential of creating benefits through trade, development of technologies, investment and growth. As for now, there is no empirical evidence that developing countries with low promotion of indigenous technologies or innovation are gaining benefits from the IP system. No impact assessment, monitoring and evaluation are done before international treaties are formulated and implemented. Although TRIPS alludes to flexibilities and exceptions and the balancing of rights of producers of IP, users and consumers (Articles 6, 7 and 8 of TRIPS), bilateral/regional agreements on trade and investment seem to be undermining the multilateral approach.

The Licensing of IP is now high on the agenda of WIPO and, if correctly applied by developing and developed countries, benefits may emanate from this regime (WIPO: Licensing of IP Guidelines). IP from developing countries may be licensed all over the world, provided it is registered in those particular countries. This has a bearing on market access. The licensing agreement may cover technology licensing agreement, trademark licensing and franchising and copyright licence agreement. All or some of these agreements may be a composite or form part of one single contract since in transfers of this nature many rights are involved and not only one type of IP. Other circumstances may give rise to licensing agreements, e.g. mergers and acquisitions, and during the conclusion of joint ventures.

WIPO has concluded the Development Agenda and, if followed correctly, developing countries will see the benefits flowing from the IP system. Implementation of the 45 criteria is in process. Technology transfer, policy making, IP and SMEs, IP and public health, application of competition laws on anti-competitive practices and monitoring and evaluation are some of the components of the Development Agenda.

The biggest risk for the Development Agenda not to succeed lies within the WIPO programme called the "Patent Harmonisation Roadmap". In short, this may happen as follows:

- One of the depressing factors at WIPO is that it is highly compromised as its customers include the private sector in the area of alternative dispute resolution (ADR) mechanisms. The private sector is the main source of funding of WIPO (not membership fee from member states). It is no wonder that the WIPO development agenda may be conflicted as it has to keep the funders happy due to the fact that they are the main users of the system, in particular patents (Shah D. G: Concerns of WIPOs Developing-Country Members and its Corporate Differ, South Centre, Issue 41, p 12).
- Developed countries have adopted the "IP enforcement agenda" and "IP harmonisation agenda". These agendas are complemented by "bilateral/trilateral/regional" trade agreements and undermine the multilateral agreement such as the TRIPS that provides for the bare minimum provisions and flexibilities as well as public policy options (Martin Khor: South Centre, Issue 41, 22 September 2009, IP and Wrongs, Shasikant Sangeeta: Third World Network, Brief 51, 8 December 2008, US Academic Exposes IP Maximalists` TRIPS-Plus-Plus Agenda, Vivas-Eugui D: Quaker United Nations Office (QUNO), 2003, Regional and Bilateral Agreements and a TRIPS-Plus World: Free Trade Area of the Americas (FTAA)).

Recommendations

- IP and Development Agenda criteria as established by WIPO must be implemented. g. IP and Competition policies should be reconciled and enforced, technology transfer must be monitored and evaluated, IP should be user friendly to SMMEs and licensing agreements should be applied to IP.
- Appropriate incentive policies should be put in place to promote technology transfer, e.g. tax breaks for companies that licence technologies to local companies.
- More public funds should be made available to promote indigenous scientific and technological capability within South Africa through scientific and technological co-operation. Global Research Alliance among South Africa research institutions and other foreign and international institutions should be supported.
- South Africa must not support "global enforcement and harmonisation of patent" agendas of developed nations that take place out of context of costs and benefit analysis, monitoring processes and "IP and Development Agenda".

CHAPTER 11: IP AND SPORTING EVENTS

Protection of major sports events and associated activities can be done through the laws of IP, in particular, trademarks [International Association for the Protection of IP (South Africa Group): Resolutions Passed at ExCo Meeting in Buenos Aires, 2009, Q210]. In South Africa, the Trade Marks Act, 1994, the Trade Practices Act 1999 and Merchandise Marks Amendment Act 2002 provides for the protection of sporting events. The Trade Practices Act provides for ambush marketing by association, while the common law of passing off is not able to deal with the issue of ambush marketing by association.

The Parliament of the Republic required that to qualify for a "protected event" status, the organisers of the event must create business opportunities for small businesses, in particular those from previously disadvantaged communities. Further, the event must be in the public interest.

Providing for legislation that caters for both types of ambush marketing was a requirement sought by FIFA during the bidding process for the FIFA 2010 World Cup. South Africa has an advanced legal regime that protects sporting events and this attracts the staging of sporting events in South Africa.

Entrepreneurs and local governments or metros must exploit business opportunities that emanate from these sports events when they take place in their areas.

Recommendations

- Ambush marketing legislation must apply to sporting events that attract at least 20 000 spectators.
- Metros and local governments where these sporting events take place must be able to quantify business opportunities and control and influence the issuing of tenders related to the sporting events, thus empowering small businesses.
- Protection of sporting events must be of a limited duration, preferably a few days or months after the last game. The rationale is that the organisers would have terminated their investments in the country, e.g. FIFA will no longer be in South Africa in 2012 and the protection of FIFA marks beyond that period. However, FIFA may be encouraged to use the trade mark protection route, provided the marks are being used in South Africa, e.g. through licensing of the merchandise of FIFA.
- Trademark and other applicable IP should be in terms of the relevant legislation, e.g. trademark protection must be for a period of 10 years subject to renewal and investment or use of the trademark in the country.
- The Minister must not be shy to withdraw the "protected event" status if there is no compliance in relation to the creation of business opportunities for small businesses from previously disadvantaged communities. Marketing of South Africa laws may assist in attracting international sporting events.

CHAPTER 12: IP OF THE STATE

The state generates a lot of IP and is entitled to protect its own IP.

Where the state pays a third person, such as a consultant, to research and produce a report, copyright belongs to the state. This occurs mostly where the state provides funding or compensates the commissioned person to render a service that brings about tangible IP.

There is also IP from the heraldic and cultural point of view. There is no synergy between heraldry and cultural legislation.

Article 6 of the TRIPS Agreement provides that a member state of the WTO may notify (through the WIPO) other states that its emblems should not be used by other states and their agencies or nationals without consent of the member state concerned.

Unfortunately at WIPO, certain states like the US are persistent that these emblems can be part and parcel of "domain name" registration. Many countries, in particular developing countries, are of the contrary view.

The Merchandise Marks Act has provisions that protect state emblems of the Republic and those of other member states of the Paris Convention as incorporated in the TRIPS Agreement. Member countries should not allow their IP offices to grant IP that incorporates emblems of member states. Other countries should reciprocate in this regard as South Africa unilaterally prohibits the use of state emblems of member states.

The Minister of Trade and Industry is also empowered to prohibit certain names, words, logos or emblems of Government and international intergovernmental organisations such as the UN and its agencies. In this regard, it is disturbing to discover that emblems of state organs are not protected through this process.

The Trade Marks Act prevents potential registrants not to trademark state emblems, except if permission has been sought from the Minister or an agency of Government with an authority. The Heraldry Act also provides for the protection of state emblems from the heraldic point of view, but there is no dovetailing of these two Acts. Other national legislation may be protecting state emblems from various perspectives, but do not seem reconciled with IP legislation.

On another note, there is IP that is produced by state parastatals such as research institutions (Agricultural Research Council, CSIR, MRC, AMSCOR and DENEL). Government should control the ownership and usage of military IP, in particular patents as they may fall in the hands of a group that takes over a state by means of a *coup d'état*, does not comply with international obligations and is therefore considered dangerous or likely to cause problems. Further IP from the military parastatals should be kept secret at designated and secured areas as the CIPC environment is not secured for this purpose.

Recommendations

- Government must compile a database of all IP owned by it through various means, e.g. copyright, heraldic, cultural, PFMA and agricultural legislation.
- Government should consider seriously developing criteria on how commercialisation of its IP should be regulated.
- Government at various spheres must compile a database of their state emblems and utilise the Merchandise Marks Act procedures to protect its state emblems nationally.
- Government must utilise the international avenue to protect its state emblems in terms of Article 6 of the Treaty of the Paris Convention.
- Various legislation such as IP, agriculture and cultural ones in Government must be amended and reconciled to protect state emblems.
- Government must consider developing licensing/franchising procedures in relation to commercialisation of its IP.
- The South African Government may persuade the African region to emulate the international procedures in the protection of state emblems.
- South Africa may encourage other countries to reciprocate in this regard as South Africa unilaterally prohibits the use of state emblems of member states.

CHAPTER 13: OUTREACH PROGRAMME

The outreach programme for IP is to communicate the policy, strategy and legislation to stakeholders that are impacted upon by the policy and legislative framework.

These must be focused and some of the stakeholders need not be put in one room as their interests are in direct conflict. The policymaker has to balance these interests for the purpose of taking the interests of the public and country into account. Good examples are trade and health issues, which may not cohabit well as pharmaceutical companies would like to have maximum profits at the expense of access to affordable medicines, and copyright users and consumers who may want to have free access to copyright at the expense of copyright producers such as composers and authors. Policymakers need to balance their interests for the better of their country.

Education and awareness on IP matters should be extended to schools, universities and other institutions of higher learning. In this regard, specific subject content on IP should be developed depending on the target group.

Recommendations

- Outreach programmes need to be intensified for small businesses on the use of IP. Business opportunities available to small businesses (SMMEs) should be explored, e.g. IP licensing/franchising for SMMEs and joint ventures in the export market.
- Outreach programmes must be focused and some of the stakeholders need not be put in one room as their interests are in direct conflict. The policymaker has to balance these interests, taking both the interests of the public and the country into account.
- Education and awareness on IP matters should be extended to schools, universities and other institutions of higher learning. In this regard, specific subject content on IP should be developed depending on the target group.
- South Africa should use to its advantage country-to-country, country-to-international, institution-to-institution co-operation that can be fostered as an outreach programme. Good examples are: the Government of South Africa and its semi-government institutions can agree to enter into co-operative agreements with their counterparts in the world or with regional or international organisations, South African semi-government institutions can enter into co-operation agreements with their counterparts on training, technical assistance and capacity building. Public and private sectors can also enter into co-operation agreements with other similar institutions, both nationally and internationally.

CHAPTER 14: DRIVERS OF THE IP POLICY

For the IP policy to succeed in the implementation phase, there is a need for Government to take certain actions such as:

- Fostering co-ordination when developing and implementing policies in Government, both nationally and internationally. Government must consider using the Intelligence Unit of Government to foster this process.
- IP policy must be fused with all relevant national policies, be it on trade, public health, indigenous knowledge, innovation or development.
- An integrated outreach programme of IP and other national policies must be developed. Laws and strategies emanating from integrated policies must be integrated.
- Cabinet and Parliament must perennially seek progress on the implementation and interventions made. Knowledge economy is based on innovation and IP is just a component of the knowledge economy; and Cabinet and Parliament should frequently pronounce on these issues.
- Monitoring and evaluation on the implementation of the policy must be in place and its relevance to other integrated policies of Government must be assessed.
- National and international NGOs may assist developing countries at international forums to formulate treaties that are sensitive to the developmental needs of developing countries. Relations with such NGOs should be fostered with care and their advice may be sought before engaging on treaty formulations or trade agreements.

Recommendation

- Recommendations for this chapter are the same as what is contained in chapter 14.

CHAPTER 15: ENFORCEMENT OF IP

Generally, enforcement of the TRIPS Agreement is under the auspices that all member states of the WTO will benefit from the IP system. Developing nations have attracted minimum obligations from TRIPS and it will be unfair to expect them to attract further discretionary obligations that are TRIPS-plus.

In view of this, South Africa should do the bare minimum under TRIPS and build capacity accordingly.

Enforcement within the country may also have to be dovetailed with enforcement of the region, e.g. African Union (AU) or Southern African Development Community (SADC). In this regard, all members of the AU or SADC are members of WIPO and the WTO respectively. These countries are guided by the same principles and interests as it has been shown during the IP and Development Agenda, both at WIPO and WTO. Common strategies at regional level on enforcement strategies may be devised. These may include having a common registration office and co-operation among the police force and customs authorities.

South Africa should also foster the enforcement of IP in its entirety. As for now, only trademarks and copyright enforcement is emphasised. Patents enforcement is dealt with under health and SAPS legislation and the enforcement of designs is generally neglected. Trade secrets are enforced under common law principles.

Enforcement of IP also involves the settlement of disputes. The current structures in the resolution of IP need some revamping and strengthening. The analysis may be as follows:

- In terms of the Companies Act, 2008, a Companies and Intellectual Property Commission (Commission) has been established. The Commission is responsible for enforcement of IP.
- The IP arm of the Commission has the Trade Mark Tribunal (Tribunal), which resolves disputes related to trademarks during pre-granting of marks. The Tribunal is effective, but is dominated by lawyers and the Rules of the High Court apply in preparing such disputes. This means that the Tribunal has highly technical and legalistic procedures. This means that this institution may not be the best to resolve dispute for the indigent and small businesses as legal costs are high. In view of this, the Tribunal needs to be revamped so that it can be friendly to all holders or potential holders of trademarks, such as the poor and small businesses. This can be done by building capacity in the Tribunal to deal with these potential users in future.
- The Copyright Tribunal also functions as the Trade Mark Tribunal and is highly technical and legalistic. Same arguments that have been advanced in 2) above apply.
- Patents Commissioner (Judge of the High Court) deals with disputes related to patents disputes. In this regard, a tribunal may have to be established as proposed in 2) above. This should be dealt with without compromising the high standards that apply to resolving sophisticated cases.
- Arbitration under the Arbitration Act 1965 may deal with dispute resolution of IP matters. Again, the arbitration process is highly legal and expensive as legal costs for senior counsel are involved. Arbitration process under this phenomenon is treated as an alternative dispute resolution (ADR), but in practice it can be expensive and so involved in so much that access to dispute resolutions may be denied.
- ADR on IP matters is well established at WIPO level and that process can be adapted and customised to suit national needs. The Department of Communications also has dispute resolution mechanisms relating to IP and domain names. The process is run by legal experts and that may stifle access and speedy resolutions. The ADR currently existing under the Companies Act, 2008 for companies (Companies Tribunal) and that of WIPO may serve as models for IP matters.
- Regarding monitoring for compliance as well as investigation, the model in the Companies Act 2008 can be adapted to deal with these matters. Monitors and investigators can be capacitated to deal with both companies and IP matters.
- Education and Awareness campaigns on IP and companies matters as envisaged in the Companies Act 2008 may assist in improving compliance with legislation administered by the Commission.
- Penalties to be imposed can be done in terms of the Companies Act 2008.