SEMINAR ON ACCESS AND BENEFIT SHARING, PATENTS AND NATURAL INGREDIENTS:

SUMMARY OF DISCUSSIONS

Hotel Epsom, Geneva, 22 October 2009

The use of patents in relation to natural ingredients creates opportunities as well as risks for companies in the food and cosmetics industry. Patents are useful tools to protect innovation and investment in natural products, creating benefits that can be shared along the supply chain. At the same time, there is concern that patenting practices in the food and cosmetics sectors do not adequately reflect the concepts and rules of the Convention on Biological Diversity (CBD).

Are patent rights inconsistent with sovereign rights over biodiversity? What are the apprehensions and criticisms contained in claims of biopiracy? How can patenting practices reflect the principles of prior informed consent, mutually agreed terms and fair and equitable benefit sharing established by the CBD? These were some of the questions discussed in this initial seminar on "Access and Benefit Sharing, Patents and Natural Ingredients," organized by the Union for Ethical BioTrade on October 22 in Geneva.

The seminar featured speakers with renowned expertise and a range of perspectives on issues at the interface of patents and biodiversity. Participants included representatives from legal, research and development and other departments of several companies in the food and cosmetics sector – from active ingredients suppliers from developing and developed countries to leading cosmetic brands.[1] Discussions reflected the growing interest of companies in the food and cosmetics sector in the ethical sourcing of biodiversity, and the need for events such as this seminar to discuss related challenges and strategies.

Patents and biodiversity

Rik Kutsch Lojenga, Executive Director of the Union for Ethical BioTrade, welcomed participants and highlighted the relevance of patent policies for the ethical sourcing of biodiversity. Access and benefit sharing (ABS) practices are, of course, much broader than patenting policies. Patents are, nevertheless, a central aspect of putting ABS into practice – both for the opportunities and difficulties they present. It

[1] Participants included representatives from companies such as Bayer Santé Familiale - Division Serdex, Chanel Parfums Beauté, Cremer Care, EcoFlora, L'Oréal, Laboratoires Expanscience, LVMH Recherche, Silab, Soliance and Yves Rocher.

is thus becoming more and more important for companies using patents to consider and adequately address ABS. Ethical BioTrade criteria such as prior informed consent, equitable sharing of benefits and recognition and reward of traditional knowledge are valuable in this regard. Events such as this seminar, Mr. Kutsch Lojenga mentioned, are also important steps in further understanding and defining good practices in the use of patents.

An introductory session provided the context for the seminar, describing the key concepts, legal framework and political dynamics in relation to patents and biodiversity. María Julia Oliva, of the Union for Ethical BioTrade, described the CBD, a landmark international agreement on biodiversity, and its principles on ABS. ABS constitutes one of the pillars of the CBD, reflecting the recognition of the rights of states and indigenous peoples over biodiversity and related traditional knowledge, and the importance of providing funds and incentives for the sustainable use of biodiversity. Ms. Oliva noted that the CBD requires Parties to ensure that patents are supportive to CBD objectives – and the private sector is also increasingly called upon to advance these objectives through its patent policies.

Wend Wendland, of the World Intellectual Property Organization (WIPO), noted the complex issues, lying at the intersection of intellectual property and biodiversity, including protecting traditional knowledge in a way to safeguard the interests of indigenous communities. The "defensive protection" of genetic resources and traditional knowledge, which aims to prevent the misappropriation through intellectual property rights is another important issue. Mr. Wendland also provided an overview of resources – including databases on ABS agreements and laws – and normative work at WIPO. In particular, an invitation was extended to companies in the cosmetics and food sectors to participate in the Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore at WIPO.

Patents and natural ingredients

This session focused on patents for natural ingredients: why they are used, what they are used for and what the process for patent application and granting is. Stéphane Agasse from Germain & Maureau, an Intellectual Property Law Firm, highlighted what can and cannot be patented in relation to natural ingredients, given patentability criteria such as novelty and inventive step. A specific extract of a plant, for instance, may be considered novel, but it is generally not considered inventive if it has the same "activity" as the plant itself. Mr. Agasse also explained how patent applications dealing with "exotic" natural material must already mention the country of origin – so as to allow a person skilled in the art to carry out the invention.

Asha Sukhwani, from the Spanish Patent and Trademark Office, presented several case studies, in order to illustrate the process of patent application and the steps required before the patent is granted. Patent applications related to *Deschampia antarctica*, one of only two vascular plants growing in Antarctica, were examined as examples of the links between patents and the principles of the CBD, as well as the various approaches to structuring patent applications.

Patents and biopiracy

This session addressed "biopiracy," a powerful yet often-unclear term used in relation to the concern on the role of patents in the misappropriation of biodiversity and related traditional knowledge. The difficulty however, is determining what exactly constitutes misappropriation and what must be done to adequately address

ABS issues and avoid any claims of biopiracy. There is a huge misunderstanding that simply patenting something makes you a pirate, explained Tomme Young, an international legal consultant. Ms. Young looked at the challenges in defining the various elements of biopiracy, from the "taking" of "genetic resources" to the lack of "fair and negotiated compensation or sharing of benefits."

Christophe Then, of the civil society coalition "No Patents on Seeds," furthered this discussion on biopiracy, describing trends in patent applications in agriculture that increasingly cover conventional breeding. Similar biopiracy-related issues come up in the pharmaceutical and cosmetic sectors, "turning plants into inventions." Mr. Then looked at the misconception that patents are a precondition for benefit sharing. He emphasized the need to find alternative, non-exclusive mechanisms for protection of innovation and the importance of other benefits beyond those that can be provided by patents. Mr. Then's presentation illustrated the perspectives of some civil society groups in relation to patents linked to biodiversity, which should be considered and addressed in patenting strategies.

Patents and Ethical BioTrade

After focusing on the issues, concerns and trends in patents and biodiversity during the morning session, discussions during the afternoon session took on a more practical view. Presentations concentrated on how exactly companies working with patents in natural ingredients could address related risks and opportunities. Michael Gollin, from Venable LLP, analyzed the innovation cycle for natural products and explained the basis for a strategic management of intellectual property for natural products. One important element in strategic management is regrouping in-house expertise when dealing with patenting and biodiversity, in order to ensure work advances towards a common goal.

Mr. Gollin also advocated for companies working with patents and natural ingredients to develop an action plan, or a "biodiversity intellectual property compliance program." Such a strategy is particularly important if source of raw materials is unclear, if research and development of products refers to traditional knowledge, or legal obligations for ABS are unclear. Components of a Biodiversity Intellectual Property Compliance Program may include: a tracking system (to identify the source of biological materials and the use of mutually agreed terms for ABS), invention disclosure forms in relation to biodiversity and ABS information, and policies, practices and staff capacity for addressing, reporting on, and complying with ABS principles and rules.

Cristiane Derani, of the University of Sao Paulo, explained the way in which ABS rules have been implemented in Brazil, providing an idea of the concrete steps and considerations that companies need to take into account in that particular national context. Her presentation showed how national legislation builds on the concepts and principles of the CBD, and the relevance that some of these requirements – such as prior informed consent – may have for patenting practices. Prof. Derani also highlighted the distinction between ethical and legal constraints – ABS principles are widely recognized, even where national laws have not implemented them.

The afternoon discussions concluded with a practical exercise in which participants were asked to reflect on the issues discussed throughout the day, by applying the knowledge gained to a case study scenario. The results of the exercise were positive, with participants showing critical thinking on ABS and its implications for patent applications and strategies, and bringing up additional questions and topics.

Conclusion

The seminar highlighted the importance, difficulties and need for information on the links between patents and biodiversity. The ethical sourcing of biodiversity, including equitable benefit sharing, must be reflected in all of a company's activities. Corporate policies in relation to patent applications and management are generally a small part of putting ABS into practice, but they are nevertheless closely watched by civil society and biodiversity-rich developing countries wary of "biopiracy." Even if it is not yet a legal imperative, addressing these concerns in patenting policies is now broadly recognized as critical to the ethical sourcing of biodiversity. Questions remain as to what constitutes good practices in patents and biodiversity, but it is clear that companies now have to, at a minimum, consider the relevance and implications of ABS in making patent-related decisions.

What would an ABS compliance patenting strategy look like? One issue to consider is the scope of patent applications. It is common practice to draft broad claims in patent applications, which are then circumscribed by the patent examiner, but this is becoming more and more controversial as patent applications are criticized for lack of novelty or inventive step and closely scrutinized for misappropriation of traditional knowledge. Another important consideration is ensuring a crosscutting or integrated approach to the ethical sourcing of biodiversity, in which all the different departments – including the department responsible for patenting – within a company coordinate, develop a consistent strategy and minimize risks.

Several developments made a strategic approach to patents even more critical. Consumer awareness on the matter is growing – as illustrated by the Ethical Biotrade Barometer – and companies will have to respond to the increasing demand for ethical sourcing practices, including on patenting. In addition, ongoing negotiations on new international rules on ABS are expected to raise the profile of patent and biodiversity, and could very well change the rules of the game. As was made evident throughout the seminar, the issue of ABS is one of great significance in the context of the ethical sourcing of biodiversity. As a result, the Union for Ethical Biotrade plans to host more workshops of this kind, focusing on some of the specific issues that came up in discussion.