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The Golden Flower and the Blue Diamond: From Patent Law to Biodiversity Regimes and Guidelines

Leïla Mamoni

SOUTH CENTRE

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THE GOLDEN FLOWER AND THE BLUE DIAMOND: FROM PATENT LAW TO BIODIVERSITY REGIMES AND GUIDELINES[1]

Leïla Mamoni[2]

SOUTH CENTRE

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[1] This document was translated by Leïla Mamoni.

[2] An independent researcher, Leïla Mamoni holds a Diplôme d'Études Approfondies (DEA) in Social Anthropology and Ethnology from the École des Hautes Études en Sciences Sociales (EHESS, France), and a Diplôme d'Université (DU) in Innovation and Intellectual Property Strategy (Faculty of Economy, Strasbourg University). Her fieldwork experiences include stays in the Peruvian Amazon, among the Shipibo-Conibo community, as well as in India, in the State of Himachal Pradesh, among the Tibetan community. The author thanks Brendan Tobin for his early encouragements, Fritz Dolder for his guidance and patience, Nirmalya Syam and Viviana Muñoz Tellez for their comments on this paper. Any mistake or omission is the sole responsibility of the author.

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Any comments on this paper or the content of this paper will be highly appreciated. Please contact:

South Centre
International Environment House 2
Chemin de Balexert 7–9
1219 Geneva
Switzerland
Tel. (41) 022 791 80 50
south@southcentre.int
www.southcentre.int

ABSTRACT

In 2010, at the World Intellectual Property Organization (WIPO), an Intergovernmental Committee started its negotiations that notably aim at protecting traditional knowledge from fraudulent patents. On that same year, French company Chanel Parfums Beauté committed itself to combatting this monopolization that encroaches on the public domain. With a limited scope, this research paper examines this initiative and looks into two patent applications that the company withdrew. It also raises questions pertaining to the biodiversity regime or guidelines of the countries where the bioprospection was conducted, namely India and Madagascar. While the adoption of the WIPO Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge marks a significant step, both examples remind us of the difficulty of establishing a fraudulent intent, as provided for in the treaty. To address that difficult task, this paper suggests that countries with limited administrative capacities may consider the possibility of relying on South-South cooperation.

En 2010, à l'Organisation mondiale de la propriété intellectuelle (OMPI), un Comité Intergouvernemental entamait ses négociations visant notamment à protéger les savoirs traditionnels des brevets frauduleux. La même année, la compagnie française Chanel Parfums Beauté s'engageait à combattre cette monopolisation qui empiète sur le domaine public. D'étendue limitée, cet article de recherche examine cette initiative et se penche sur deux demandes de brevet que la compagnie a retirées. Il soulève également des questions se rapportant au régime ou lignes directrices sur la biodiversité des pays où la bioprospection a été conduite, à savoir l'Inde et Madagascar. Tandis que l'adoption du Traité de l'OMPI sur la propriété intellectuelle, les ressources génétiques et les savoirs traditionnels associés marque une étape significative, ces deux exemples rappellent la difficulté à établir une intention frauduleuse, comme prévu par le traité. Pour prendre en charge cette tâche difficile, cet article suggère que les pays ayant des capacités administratives limitées pourraient considérer la possibilité de s'appuyer sur une coopération Sud-Sud.

En 2010, en la Organización Mundial de la Propiedad Intelectual (OMPI), un Comité Intergubernamental empezó sus negociaciones que notablemente tienen la meta de proteger conocimientos tradicionales de patentes fraudulentas. El mismo año, la compañía francesa Chanel Parfums Beauté se comprometió en combatir esta monopolización que cercena el dominio público. Con un alance limitado, este artículo de investigación examina esta iniciativa e investiga dos solicitudes de patente que la compañía retiró. Plantea también cuestiones perteneciendo al régimen o a las pautas sobre la biodiversidad de los países donde la bioprospección fue conducida, a saber, la India y Madagascar. Mientras la adopción del Tratado de la OMPI sobre la Propiedad Intelectual, los Recursos Genéticos y los Conocimientos Tradicionales Asociados representa un marco importante, ambos ejemplos hacen recordar la dificultad de evidenciar una intención fraudulenta, como previsto en el tratado. Para tomar en carga esta difícil tarea, este artículo surgiere que tal vez, países que tienen capacidades administrativas limitadas podrían considerar la posibilidad de basarse en una cooperación Sur-Sur.

2010年，**世界知**识产权组织**下属政府**间委员会启动谈判，旨在保护传统知识免遭欺诈性专利侵害。同年，法国香奈儿香水美妆公司承诺抵制这种侵蚀公共知识领域的垄断行为。**本文以有限**视角审视该倡议，并深入分析该公司撤回的两项专利申请。**研究同**时关注生物勘探实施国（印度与马达加斯加）生物多样性制度及指导方针。尽管《产权组织知识产权、遗传资源和

相关传统知识条约》**的通**过具有里程碑意义，但两个案例均揭示出条约中**“欺**诈意图”认定标准的实施困境。为应对这一挑战，本文建议行政能力有限的国家可考虑借助南南合作机制寻求解决方案。

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I. INTRODUCTION

In 1992, the United Nations (UN) adopted the Convention on Biological Diversity (CBD).[3] On the one hand, this international treaty recognizes the sovereignty of States over the biological resources hosted within their borders. Therefore, to access these resources, a prior informed consent has to be obtained in accordance with national legislation and regulation. On the other hand, the CBD aims at ensuring the conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of benefits arising out of their utilization. With regard for fairness and equity, the sharing of benefits (monetary and/or non-monetary) requires a prior informed consent and a decision made upon mutually agreed terms. Stressing that many indigenous and local communities depend on biological resources to secure their daily needs, lifestyles and traditions, the CBD promotes their participation to achieve its objectives and foster innovation. Article 8 (j) provides that each Contracting Party shall:

> subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.

This provision is important because it recognizes the epistemic value of knowledge that indigenous and local communities hold, as well as their right over such knowledge. However, such right and knowledge are not defined in this international public law treaty. While defining a knowledge is particularly difficult,[4] in the early 1960's, French ethnologist Claude Lévi-Strauss emphasized that:

> indigenous classifications are not only methodical and based upon a theoretical knowledge robustly carpentered. They also happen to be comparable, from a formal point of view, to those that zoology and botany continue to use. (...) It is a professional biologist who stresses how many mistakes and confusions could have been avoided (...) if elder travelers had relied on indigenous taxonomies instead of improvising others (...).[5]

To better understand the CBD Article 8 (j), the previous emergence of three trends in the United States (US) during the 1980's should be recalled for their further impact at international level. Firstly, in the US, where the concept of "biological diversity" was invented, it was indissociable from the emergence of a scientific discipline dedicated to the study of biological diversity, including to document and to address losses of "biodiversity" in a scientific way. Secondly, in the US, the rise of the biotechnology industry was concomitant with the extension of patent protection for genetically modified microorganisms and genetically modified plants. Thirdly, in this context, US universities were encouraged to innovate and to obtain patent protection for their innovations.[6] As reflected in the CBD Article 8 (j), knowledge of indigenous and local communities associated to biological / genetic resources became relevant for biodiversity conservation purposes and for scientific

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[3] Convention on Biological Diversity (1992). Available from https://www.cbd.int/doc/legal/cbd-en.pdf.

[4] For a reflection on the young sub-discipline of anthropology of knowledge, see: Nicolas Adell, *Anthropologie des savoirs* (Paris, Armand Collin, 2011).

[5] Claude Lévi-Strauss, *La pensée sauvage* (Paris, Plon, 1962), pp. 60-61.

[6] Graham Dutfield, *Intellectual Property Rights and the Life Science Industries: Past, Present and Future* (2nd Edition), (Singapore, Hackensack; London, World Scientific Publishing, 2009), pp. 193-199.

research, with potential industrial applications. The stakes being high, the CBD provides that "Contracting Parties, recognizing that patents and other intellectual property rights may have an influence on the implementation of this Convention, shall cooperate in this regard subject to national legislation and international law in order to ensure that such rights are supportive of and do not run counter to its objectives" (Art. 16.5).

To put those words into practice, a proposal suggested to create a certificate of origin, or legal compliance for claimed inventions that use traditional knowledge and/or genetic resources.[7] In 2010, the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity was adopted.[8] To ensure and monitor compliance with Access and Benefit Sharing (ABS) requirements, it notably provides that an internationally recognized certificate of compliance shall be used. To address transboundary situations, among others, the Nagoya Protocol provides that:

> Parties shall consider the need for and modalities of a global multilateral benefit-sharing mechanism to address the fair and equitable sharing of benefits derived from the utilization of genetic resources and traditional knowledge associated with genetic resources that occur in transboundary situations or for which it is not possible to grant or obtain prior informed consent. The benefits shared by users of genetic resources and traditional knowledge associated with genetic resources through this mechanism shall be used to support the conservation of biological diversity and the sustainable use of its components globally (Art. 10).

Beyond issues relating to fairness and equity, the concerns of developing countries about traditional knowledge and intellectual property rights are due to ''biopiracy'' cases.[9] Coined in the early 1990's, the term ''biopiracy'' designates the fraudulent access to and patenting of biological / genetic resources or traditional knowledge. With regards to the monopolization of traditional knowledge, fraud consists in filing a patent application to claim it as a new invention, breaching thus the rules establishing a duty to disclose any prior art known to the applicant. Leaning on the difficulty for examiners to conduct their search of a prior art that is little-known and sometimes undocumented, fraudsters rely on the time-consuming burden they impose on patent offices. Hence, unless the patent is revoked, the mere importation of foreign knowledge can lead to its privatization (generally for twenty years), and to unfair competition. For instance, in 1995, a patent granted by the US Patent and Trademark Office (USPTO) covered the use of *Turmeric* in wound healing, a well-known use in India. After the Council of Scientific and Industrial Research (CSIR) of India requested a reexamination of the patent claims, they were cancelled on grounds of lack of novelty, and lack of inventive step. Although the patent application provided information on the use of turmeric in India, the inventors (of Indian origin) claimed to be the first ones to use it to heal wounds, breaching thus the duty of disclosure, which is punished under US law. In this case, the reexamination of the claims allowed to avoid unfair competition but it showed the need for more rigorous examination of claimed inventions. As importantly, it showed the need for a stronger duty of

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[7] Brendan M. Tobin, ''Certificates of Origin: A Role for IPR Regimes for Securing Prior Informed Consent'', in *Access to Genetic Resources: Strategies for Benefit Sharing*, Mugabe *et al.*, eds. (Nairobi, ACTS Press, 1997). Available from https://www.academia.edu/6636676/Certificates_of_Origin_A_Role_for_IPR_Regimes_in_Securing_Prior_Informed_Consent.

[8] Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (2010). Available from https://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf.

[9] The term ''biopiracy'' was coined by Pat Mooney, co-founder of the Rural Advancement Fund International (RAFI) further renamed Action Group on Erosion, Technology and Concentration (ETC Group). He notably received the Alternative Nobel Prize in 1985. See https://www.etcgroup.org/users/pat-mooney.

disclosure, with a focus on disclosure of geographic information so as to enable examiners to conduct the search of prior art.

The year 1995 also corresponds to the entry into force of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) that is indissociable from membership of the World Trade Organization (WTO). Historically, while intellectual property law was adopted or not by countries according to their level of industrial development, needs and priorities, the TRIPS Agreement has set minimum standards for patent protection that are so high that they undermine developing countries' capacity to pursue their policies according to their level of development. It should be recalled that during the 1980's, in the US, patent protection for genetically modified microorganisms was initially rejected by the USPTO on grounds of the nature doctrine. As living matter is found in nature and is not man made, this doctrine held that such matter was not eligible for patent protection. However, a Decision of the US Supreme Court overturned the doctrine and ruled that the genetic engineering of microorganisms was man made, and potentially non-obvious to a person skilled in the art; thereby it was eligible for patent protection. Paving the way for the patenting of genetically modified plants,[10] this Decision changed the legal landscape that was further implemented at international level with the adoption of the TRIPS Agreement (hereafter "TRIPS"). Based on a reciprocity principle, country members of the WTO have to provide for patent protection, or other forms of intellectual property protection for innovations in all technical fields, including biotechnology, or pharmacology. In 2000, a resolution of the UN Sub-Commission on the Promotion and Protection of Human Rights stressed actual or potential conflicts between TRIPS and the right to self-determination, the right to food, to health, education, etc. Referring to biopiracy, the resolution pointed out the need for adequate protection of traditional knowledge.[11]

Also designated as misappropriation cases, the issue of fraudulent patenting of traditional knowledge or biological / genetic resources was brought by developing countries before the TRIPS Council that is mandated to periodically review TRIPS provisions. As misappropriation cases breach rules on the duty of disclosure, since 1999, developing countries have been seeking to introduce additional disclosure requirements in TRIPS related-provisions. To this end, a certificate of legal compliance with the ABS legislation of the country providing the biological / genetic resources used in a claimed invention could be implemented as a tool that provides information relevant for the search of prior art. On the other hand, this certificate could be implemented as a tool that triggers synergies with the CBD.[12] However, although some developed countries support this proposal, since 2011, discussions didn't progress. Meanwhile, more and more controversies about patents cast a new light on notions such as "person skilled in the art", or "intellectual non-obvious". In the case relating to *Hoodia gordonii*, despite evidence of traditional use of the cactus to suppress appetite, the patent that claimed such use as a novel invention was not revoked after an opposition procedure was filed.[13] In the case relating to a variety of ayahuasca (*Banisteriopsis caapi*), unexpectedly, the revocation of a plant patent was followed by its

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[10] Graham Dutfield, *op. cit*., 2009.

[11] United Nations Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Intellectual property and human rights, Resolution 2000/7. Available from https://ap.ohchr.org/documents/E/SUBCOM/resolutions/E-CN_4-SUB_2-RES-2000-7.doc.

[12] Jorge Cabrera Medaglia, "The Political Economy of the International ABS Regime Negotiations: Options and Synergies with Relevant IPRs Instruments and Processes", in *Triggering the Synergies between Intellectual Property Rights and Biodiversity*, Alexander Werth and Susanne Reyes-Knoche, eds. (Eschborn, Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) GmbH, 2010), pp. 69-107.

[13] Fritz Dolder, ‘‘Traditional Knowledge and Patenting: The Experience of the Neemfungicide and the Hoodia Cases’’, *Biotechnology Law Report*, No. 6, December 2007, pp. 587-589. Rachel Wynberg and Roger Chennells, ‘‘Green Diamonds of the South: An Overview of the San-Hoodia Case’’, in *Indigenous Peoples, Consent and Benefit Sharing: Lessons from the San-Hoodia Case*, R. Wynberg, D. Schroeder and R. Chennells, eds. (Dordrecht, Heidelberg, London, New York, Springer, 2009).

reinstatement by the USPTO.[14] Such disconcerting decisions raise a question: "(...) does patent law have a specialised epistemology of its own?".[15]

To address these and similar issues, an Intergovernmental Committee (IGC) on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (GRTKF) was set up at the World Intellectual Property Organization (WIPO). Starting its work in 2000, to prevent the misappropriation of traditional knowledge and genetic resources, discussions and consultations focused on various challenges. In patent law, one of them relates to the status of oral knowledge / disclosures in the definition of novelty and prior art.[16] When a traditional knowledge is fixed in writing, beyond any language barrier, a lack of accessibility to the documents for patent offices has to be resolved. Therefore, the need to create prior art databases of traditional knowledge in accordance with documentation standards was stressed, as well as underlying challenges for Indigenous Peoples and Local Communities.[17] International cooperation with patent offices that have a recognized expertise in traditional knowledge was recommended too.[18] Discussing the necessity to disclose the origin, or source of a traditional knowledge in claimed inventions using, or based on that knowledge, to the exception of few but influent countries, others progressively agreed to make this requirement mandatory at the national or regional level. As an equivalent international obligation would allow to track the provenance of biological / genetic resources and/or traditional knowledge used, or material to claimed inventions, discussions progressed but at very slow pace. The question of sanctions was one of the major points of contention. In case of non-compliance with procedural obligations, countries such as India proposed that a patent application be rejected.[19] However, countries such as the US strongly opposed any proposal that would include such a sanction. After the IGC was mandated to negotiate an international instrument, another long process started.[20] Along the way, the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) had affirmed their collective intellectual property rights,[21] opening thus a new path toward a better recognition of little-known rules.[22]

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[14] Glenn Wiser, ‘‘U.S. Patent and Trademark Office Reinstates Ayahuasca Patent’’, *Center for International Environmental Law*, June 25, 2001. Available from https://www.ciel.org/wp-content/uploads/2015/06/PTODecisionAnalysis.pdf.

[15] World Intellectual Property Organization, document WIPO/GRTKF/IC/9/8, Annex, § 9, pp. 3-4. (See the full quotation of Lord Hoffmann.) Available from https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_9/wipo_grtkf_ic_9_8.pdf.

[16] The prior art is the sum of knowledge used to assess the novelty and inventive step of a claimed invention. However, definitions of novelty and prior art are local, reflecting thus subjectivities, or even industrial policies choices. For instance, under the European Patent Convention (1973), the prior art includes oral disclosures such as traditional knowledge, and uses made anywhere in the world. In the US, until recently, this definition was limited to printed disclosures, or uses made within its jurisdiction. However, the adoption of the Leahy-Smith America Invents Act (2011) broadened that definition to oral sources and uses made anywhere in the world.

[17] World Intellectual Property Organization, document WIPO/GRTKF/IC/2/6. Available from https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_2/wipo_grtkf_ic_2_6.doc.

[18] World Intellectual Property Organization, document WIPO/GRTKF/IC/13/7, Annex, p. 27. Available from https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_13/wipo_grtkf_ic_13_7.doc.

[19] Fritz Dolder, ‘‘Improving the Legal Position of Stakeholders of Bioresources in the Statutory Law of Developed Industrial Countries’’, *Berne Declaration*, November 2004, p. 5. Available from https://www.wipo.int/documents/d/igc/docs-en-ngo-meienberg1.pdf.

[20] Viviana Muñoz Tellez, ‘‘The WIPO Negotiations on IP, Genetic Resources and Traditional Knowledge: Can it Deliver?’’, Policy Brief, No. 22 (Geneva, South Centre, September 2015). Available from https://www.southcentre.int/policy-brief-22-september-2015/. .

[21] United Nations Declaration on the Rights of Indigenous Peoples (2007). See Art. 18 and Art. 31. 1). Available from https://www.ohchr.org/en/indigenous-peoples/un-declaration-rights-indigenous-peoples.

[22] While intellectual property is rightly associated to market-based economies, little-known research in cultural anthropology and ethnology (including early work using the term ‘‘primitive’’ later dismissed) argue that coercive rules relating to intangible elements may be found in various societies. See Robert H. Lowie, ‘‘Incorporeal Property in Primitive Society’’, *Yale Law Journal*, Vol. 37, No. 5, 1928, pp. 551-563. Available from https://openyls.law.yale.edu/bitstream/handle/20.500.13051/12080/40_37YaleLJ551_1927_1928_.pdf?sequence=2&isAllowed=y. Mark Suchman, ‘‘Invention and Ritual: Notes on the Interrelation of Magic and Intellectual Property in Preliterate Societies’’, *Columbia Law Review*, No. 89, 1989, pp. 1264-1274. Available from

Today, the adoption of the WIPO Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge[23] marks a significant step toward mitigating future misappropriation cases.[24] However, its provision on post grant sanctions or remedies in cases where the mandatory disclosure requirement is breached with fraudulent intent (Art. 5.4) puts the burden of establishing such intent on developing countries.

Over these decades, the promotion of fair trade gained growing acceptance in developed countries, along with notions of transparency, equity, social and environmental responsibility. In 1996, the UN Conference on Trade and Development (UNCTAD) launched the BioTrade Initiative so as to implement the Earth Summit's Agenda 21 adopted with the CBD. Later, in 2006, during a Conference of the Parties to the CBD held in Brazil, UNCTAD organized a roundtable on biodiversity, trade and economic development with small and medium-sized companies. Then, another roundtable organized in Geneva led to the idea to establish an international association that would set good practice standards in accordance with the CBD and obtain a market recognition of BioTrade products. Supported by developing country partners and UNCTAD, various organizations and private sector actors joined the project. In 2007, the Union for Ethical BioTrade (UEBT) was founded with private sector participation. To become a member of the association and be further allowed to use its logo on certified products, some minimum requirements have to be met. For instance, back then, it was required that ''the applicant is not, directly or indirectly, involved in any disputes related to the use of biodiversity and traditional knowledge of substantial magnitude involving a significant number of interests''.[25] As for sanctions, in case of non-compliance with the UEBT standards, to avoid undue publicity, the suspension of a member is listed on the association's website. Moreover, in accordance with the Article 16.5 of the CBD on patents and other intellectual property rights, in case of biopiracy accusations against a member, a procedure aims at assessing and, where appropriate, at addressing the issue.[26]

Before joining recently the UEBT,[27] in 2010, French company Chanel Parfums Beauté (hereafter "Chanel") committed itself to protecting Tibetan medicine from biopiracy. With a limited scope, this research paper examines this initiative and makes few recommendations. Section II is dedicated to its cosmetic product based on Tibetan medicine and made from *Magnolia champaca*, a ''golden flower''. It addresses a publication project aiming at documenting and thereby, at protecting this medical knowledge from being the subject of patent applications. After confirming a company's statement that the product isn't patented,

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https://www.researchgate.net/publication/270336857_Invention_and_Ritual_Notes_on_the_Interrelation_of_Magic_and_Intellectual_Property_in_Preliterate_Societies. Simon Harrison, ''Ritual as Intellectual Property'', *Man*, Vol. 27, No. 2, June 1992, pp. 225-244. Available from https://www.jstor.org/stable/2804052. David A. Cleveland and Stephen C. Murray, ''The World's Crop Genetic Resources and the Rights of Indigenous Farmers'', *Current Anthropology*, Vol. 38, No. 4, August–October 1997, pp. 477-516. Available from https://www.farmersrights.org/getfile.php/132072-1663062734/Dokumenter/97a.pdf. Jason Baird Jackson, ''Boasian Ethnography and Contemporary Intellectual Property Debates'', *Proceedings of the American Philosophical Society*, Vol. 154, No. 1, March 2010, pp. 40-49. Available from https://www.jstor.org/stable/20721526?ab_segments=0%2Fbasic_phrase_search%2Fcontrol&typeAccessWorkflow=login. Due to the increase of interactions between potentially conflicting normative systems, as suggested, further research is needed. See: Laura Nader, *The Life of the Law: Anthropological Projects* (Berkeley, Los Angeles, University of California Press, 2002), pp. 213-230. See also the annotated bibliography compiled by Jessica Scott Jerome. Available from https://regionalworlds.uchicago.edu/AnnotBibJerome.pdf.

[23] WIPO Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge (2024). Available from https://www.wipo.int/edocs/mdocs/tk/en/gratk_dc/gratk_dc_7.pdf.

[24] Nirmalya Syam and Carlos M. Correa, ''Understanding the New WIPO Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge'', Policy Brief, No. 131 (Geneva, South Centre, July 2024). Available from https://www.southcentre.int/policy-brief-131-3-july-2024/. .

[25] Available from https://web.archive.org/web/20081011022552/http://www.ethicalbiotrade.org/membership/requirements.html.

[26] Union for Ethical BioTrade, *Procedure for addressing claims of conduct inconsistent with ethical sourcing of biodiversity*, 2010. Available from https://uebt.org/resource-pages/procedure-claims-alleged-biopiracy.

[27] Chanel Parfums Beauté became a UEBT member in 2022. Available from https://uebt.org/uebt-members-list.

this section points out that a patent application was withdrawn in 2010, after positive opinions. Notably claiming some cosmetic and pharmaceutical uses of a magnolia champaca oil as a new invention, the contribution of traditional knowledge was partially disclosed. Given that the bioprospection was conducted in India, questions pertaining to the application of the Indian Biological Diversity Act are raised. Section III analyses another product of Chanel based on a traditional knowledge collected in Madagascar and made from ginger (*Zingiber cassumunar Roxb.*), a ‘‘blue diamond’’. It reports the publication of a book for defensive protection purposes against third party patent applications and raises questions about its distribution. Confirming a statement that the product isn’t patent protected, this paper underlines that a patent application was withdrawn in 2011, after negative opinions. Among others, the application claimed some cosmetic uses of ginger extracts as a new invention, and although a traditional knowledge was used, its disclosure was partial. As the research was conducted in Madagascar, ethical questions pertaining to the African Model Legislation are raised. Lastly, section IV draws lessons from both patent applications with regards to the future implementation of the new WIPO treaty. The main lesson reminds us that establishing the fraudulent intent of an applicant, as provided for by the treaty (Art. 5.4), is virtually impossible and thereby a burden. To address that burden, this paper suggests that countries with limited administrative capacities may consider the possibility of relying on South-South cooperation. A lesson to draw from the patent application relating to magnolia champaca is that to prevent erroneous positive opinions from being issued by patent offices, international cooperation with offices that have a recognized expertise in traditional knowledge remains necessary. Given the defensive function of traditional knowledge prior art databases, there is a need to expand and to centralize them. In accordance with UNDRIP, for purposes of knowledge documentation, including by knowledge holders themselves, and where appropriate, for purposes of rights registration, this paper calls for long-term capacity-building of Indigenous Peoples and Local Communities. To these ends, a funding mechanism is a necessity that requires sound and lasting commitments that this paper also calls for.[28] Last but not least, a lesson to draw from both patent applications is that the Patent Cooperation Treaty (PCT) remains the administrative route privileged by applicants. As the new WIPO treaty has no effect on PCT applications,[29] at the decisive multilateral level of the WTO, this paper encourages developing countries to pursue their efforts that aim at implementing additional disclosure requirements in TRIPS provisions.[30]

[28] World Intellectual Property Organization, document WIPO/GRTKF/IC/2/6, p. 9.

[29] Nirmalya Syam and Carlos M. Correa, *op. cit.*, 2024.

[30] Health, Intellectual Property and Biodiversity Programme, ‘‘Matrix of Key Issues in the WTO TRIPS Council’’ (Geneva, South Centre, November 2024). See Agenda Items 5-6, pp. 6-8. Available fromhttps://www.southcentre.int/matrix-of-trips-council-issues-18-november-2024/.

II. THE GOLDEN FLOWER

A. Publish to protect

In June 2010, diversifying its line Sublimage, French company Chanel Parfums Beauté (hereafter "Chanel") launched a cosmetic product made from *Magnolia / Michelia champaca*, a ‘‘golden flower’’. Inspired by Tibetan medicine,[31] Xavier Ormancey, botanist in charge of the research in phytochemistry, explained:

> (...) I have to make the connection between what I observe on the spot and my thematics of research. I have to transpose, to objectify with scientific tests. And in the majority of cases, it leads to nothing. Out of a hundred plants tested, we keep an average of three. Not only because we don’t observe the desired effect. It is also likely that the extraction process is too complicated, that the active compound is already patented, or that this variety cannot be cultivated.[32]

Anticipating any risk of pressure, he added: ‘‘for our serum, we only need 3 % of the golden flowers harvested in Ladakh’’ (*sic*).[33] Far from being isolated, this statement was never rectified. However, according to the Biodiversity Portal of India, michelia / magnolia champaca doesn’t grow in Ladakh.[34] Indeed, its dry climate and scarce water resources are not adapted to its growth.

Among different commitments, the company announced to subsidize a non-governmental organization (NGO) dedicated to the teaching of Tibetan / Amchi (name of practitioners) medicine in Ladakh. According to a magazine:

> (...) until now, all the data on the flora were oral. As it is essential to officially pass on information to fight biopiracy, the brand also subsidizes the publication of an ultra-complete scientific book for international scientists, and of another one, more basic, in Tibetan, that will be distributed for free to the students and doctors of the Himalayas. The United Nations greeted this ethical conduct in their biodiversity program.[35]

Regarding the local flora, scientific data had already been published, including in botany.[36] However, it is very likely that some local knowledge remain transmitted orally. As concerns the United Nations greeting the ethical conduct of the company, no source nor date was cited. Besides, subsidizing the publication of oral knowledge to protect it from patents rendered a global greeting improbable: in 2002, the Parties to the CBD had unanimously adopted a set of guidelines that notably addressed the conditions of access to traditional

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[31] Founded on local practices, then on knowledge coming from China, Nepal, India, Persia, etc., Tibetan medicine is practiced in various countries. For instance, in India, in the Himalayas, it is practiced in Ladakh. This medical system is a good example of the transboundary nature of knowledge, and of spiritual values in which knowledge is embedded.

[32] Isabelle Willot, ‘‘Les baroudeurs de la beauté’’, *Le Vif* (Bruxelles), 11 Octobre 2010. Available from https://weekend.levif.be/lifestyle/beaute/les-baroudeurs-de-la-beaute/article-normal-335505.html.

[33] *Ibid*.

[34] India, Biodiversity Portal, *Michelia champaca*. Available from https://indiabiodiversity.org/species/show/15644.

[35] Nolwenn du Laz, ‘‘La médecine tibétaine sauvée par les femmes’’, *Marie Claire*, No. 697, Septembre 2010, p. 38.

[36] Vaidya Bhagwan Dash, *Materia medica of Indo-Tibetan medicine* (Delhi, Classics India Publication, 1987). Dawa (Dr), *A clear mirror of Tibetan medicinal plants, Volume I* (Roma, Cultural Association Tibet Domani, 1999). Dawa (Dr), *A clear mirror of Tibetan medicinal plants, Volume II* (Dharamsala, Men-Tsee-Khang, 2009).

knowledge.[37] To ensure their coherent implementation, the work of the WIPO Intergovernmental Committee GRTKF had to be taken into account. In 2006, the Secretariat of WIPO had issued an interim draft dedicated to examining the recognition of traditional knowledge within the patent system. Not representing any official position and only aiming at facilitating discussions and consultations, it noted that:

> (...) in some scenarios, defensive protection may actually undermine the interests of traditional knowledge holders, particularly when this involves giving the public access to traditional knowledge which is otherwise undisclosed, secret or inaccessible. In the absence of positive rights,[38] public disclosure of traditional knowledge may actually facilitate the unauthorized use of traditional knowledge which the community wishes to protect. For this reason, these recommendations do not encourage traditional knowledge holders to disclose, document or publish any element of their traditional knowledge, or to give consent to their traditional knowledge to be published or otherwise disseminated, unless they have had the opportunity to consider fully the consequences of doing so and have given their prior informed consent.[39]

Therefore, while the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) had been adopted, in the absence of information about any consultation prior to this publication project, it was improbable that the United Nations greeted Chanel's initiative. Moreover, in August 2010, India granted Tibetan medicine a legal recognition[40] providing for its entry in the Traditional Knowledge Digital Library (TKDL).[41] Since 2009, this confidential database is made available to patent offices so that examiners can conduct their search of prior art among knowledge kept confidential. As concerns Chanel's commitment, in 2011, a press article reported that ''the English version of the book will be distributed to the scientific community and NGOs involved in protecting biodiversity. (...) The book will not be available for mass distribution''.[42] In terms of accessibility for patent offices, how could such a distribution of the book ensure a defensive protection of the knowledge?

A doctorate dissertation in pharmacy examined by a jury including Marie-Hélène Lair, pharmacist expert in cosmetology, then head of Chanel's scientific communication, provides other elements. Entitled ''Botany: source of inspiration on the luxury cosmetics segment'', this dissertation was examined in 2013. Its abstract explains that:

> the main difficulty for brands when they talk about this topic is to find the right words to evoke traditional knowledge without being accused of biopiracy. The strategic solution most often used is then the storytelling strategy that allows to tell the story of the plant without evoking too much the most sensitive topics

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[37] Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization (2002). Available from https://www.cbd.int/doc/publications/cbd-bonn-gdls-en.pdf.

[38] Sometimes recognized at the national and regional level, positive rights allow traditional knowledge holders and owners to authorize or refuse any use of their knowledge, and define the way the use is permitted or not.

[39] World Intellectual Property Organization, document WIPO/GRTKF/IC/9/8, Annex, § 14, p. 5. Available from https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_9/wipo_grtkf_ic_9_8.pdf.

[40] India, Parliament of India, The Indian Medicine Central Council (Amendment) Bill (2010).

[41] The Traditional Knowledge Digital Library (TKDL) is a confidential database that compiles knowledge practiced in India, such as Ayurveda, Unani medicine, etc. See https://www.tkdl.res.in/tkdl/langdefault/common/Home.asp?GL=Eng.

[42] Daphne Nikolopoulos, ''Luxury with a conscience'', *Naples Illustrated*, January 21, 2011, p. 56. Available from https://issuu.com/pbmg/docs/npi_0211.

> which are the details of the partnerships between the firm and local populations. (...)[43]

One of the questions addressed is: ‘‘then how to talk about the plants used without being accused of biopiracy?’’.[44] Regarding Chanel’s product made from magnolia champaca, this dissertation explains that ‘‘in the light of the last regulations on biodiversity, it was decided to stop the communication on traditional know-how’’.[45] These ‘regulations’ correspond to the Nagoya Protocol that was adopted in October 2010 and entered into force at the end of 2014. Consolidating the CBD, it notably aims at implementing conditions of access to traditional knowledge while ensuring a fair and equitable sharing of benefits arising from its use. Why did the Nagoya Protocol incite the company to stop its communication on traditional knowledge? In 2010, when it was adopted, the communication wasn’t modified. In 2012, in an interview, Marie Hélène Lair reminded the different contributions to the development of the product. On that occasion, she recalled the ‘‘local populations where the Golden Flower grew: Ladakh’’ (*sic*).[46] At the end of 2013, on the company’s website, the reference to ‘‘the traditional Amchi medicine’’ still remained.[47] For the year 2014, no external archive of its website allows to establish any possible maintenance of this reference, or any modification. But in 2015, once the Nagoya Protocol entered into force, this reference disappeared.[48] In 2012, Marie Hélène Lair had stated that the subsidizing of the Ladakhi NGO had been planned ‘‘to implement a viable and autonomous system’’.[49] Hence, this storytelling had implicitly ended on a positive note. Further, in 2016, on the tenth anniversary of its line Sublimage, Chanel announced that henceforth, the main ingredient of those products would be Vanilla planifolia,[50] commercialized before magnolia champaca.[51] The end of the communication on traditional knowledge was thus followed by a silence about the golden flower. Likewise, the publication of a book to protect Tibetan medicine was never mentioned again. Today, a question remains unanswered: if that book was published, did patent offices receive a copy of it?

B. A patent application

The cosmetic product using *Magnolia champaca* was presented as non-patented,[52] which is the case. However, from March 2006 to April 2010, the company had applied for a patent in

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[43] Anne-Laure Madier, ‘‘La botanique: source d’inspiration sur le segment des cosmétiques de luxe’’, Thèse pour le diplôme d’État de Docteur en Pharmacie, Université de Nantes, 2013, pp. 5-6. Available from http://archive.bu.univ-nantes.fr/pollux/fichiers/download/40b01d3d-f21a-441a-8125-f5d3e6b0e396.

[44] *Ibid*., p. 90.

[45] *Ibid*., p. 95.

[46] Marion Lahore, ‘‘Chanel et le diamant bleu: sois belle et responsable!’’, *No ticket for fashion shows*, 19 Mars 2012.

[47] Available from https://web.archive.org/web/20131125090650/http://www.chanel.com/fr_FR/parfums-beaute/Soin-S%2525C3%2525A9rums-SUBLIMAGE-L'ESSENCE-90951?sku=91846. ***NB***: on the company’s website, there was no reference to Ladakh.

[48] Available from https://web.archive.org/web/20150302044339/http://www.chanel.com/fr_FR/parfums-beaute/soin/par-categorie/serums/sublimage-l_essence-essence-detoxifiante-ultime-activatrice-de-lumiere-p142970.html?sku=0142970.

[49] Marion Lahore, *op. cit.*, 2012.

[50] Sunhee Grinnell, ‘‘Sublime Extract in Chanel’s Sublimage Creams’’, *Vanity Fair*, January 07, 2016. Available from https://www.vanityfair.com/style/2016/01/sublime-extract-with-chanels-sublimage-creams.

[51] Isabelle Willot, *op. cit.*, 2010.

[52] Daphne Nikolopoulos, *op. cit*., 2011.

Europe[53] and Japan,[54] while planning to apply in other countries.[55] The patent application abstract stated that:

> the invention relates to an oil extracted from the flowers of at least one type of *Magnolia champaca*, to its process of preparation, to the cosmetic, pharmaceutical or dermatological compositions comprising it and to its use as polyfunctional active agent for the prevention and/or treatment of detrimental changes to the skin.[56]

Among others, to be granted, a patent application must comply with the conditions of novelty and inventive step (intellectual non-obviousness). The applicant has to disclose any relevant information she/he is aware of. Under the Rule 42 (1) b) of the European Patent Convention (EPC), she/he is required to ''indicate the background art which, as far as is known to the applicant, can be regarded as useful to understand the invention (...)''. In Europe, the prior art includes oral descriptions such as traditional knowledge (EPC, Art. 54 (2)). In Japan, as elsewhere, a duty of disclosure applies (Art. 36 (4) (ii)), and the prior art includes anything that is publicly known or used (Art. 29).[57] Given that traditional knowledge had contributed to the research and development of the product, in this patent application, any geographic data could have helped examiners to conduct their search of a prior art. However, the description of this application indicated that magnolia champaca is ''originating from the wet and wooded regions of China'',[58] without mentioning India, yet equally considered in the scientific literature as an area of origin.[59] As the duty of disclosure then didn't require any provenance information, it wasn't breached. Moreover, in its description, Chanel cited a scientific article reporting some medicinal uses of the flower in India for its anti-inflammatory properties.[60]

In 2010, Xavier Ormancey stressed: ''it is very rare to find beauty recipes on the spot. Cosmetics remains very occidental''.[61] He mentioned that some uses of magnolia champaca in Tibetan medicine and Ayurveda were to relieve insect bites, prevent vomiting, regenerate the body and help it to detoxify itself.[62] In 2012, Marie Hélène Lair added: ''(...) we had discovered the Golden Flower, a flower utilized in Ayurvedic medicine, used in skin balms''.[63] More precisely, in Ayurveda, the flower is notably known for its wound healing properties.[64] However, in the patent application, the use of a magnolia champaca oil to improve wound healing was claimed as being new and non-obvious to a person skilled in the art. The use of that oil as an agent for detoxifying the epidermis was also claimed as being new and non-

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[53] Patent application No. EP06290451. Available from https://register.epo.org/application?number=EP06290451&lng=en&tab=doclist. ***NB***: Xavier Ormancey wasn't part of the inventors designated.

[54] Patent application No. JP2009-500955. Available from https://register.epo.org/ipfwretrieve?apn=JP.2009500955.A&lng=en.

[55] International Application Number PCT/IB2007/000697.

[56] European Patent Office (EPO), Document (Doc.) No. 06290451-2006-03-21-ABST-Abstract.

[57] Japan, Patent Act (1959).

[58] EPO, Doc. No. 06290451-2006-03-21-DESC-Description, p. 2, line no. 25.

[59] National Tropical Botanical Gardens, *Magnolia champaca.* Available from https://ntbg.org/database/plants/detail/Magnolia-champaca.

[60] Vimala *et al*., ''Anti-inflammatory and antipyretic activity of Michelia champaca Linn., (white variety), Ixora brachiata Roxb. and Rhynchosia cana (Willd.) D.C. flower extract'', *Indian Journal of Experimental Biology*, Vol. 35, December 1997.

[61] Isabelle Willot, *op. cit*., 2010.

[62] Daphne Nikolopoulos, *op. cit*., 2011.

[63] Marion Lahore, *op. cit*., 2012.

[64] S. Dwajani and T. Shanbhag, ''Michelia Champaca: Wound Healing Activity in Immunosuppressed Rats'', *The Internet Journal of Alternative Medicine*, Vol. 7, No. 2, 2008. Available from https://scispace.com/pdf/michelia-champaca-wound-healing-activity-in-immunosuppressed-tmz1rnizea.pdf.. K.M. Nandkarni, *Indian Materia Medica* (Bombay, Popular Book Department, 1954).

obvious.[65] It is possible that in dermatology, Chanel's knowledge in Ayurveda was limited to the use of the flower to relieve insect bites. By citing an article reporting its use in India for its anti-inflammatory properties,[66] the company duly disclosed a prior art it was aware of. However, this article doesn't report any use of the flower in balms. If Chanel had no data about wound healing, it is possible that this claim was the result of an inventive step. Moreover, a rapid one: the research conducted in India had started in 2005.[67] Back then, the neem (*Azadirachta indica*) case had reinforced a legitimate mistrust and concern.[68] In this context, the company managed to conduct research, then to innovate and apply for a patent as soon as March 2006. Therefore, why were some uses of the flower not regarded as useful to understand the claimed invention and duly disclosed? Wouldn't the claims relating to the detoxification of the epidermis have gained in clarity in the light of the traditional uses to help the body to detoxify itself? If not, why? Wouldn't the claims relating to wound healing have possibly gained in clarity in the light of the traditional uses to regenerate the body? If not, why? In 2006, while requesting some clarifications, the examining division of the European Patent Office (EPO) issued a positive opinion on the novelty and inventive step of all the claims, including those detailing the process of preparation of an oil rich in active compounds and of very high quality.[69]

In parallel, in 2007, for the related international application filed under the Patent Cooperation Treaty (PCT),[70] the EPO was designated as the International Searching Authority (ISA) to conduct the international search of prior art.[71] For the definition of the latter, the Patent Cooperation Treaty (PCT) provisions on oral disclosures are limited,[72] which narrows options available elsewhere. The opinion of an ISA is indeed not binding but often adopted at a local level for its authoritative value. Besides, on January 2006, a new edition of the International Patent Classification (IPC) had entered into force. Administered by WIPO, its Secretariat explained that:

> a WIPO Task Force on Classification of Traditional Knowledge developed a new main group for the IPC, designated A61K 36/00, with approximately 200 subgroups, in the field of medicinal preparations containing plants. This should increase the likelihood that patent examiners will locate already published TK [Traditional Knowledge] that is relevant to claimed inventions in patent applications, without adversely affecting the legal status of TK from the point of view of TK holders.[73]

However, for Chanel's patent application, in spite of its claims concerning some pharmaceutical uses of a magnolia champaca oil, and despite its reference to the medicinal uses of the flower in India for its anti-inflammatory properties, the IPC group attributed by examiners wasn't A61K 36/. Hence, the likelihood that other examiners conducted a search of prior art among traditional knowledge wasn't increased. On late September 2008, the

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[65] EPO, Doc. No. 06290451-2006-03-21-CLMS-Claims. See claims no. 16 to 18.

[66] Vimala *et al*., *op. cit*., 1997.

[67] Isabelle Willot, *op. cit*., 2010.

[68] Fritz Dolder, *op. cit*., 2007.

[69] EPO, Doc. No. 06290451-2006-09-05-1703-European search opinion.

[70] Patent Cooperation Treaty (1970). See https://www.wipo.int/pct/en/.

[71] International Application Number PCT/IB2007/000697. Documents available from https://register.epo.org/ipfwretrieve?apn=IB.2007000697.W&lng=en.

[72] Carlos M. Correa, ''An agenda for patent reform and harmonization for developing countries'', paper presented at the Bellagio Dialogue on Intellectual Property and Sustainable Development: Revising the agenda in a new context, Bellagio, September 2005. Available from https://www.wipo.int/export/sites/www/meetings/en/2006/scp_of_ge_06/presentations/scp_of_ge_06_correa.pdf.

[73] World Intellectual Property Organization, document WIPO/GRTKF/IC/11/7, Annex, pp. 21-22. Available from https://www.wipo.ch/edocs/mdocs/tk/en/wipo_grtkf_ic_11/wipo_grtkf_ic_11_7.doc.

International Preliminary Report on Patentability issued a positive opinion on the novelty and inventive step of all the claims.

Back to the local administrative route, after the request for clarifications, in the second version of the claims, those relating to wound healing and detoxification were maintained.[74] Then, at the end of 2009, the EPO notified its intention to grant a patent.[75] Back then, the TKDL database provided by India was at its disposal since February of that year. And, online since 2008, a scientific article had confirmed the wound healing properties of magnolia champaca by referring to a book published in 1954 (see *supra*, footnote no. 64). Hence, for this use of the flower, a prior art had been documented before the filing of the patent application. Therefore, the novelty and inventive step of any similar claim could have been challenged on grounds of written evidence. After the EPO notified its intention to grant a patent, the company confirmed its will to enforce this exclusive right by paying some administrative fees.[76] Later on, in the third version of its claims, there was no more reference to the detoxification and the terms ‘‘wound healing’’ disappeared.[77] On April 2010, the translations of the claims were provided to the EPO, confirming again a will to enforce this patent.[78] But two weeks later, Chanel withdrew its application.[79] In Japan, it was also withdrawn.[80] If the patent application had been maintained and an opposition procedure conducted, patent offices would have had the possibility to consult the TKDL database, which is based on a classification system adapted to the work of such offices.

C. The Biological Diversity Act

Given that the bioprospection was conducted in India, the patent application for the cosmetic product raises questions pertaining to national legislation and regulation. In 2002 and 2004, India adopted the Biological Diversity Act and Biological Diversity Rules, a national translation of the CBD.[81] Entered into force in 2003, this domestic law provides that:

> Section 3. (*1*) No person referred to in sub-section (*2*) shall, without previous approval of the National Biodiversity Authority, obtain any biological resource occurring in India or knowledge associated thereto for research or for commercial utilization or for bio-survey and bio-utilization.
>
> (*2*) The persons who shall be required to take the approval of the National Biodiversity Authority under sub-section (*1*) are the following, namely:
> (a) a person who is not a citizen of India;
> (...)
> (c) a body corporate, association or organization -
> (i) not incorporated or registered in India; or
> (ii) incorporated or registered in India under any law for the time being in force which has any non-Indian participation in its share capital or management.

[74] EPO, Doc. No. 06290451-2008-09-29-CLMS-Claims. See claims no. 15 to 17.

[75] EPO, Doc. No. 06290451-2009-12-23-2004-Communication about intention to grant a European patent.

[76] EPO, Doc. No. 06290451-2010-02-17-FEES-Letter concerning fees and payments.

[77] EPO, Doc. No. 06290451-2010-03-12-CLMS-Claims.

[78] EPO, Doc. No. 06290451-2010-04-02-IGRA7-Filing of the translations of the claims.

[79] EPO, Doc. No. 06290451-2010-04-13-WDRA-Withdrawal of application.

[80] Application withdrawn on May 10, 2010.

[81] India, Ministry of Law and Justice, The Biological Diversity Act and Biological Diversity Rules (2002). Available from http:/nbaindia.org/uploaded/act/BDACT_ENG.pdf.

To manufacture its product, the company explained it received from India a magnolia champaca oil refined in France with its molecular extraction process.[82] In the patent application, the description of the process refers to the use of fresh flowers,[83] which doesn't preclude a possible use of an imported oil. In such a case, the question of the legal compliance for the access to the biological resource wouldn't be relevant. However, other questions remain unanswered: to access the traditional knowledge associated to the flower, did the company obtain a previous approval of the National Biodiversity Authority? Given the stakes of prior informed consent and benefit sharing upon mutually agreed terms, this question is fundamental with regard for local communities and individuals who may not be aware of their rights.

Regarding intellectual property, the Biological Diversity Act provides that:

> **Section 6**. (*1*) No person shall apply for any intellectual property right, by whatever name called, in or outside India for any invention based on any research or information on a biological resource obtained from India without obtaining the previous approval of the National Biodiversity Authority before making such application.
>
> Provided that if a person applies for a patent, permission of the National Biodiversity Authority may be obtained after the acceptance of the patent but before the sealing of the patent by the patent authority concerned:
>
> Provided further that the National Biodiversity Authority shall dispose of the application for permission made to it within a period of ninety days from the date of receipt thereof.
>
> (*2*) The National Biodiversity Authority may, while granting the approval under this section, impose benefit sharing fee or royalty or both or impose conditions including the sharing of financial benefits arising out of the commercial utilisation of such rights.
>
> (...)
>
> **Section 18.** (*4*) The National Biodiversity Authority may, on behalf of the Central Government, take any measures necessary to oppose the grant of intellectual property rights in any country outside India on any biological resource obtained from India or knowledge associated with such biological resource which is derived from India.

Therefore, after the EPO notified its intention to grant a patent, before the company withdrew its application, did it ask permission of the National Biodiversity Authority? Beyond issues of fraudulent intent, the relevance of the latter provisions is also to be appreciated with regard to a possible independent discovery made by the applicant that needs to be assessed - a basic precaution to avoid undeserved biopiracy accusations. In case of breach, the Indian law stipulated that:

> **Section 55.** (*1*) Whoever contravenes or attempts to contravene or abets the contravention of the provisions of section 3 or section 4 or section 6 shall be punishable with imprisonment for a term which may extend to five years, or with fine which may extend to ten lakh rupees and where the damage caused

[82] Anne-Laure Madier, *op. cit.*, 2013, p. 94.
[83] EPO, Doc. No. 06290451-2006-03-21-CLMS-Claims. See claims no. 6 to 13.

> exceeds ten lakh rupees such fine may commensurate with the damage caused, or with both.

After a recent amendment, the Biological Diversity Act now provides that:

> **Section 55.** If any person or entity covered under sub-section (*2*) of section 3 (...) contravenes or attempts to contravene or abets the contravention of the provisions of section 3 (...) or section 6 (...), such person shall be liable to pay penalty which shall not be less than one lakh rupees, but which may extend to fifty lakh rupees, but where the damage caused exceeds the amount of the penalty, such penalty shall be commensurate with the damage caused (...).[84]

The following provision remains identical:

> **Section 57.** (*1*) Where an offence or contravention under this Act has been committed by a company, every person who at the time the offence or contravention was committed was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence or contravention and shall be liable to be proceeded against and punished accordingly:
>
> Provided that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act, if he proves that the offence or contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence or contravention.
>
> (...)

[84] India, Ministry of Law and Justice, The Biological Diversity (Amendment) Act, 2023. Available from https://egazette.gov.in/WriteReadData/2023/247815.pdf.

III. THE BLUE DIAMOND

A. Combatting biopiracy

In 2011, Chanel launched a cosmetic product during a press conference organized in Madagascar, in the Vohimana natural reserve. However, its press-book focused on a sustainable development project in partnership with a local NGO that the company subsidizes.[85] In 2012, Marie Hélène Lair explained that:

> the story started in 2004. The Chanel laboratories were in search of new natural compounds for its skin cares. (...) The blue diamond is actually a ginger imported centuries ago by populations coming from Asia. Since then it was used in the region as a wound healing balm. The Chanel laboratories then discovered powerful anti-free radicals compounds. (...) [Emphasis added]

The interviewer remarked:

> yes, but laboratories now have the negative reputation of patenting plants that were used for millennium by populations for whom these are their only food or medicinal resources.

Marie-Hélène Lair assured:

> indeed (...), it is Bio-Piracy. Local populations then can no longer access these plants and there are real human tragedies. This is why Chanel wanted to publish [éditer] a book listing all the resources of this forest. This book is now used by inhabitants, who sometimes discover again a forgotten patrimony, but also by academics. It is therefore impossible henceforth to patent these plants! [86]

When a patent wrongfully grants a temporary monopoly on traditional uses of a plant, it doesn't grant any right on the plant itself, which is a product of nature, not an invention. As to the loss of access to a plant for local populations, the real issue is the risk of pressure that an industrial production may exert on the availability of the resources. Besides, apart from any patent, the mere disclosure of properties of a plant can also lead to an increase of the demand (national and/or international), and then to pressures on the resources.

As Marie-Hélène Lair made it clear in the interview above, Chanel both took the initiative and was the publisher of the book dedicated to the Malagasy knowledge. It was printed in 2012, in Madagascar, in partnership with the local NGO previously mentioned.[87] Given that the book was published to combat biopiracy, it is appropriate to question whether patent offices received a copy of it, or not.

At the end of 2011, after the press conference held in the Vohimana reserve, an article reported that the company didn't register any patent.[88] However, from June 2006 to February 2011, it had applied for a patent in Europe, the US and Japan, while planning to apply in other countries. Notably claiming some cosmetic uses of ginger extracts (*Zingiber cassumunar Roxb*.), a prior art it was aware of was duly disclosed:

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[85] Anne-Laure Madier, *op. cit*., 2013, p. 81.

[86] Marion Lahore, *op. cit*., 2012.

[87] Mariana Grépinet, ''Madagascar: la belle histoire du gingembre bleu'', *Paris Match*, 05 Mai 2012. Available from https://www.parismatch.com/Vivre/Art-de-vivre/Madagascar-la-belle-histoire-du-gingembre-bleu-162030.

[88] Hélène Guillaume, ''Madagascar, l'île de beauté de Chanel'', *Madame Figaro*, 20 Décembre 2011. Available from http://madame.lefigaro.fr/beaute/madagascar-lile-de-beaute-de-chanel-201211-206333.

> Bengle [vernacular name] extracts are conventionally used in traditional Indonesian medicine (Jamu) to firm the skin. However, there is no indication or teaching that the extracts contain arylbutenoids and/or cassumunarins, nor that they are applied on the skin.[89]

But the use as a wound healing balm mentioned by Marie-Hélène Lair wasn't disclosed there. By the end of 2006, among others, the EPO deemed that certain claims didn't fulfill the novelty condition,[90] a negative opinion also issued in the International Preliminary Report on Patentability.[91] At first, Chanel tried to amend some claims and, in May 2010, a payment of administrative fees maintained them.[92] Then, after a notification without reply, the application was deemed withdrawn in Europe.[93] In the US, where the duty of disclosure is strict, the administration also considered that various conditions were not met and the application was further deemed abandoned there.[94] In Japan, it was withdrawn in February 2011.[95] In parallel, the related PCT application had been filed in 2007 and the EPO had been designated as the International Searching Authority (ISA) that processed it. In doing so, it didn't classify it under the IPC main group A61K 36/. But, interestingly, at its local level, the USPTO did.[96]

B. The African Model Legislation

In 2000, as a Member of the African Union, Madagascar adopted the African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources.[97] However, this model law only served as a framework and was not legally binding unless incorporated into national legislation. When Chanel conducted its activities, Madagascar had not yet enacted an Access and Benefit-Sharing (ABS) law relating to the CBD, which was adopted in 2017.[98] Hence, in this case, the provisions of the African Model Law represented ethical guidelines that companies were encouraged to observe on a voluntary basis. Recognizing customary laws,[99] with an emphasis on prior informed consent and benefit-sharing, these guidelines notably provide that:

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[89] Patent application No. EP06290953. Available from https://register.epo.org/application?number=EP06290953&lng=en&tab=doclist. See: Doc. No. 06290953-2006-06-12-DESC-Description, p. 4. ***NB***: Xavier Ormancey wasn't part of the inventors designated.

[90] EPO Doc. No. 06290953-2006-12-04-1703-European search opinion, pp. 2-3.

[91] EPO Doc. No. 07729705-2009-01-08-IPRP-Copy of the international preliminary report on patentability, p. 4.

[92] EPO, Doc. No. 06290953-2008-10-23-EXRE3-Reply to communication from the Examining Division. EPO, Doc. No. 06290953-2010-05-03-FEES-Letter concerning fees and payments.

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[94] Patent application No. US 2009/0202666, deemed abandoned on October 17, 2011. Available from https://register.epo.org/ipfwretrieve?apn=US.30466007.A&lng=en.

[95] Patent application No. JP2009-514739. Available from https://register.epo.org/ipfwretrieve?apn=JP.2009514739.A&lng=en.

[96] International Application Number PCT/EP2007/055294. Documents available from https://register.epo.org/application?number=EP07729705&lng=en&tab=family. See also https://worldwide.espacenet.com/patent/search/family/037236261/publication/US2009202666A1?q=pn%3DUS2009202666.

[97] African Union, African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources (2000). Available from https://www.wipo.int/wipolex/en/legislation/details/11428. .

[98] See https://absch.cbd.int/en/countries/MG/NFP.

[99] Brendan M. Tobin, "'The Law Giveth and the Law Taketh Away': The Case for Recognition of Customary Law in International ABS and Traditional Knowledge Governance", *Policy Matters*, Vol. 17, 2010. Available from https://www.academia.edu/23442585/The_Law_Giveth_and_the_Law_Taketh_Away_The_Case_for_Recognition_of_Customary_Law_in_International_ABS_and_Traditional_Knowledge_Governance.

Article 5

1) Any access to biological resources, knowledge and or technologies of local communities shall be subject to the written prior informed consent of:
i) the National Competent Authority; as well as that of
ii) the concerned local communities, ensuring that women are also involved in decision making.

2) Any access carried out without the prior informed consent of the State and the concerned local community or communities shall be deemed to be invalid and shall be subject to the penalties provided in this legislation or any other legislation that deals with access to biological resources.

(...)

Article 8

1) The agreement referred to in article 7 shall contain commitments undertaken or to be undertaken by the collector, as follows.
(...)
v) (...) not to apply for intellectual property rights protection over a community innovation, practice, knowledge or technology without the prior informed consent of the original providers;
vi) to provide for the sharing of benefits;
(...)

(...)

Article 12

(...)

2) The State and the community or communities shall be entitled to a share of the earning derived from when any biological resource and/or knowledge collected generates, directly or indirectly, a product used in a production process.

(...)

Article 17

The State recognizes and protects the community rights that are specified in Article 16 as they are enshrined and protected under the norms, practices and customary law found in, and recognized by, the concerned local and indigenous communities, whether such law is written or not.

(…)

Article 19

Local communities have the right to refuse access to their biological resources, innovations, practices, knowledge and technologies where such access will be detrimental to the integrity of their natural or cultural heritage.

Article 20

> Local communities shall have the right to withdraw consent or place restrictions on the activities relating to access where such activities are likely to be detrimental to their socio-economic life, or their natural or cultural heritage.
>
> (...)

Ginger being a widely commercialized agricultural product,[100] a question about the access to the resource for research and development may not be relevant. However, a question remains unanswered: before filing its patent application, did the company obtain the prior informed consent of the providers of the traditional knowledge? Although this question only addresses an ethical issue, it doesn't preclude its legitimacy, this notably in a context where Chanel became a member of the Union for Ethical Biotrade (UEBT).

[100] The status of food biological / genetic resources is defined by the International Treaty on Plant Genetic Resources for Food and Agriculture (2001), administered by the Food and Agriculture Organization of the United Nations (FAO). This FAO treaty doesn't deal with the requirements for the acquisition of intellectual property rights. See: Nirmalya Syam and Thamara Romero, ''Misappropriation of Genetic Resources and associated Traditional Knowledge: Challenges posed by Intellectual Property and Genetic Sequence Information'', Research Paper, No. 130 (Geneva, South Centre, April 2021), p. 17. Available from https://www.southcentre.int/research-paper-130-april-2021/.

IV. FINAL REMARKS AND RECOMMENDATIONS

A lesson to draw from both patent applications is that establishing the fraudulent intent of an applicant is virtually impossible. To avoid this deadlock, during the negotiation of the new WIPO treaty, developing countries proposed to implement a mandatory requirement to disclose the providers and/or the source of a traditional knowledge associated to a genetic resource when it is *used* in a claimed invention.[101] However, unlike this proposal, the new treaty provides that such mandatory disclosure shall be made for claimed inventions *based on* that knowledge (Art. 3.2). The proposed formulation would have been more effective, as otherwise the initial assessment of the degree of contribution of a traditional knowledge to the claimed invention is left to the applicant's discretion. For claimed inventions based on a genetic resource and its associated traditional knowledge, the new treaty provides for a mandatory disclosure of its country of origin (Art. 3.1 a)). Where there are several countries, the applicant shall disclose the one from which the resource was obtained.[102] To ensure the readily submission of observations by concerned third parties, the name of the country of origin should be contained in the title and abstract of the patent application. As the new treaty provides that ''Contracting Parties shall not place an obligation on Offices to verify the authenticity of the disclosure'' (Art. 3.5), the role of third parties and opponents in protecting the public domain and ensuring fair competition should be facilitated in all possible ways. Furthermore, ''each Contracting Party may provide for post grant sanctions or remedies where there has been fraudulent intent in regard to the disclosure requirement in Article 3 of this Treaty, in accordance with its national law'' (Art. 5.4). Compared to the South's proposal for the rejection of a patent application that fails to comply with procedural obligations (a sanction yet provided for in some countries[103]), the latter provision of the new treaty casts serious doubts on a will not to unduly burden patent offices. *Quid* of the burden of establishing a fraudulent intent? To address that burden, this paper suggests that countries with limited administrative capacities may consider the possibility of relying on South-South cooperation. A lesson to draw from the patent application relating to magnolia champaca is that international cooperation with patent offices that have a recognized expertise in traditional knowledge remains necessary to prevent erroneous positive opinions from being issued. Such international cooperation might also be necessary to ensure that the IPC main group A61K 36/ be rightly attributed to patents (applications). In parallel, prior art databases of traditional knowledge which is already publicly known will remain critical tools that need to be expanded, harmonized and centralized. In accordance with UNDRIP, for knowledge documentation purposes, including by knowledge holders themselves, and where appropriate, for rights registration purposes, this paper calls for long-term capacity-building of Indigenous Peoples and Local Communities. To these ends, a funding mechanism is a necessity that requires sound and lasting commitments that this paper also calls for.[104] Last but not least, a lesson to draw from both patent applications is that the PCT remains the administrative route privileged by applicants. As the new WIPO treaty has no effect on PCT applications,[105] at the decisive multilateral level of the WTO, this paper encourages developing countries to pursue their efforts that aim at implementing additional disclosure requirements in TRIPS provisions.[106]

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[101] Nirmalya Syam and Carlos M. Correa, *op. cit.*, 2024.

[102] Where there is more than one country of origin of a genetic resource, obtaining it from a country with a different knowledge system could turn the mandatory disclosure requirement into a camouflage.

[103] Fritz Dolder, *op. cit.*, 2004, p. 5.

[104] World Intellectual Property Organization, document WIPO/GRTKF/IC/2/6, p. 9.

[105] Nirmalya Syam and Carlos M. Correa,

[106] Health, Intellectual Property and Biodiversity Programme, South Centre, *op. cit.*, 2024.

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SOUTH CENTRE

International Environment House 2
Chemin de Balexert 7-9
1219 Geneva
Switzerland

Telephone: (41) 022 791 8050
E-mail: south@southcentre.int

Website:
http://www.southcentre.int

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