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BRIEFING PAPER

Dirty Business for Clean Skin: Nestlé's Rooibos Robbery in South Africa

Nestec S.A has claimed 5 patents on the use of Rooibos and Honeybush. This briefing note is intended to provide a summary on:

- The five patent applications;
- Nestec/Nestlé - the patent applicant;
- Rooibos and Honeybush;
- The international and national legislation governing the access and use of these resources; and
- Annex: Berne Declaration and Natural Justice Press Release

1. The Patents

The applicant of the five patents in question is Nestec S.A.. Nestec is the technical, scientific, commercial and subsidiary of Nestlé (and fully owned by Nestlé) whose units, specialised in all areas of the business, supply permanent know-how and assistance to operating companies in the Nestle Group within the framework of the licence and equivalent contracts. It is also responsible for all scientific research and technological development, which it undertakes itself or through affiliated companies.¹

All the five patents have been filed as WO patents² in 2009 (published in January 2010). None of the patents are granted yet in any of the designated states. The patents are as follows:

A) Patent WO2010000564; **ROOIBOS AND INFLAMMATION**

Applicant: Nestec S.A.
Filing Date: 05.06.2009
Publication: 07.01.2010

Main Claims:

The claimed innovation is the use of a composition comprising *Aspalathus linearis* (Rooibos) or an extract thereof for the preparation of a product to treat and/or prevent inflammatory disorders - especially inflammatory disorders of the gut, osteoarthritis and rheumatoid arthritis.

The extract is obtainable by a water or an alcohol/water extraction from Rooibos plant material. The patent also seeks to cover the use of the composition for food products, drinks, food supplements, nutraceuticals, cosmetic products, pet food products or medicaments). The long list covers a broad range of products, ranging from cappuccino to salad dressing and toothpaste to lipsticks. Of special note, is the use of the extract in a product together with probiotics.

B) Patent WO 2010000580; **USE OF ROOIBOS OR ROOIBOS EXTRACTS WITH PREBIOTICS FOR SKIN AND HAIR**

Applicant: Nestec S.A.
Filing Date: 09.06.2009
Publication: 07.01.2010

Main Claims:

The claimed innovation is an orally ingestible composition comprising *Aspalathus linearis* (Rooibos) or an extract thereof and at least one prebiotic.

¹ Consolidated Financial Statements of the Nestlé Group (2009)

² WO Patents are patents, which have been filed through the Patent Cooperation Treaty (PCT) administered by the World Intellectual Property Organization. There are currently 142 Member States to the PCT.

The extract is obtainable by a water or an alcohol/water extraction from Rooibos plant material. The composition is used for the preparation of a food product, a drink, a food supplement, a nutraceutical, a pet food product or a medicament to treat (inter alia) skin inflammation, reactive or dry skin, psoriasis, acne, ageing, wrinkles and for preventing hair and coat loss.

C) Patent WO2010000578; **USE OF HONEYBUSH OR HONEYBUSH EXTRACTS WITH PREBIOTICS FOR SKIN AND HAIR**

Applicant: Nestec S.A.
Filing Date: 09.06.2009
Publication: 07.01.2010

Main Claims:

The claims of this patent are identical with the claims of Patent WO 2010000580; USE OF ROOIBOS OR ROOIBOS EXTRACTS WITH PREBIOTICS FOR SKIN AND HAIR. The only difference being that *Aspalathus linearis* (Rooibos) is replaced with Honeybush.

D) Patent WO 2010000579; **USE OF ROOIBOS OR ROOIBOS EXTRACTS FOR SKIN AND HAIR**

Applicant: Nestec S.A.
Filing Date: 09.06.2009
Publication: 07.01.2010

Main Claims:

The claimed innovation is the use of a composition comprising *Aspalathus linearis* (Rooibos) or an extract thereof for the preparation of an orally administrable product for improving skin or hair health. This patent includes similar claims as WO 2010000580, with the exception of three claims related to the use of Rooibos combined with a prebiotic, which are not claimed here. An additional difference is that in this case the claims are on "the use" of a composition. WO 2010000580 claims the composition itself.

E) Patent WO2010000577; **USE OF HONEYBUSH OR HONEYBUSH EXTRACTS FOR SKIN AND HAIR**

Applicant: Nestec S.A.
Filing Date: 09.06.2009
Publication: 07.01.2010

Main Claims:



The claims of this patent are identical with the claims of Patent WO 2010000579; USE OF ROOIBOS OR ROOIBOS EXTRACTS FOR SKIN AND HAIR. The only difference being that *Aspalathus linearis* (Rooibos) is replaced by Honeybush.

2. Nestlé, L'Oréal and Cosmetics

It may be surprising that Nestlé files patents in the cosmetic sector, but Nestlé is a major player in cosmetics. Nestlé holds a 30.5% share in L'Oréal (the biggest cosmetic producer worldwide) with the market value of shares being US\$ 18 836 million³. Further Nestlé holds 50% of Innéov (www.inneov.com) and the other 50% are held by L'Oréal⁴. Innéov is a cosmetic company specialising in food supplements for skin and hair. They call their products beauty pills. Products against hair loss, wrinkles or acne are the core business of Innéov.

3. ROOIBOS AND HONEYBUSH

Rooibos (*Aspalathus linearis*)

	
<p>(Photo from www.phytochemicals.info/plants/Rooibos.php)</p>	<p>(Photo from http://saRooibos.co.za/images/Rooibos-farming/13.jpg)</p>

Origin

The ancient San and Khoi people of South Africa are believed to be the first to discover that Rooibos can be used in a refreshing brew.⁵ Early settlers then used the plant⁶ as an alternative for black tea and for a range of medicinal practices. It continues to be a very popular drink in South Africa and is available in most South African households.

Rooibos (which stands for 'red bush' in Afrikaans) is endemic to South Africa and only grows in the Cederberg Mountains in the Western Cape Province of the country. Efforts to grow the plant anywhere else have failed due to the particular climate and soil quality needed for its growth.⁷

³ Consolidated Financial Statements of the Nestlé Group (2009)

⁴ Consolidated Financial Statements of the Nestlé Group (2009)

⁵ <http://saRooibos.co.za/content/view/31/79/>

⁶ For a history of Rooibos see the South African Rooibos council:

<http://saRooibos.co.za/content/view/31/79/>

⁷ <http://www.phytochemicals.info/plants/Rooibos.php>

Commonly known medicinal properties⁸

According to Phytochemicals.com Rooibos contains the following phytochemicals: Aspalathin, Nothofagin, Caffeic Acid, Chrysoeriol, Isoquercitrin, Orientin, Isoorientin, Luteolin, Vitexin, Isovitexin, Luteolin, Rutin, Flavonoids, Quercetin, Polyphenols.

Rooibos is commonly used in South Africa for a range of medicinal uses often in the form of tea and/or ointments.⁹ These include among a large range of skin disorders, anti-inflammatory and anti-allergic properties, prevention and treatment of vascular diseases, asthma, gastrointestinal disorders, anti viral properties and strengthening of the immune system.

According to Phytochemicals¹⁰ Rooibos is the only known source of the phytochemical aspalathin. Studies in laboratories or on animals suggested that quercetin and luteolin help to prevent cardiovascular disease, some cancers and stroke. Rutin has been associated with the maintenance of blood vessels walls.

Honeybush (*Cyclopia* spp.)



Photos source: <http://www.itmonline.org/arts/Honeybush.htm>

Origin

Honeybush is a shrub in the Fabaceae family (Leguminosae) which grows in the botanical zone in the fynbos biome that is endemic to the coastal regions of South Africa's Western Cape and Eastern Cape Provinces broadly stretching between Darling to Port Elizabeth.¹¹

It owes its name to its distinctive yellow flowers, which have a honey like scent. Similar to Rooibos the plant has been traditionally used by the Khoi and San as a beverage as well as for certain medicinal use. Early settlers then used the tea as a

⁸ For an overview of research references, see: <http://saRooibos.co.za/content/view/20/50/>

⁹ Compiled from: <http://saRooibos.co.za/content/view/20/50/> and <http://www.phytochemicals.info/plants/Rooibos.php>

¹⁰ See <http://www.phytochemicals.info/plants/Rooibos.php>

¹¹ See: http://www.Rooibos.ch/Honeybush_info.html

substitute for black tea, which subsequently developed into a major industry. The first documented use of Honeybush dates back to 1705.¹²

There are approximately two-dozen species of Honeybush, whereas most commercial supply is obtained in the form of tea from the species *Cyclopia intermedia* and *Cyclopia subternata*. All Honeybush species require a unique habitat to grow.¹³

According to the Agricultural Research Council there are currently 10 commercial growers who contribute approximately 30% of the total annual production of Honeybush. The rest is harvested in the wild.¹⁴

Medicinal use

Honeybush has been used traditionally for a range of medicinal qualities, including for its anti-coughs and calming properties through its content of pinitol. Its yellow flower pigments traditionally have been used as a dye and are now commercially explored.

It contains the following ingredients:

Flavones, isoflavones, coumestans, luteolin, 4-hydroxycinnamic acid, polyphenols, and xanthones.

Further research has explored Honeybush's potential, among a large group of others, in the following fields:¹⁵ blood-sugar and fat level lowering effects, prevention of breast, prostate and uterus cancer, anti-fungal properties, anti oxidant properties, anti inflammatory properties. Its high levels of Zinc and Calcium are of additional benefit to skin care.

¹² See: <http://www.arc.agric.za/home.asp?pid=4051>

¹³ See: "Honeybush: Healthful beverage tea from South Africa by Subhuti Dharmananda, Ph.D., Director, Institute for Traditional Medicine, Portland, Oregon" <http://www.itmonline.org/arts/Honeybush.htm>

¹⁴ See: <http://www.arc.agric.za/home.asp?pid=4051>

¹⁵ Compiled from http://www.Rooibos.ch/Honeybush_info.html and <http://www.itmonline.org/arts/Honeybush.htm>

4. INTERNATIONAL AND NATIONAL LEGISLATION

There are international and national laws that provide specific requirements regarding the use of natural resources, or genetic resources as often referred to in such legislation. According to international law and the laws of the Republic of South Africa, Nestec S.A. are therefore obliged to comply with the following:

International

The Convention on Biological Diversity

Pursuant to Articles 1, 8(j), and 15 of the *United Nations Convention on Biological Diversity (CBD)*¹⁶ prior informed consent must be obtained from the provider country and the traditional knowledge holders prior to accessing genetic resources and its associated traditional knowledge. In the present matter, the Republic of South Africa is clearly the provider country (article 15.3 of the CBD) and hence Nestec S.A. is obligated to obtain consent for access to Rooibos and/or Honeybush. Additionally, Nestec S.A. is required to share the commercial and other benefits with the providers of the resources and the traditional knowledge on mutually agreed terms. The South African Government confirmed to Natural Justice and the Berne Declaration that neither Nestec S.A. nor Nestlé has ever received consent to access Rooibos or Honeybush and has not negotiated a benefit-sharing agreement.

National

The National Environment Management: Biodiversity Act

South Africa has complied with article 15.7 the CBD by enacting the *National Environment Management: Biodiversity Act, 2004*.¹⁷ Pursuant to Sections 81-84 of Chapter 6 of this Act, Nestec S.A. may not engage in bio-prospecting¹⁸ involving indigenous biological resources¹⁹ without consent, which is obtained through the requisite permit issued by the Minister of Environmental Affairs. In order to obtain such a permit and comply with the conditions in the said Act and its concomitant regulations on *Bioprospecting, Access and Benefit Sharing (2008)* Nestec S.A. must disclose all information concerning the proposed bioprospecting and the indigenous biological resources to be used, enter into a material transfer agreement that regulates the access to the resources and a benefit sharing agreement that provides for the sharing in any future benefits that may be derived from the bio-prospecting. Prior to the provision of such a permit, the National Environment Management: Biodiversity Act, 2004 also stipulates that the interests of indigenous communities whose traditional uses or

¹⁶ <http://www.cbd.int/convention/convention.shtml>

¹⁷ <http://www.cbd.int/doc/measures/abs/msr-abs-za-en.pdf>

¹⁸ Bio-prospecting, as defined in Chapter 1, section 1 of the National Environment Management: Biodiversity Act 2004, is any research on, or development or application of, indigenous biological resources for commercial or industrial exploitation.

¹⁹ The National Environment Management: Biodiversity Act, 2005 defines an indigenous biological resource as a species that occurs, or has historically occurred, naturally in a free state in nature within the borders of the Republic, but excludes a species that has been introduced in the Republic as a result of human activity.

knowledge of the indigenous biological resources have initiated or contributed to the proposed bioprospecting, must be considered. Further, pursuant to Section 82 of the said Act, a permit in such circumstances may only be granted when the applicant has disclosed all material information relating to the bioprospecting, obtained the prior consent of any affected indigenous community and entered into a benefit sharing agreement with them. The South African Government confirmed to Natural Justice and the Berne Declaration that neither Nestec. S.A. nor Nestlé have received the permits necessary to use South African genetic resources.

The patent applications also document that the abovementioned indigenous biological resources could be obtained through South African companies Afriplex (a company that supplies products and services in the nutritional, health food sector) and Rooibos Limited (producers, processors and marketers of Rooibos). Pursuant to national legislation both these companies must also seek a permit from the Minister when the indigenous biological resource is to be used in bioprospecting.

Cape Town, Zürich; May, 2010

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NATURAL JUSTICE – lawyers for communities and the environment – is a not-for-profit organization based in Cape Town, South Africa, working with communities to develop their legal capacity to affirm social and environmental justice. www.naturaljustice.org

The BERNE DECLARATION is a Swiss NGO with more than 21,000 members, promoting more equitable, sustainable and democratic North-South relations since 1968. www.evb.ch

ANNEX

Berne Declaration (Switzerland), Natural Justice (South Africa)
Press Release

Rooibos Robbery: Nestlé accused of Biopirating South African Genetic Resources

Research by the Berne Declaration and Natural Justice reveals that five recent patent applications by Nestlé on the use of Rooibos and Honeybush are in conflict with South African Law and the Convention on Biological Diversity (CBD). This second biopiracy case in South Africa in less than a year again demonstrates how big corporations neglect their obligations to seek prior informed consent and to share benefits when using genetic resources from the developing countries as obliged by the CBD.

Four out of the five patents in question relate to the use of Rooibos and Honeybush for the treatment of certain hair and skin conditions. Another patent claims the use of Rooibos for the preparation of a product to prevent inflammatory disorders. The claims are very broad and subsequently applicable to a product range that stretches from cappuccino to salad dressing and from toothpaste to lipstick. Applicant of the patents is Nestec S.A., a subsidiary of Nestlé. Rooibos and Honeybush are both endemic to the South African Western and Eastern Cape Provinces and both plants have a long tradition of use in the region, also for related medicinal purposes.

According to the South African Biodiversity Act (which implements the CBD in South Africa) a company needs a permit of the Government to do research with commercial intent on, or patent the use of, genetic resources occurring in South Africa. Such a permit can only be obtained if a benefit-sharing agreement has been negotiated. The Department of Environmental Affairs of the South African Government confirmed to Natural Justice and the Berne Declaration that Nestlé has never received the permits to use these South African genetic resources. Therefore the patents of Nestlé and the research on which they are based are in contradiction with South African Law and the CBD. The Department of Science and Technology's National *Indigenous Knowledge Systems* Office has also been approached given their mandate to safeguard the interests of indigenous communities and they are currently considering the nature of their involvement.

Nestlé's holds a 30.5% participation in L'Oréal (the biggest cosmetic producer worldwide) and 50% in Innéov, a joint venture with L'Oréal, which could explain the company's interest in skin and hair care products. "Nestlé builds its new business on illegally accessed material, precluding South Africa of their rightful share of benefits. Such illegal behaviour must no longer be supported by the patent system and tolerated by our governments," says François Meienberg of the Berne Declaration.

Over the last few years CBD member states have been negotiating a new protocol to ensure compliance with the rules of Access and Benefit Sharing under the CBD

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and the corresponding national laws. “The Nestlé case highlights the urgent need of a new protocol that prevents the misappropriation of genetic resources and associated traditional knowledge. Only a strong protocol will protect developing countries from an unlawful exploitation by companies,” says Kabir Bavikatte from Natural Justice.

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The briefing paper, “Dirty Business for Clean Skin: Nestlé's Rooibos Robbery in South Africa” can be found at www.naturaljustice.org or www.evb.ch

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