

Response by Natural Justice and the Berne Declaration to the statements of Nestlé on the Rooibos Robbery Case.

21 June 2010

1) Argument by Nestlé *Nestlé spokesman Ravi Pillay said the company had not carried out any research activities in South Africa on these plants and had not collected any materials in South Africa. "South African suppliers provided Rooibos and Honeybush extracts and material to two Nestlé research facilities in Switzerland and France, which used it as part of their fundamental research programme in bioactive ingredients" he said.*

Reply Natural Justice/Berne Declaration: In the Convention on Biological Diversity (CBD) and in the South African Biodiversity Act the trigger for the need for Prior Informed Consent and the Sharing of Benefits is the use of a genetic resource (or indigenous biological resources in South African law) no matter where the use takes place. In South African law indigenous biological resources are defined, among others, as those that historically have come from South Africa, and not as those that have been collected in South Africa. It is therefore irrelevant whether Nestle accessed the material directly in South Africa or through a supplier abroad. The fact is that Nestle engaged in bioprospecting with commercial intent on South Africa's genetic resources without the bioprospecting permit required by law.

That Nestle has accessed the material through a South African exporter does not exempt them from having to obtain a bioprospecting permit. In addition, the South African exporter would have to obtain an export permit, if the genetic resource is to be used for bioprospecting. Therefore the onus clearly falls on Nestle to inform the exporter of its intent to use the genetic resources for bioprospecting.

Nestle has an obligation to verify if the exporter had the necessary permits to export the plant extract and material for the purpose of bioprospecting. This obligation is also explicitly mentioned in the ABS-Management Tool, published by the Swiss State Secretariat for Economic Affairs ["Does provider have right to grant access?"]. If Nestlé uses genetic resources accessed by an exporter without the necessary permit, it could be seen as receiving stolen goods. The behaviour of Nestlé is also in contradiction with its own business guidelines¹ and supplier guidelines which highlights the importance of respecting national law as well as ensuring that its suppliers respect national law.

¹ <http://www2.nestle.com/CSV/CreatingSharedValueAtNestle/Pages/CreatingSharedValue.aspx>

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2) Argument by Nestlé: *Pillay said Nestlé's subsidiary Nestec had, following research, filed several patents in Switzerland to protect its research results, which showed potential benefits for consumers. "Nestec has not filed any patent relating to the plants themselves, or extracts of the plants."*

Reply Natural Justice/Berne Declaration: The first claim in two of the patents reads: *"Use of a composition comprising [Rooibos/Honeybush] or an extract thereof (...) for improving skin or hair health (...)." In two other patents the first claim reads: "An orally ingestible composition comprising [Honeybush/Rooibos] or an extract thereof and at least one prebiotic."* Nestlé clearly claims the specific use of extracts of the plants and the extracts themselves in combination with prebiotics. In the description of patent WO 2010/000579 Nestlé write: *"One typical example of an extract of *Asphalatus linearis* [Rooibos] that can be used in the framework of the present invention is rooibos tea."*

However, the central question here is not the exact wording of patent claims and whether the claims include the extract itself. The CBD and the South African Biodiversity Act refer to the use of a genetic resource. There is no doubt that rooibos and honeybush have been used to engage in the research necessary to file the patents. Therefore the patents are proof that Nestle engaged in bioprospecting in a manner that is in conflict with international and national law. In some jurisdictions, such as South Africa's, this could result in the automatic refusal of granting the patent.

3) Argument by Nestlé: *"Nestlé has not made any commercial use of these patents, and has no plans to do so in the near future" Pillay said. He said that should Nestlé decide to make commercial use of these patents then it would of course fully comply with the benefit-sharing provisions of the South African Biodiversity Act.*

Reply Natural Justice/Berne Declaration: This answer shows a fundamental misunderstanding of the current law. The South African Biodiversity Act is very clear that before a company engages in bioprospecting it would require a bioprospecting permit, which includes a benefit sharing agreement. The Biodiversity Act explicitly states that commercialization includes, among other, the following activities in relation to indigenous biological resources: *"the filing of any complete intellectual property application, whether in South Africa or elsewhere."*

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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 demand 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**