

**National Group:** BELGIUM

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## **Questionnaire February 2010**

**Special Committees Q 94 – WTO/TRIPS and Q166 – Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore**

**on the**

**Requirement of indicating the source and/or country of origin of genetic resources and traditional knowledge in patent applications**

### **Questions**

**1)** Is there a legal requirement in your country that the source and/or country of origin of biological/genetic resources and traditional knowledge must be indicated in patent applications for inventions based on such biological/genetic resources or traditional knowledge? If yes, please quote the corresponding text from the law or regulations and reply to the following questions, if applicable:

There are in fact two different provisions in the Belgian Patents Act which refer to biological resources. There is a general provision in Article 1, para 2, according to which:

*“Deze wet doet geen afbreuk aan de in België uitvoerbare bepalingen van een verdrag. Dit impliceert met name de eerbiediging van de volgende internationale teksten: het Verdrag inzake biologische diversiteit opgemaakt te Rio op 5 juni 1992, de Overeenkomst inzake handelsaspecten van de intellectuele eigendom opgemaakt te Marrakech op 15 april 1994 en het Europees Verdrag voor de rechten van de mens van 4 november 1950.”*

*“La présente loi ne porte pas atteinte aux dispositions d'un traité ou d'une convention applicable en Belgique.*

*Cela implique le plein respect notamment des textes internationaux suivants: la Convention sur la diversité biologique conclue à Rio le 5 juin 1992, l'Accord sur les aspects des droits de propriété intellectuelle qui touchent au commerce conclu à Marrakech le 15 avril 1994 et la Convention européenne des droits de l'homme du 4 novembre 1950."*

*"This statute is without prejudice to provisions applicable in Belgium of any Treaty: This implies more in particular the respect of the following International acts: the Convention on biological Diversity done at Rio on June 5, 1992, the Agreement on Trade-Related Aspects of Intellectual property made in Marrakesh on April 15, 1994 and European Convention on Human Rights of 4 November 1950."*

A more specific provision regarding the disclosure of the geographical origin of biological material is laid down in Article 15, para 1, sub 6, according to which:

*"§ 1. De octrooiaanvraag moet bevatten:*

*[...]*

*6) een vermelding van de geografische oorsprong van het biologisch materiaal van plantaardige of dierlijke oorsprong op basis waarvan de uitvinding ontwikkeld werd, indien deze bekend is. De Koning kan de toepasselijke voorwaarden en uitvoeringsmaatregelen vastleggen."*

*"§ 1er. La demande de brevet doit contenir :*

*[...]*

*6) une mention de l'origine géographique de la matière biologique d'origine végétale ou animale à partir de laquelle l'invention a été développée, lorsque celle-ci est connue. Le Roi peut fixer les conditions et les mesures d'exécution applicables."*

*"Art. 15 §1 (6): [the patent application shall contain:] a declaration of geographical origin of the biological material of plant or animal origin on the basis of which the invention has been developed, if known. The King can determine the applicable conditions and implementing regulations."*

- a) Are these regulations found in patent law, general IP laws or in legislation implementing the Convention on Biological Diversity?

In the Belgian Patents Act, Article 1, para 2 and Article 15, para 1, sub 6.

- b) What "triggers" the disclosure requirement, i.e. how close must the relationship of the invention to the biological/genetic resource be to require disclosure?

The statute is not entirely clear on this issue. The statute refers to the origin of the biological material on the basis of which the invention has been developed. This requirement seems to be more precise than the general recital 27 of Directive 98/44/EC on which the present provision in the Belgian Patents Act is based, according to which the origin of the biological material on which an invention is based should be disclosed if known. The wording "*on the basis of which the invention has been developed*" in the Belgian Patents Act seems to be more precise than the wording "on which the invention is based" in Directive 98/44/EC.

The explanatory memorandum pointed out potential difficulties in interpreting the provision of Article 15, para 1, sub 6, and urged for implementing regulations to make this requirement more concrete. Hitherto, no implementing regulations have passed the legislative process.

- c) Is it clear what the concept of “source” or “country of origin” or “country providing the resource”, and “based on genetic resource/traditional knowledge” or “derived from biological resource and associated traditional knowledge” means and what information must be included in the patent application?

In the absence of implementing regulations in the Belgian Patents Act, these concepts have not been further clarified than what the statute says.

- d) Is the disclosure requirement limited to biological/genetic resources or traditional knowledge of your country only or is it applicable also to biological/genetic resources or traditional knowledge obtained or obtainable from other countries and geographical areas?

See sub c)

- e) Are there ways to complement, correct or amend the corresponding text in the patent application after filing?

See sub c)

- f) Is disclosure of “prior informed consent” and/or agreements on “fair and equitable benefit-sharing” required?

This is not required by the Belgian Patents Act.

- g) Are human genetic resources treated differently or the same way as animal or plant genetic resources falling under the CBD?

The Belgian Patents Act does not refer to the separate category of “*human genetic resources*” in terms of disclosure of geographical origin, but refers only to “*plant or animal material*”. As far as patentability of human genetic material is concerned, the Belgian Patents Act follows the provisions of Article 5 of Directive 98/44/EC literally.

- h) Is traditional knowledge properly defined, and is the source of traditional knowledge to be indicated only if it is connected to genetic/biological resources (e.g. falling under the CBD) or in general?

No requirements pertaining to traditional knowledge in the Belgian Patents Act.

- i) Are sanctions foreseen for non-compliance (e.g. patent invalidation, revocation or lack of enforceability, patent transfer to the owner of the resource, fines, criminal sanctions etc.)?

No sanctions have been foreseen in the Belgian Patents Act. In earlier draft bills such sanctions were foreseen, but these have not survived the legislative process. The aim of the current provision is predominantly to inform third parties of the use of the material and its geographical origin.

- j) Does the law/regulation indicate that access to a genetic/biological resource would not mandate a disclosure in the patent application, if such access had occurred prior to a particular date, e.g. prior to the date of entry into force of the CBD?

No specific provision in the statute to that effect, but Article 15, para 1, sub 6 has been incorporated in the Belgian Patents Act by law of 28 April 2005, entering into force on 23 May 2005. For patent applications filed prior to that date, the requirement was not in place in any event.

- 2) Please indicate your *experience* with the application of the legal requirement as listed under 1) when filing and prosecuting patent applications in your country.

The form to be used when filing a Belgian patent application mentions under section IX the disclosure of biological origin and requires the applicant to mention the geographical origin as referred to in Article 15, para 1, sub 6, or to tick the box that the origin is not known.

- 3) Please give *statistical data* on the number of applications mentioning source and/or country of origin of genetic resources and/or traditional knowledge, following the legal requirement as listed under 1) in your country. If such data are not available, please give an estimate of the number of such applications.

Structural statistical data are not available at the moment.

- 4) Please indicate whether *administrative or judicial decisions* on the application of the legal requirement as listed under 1) are available. If yes, please provide the text of such decisions.

We are not aware of any administrative or juridical decisions on the application of the requirement as set out in the report.

- 5) If there is no legal requirement of indicating the source and/or country of origin of genetic resources and/or traditional knowledge in patent applications for inventions based on such genetic resources or traditional knowledge in your country: Do you know of any *project of law* in your country dealing with the topic? If yes please provide the corresponding text and review it for the questions a) to i) as under 1). Please include also links to websites which would allow us to follow the progress on these projects of law.

## Procedure

It would be most helpful if the National Groups would fill out the Questionnaire and send in their answers to the General Secretariat of AIPPI by **12 March 2010** to:

[f.martin@aippi.org](mailto:f.martin@aippi.org)

Please use a separate sheet for indicating your answers or include the answer in the present text at the end of each question.

For inquiries, please contact any of the chairs of Q94 and Q166:

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