National Group: [THAILAND]

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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:

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

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?
e) Are there ways to complement, correct or amend the corresponding text in the patent application after filing?
f) Is disclosure of “prior informed consent” and/or agreements on “fair and equitable benefit-sharing” required?
g) Are human genetic resources treated differently or the same way as animal or plant genetic resources falling under the CBD?
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?
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.)?
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?

Answer : There is no requirement under the Patents Act or in any other legislation in Thailand that the applicant for a patent must identify the source and/or country of origin of the biological/genetic resources or traditional knowledge.

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.

Answer : Not applicable.

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.

Answer : Not applicable.

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.

Answer : Not applicable.

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.

Answer : As already stated in 1 above, there is no legislation in Thailand that requires patent applicants to identify the source and/or country of origin of the biological/genetic resources or traditional knowledge. However, there is legislation which requires owners registering plant varieties to provide details of the origin of the plant material or the genetic material.

In compliance with Article 27(3) of TRIPS Thailand opted to provide for the protection of plant varieties by adopting a sui generis system. Nevertheless, the Plant Varieties Protection Act, B.E. 2542 (1999) (hereinafter "PVP Act") provides patent-like rights to breeders and developers of plant varieties. Section 19(3) of the PVP Act requires applications to register a new plant variety to provide details of the origin of the new plant variety or the genetic material.

b) There is no trigger. Disclosure is automatic. Section 19(3) of the PVP Act simply states the applicant shall provide:

> "details showing the origin of the new plant variety or the genetic material used in the breeding of the variety or in the development of the new plant variety, including its breeding process, provided that details enabling clear comprehension of such process shall also be included"

c) It is not clear what the concept of "origin" is as no clarifying information is provided in the Act. Section 19(3) of the PVP Act simply states the applicant shall provide:

> "details showing the origin of the new plant variety or the genetic material used in the breeding of the variety or in the development of the new plant variety, including its breeding process, provided that details enabling clear comprehension of such process shall also be included"

d) It is not limited to Thailand.

e) Not applicable

f) There is no general requirement for a right holder to obtain the prior informed consent of the authority representing the local community if a plant variety is developed from traditional varieties.

However, plant varieties are divided into (1) general domestic plant varieties and wild plant varieties, and (2) local domestic plant variety. For (2), the PVP Act states that where a "plant variety only exists in any particular locality and has been conserved or developed exclusively by a particular community, that community shall have the right to submit, to the local government organization in whose jurisdiction such community falls, a request for initiating an application for registration of the local domestic plant variety in the name of such community" (Section 45). Therefore, while no prior informed consent is necessary, this is because the right to obtain protection for local domestic plant varieties is limited to the local community.

Thailand provides for benefit sharing, but this is limited to profit sharing.

For general domestic plant varieties and wild plant varieties, any person who "collects, procures, or gathers" of such plant varieties or any part of such plant varieties for the purposes of variety development, education, experiment or research for commercial interest" is required make a profit-sharing agreement with the income accruing to the Plant Varieties Protection Fund (Section 52 PVP Act).

Section 52 of the PVP Act provides that the general domestic plant varieties and wild plant varieties, the profit-sharing agreement shall have the following particulars:

- the purposes of the collection and gathering of the plant variety;
- the amount and quantity of samples of the plant variety;
- the obligations of the person to whom permission is granted;
- the intellectual property rights in the products which result from the
- development, study, experiment or research of or into the plant variety and
- which are derived from the use of the plant variety under the agreement;
- the amount or rate of, or the term for, the profit-sharing agreement in respect
- of products derived from the use of the plant variety;
- the duration of the agreement;

- the terms for revocation of the agreement;
- the relevant dispute settlement procedure; and
- other particulars prescribed in the Ministerial Regulation.

For local domestic plant varieties, any person who “collects, procures or gathers” such plant varieties or any part thereof for the purposes of “variety development, education, experiment or research for commercial interest” is required to make a profit-sharing agreement in relation to the profits derived from the use of such local domestic plant variety (Section 48 of the PVP Act).

Under Section 49 of the PVP Act, the profits derived from the use of the local domestic plant variety are to be allocated in the following manner:

- 20 per cent to the person who conserves or develops the plant variety;
- 60 per cent to the community as its common revenue; and
- 20 per cent to the local government organization, farmers' group or co-operative that makes the agreement.

g) Not applicable. We should note that that Patents Act specifically prohibits patents on plants or animal and plant extracts (Section 9(1), Patents Act B.E. 2522 (1979)). However, some applicants have been able to patent chemical derivatives from plants.

h) Thailand has a sui generis regime to protect traditional knowledge in relation to traditional medicine, namely the Act on Protection and Promotion of Traditional Thai Medicinal Intelligence B.E. 2542 (hereinafter referred to as “PPTTMI Act”).

There is no direct definition of traditional knowledge is not defined directly, but it is instead defined indirectly. The Act protects ‘formulas of traditional Thai drugs’ and ‘texts on traditional Thai medicine’ (Section 14 of PPTTMI Act).

“Text on traditional Thai medicine” is defined as “the technical knowledge concerned with traditional Thai medicine which has been written or recorded in Thai books, palm leaf, stone inscription or other materials or that have not been recorded but passed on from generation to generation” (Section 3 of PPTTMI Act)

“Formula of traditional Thai drugs” is defined as “a formula stated as the production process and ingredients which contain Thai traditional drugs, no matter what form the ingredients are.” (Section 3 of PPTTMI Act).

In general, “traditional Thai medicinal intelligence” means “the basic knowledge and capability concerned with traditional Thai medicine.” “Traditional Thai medicine” is defined as “the medicinal procedures concerned with examination, diagnosis, therapy, treatment or prevention of, or promotion and rehabilitation of the health of humans or animals, obstetrics, traditional Thai massage, and also includes the production of traditional Thai drugs and the invention of medical devices, on the basis of knowledge or text that has been passed on from generation to generation.” (Section 3 of of PPTTMI Act).

i) Under the PVP Act, penalty for not complying with the profit-sharing agreement is a term of imprisonment exceeding two years or to a fine not exceeding four hundred thousand Baht or both (Section 66).

j) Not applicable.

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:

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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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