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WIPO/GRTKF/IC/1/7
ORIGINAL: Spanish
DATE: April 26, 2001

WORLD INTELLECTUAL PROPERTY ORGANIZATION
GENEVA

INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE

First Session
Geneva, April 30 to May 3, 2001

DOCUMENT OF THE HOLY SEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE

Document submitted by the Permanent Observer Mission of the Holy See

1. In a Note dated April 25, 2001, the Permanent Observer Mission of the Holy See to the United Nations in Geneva submitted to the World Intellectual Property Organization (WIPO) a document entitled "Document of the Holy See on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, for the First Session of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore."

2. The Note included the request that the document be made available, as a Member State paper, to the participants at the first session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore.

3. The document is reproduced and published as an Annex.

4. The Committee is invited to take note of this document and the Annex to it.

[Annex follows]

DOCUMENT SUBMITTED BY THE HOLY SEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE FOR THE FIRST SESSION OF THE GOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE

Document presented by the Holy See

1. The purpose of this document from the Holy See is to contribute to the implementation of the mandate of the Intergovernmental Committee on biological resources, traditional knowledge and folklore, following two directions of thought. First it contains some considerations on intellectual property in general and on the problems that will be considered by the Committee, which are located at the higher legal level of fundamental human rights (paragraphs 2 to 9). Secondly, following on from the above, some suggestions are made for the guidelines to be observed in the work that will be undertaken as from the first session (paragraph 10).

2. The *raison d'être* of intellectual property protection systems is the promotion of literary, scientific or artistic production and inventive activity for the sake of the common good. That protection officially attests the right of the author or inventor to recognition of the ownership of his work and to a degree of economic reward, at the same time as it serves the cultural and material progress of society as a whole. The ultimate cause that intellectual property protection works for is the recognition of the dignity of man and his work, in its double dimension, namely as a medium of expression and growth of the individual personality and as a contribution to the common good.[1]

3. The classical protection framework for intellectual rights[2] always has as its ultimate reference point an innovative intellectual or artistic activity that is attributable to a specific natural person or legal entity and is definable and registrable by means of a series of technical means (writing, registration, multimedia dissemination, etc.). Such a legal system is not well suited, however, to the protection of any moral or economic right that may be derived from innovative or creative activities developed and refined throughout history, which are like the social manifestation of the work of several generations and a genius peculiar to communities, peoples or families. The intellectual manifestations of tradition or folklore nevertheless deserve recognition, because they correspond in all respects to the substantive concepts that afford entitlement to "classical" protection of intellectual property, as on the one hand they constitute a means of constructing and projecting the identity of the members of the

[1] Universal Declaration of Human Rights, Article 27, second paragraph. International Covenant on Economic, Social and Cultural Rights, Article 15.1(c). Cf. John Paul II, Encyclical *Laborem exercens* "LE," Vatican City, 1981, Nos. 5, 6, 9 and 15.

[2] Berne and Paris Conventions and other treaties administered by WIPO.

community concerned, and on the other they are a common asset of that same community, which has grown with small, anonymous contributions over a great many generations.[3]

4. The ever-strengthening bond between applied science and industry, which is particularly strong in certain leading sectors (industrial use of applications and results of knowledge of the structure of matter and life mechanisms) has caused "intellectual property" to evolve from an economic asset and remuneration for individuals (men or women) into a capital asset or production factor. Thus the capacity of companies for scientific research (undertaken on their own or in association with academic bodies) and the corresponding legal protection of the intellectual heritage that results have become one of the most important parameters governing their economic strength and their ability to attract investment.

With regard to the use and exploitation of biological resources, applied microbiological science has highlighted the great social usefulness of those resources and of the products resulting from their industrial transformation, above all in the medical and pharmaceutical field, but also in other areas of biochemistry. This potential has in recent decades brought about a more and more intensive search for new biological resources and genetic materials,[4] motivated more often than not by the aim of developing derivatives offering a favorable cost-benefit ratio.

At the same time, the administrative practice of a number of industrialized countries concerning patents and the corresponding case law have evolved into a broad invention concept that encompasses not only novel creations of the human mind, but also the discovery of genetic material existing in nature, provided that it is possible to replicate it using a biochemical process – a sort of reverse engineering of the complex results of natural evolution.[5] This legal development has made it possible to patent genetic components of plants, animals and human beings that possess biochemical or pharmaceutical properties of particular usefulness.

5. Many of the biological resources that possess great economic and social usefulness are located in territory inhabited since time immemorial by native communities within the jurisdiction of countries different from those in which the industrial development of the genetic material takes place and the patents are obtained. At the same time, it happens that those native communities already have some knowledge and make use of some of the biological properties covered by the patent. It has also to be recognized that ancestral concern for the soil on the part of indigenous communities generates a right to its use and usufruct,

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[3] Cf John Paul II, LE, Nos. 10 and 3. Cf also United Nations Conference on Environment and Development, Convention on Biological Diversity (CBD), Rio de Janeiro, June 1992, preamble, paragraph 11; International Labour Organization (ILO), C-169, Convention on Indigenous and Tribal Peoples, 1989, Articles 4, 1; 5, (a)-(b); 7, 1; etc. It is also important to be aware, in terms of fundamental principles and where appropriate, of the results of the work of the Working Group on Indigenous Populations of the Human Rights Commission Sub-Commission on Prevention of Discrimination and the Protection of Minorities (UN-ECOSOC).

[4] Cf. WIPO document WIPO/GRTKF/IC/1/3, March 16, 2001, "Matters Concerning Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore – An Overview," Annex 3, Prevalent Use of Relevant Terms.

[5] Cf. Directive 98/44/EC of the European Parliament and Council of 6 July 1998 on the legal protection of biotechnological inventions, Articles 3 and 5; WIPO/GRTKF/IC/1/3, March 16, 2001, "Matters Concerning…," paragraphs 55 to 58.

and it has also to be recognized that this right extends also to the plants and animals that go with the territory. The biological environment tends in addition to be closely associated with the culture of those peoples, and constitutes an integral factor of their identity and social cohesion. Such rights of native populations in the land and its fruits exist, and have to be protected, even where modern systems of property protection — both movable and immovable property as well as intellectual property, do not contain elements that allow it to be recognized and protected to a sufficient extent.[6]

Other biological material susceptible of industrialization forms part of the genetic heritage of men and women, and especially the members of those native communities which, owing to their peculiar lifestyles, have in the course of generations developed specific genetic features. Any attempt at economic exploitation of such resources has to be strictly regulated, in order always to ensure full respect for personal dignity and freedom, which includes the right to be fully informed on a given project, the right to fair participtionin the benefits, and also the right to object to the use of resources derived from their own body.[7]

6. Parallel to the problems of the rights deriving from the use and appropriation of genetic resources and associated knowledge, the interaction between industrial companies and native populations raises the problem of defining and protecting folklore in order to avoid a situation where folklore creations become a commodity capable of being used by anyone at the expense of the interests and rights of the communities with which they originated. The disciplines of intellectual property and labor law have created a network of legal and social institutions whose aim is to defend the rights of individual authors, composers and performers to keep pace with the constant growth of corporate activity in the dissemination of artistic creations, but until now they have not succeeded in creating sufficient elements with which to protect the rights deriving from foklore creations.

7. In the case of the copyright law and patent law of the period before the 1980s, the two types of legal claim that the intellectual property system had to balance against each other were the right of the author or inventor to recognition of his authorship of the work and to remuneration on the one hand, and on the other hand the interest of society in stimulating intellectual innovations that were of general usefulness. The new legal panorama created, among other things, by the linking of intellectual property protection to international trade policies and by the extension of industrial property to certain scientific discoveries,[8] includes a wider range of rights and interests.

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[6] Cf. ILO, C-169, Articles 13 to 18. Cf. Papal Council "Justice and Peace" "Towards Better Land Distribution — the Challenge of Agrarian Reform," Vatican City 1997, paragraph 11. Papal Council "Justice and Peace," Indigenous Peoples in the Teaching of John Paul II, Vatican City 1993, p. 22.

[7] Universal Declaration on the Human Genome and Human Rights, UNESCO, November 12, 1997, Articles 4, 5(b) and 10; Convention on Human Rights and Biomedicine, Oviedo, April 4, 1997 (Council of Europe, STE, paragraph 164), Article 5.

[8] Marrakesh Agreement Establishing the World Trade Organization, Annex IC: Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Marrakesh, April 15, 1994; European Directive 98/44/EC, Articles 3 and 5, etc. Cf. also WIPO/GRTKF/IC/1/3, March 16, 2001, "Matters Concerning …," paragraphs 55 to 61.

What are at stake are the rights of the native populations that have developed the traditional knowledge and the expressions of foklore or who occupy the territories from which the genetic material comes, the right of the countries to the resources associated with biological diversity, the right of the inventor or discoverer to remuneration for any intellectual value that he may have added, the possible rights and interests of companies, society's right to or interest in the stimulation of inventive activity and the development of science and the arts, and finally a more general right of all mankind to be assured that the products of scientific progress will serve everyone equally and not only the sectors with the greatest acquisitive potential.[9] The ethical challenge to be met is therefore that of reconciling the various rights and interests at stake in such a way that the legitimate economic interest does not compromise higher values such as the social function of inventions and knowledge and the rights of the peoples with which the knowledge and resources originate.

8. The Holy See advocates a unitary vision of law that is structured on the basis of fundamental human rights. According to that vision, the value of justice in any set of enactments has to be measured by the possibility of perpetuating it and reconciling it with such human rights. According to that conception, the correct determintion of the scope of ownership rights has to be made in relation to another, higher principle of justice, which is the universal destiny of the products of creation.

All men and women of all nations are entitled to have whatever they need for their subsistence and personal advancement, taking it from all the resources available at any given time in history. The provisions protecting private property cannot therefore ever lose sight of the common destiny of all goods, so much so that it has to be said that all private property is subject to a social encumbrance. Consequently, should there be an institutional conflict between acquired private rights and overriding community demands, it is for the public authorities to set about resolving it with active involvement on the part of individuals and social groups.

Private property, ultimately, is for no one an unconditional, absolute right but rather, and above all, an instrument with which to achieve effective access to property destined for the whole of mankind, ensuring at the same time that all individuals and all families have their essential environment of freedom and just autonomy in the face of all kinds of totalitarian tendency — both that which comes from the State and that which is attributable to a blurred, economistic view of life.[10]

9. It may be said that the classical intellectual property system, under the industrial property (patent) heading as well, included in its original conception the notion of a social encumbrance, manifested in the substantive and time limitations on the rights granted, and, in the case of patents, in the discretion of governments with regard to the choice of the industrial

[9] The latter point is the central theme of the controversy surrounding access to drugs and their connection with intellectual property, a matter that is not directly related to the purpose of the Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore.

[10] C.f. John Paul II, Encyclical *Centesimus Annus* (CA), Vatican City, 1991, paragraph 6 and 30; LE, paragraph 14; Paul VI, Encyclical *Populorum Progressio* (PP), Nos. 22 and 23; Vatican Council II, Pastoral Constitution *Gaudium et Spes* (GS), Vatican City, 1965, Nos. 69 to 71.

sectors to be protected, the free determination of the scope of the conditions of patentability, the various options for opposing patents and the compulsory license regime.[11]

On the other hand, the present legislative tendency to include all industrial and commercial activities in the patent regime, together with the uniformization of intellectual property laws, brings with it the risk of total abandonment of the social function of intellectual property and of ever more emphasis on the immaterial-producer-good aspect, the latter having certain legal connotations that even go beyond the protection of the ownership of the material goods: the latter grants only the power to object to third-party ambitions to exercise prerogatives of ownership on goods of which one is the owner. Industrial property, meaning the patent, on the other hand, tends to grant, throughout the lifetime of the patent, the right to control each and every act of whatever person that entails a use of the patented knowlege, in any place within the jurisdiction or jurisdictions in which the patent is enforceable, and regardless of the subject matter affected by those acts or the social environment in which they take place. In addition, from the point of view of economic-dynamics, patents constitute a brake on free competition, manifested in the grant to their owners of discretionary power to control or charge for acts involving the content of the patent.

For these reasons, and with a view to ensuring that intellectual property always serves the common good, case law and administrative practice should abide by prudent and restrictive rules in relation to the extension of their scope, allowing such extension only in cases of proven social usefulness. At the same time there is an urgent need to preserve the possibility of invoking where appropriate the "social encumbrance" mentioned earlier through the application, subject to respect for the rule of law, of the moderating elements devised by legal science and practice, such as compulsory licensing and the exclusion of protection for reasons of public policy and morality in the case of patents, or reasonable exceptions to copyright.[12]

10. With regard to the specific work of the Intergovernmental Committee, it would be desirable that new legal machinery be successfully created that is fully integrated in and consistent with the international provisions currently in force, and imposes on the legislation of all Member States of WIPO certain minimum protection requirements for those sectors whose rights and interests are not fully catered for in systems now in force.

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[11] On the application of the "social encumbrance" concept to intellectual property, cf. John Paul II, message to the Jubilee 2000 debt campaign (23 September 1999), *Osservatore Romano*, September 25, 1999, p. 5; CA, Nos. 31 to 33; Message to the United Nations Special Session on Development (UNSSD) (August 25, 1980), paragraphs 7 and 2, *Osservatore Romano*, August 27, 1980.

[12] These legal institutions have also been embodied in the provisions of the TRIPS Agreement, see Article 31 on compulsory licensing, footnote 6 to Article 28 and Article 6 on the exhaustion of rights, Articles 7 and 66.2 on the promotion of development and technology transfer, Article 27.2 on the exclusion of patents on grounds of morality or public policy and Article 13 on reasonable exceptions to copyright.

In the case of biological resources, the Holy See considers that the proposed tasks (tasks A.1 to A.4) as a whole should result in the drafting of guidelines that guarantee the following objectives:

(a) acceptance of the institution of the informed, free consensus of persons, peoples[13] and States[14] as a prerequisite of patenting and/or defense of industrial secrecy or trade secrets relating to such resources.

(b) achievement of equitable economic participation of native populations in the benefits deriving from the commercial exploitation of biological resources.[15]

(c) in the case of human genetic resources obtained from populations or individuals, the integration in the legal institutions of intellectual property, in the appropriate manner, of international designations already existing that relate to biomedicine and human rights.[16]

(d) assurance that patents for biological discoveries do not constitute an undue obstacle to subsequent research and scientific teaching.[17]

In the case of the protection of traditional knowledge, the results of work objectives B-1 to B-4 should be the promotion of effective means of ensuring respect for the collective ownership of traditional knowledge and full recognition and enforcement of the rights resulting from existing common law systems, also where appropriate going beyond the actual territorial scope or national borders.[18]

[13] ILO, C-169, Articles 13 and 15; CBD, Article 8(j).
[14] CBD, Article 15.5.
[15] CBD, Article 8(j), in fine. Cf WIPO/GRTKF/IC/1/3, March 16, 2001, "Matters Concerning…," paragraphs 42 to 47.
[16] Universal Declaration on the Human Genome and Human Rights, UNESCO, November 12, 1997, Articles 4, 5(b) and 10; Convention on Human Rights and Biomedicine-Oviedo, April 4, 1997 (Council of Europe, Ste No. 164), Article 5.
[17] Universal Declaration on the Human Genome and Human Rights, UNESCO, November 12, 1997, Articles 4 and 13 to 15. WIPO/GRTKF/IC/1/3, March 16, 2001, IV.A.4 Protection of Biotechnological Inventions, including certain related administrative and procedural issues, paragraphs 55 to 60.
[18] Cf WIPO/GRTKF/IC/1/3, March 16, 2001, "Matters Concerning…," paragraphs 63 to 87; ILO, C-169, Articles 5(b), 6(c), 7(1)and (4), 13(1), 23, 32.

For the purposes of the effective protection of knowledge and folklore creations, the intergovernmental group should concern itself with the updating of the model provisions drawn up by WIPO and UNESCO,[19] the drafting of indications *de iure condendo* on the protection of craft creations and the effective incorporation of both in national law (task C-1 and C-2).

Vatican City, April 24, 2001

[End of Annex and of document]

[19] UNESCO-WIPO Model Provisions (1982).