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INITIATIVES FOR THE PROTECTION OF HOLDERS OF TRADITIONAL KNOWLEDGE, INDIGENOUS PEOPLES AND LOCAL COMMUNITIES

Document presented by Mr. Atencio López, President of the Napguana Association, Panama

INITIATIVES FOR THE PROTECTION OF THE RIGHTS OF HOLDERS OF TRADITIONAL KNOWLEDGE, INDIGENOUS PEOPLES AND LOCAL COMMUNITIES[♣]

Since the establishment of what we now know as the "intellectual property system" just over a century ago, indigenous knowledge, which is rich in medicine, art, crafts, music, literature, etc. has been steadily marginalized, simply because it has to do with the collective rights of a people and because it does not have a known author or creator. This legal vacuum could be looked upon as the continuation of an unending genocide inflicted on indigenous peoples from time immemorial. One might think that our culture had been intended solely to give mankind its folklore image, to the extent of being catalogued as the heritage of that same mankind, with no recognition of its true origin.

We are living through a period of wholesale plundering or pirating of indigenous knowledge and products without any related benefits for our peoples. For instance, until quite recently the involvement of indigenous botanists and medicine men was considered retrograde in medicine, while today many of medicine's transnational pharmaceutical companies are investing large or smaller amounts of money to gain control of traditional indigenous medicine, and even registering sacred plants as if they have been developed in a laboratory. At the same time indigenous designs are gradually gaining a foothold in fashion and on the runways, but with alien labels or marks that have nothing to do with our peoples.

Finally, persons who have no connection with our peoples write, record and sell songs, legends and tales for commercial purposes with no concern for the copyright of the peoples affected. As a first step it is urgently necessary to put an end to this appropriation, which is virtually legalized in many countries, and for the governing body of intellectual property,

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[♣] This document reflects the author's opinion and not necessarily that of the World Intellectual Property Organization (WIPO).

namely WIPO itself, to introduce an international legal standard for the preservation of indigenous knowledge.

At the indigenous level, it was not until the eighth decade of this century that the subject began to be discussed and became a matter for concern, and only in very recent years that it has been subjected to analysis in various international forums and institutions. This in turn has led to a situation where we indigenous peoples do not agree on concepts, and it has been difficult to conform to the already firmly established precepts of WIPO, owing to the fact that our collective rights are denied us, or are a subject still unknown to us. This being the situation within the United Nations system in recent years, special attention has been given to the subject in such areas as the United Nations Development Programme (Conserving Indigenous Knowledge: Integrating two Systems of Innovation; study conducted by Rural Advancement Foundation International (RAFI) for the UNDP, 1994), the UN Commission on Human Rights (report by Erica-Irene Daes, "Protection of the Heritage of Indigenous Peoples," E/CN.4/sub.2/1995/26), UNESCO (Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions), the implementation of Article 8(j) and related articles of the Convention on Biological Diversity (CBD) and finally WIPO itself, summing up the debate on these matters, not to mention the interest also shown by the World Trade Organization (WTO). To my way of thinking, however, all appear still to have their own agendas, which is why we are not likely to move forward or to help indigenous communities unless we join forces and hold an international conference under the auspices of WIPO.

This is also a sign that our demands are being heeded, and it remains only for all interested parties sit round the same negotiating table and look for the best options for doing justice to indigenous peoples. We have to put our grievances and complaints to one side and involve ourselves in the search for solutions.

To do that it is important that we start by studying national legislation, which, if we look at it in detail, will at best afford us some leads or legal expedients for the protection of indigenous knowledge, whereupon we can evaluate the international indigenous steps that have already been taken in this field, including the following:

– "Map of the Lands of Indigenous Peoples—Kari-Oca Declaration" (Part 5, *Cultura, Ciencia y Propiedad Intelectual*, Rio de Janeiro, May 1992);

– Mataatua Declaration "On the Intellectual and Cultural Rights of Indigenous Peoples" (Aotearoa, June 1993);

– Declaration of Santa Cruz de la Sierra, Bolivia, Regional Meeting on Intellectual Property and Indigenous Peoples (September 1994);

– Declaration by the Indigenous Peoples of the Western Hemisphere on the Human Genome Diversity Project (Phoenix, Arizona, 1995);

– Ukupseni Declaration, Indigenous Workshop Meeting on the Human Genome Diversity Project (Kuna Yala, Panama, November, 1997).

In the light of the foregoing, we are extremely pleased to see that WIPO has shown an interest and has created a Division of Global Intellectual Property Issues, whose 1998-1999 work plan includes the sub-program "Intellectual Property Rights for New Beneficiaries," which has brought us together today. At this time it is important to proceed with a study of the system already established within WIPO in order that we may demand our rights.

Brief Analysis of the Situation in Central America

In the Central American context we can see how the countries of the region have been pressing ahead with the adoption of laws on intellectual property and copyright, some of them forced into it by the United States of America and others, as they do not wish to be kept out of those business activities which, at the international level, require respect for copyright.

However, there is no sign, in these preliminary drafts or laws, of parts dedicated to the protection of the copyright or intellectual property rights of indigenous peoples, or, if there is, they take the form of a mere mention in certain chapters without the development that they deserve. In this way the legislators have endeavored to disregard one of the features that Governments try to exploit the most in order to attract tourists or exalt nationhood. We regard this as being due to a lack of understanding or even a disregard for indigenous culture, not wanting to call it racism.

In 1970 and thereafter Guatemala, El Salvador, Honduras, Nicaragua and Costa Rica signed the Central American Convention for the Protection of Industrial Property, which came into force in 1975. Its approval had been a prerequisite of progress in the attainment of the objectives of the Central American economic integration program. The Convention contains provisions on use and on collective trademarks. It also covers the lapse of trademark ownership, the protection of trade names and advertising slogans or signs, unfair competition, indications of source, appellations of origin and matters concerning industrial registration. At present there is growing interest within the Central American Parliament in the establishment of a new Convention to encompass more countries, but there seems to be no political will to expedite such discussions, and the Convention will not come into being unless there is due consultation of the actual peoples concerned.

In Honduras the laws on the subject date back to 1919, one of them a patent law and the other a law on manufacturing trademarks. They were revised in 1936 to accommodate the copyright concept. Provisions on the subject were introduced in Costa Rica in 1896, when industrial property, in the form of trademarks, trade names, advertising slogans and inventions, was protected in the same way as copyright. In El Salvador the most recent law was passed on July 14, 1993, and is known as the Law on the Promotion and Protection of Intellectual Property. In Guatemala the legislation dates back to 1954, the protection for industrial creation being currently provided by the Law on Patents, Utility Models and Industrial Designs, approved in 1986.

As we said at the beginning, the countries of Central America have been under pressure from the United States of America, as they do not wish to be excluded from the commercial dealings taking place at the international level, such as the free-trade treaties, or the protection for North American videos, which circulate freely in the area without the authorization of the producers or legitimate distributors.

If one considers other related laws, there is ILO Convention 169, which only Costa Rica and Guatemala have ratified, while in other countries, notably Panama, it is a highly controversial subject, to such an extent that it has become a campaign banner for indigenous

peoples. The Convention on Biological Diversity is suffering the same fate, especially its Article 8(j), which is going to be delayed for some more time yet. The priority for Governments is the sale of package holidays in industrialized countries, or the declaration of free-trade areas, which give precedence to foreign authors' rights, as a result of which there are few or no laws that protect indigenous knowledge.

Intellectual Property Legislation in Panama

Panama has many local industries that are in fact subsidiaries of innovative transnational or multinational companies, and because of that has laws that promote innovation by controlling the copying of inventions, identification symbols and creative expressions. Those laws encompass four characteristic and separate types of intangible property, namely patents, registered trademarks, copyright and manufacturing secrets, in other words what we call "intellectual property."

There is not one single law on the protection of the collective rights or the knowledge of indigenous peoples, in spite of the fact that the 1983 Constitution, the one currently in force, still has the following in its Articles 77 and 86:

"Article 77. National culture is made up of the artistic, philosophical and scientific manifestations produced by the people of Panama throughout the ages. The State shall promote, develop and safeguard that heritage."

"Article 86. The State recognizes and respects the ethnic identity of indigenous national communities, shall implement programs for the development of the specific material, social and spiritual values of their individual cultures and shall create an institution for the study, preservation and disclosure of those cultures and their languages and for the promotion of the comprehensive development of the said groups of people."

Each of these constitutional provisions has remained a dead letter since the time of its implementation, in such a way that it has proved necessary to resort to other laws for the protection of indigenous knowledge; they include the following:

1. Law No. 41 of July 13, 1995, “Approving the Paris Convention for the Protection of Industrial Property of March 20, 1883, as revised at Brussels on December 14, 1990, Washington on June 2, 1911, the Hague on November 6, 1925, London on June 2, 1934, Lisbon on October 31, 1958, and Stockholm on July 14, 1967.”

In the case of Panama there has been a great deal of delay in the ratification of the Paris Convention and, as far as indigenous peoples in general are concerned, it does not in any way afford protection to indigenous knowledge, indeed it actually protects the individual rights of creators or inventors, and therefore not collective rights. For that reason we consider it inappropriate to look on this international instrument in expectation of immediate benefits for indigenous peoples until such time as it is brought up to date.

2. Law No. 15 of August 8, 1994, “Approving the Law on Copyright and Neighboring Rights and enacting other provisions.” This Law has been introduced against a background characterized by the majority of Central American countries speeding up the preparation of preliminary draft legislation on intellectual property and copyright in recent years, for fear of being left out of the most important developments in international trade. The area’s obsolete regulations did not win the blessing of the United States of America, which is the party with the greatest interest in respect for the intellectual property rights of its businesses and industry, regardless of whether or not the Central American countries protect the same rights of their own nationals, not to mention those of their indigenous peoples.

From its very first Article, it gives indigenous peoples no opportunity to claim collective rights in their art, science or musical compositions, which however the present Law is supposed to protect for the benefit of the country’s nationals.

According to its Article 1(11) , “‘Expressions of folklore’ means productions of characteristic elements of the traditional cultural heritage, constituted by the whole store of literary and artistic works created on the national territory by unknown or unidentified authors presumed to be nationals or to belong to the country’s ethnic communities, and which are

handed down from generation to generation and reflect the traditional artistic or literary aspirations of a community."

This is the only part that speaks of "ethnic communities"; it is not found anywhere else, which is a reflection of the lack of interest in legislating in favor of indigenous peoples, and a reflection also of the fact that there was never any consultation of those peoples.

Another of the Law's adverse aspects with regard to the protection of the collective rights of indigenous peoples is the part concerned with "Term and Limitations" (Articles 42 and 43).

"Article 42. Economic rights shall subsist for the life of the author and 50 years following his death and shall be transferred *mortis causa* in accordance with the provisions of the Civil Code. In the case of a work of joint authorship, the term shall be calculated from the death of the last surviving co-author.

"Article 43. In the case of anonymous and pseudonymous works, the term shall be 50 years from the year of the disclosure thereof, except where the author reveals his identity before the said term expires, in which case the provisions of the foregoing Article shall be applicable."

Apart from that Panamanian legislation provides solely that words, letters or signs "used" by indigenous groups may not be registered as trademarks or trade names. There is no mention of the groups' ownership, but only of use or mere possession, with the result that the art and the medicinal products or knowledge of indigenous peoples continue to be exposed to the risk of patenting by companies and persons alien to the community. Neither is it specified, when "groups" are spoken of, whether the reference is to communities, villages or regions, "indigenous groups" being likened to mere religious groups or non-profit associations. In other words, as in all Panamanian law, indigenous peoples do not themselves have legal capacity, which can be a limiting factor for the registration of their own knowledge or products by means of the legal machinery provided by Law No. 35 of March 10, 1996.

In order to deal with this, the Ministry of Commerce and Industries, acting through the Directorate General of the Industrial Property Registry, has made it known to the indigenous Kuna tribe that it has frozen all registrations of trademarks and patents that are detrimental to the interests or heritage of the Kuna people, giving priority to applications for the registration as trademarks of indigenous subject matter by the indigenous peoples themselves, thereby giving indigenous products the cultural, ethnic and commercial value that they deserve. In that case we would be speaking of collective and guarantee marks and the registration of indications of source and appellations of origin.

This indicates to us that, if an analysis were made and if the non-indigenous authorities competent in the field were asked for a pronouncement or explanation on the laws already existing in relation to the basic principles of WIPO, we might find certain legal provisions that could benefit us, without perhaps satisfying us completely, but nevertheless affording a window through which we could enter the complex world of intellectual property.

Finally, we hope that this Roundtable will not be just the first or the last, but rather that it will be the beginning of an exercise that will eventually satisfy the demands of our peoples by implementing a Convention dedicated to protecting the collective intellectual property rights of the indigenous peoples of the world.

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