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INTELLECTUAL PROPERTY RIGHTS IN GERMANY

(Submission by the Government of Germany)

The German Federal Government attaches great importance to the protection of genetic resources and natural diversity of species. The Convention on the Protection of Biological Diversity subjects access to the genetic resources to limiting regulations and contains mechanisms aimed at including the countries of origin of genetic resources in the benefits gained from the use of said genetic resources as well as at improving technology transfer.

These fundamental principles do not contradict the granting of industrial property rights. In the case of innovative new creations industrial property rights merely grant the right to their exclusive exploitation for a limited period of time, imitations of his/her invention. Both according to the European Patent Convention and the German Patent Act, the granting of patents for living material is essentially admissible. Biological invention, too, may be the object of the patent right. Patent protection does not apply to abstract biological material, and, of course, not to any natural occurring material, but rather to new techniques and technologies made available by the inventor. Hence, the patent provides protection against use of the invention by third parties, without granting the state a positive right to use. The patent holder, too, is obliged to observe the relevant legislation restricting the exploitation of an invention (for example, the Act on Genetic Engineering or the Prevention of Cruelty to Animals Act). According to articles 53 and 51 of the European Patent Convention the following can, for example, be subject to patent protection:

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- microbiological processes and the products thereof as well as micro-organisms (Art. 53 b 2 HS EPC),
- genetic processes, including those intended for the cultivation of plants and the breeding of animals,
- genetic information and the carriers thereof, such as individual genes, vectors or plasmids,
- plant materials such as cells lines or plant parts,
- chemical substances, immunogenes or enzymes derived from plants or animals,
- plants and animals with the exception of specifiable varieties or breeds.

Only the following are however excluded from the grant of patents:

- plant varieties: plant varieties are protected by a specific law, the Plant Protection Act; a main issue and a distinction with regard to patent rights is the provision that protected varieties can be used by third parties without restriction for breeding activities (the so-called breeders' exemption) (Art. 53 b of the European Patent Convention)

- animal varieties (breeds). No special protection exists in this respect; there is hence a gap in protection (Art. 53 b of the EPC).
- inventions the publication or exploitation of which would be contrary to ordre public or morality (Sect. 2, No. 1 Patent Act, Art. 53 a of the EPC),
- methods for treatment of the human or animal body by surgery, therapy or diagnostic methods (Sect. 5, subs. 2 of the Patent Act, Art. 52, para. 4 of the EPC; these processes are deemed not to be susceptible of industrial application),
- finally, it may be deduced from general principles that the patentability of human beings is forbidden.

If there are ethical misgivings with regard to individual inventions, these will be considered in the proscription of the patenting of unconscionable inventions that is contained in the law presently in force. Generally speaking, all inventions affecting plants or animals, without wishing to regard an individual case as unconscionable without considering its individual merits, can be seen as a step too far. Patent law cannot answer the question as to the social desirability of the new technology. Hence, neither can it prevent the exploitation of questionable inventions. On the contrary, publishing patent applications contributes to improved awareness of the technological developments and indirectly promotes the evaluation of the consequences of new technologies, without being able to afford such an evaluation itself.

Claims that the patenting of plants and plant variety protection in general, is detrimental to the Third World and will as such lead to an impoverishment of species diversity, are incorrect. The progress incultivation that is encouraged by industrial property rights may lead to an increase in varieties that can be used for commercial purposes without harming in any way the preservation or distribution of existing natural or traditional varieties and species. The cultivation of new and more efficient varieties enriches genetic diversity.

Developing countries, too, can benefit from this progress in cultivation methods without being forced to protect on their territories inventions that have been discovered in industrialized nations.

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Patent rights do not exclude individuals from developing countries from patent protection. They, too, have the right to acquire patent rights in accordance to the law of the country in question. Nevertheless, , traditional curative preparations and medication are usually not subject to patent protection due to want of novelty. Thus, patent rights are not detrimental to the preservation and conservation of traditional knowledge and practices.

It is, however, the task of the developing countries itself to protect the rights of its own nationals.

Access to genetic material depends on the prevailing ownership regulations of the member states. The use of patented genetic material for commercial purposes is usually prohibited unless the respective patent holder gives consent. The provisions of the Convention on the Protection of Biological Species Diversity merely substantiate national obligations. They do not affect any private rights. The transfer of technologies, including the transfer of technology which is subject to patent must, as is explicitly articulated in Article 15, paragraphs 4 and 5 of the Convention, be under conditions that have been laid down by mutual consent. The prerequisite for access to genetic resources is, in all cases, an agreement with the right holder. Furthermore, Article 16, paragraph 2 of the Convention explicitly emphasises that access to and transfer of patented technology is to be provided on the terms which recognise and are consistent with the adequate and effective protection of intellectual property rights.

The transfer of technology and the distribution of the benefits emanating from the use of genetic resources with developing countries must be left to the treaty arrangements by those contracting parties involved in the transfer of genetic resources. The transfer and distribution of benefits is hence to be on a voluntary basis and is to occur under market conditions.

As the Convention only contains the obligations of the contracting States, it is to be the task of the Federal Government to create the general conditions facilitating access to and transfer of technology specifically by the developing countries.

In the opinion of the Federal Government the following points have to be stressed in respect of the role of property rights:

- The inventor of an innovation that may be put to commercial use is to receive for a limited period of time, by virtue of the patent rights, or plant variety protection provisions, the right to prevent imitations of the invention that he/she discovered at considerable personal expense both financially and in respect of the time spent on the said invention.
- Patent rights and plant protection provisions in general, do not contradict the preservation of the natural preservation of the species.
- Patent rights do not grant their holder the right to prevent the state from using an invention but merely excludes the use of the said invention by third parties.
- Access to genetic material subject to patent protection is to be compatible with property rights and is to be arranged on a contractual basis with the consent of the owner.
- The transfer of technology and the distribution of benefits from the use of the said technology is to be on a voluntary contractual basis and shall take intellectual rights into consideration.
