

QUESTION 159

The Necessity And Possible Means Of Implementing The Convention On Biological Diversity Into Patent Laws

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Q159

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The Necessity And Possible Means Of Implementing The Convention On Biological Diversity Into Patent Laws

Resolution

AIPPI

Considering that:

- (a) The Convention on Biological Diversity (or Biodiversity), signed in Rio de Janeiro on 5th June 1992, came into force on 29th December 1993 and is applicable in a large number of States.
- (b) The objectives of this Convention, referred to as the Rio Convention, are the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the exploitation of the genetic resources in the world.
- (c) According to Article 16(5) of this Convention, "The Contracting parties, recognizing that patents and other intellectual property rights may have an influence on the implementation of this Convention, shall cooperate in this regard subject to national legislation and international law to ensure that such rights are supportive of and do not run counter to its objectives."
- (d) It is thus important to investigate the possible effect which patent laws might have on the implementation of this Convention, and to determine the position of the Convention in the patent system, in particular in view of the TRIPS agreement, signed on 15th April 1994, which is also applicable in a large number of States.

- (e) Article 27(3) of the TRIPS agreement contains provisions allowing national legislation to exclude from patentability plants and animals other than microorganisms, and essentially biological processes for the production of plants and animals, however States shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system.

Adopt the following resolution

1. The Rio Convention does not call into question the system of intellectual property rights, and especially the patent system, and is not an international instrument with higher authority than treaties or agreements relating to patents.
2. The grant of a patent does not create a right to use the patented invention. The mere existence of patent rights is not in conflict with the sustainable use of genetic resources and the fair and equitable sharing of the benefits arising out of the exploitation of these resources as stated below.
3. The Rio Convention and the TRIPS agreement each apply in their respective fields. In the case of any conflict arising in the interpretation or implementation of these treaties, the TRIPS agreement should take precedence, given that it was negotiated and signed after the Rio Convention had come into force.
4. The implementation of the Rio Convention must respect the principles laid down in the TRIPS agreement, in particular those of Article 27 on the patentability of inventions and Article 31 on use without authorisation of the right holder. The concern that patent rights could restrict pre-existing practices is ill-founded. Patent rights cannot validly cover such practices or naturally occurring biological material as such in its natural state.
5. Absence of patent protection (or plant variety protection) in Rio Convention Member States for inventions listed in Article 27 of the TRIPS agreement would not facilitate the implementation of this Convention and would have the effect of weakening rather than strengthening it. Effective protection for the inventions in question provides the means for the effective transfer of technology and the viable utilization of genetic resources. Absence of such protection would inevitably lead to a reduction or withdrawal of investment in these fields, which would discourage research or encourage researchers to adopt a policy of secrecy, limiting the access of scientists to technology and depleting the information available on genetic resources. Patents, by their publication, enrich scientific and technical knowledge and promote access to this knowledge, consistent with the objectives of the Rio Convention.

6. Resolutions already taken on questions Q 114 (Biotechnology), Q 128 (Patents and protection of the environment) and Q 150 (Patentability requirements and scope of protection of EST sequences, single nucleotide polymorphisms SNP and entire genomes) are confirmed.
7. The rules of law which apply to inventions in all fields should apply to determine the ownership of inventions arising from the use of a genetic resource.
8. As the Rio Convention provides, the negotiation and execution of mutually agreed contracts ensuring prior informed consent for access to and use of genetic resources should be encouraged. Such contracts are a practical means for regulating access to the genetic resources, and sharing the benefits (including financial) arising out of exploitation of said resources, while fulfilling the objectives of the Rio Convention and taking account of the individual circumstances relating to these resources. States or institutions (including in *vivo* and in *vitro* collections) possessing genetic resources are requested to adopt legal measures to facilitate the settlement of such contracts.
9. Each State is requested to designate and define the legal status of any body having the authority to grant access to genetic resources, and the limits to its powers, to ensure the maximum certainty with respect to the legal rights of the parties accessing or using said resources, and of the holders of patents derived from such resources.
10. AIPPI supports the conduct of studies by relevant bodies to establish guidelines for drawing up contracts regulating access to genetic resources and their utilization in accordance with the objectives of the Rio Convention.

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