

Hungary
Hongrie
Ungarn

Report Q 159

in the name of the Hungarian Group by
Dr. Daisy MACHYTKA-FRANK, Dr. Éva SOMFAI,
Dr. Margit SÜMEGHY (chair) and Dr. Ernő SZARKA

**The need and possible means of implementing the
Convention on Biodiversity into Patent Laws**

A) The national situation

1. The Rio Convention on Biodiversity has been signed and ratified by Hungary.
2. The Rio Convention was promulgated by Law No. LXXI of 1995 on September 28, 1995. According to Article 3 the provisions of this Law are to be applied as from May 25, 1994.
3. The authorities competent for the implementation of the Rio Convention can initiate special legislation in the fields and to the extent they deem it necessary.
4. Decree No. 92/1997. (XI.28.) FM of the Minister of Agriculture on the preservation and utilization of botanic genetic materials was issued partly with regard to the enforcement of the Rio Convention. This Decree contains regulations on the access to natural (genetic) resources of our country in the spirit of the Rio Convention. It does, however, not contain export provisions of such resources or provisions on the sharing of the results of the use of these resources, or on the transfer of technologies using them.
5. Some articles of the Hungarian patent literature deal with the problem but having no practical experience, one cannot suppose that the Hungarian practitioners in general are aware of the impact on patent law of the Rio Convention. Those who are familiar with the issue consider the relevant provisions of the Convention as too theoretical and vague to have a direct impact on patents in practice. The Hungarian Group believes that the Convention cannot be taken into consideration at present time. In our view further study of the issue is necessary.
6. The TRIPS Agreement has been signed and ratified by Hungary.
7. The TRIPS Agreement was promulgated by Law No. IX of 1998, and is applicable as from January 1, 1995.

8. It is considered by the Hungarian Group that the practice of the Hungarian Patent Office and that of the courts cannot but be consistent with the Rio Convention since the Hungarian Patent Law is also in conformity with the objectives of the Convention. As indicated above under paragraph 5, the relevant provisions of the Rio Convention are considered as too theoretical and vague and thus they do not serve as a basis to quote examples of the legal practice illustrating our answer.

It is to be noted that in the case of biotechnology-related patents the practice of the Hungarian Patent Office is in line with the European Community's Directive 98/44/EC of July 6, 1998.

B) Possible means of implementing the Rio Convention into patent laws

9. According to the opinion of the Hungarian Group there is no contradiction between the Rio Convention and the TRIPS Agreement.
10. The Hungarian Group agrees with the reservation of Article 27(2) of the TRIPS Agreement since it only permits but does not require member states to exclude from patentability certain inventions indicated therein.

The Hungarian Patent Law provides for the exclusion from patent protection of inventions whose commercial exploitation would be detrimental to "ordre public" or morality. This is in compliance with Article 6 of the EC Directive cited above under paragraph 8. Since AIPPI's Resolution on Question 114 adopted in Montreal in 1995 preceded this Directive it does not seem to be necessary to confirm it.

Taking into account the optional character of Article 27(2) of the TRIPS Agreement we do not see any particular reason for confirming the Resolution on Question 128 either. It is to be noted that once it is possible to exclude from patentability inventions the commercial exploitation of which would be detrimental to "ordre public" or morality - with which we agree - this could in principle involve the refusal of granting a patent of subject matters which might seriously prejudice nature or the environment without this being explicitly mentioned by the law. In any case such a provision should be interpreted and applied narrowly.

11. We believe that the possibility of the national legislations to exclude certain biological material such as DNA, living tissues etc. would have no influence for putting in practice the provisions of the Rio Convention. The access and use of genetic resources of a country cannot be effectively regulated by provisions concerning the patentability of these resources.
12. The reply to this question is the same as that to question 11 with the additional remark that in our interpretation the exclusion under Article 27(3) of the TRIPS Agreement relates to plants and animals manipulated by human intervention. Plants and animals in their natural form are not inventions and are not patentable even without this reservation.
13. The signature of research and/or development agreements can be an appropriate path to explore with a view to solving the patent rights ownership allocation issue where the subject inventions are achieved due to information concerning genetic

resources or by means of genetic resources themselves. Attention should be paid to the specificity of the individual cases, e.g. the allocation of ownership between the parties shall be determined taking into account also their contribution to the invention concerned.

14. In our opinion States can be entitled to obtain compulsory licences in conformity with the conditions under Article 31 of the TRIPS Agreement, in case of public interest, e.g. national emergency or public health. However, a State should not be entitled to constrain a patent owner to sell the patent. We think that apart from the institution of the compulsory licence under the conditions imposed by the TRIPS Agreement the utilization of the natural biological resources cannot be regulated by means of patent law.
15. The Hungarian Group does not have any experience in this respect.
16. The Hungarian Group agrees that amicable and free negotiations should prevail between contracting parties, including States because it is held that this would be in compliance with the aim indicated in Articles 15 and 16 of the Rio Convention.

Summary

Hungary is a Member of the Rio Convention and of the TRIPS Agreement and its Patent Law and other legislation is in compliance with these international treaties. The Hungarian Group does not see any contradiction between the provisions of these treaties. The practice of the Hungarian Patent Office is consistent with the Rio Convention and with the EC Directive 98/44/EC. Articles 27(2) and 27(3) of the TRIPS Agreement are not objected to by the Hungarian Group from the point of view of putting into practice the provisions of the Rio Convention. Although in Hungary there is practically no experience in this field, we are of the opinion that the possibilities of settling the issue of access to and use of biotechnological material by means of patent law are rather limited. Nevertheless, we support the idea of a study on the question how the Rio Convention could be implemented concretely into patent law.

Résumé

La Hongrie est le membre de la Convention de Rio et également de l'Arrangement TRIPS et sa Loi sur les brevets et autre législation se conforme à ces traités internationaux. Le Groupe hongrois ne voit aucune contradiction entre les dispositions de ces traités. La pratique de l'Office hongrois des brevets est en accord avec la Convention de Rio et avec EC Directive 98/44/EC. Les articles 27(2) et 27(3) de l'Arrangement TRIPS ne sont pas incriminés par le Groupe hongrois du point de vue de la mise en pratique des dispositions de la Convention de Rio. Bien qu'en Hongrie il n'y ait pratiquement pas d'expérience dans ce domaine, nous sommes d'avis que les possibilités ayant influence sur l'accès aux matières biotechnologiques et sur leur utilisation au moyen de la loi sur les brevets sont plutôt limitées. Pourtant, nous secondons l'idée d'une étude sur la question, comment la Convention de Rio pourrait être concrètement insérée dans la loi sur les brevets.

Zusammenfassung

Ungarn ist ein Vertragsstaat sowohl der Rio Konvention als auch des TRIPS Übereinkommens, und das ungarische Patentgesetz und andere ungarische Rechtsnormen sind mit diesen internationalen Übereinkommen im Einklang. Nach Meinung der Ungarischen Landesgruppe gibt es keinen Widerspruch zwischen den Vorschriften der obigen internationalen Übereinkommen. Die Praxis des Ungarischen Patentamtes ist im Einklang mit dem Rio Übereinkommen und mit der Richtlinie 98/44/EC. Wir haben keinen Einwand gegen Artikel 27(2) und 27(3) des TRIPS Übereinkommens mit Rücksicht auf die Anwendung der Vorschriften der Rio Konvention. Obwohl es in Ungarn an praktischen Erfahrungen auf diesem Gebiet mangelt, nehmen wir an, dass die Möglichkeiten zur Lösung des Problems der Zugänglichkeit und Anwendung biotechnologischer Materialien durch patentrechtliche Maßnahmen ziemlich gering sind. Doch unterstützen wir die Idee eines Studiums bezüglich der Möglichkeiten der unmittelbaren Anwendung der Rio Konvention in patentrechtlichen Vorschriften.