

**OCHRANA BIOLOGICKÉ ROZMANITOSTI,
PATENTNÍ OCHRANA A ODPOVĚDNOST ZA ŠKODY**

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Assessment of Capacity-building Needs: Access to Genetic Resources and Benefit-sharing, Conservation and Sustainable Use of Biodiversity Important for Agriculture, Forestry and Research – Czech Republic

BIODIVERSITY CONSERVATION, PATENT PROTECTION AND DAMAGE LIABILITY AND REDRESS

Summary

Legislative Aspects of Access to Genetic Resources and Benefit-Sharing

Biodiversity Conservation, Patent Protection and Damage Liability and Redress

Legal regulation of access to genetic resources and benefit-sharing is reflected at three levels: international, regional and national level. The first chapter of the present study gives a summary of the most important sources of international law related to the access to genetic resources. Only international conventions to which the Czech Republic is a Party were analyzed, such as the FAO International Treaty on Plant Genetic Resources for Food and Agriculture, International Convention for the Protection of New Varieties of Plants, WTO Agreement on Trade-related Aspects of Intellectual Property Rights etc.

The second chapter provides an update of existing approaches to assist European Parties and stakeholders with access and benefit-sharing implementation. The attention is focused to actions undertaken by the European Commission to implement the Bonn Guidelines and to experience of some countries. The debate on the issue of „disclosure of origin“ of genetic resources and traditional knowledge in patent applications is also included.

The third chapter of the study summarizes the current Czech legislation related to access to genetic resources in the field of plant varieties, farm animal species and forest reproductive materials. Real progress in breeding, sustainable and productive in a long term, is possible only if protected varieties and animal species are available for breeding (so called the „breeder’s exemption“). That is why the Czech legislation was analyzed also from the „breeder’s exemption“ point of view. The final part of chapter gives comparison between protection of an invention by patent and protection of a variety by plant variety protection based on the International Convention for Protection of New Varieties of Plants.

Relationship between Biodiversity Conservation and Commercial Aspects of Intellectual Property Rights

The report is focused on relation between the WTO Agreement on Trade-related Aspects of Intellectual Property Rights /TRIPS/ and the Convention on Biological Diversity, which so far has not been intensively discussed in the Czech Republic.

The first part of the report shortly summarizes the main provisions concerning the patenting of life forms and presents critical objections of researchers and namely of non-governmental ecological initiatives against some provisions of TRIPS, especially as regards access to genetic resources, fair and equitable sharing of benefits arising from utilisation of genetic resources, technology transfer and conservation and sustainable use of biological diversity.

The Czech Republic as a member of the World Trade Organization and a Party to the Convention on Biological Diversity is obliged to ensure mutually supportive implementation of both agreements at national level. Therefore the second part of the report analyzes national implementation measures – from intellectual property rights aspects. The Czech Biotechnological Invention Protection Act of the year 2000 does not require patent applicants to disclose the geographical origin of genetic resources used in an invention. This report therefore proposes to change this current practice and disclosure of geographical origin of genetic resources used in an invention take as a mandatory requirement in course of patent application process. The proposal also discussed the legal implications of non-compliance, wrongful disclosure and other similar aspects.

Liability and Redress for Damage Resulting from Transboundary Movement of Living Modified Organisms

An international environmental liability and redress regime is an essential mechanism for the enforcement of the environmental policy through multilateral conventions. Therefore, the topic of liability and redress is an important part of the discussions underway in connection with the entry into force and implementation of the Cartagena Protocol on Biosafety to the Convention on Biological Diversity. Article 27 of the Protocol presupposes to elaborate an international rules and procedures in the field of liability and redress for damage resulting from transboundary movements of living modified organisms and to complete this process within four years. This article recommends to take into account the ongoing processes in international law on these matters.

The study is structured in three chapters with the aim to:

- Give a summary of economic nature and some legal aspects of environmental liability and redress regime.
- Analyze selected important multilateral treaties in the field of liability and redress for transboundary damage and attempt to set out lessons to be learnt from such experience.
- Discuss some issues connected with international rules on liability and redress for damage resulting from transboundary movement of living modified organisms.

Within the first chapter, the position of „environmental liability and redress regime“ among the environmental policy instruments is analyzed. It is emphasized that the most effective application of this instrument is in relation to operators, activities of which are connected with the highest risk of damages to environment and human health. Three important functions of liability regime are analyzed: internalization function, which is

conforming with the polluter-pays principle, compensatory function, which is provided by insurance or alternative financial schemes and preventive function, which stimulates the polluter to preclude damage to the environment. As concerns the legislative encompassment of the principle of liability for damage the levels of public law and private law are discerned, as well as the difference between strict liability and fault-based liability.

The second chapter analyses some multilateral conventions that have been adopted in the field of liability and redress for transboundary harm. The majority of the negotiated liability regimes at the international level are sector-specific and addresses damage resulting from ultra-hazardous activities (such as nuclear damage, oil pollution damage, transport of dangerous goods and substances damage or space objects damage). Only the Lugano Convention is more comprehensive, but deals with environmental damage regardless of whether it has a transboundary dimension or not, and has not yet entered into force. Majority of analyzed conventions impose civil liability in the form of strict liability which is channelled to the entity that undertakes the dangerous activity. This type of liability is not based on the legality of the activity or the fault of the operator, but on the causal link between the activity and the resultant transboundary damage. Few conventions introduce subsidiary State liability, through the establishment of supplemental public funding, beyond the maximum limit of operator liability (see nuclear damage). Special case is absolute liability of State to pay compensation for damage caused by its space objects. Finally this chapter specifies some obstacles to ratification and entry into force of international liability regimes.

The negotiations on international rules in the field of liability and redress for damage resulting from transboundary movements of living modified organisms are in their early stages. That is why the specific aim of the third chapter of the study is to open broader discussion on wide range of issues connected with negotiated international rules. Among these open issues are: functional scope of damage resulting from transboundary movements of living modified organisms, optional components for the definition of damage in this sphere, possible approaches to valuation of damage to conservation and sustainable use of biological diversity, channelling of liability, standard of liability, limitation of liability, mechanism of financial security, threshold of damage, right to bring claims, settlement of claims etc. Special attention is given to the European Union views on these open issues according to which damage to conservation and sustainable use of biological diversity should be the starting point when considering the types of damage covered by the rules and procedures under Article 27 of the Protocol.

It is generally accepted that the gaps of information exist, especially with respect to the scientific analysis and assessment of risk involved in the transboundary movement of living modified organisms and the availability of financial security to cover this type of liability and the prices at which such financial security is available.

