

There is only one provision in the TRIPs Agreement mentioning food in the sense of nutrition. Art. 8 of the TRIPs Agreement states that WTO Members may introduce measures necessary to protect public health and nutrition. Furthermore, the public interest in sectors of vital importance to their socio-economic and technological development can be promoted. These measures are only allowable if they are in conformity with the TRIPs Agreement.

III. Consequences

*Straus*¹⁸⁴ thinks of the TRIPs Agreement as a revolution in patent law and states:

"The TRIPs Agreement constitutes an immensely important milestone in patent law (...) reducing the deficits in protection that were inherent in the Paris Convention for over 100 years (...)."

The TRIPs Agreement led to a more rational understanding of the patent system.¹⁸⁵ Food was not in the focus of the negotiations for the TRIPs Agreement, as it was discussed only in context with pharmaceuticals and agrochemicals, but not on its own. In contrast, pharmaceuticals were widely debated in the ministerial conferences of the WTO. Its Members' governments agreed on August 30, 2003, on legal changes facilitating the import of cheaper drugs into developing countries under compulsory licensing if these countries cannot manufacture the medicines themselves.¹⁸⁶ There have been no such initiatives for food-related inventions. The patentability of food has not yet been particularly discussed at any of the Ministerial Conferences.

184 *Straus*, Implications of the TRIPs Agreement in the Field of Patent Law, in: *Beier&Schricker* (eds.), From GATT to TRIPs – The Agreement on Trade-Related Aspects of Intellectual Property Rights, Weinheim 1996, 160, 214.

185 Rott, Patentrecht und Sozialpolitik unter dem TRIPS-Abkommen, Baden-Baden 2002, 336.

186 WTO, Decision Removes Final patent Obstacle to Cheap Drug Imports, press release 350/Rev.1 of August 30, 2003.

C. Patentability of food in Brazil, China, and India

The historical development regarding the patentability of food under the TRIPs Agreement in Brazil, China and India is shown in a comparative manner taking into account the historical development in Germany.¹⁸⁷ The question, why there was an exemption to patentability of food and the question, which consequences had its abolition will be answered. First, the implementation of the TRIPs Agreement in Brazil, China and India is shown retrospectively. Next the increase in food-related patent applications as a consequence of the abolition of the exemption to patentability is demonstrated. As Director General of WIPO *Idris* puts it “one of the most reliable indicators of innovation in a particular country or region is patenting activity.”¹⁸⁸ Finally the economic situation of the food sector in Brazil, China and India is used as an indicator of the economic influence of the patentability of food-related inventions.

I. Implementation of the TRIPs Agreement in Brazil

The first Brazilian Patent Act of 1809 excluded food from patentability.¹⁸⁹ Since then food has not been patentable. Brazil ratified the TRIPs Agreement by decree No. 1.355 on December 30, 1994, which entered into force on January 1, 1995. Brazil is considered a developing country, and thus enjoyed a transition period of 4 years under Art. 65 (2) of the TRIPs Agreement for implementing the TRIPs Agreement. Brazil enjoyed another transition period of 5 more years under Art. 65(4) of the TRIPs Agreement with respect to substances initially excluded from patentability, namely food. Brazil amended its patent system in 1996 by the Industrial Property Law of May 14, 1996, which entered into force on May 15, 1997.¹⁹⁰ Sec. 8 of this law states that “any invention complying with the requirements of novelty, inventive activity and industrial application shall be patentable.”

187 A recent study by *Imam* discusses the benefits through stronger patent protection in Brazil, China and India and claims that reforming the domestic patent protection systems of developing countries is the first step towards meaningful economic growth, *Imam*, How Does Patent Protection Help Developing Countries?, IIC 2006, 245.

188 *Idris&Arai*, The Intellectual Property-Conscious Nation: Mapping the Path From Developing to Developed, WIPO Publication No. 988(E) (2006), 13.

189 *Graca Aranha*, The Challenge for the Medium Sized Office, WIPO Conference on the International Patent System, Geneva, March 25-March 27, 2002, available at www.wipo.int/patent/-agenda/en/meetings/2002/presentations/gracaaranha.pdf.

190 Law No. 9,279; English version available at www.e-moeller.com/Ingles/htm/Legislation-Brazil-01.htm.