



February 15, 2011

To  
Mr. Stanford K. McCoy  
Assistant U.S. Trade Representative for Intellectual Property and Innovation  
Office of the United States Trade Representative (USTR)

**Re: 2011 Special 301 Review**

Dear Mr. McCoy,

The Brazil Industries Coalition (BIC), the Federation of Industries of the State of São Paulo (FIESP), the Brazilian Section of the Brazil-U.S. Business Council (CEBEU), and the National Confederation of Industry (CNI) are making this submission in response to the request by the United States Trade Representative (USTR) for written comments from the public concerning foreign countries' acts, policies, or practices that are relevant to the decision on whether a particular trading partner of the United States should be identified as a priority foreign country under Section 182 of the Trade Act of 1974 (Special 301) or placed on the Priority Watch List or Watch List. The USTR's request was published in the Federal Register on December 30, 2010.

**UNDERSIGNED BUSINESS ASSOCIATIONS**

The BIC is a Washington-based trade association that represents Brazilian companies and other Brazilian trade organizations in the U.S. Its membership is comprised of trade associations from the agribusiness and manufacturing sectors, as well as leading Brazilian companies, most of which are invested in the United States. The BIC's mission is to work towards a stronger partnership between Brazil and the U.S. through wider and deeper economic relations and political ties.

FIESP is the leading regional manufacturing sector organization in Brazil. It is comprised of 132 sectoral trade associations, representing over 67% of the country's industrial GDP and approximately 150,000 companies.

CEBEU is a bilateral organization that provides a high-level private sector forum for the business communities of both Brazil and the U.S. The Council's members engage in substantive dialogue on trade and investment issues and communicate those private sector priorities to the U.S. and Brazilian governments. The Brazilian Section of CEBEU is sponsored by CNI and represents a wide range of Brazilian corporations.

CNI is the umbrella manufacturing sector organization in Brazil. Created in 1938, the Confederation is comprised of 27 Federations of Industries in all Brazilian states and the Federal District, and over 1,000 sectoral trade associations representing more than 196,000 companies.

## **REQUEST**

Brazil's historical record, as well as recent action taken by the Brazilian government (federal, state, and local) and its private sector, demonstrate that the country, according to the U.S. federal statutes, adequately and effectively protects intellectual property rights (IPR), and grants fair and equitable market access to United States persons that rely upon intellectual property protection. Evidence for that is provided in the Annex to this letter.

Brazil's commitment to the protection and promotion of IPR is unequivocal. It is no longer perceived by its government and private sector as a self-imposed and unfair burden to its right to development, but both as an intrinsic value of the Brazilian society and an opportunity.

**Therefore, the undersigned business associations respectfully request for the third consecutive year that the USTR removes Brazil from the Special 301 Watch List.**

We look forward to working with the USTR and we are available at any time for clarification of any issue raised in this submission.

Respectfully,

The Brazil Industries Coalition (BIC)  
The Federation of Industries of the State of São Paulo (FIESP)  
The Brazilian Section of the Brazil-U.S. Business Council (CEBEU)  
The National Confederation of Industry (CNI)

# ANNEX

## 1. ADEQUATE AND EFFECTIVE PROTECTION OF INTELLECTUAL PROPERTY RIGHTS

Section 182 of the Trade Act of 1974 determines that the USTR identifies, on an annual basis, foreign countries that deny adequate and effective protection of intellectual property rights (19 USC 2242(a) (1) (A)).

According to this Section's special rules for identifications, the USTR must identify such situation only if it finds that the particular country: has the most onerous or egregious acts, policies, or practices (19 USC 2242(b)(1)(A)); that these acts, policies, or practices have the greatest adverse impact, actual or potential, on the relevant United States products (19 USC 2242(b)(1)(B)); and that it is not entering into good faith negotiations, or making significant progress in bilateral or multilateral negotiations to provide adequate and effective protection of intellectual property rights (19 USC 2242(b)(1)(C)). These rules comprise thus a three-pronged cumulative test.

Finally, Section 182 requires that the USTR takes into account the history of intellectual property laws and practices in the foreign country (19 USC 2242(b) (4) (A)), as well as efforts of the United States, and the response of the foreign country, to achieve adequate and effective protection and enforcement of intellectual property rights (19 USC 2242(b)(4)(B)).

Brazil does not incur in any of the abovementioned situations. On the contrary: on one hand, there is a growing consensus within the Brazilian society regarding the importance of the protection and promotion of IPR and the role of innovation in economic and social development. On the other, the Brazilian government has been responding to this demand by making significant progress in its legal framework and regulatory structure, law enforcement efforts, and international cooperation initiatives, as described below.

### Brazilian Society Consensus

There is a growing consensus within the Brazilian society regarding the importance of the protection and promotion of IPR. Accordingly, acts, policies, or practices that infringe these rights are perceived and treated as unfair and illegal. They are further perceived as practices that threaten consumers' life, neglect health and safety standards, harm manufacturers and IPR owners, and negatively affect the Brazilian economy.

The recognized negative consequences of IPR violations are also true to the Brazilian experience: they disrupt legitimate markets, contributing to unemployment and underemployment; feed the informal economy; reduce government tax revenues; finance organized crime activities; and undermine the development of a strong knowledge-intensive creative economy. Therefore, actions to fight counterfeiting,

piracy, and other violations are being intensified all across the country at the federal, state, and local levels, with increasingly better results each year.

It is worth noting that IPR protection is no longer pursued as a standalone Administration effort, but rather as a long-term far-reaching governmental policy supported by Brazilian service businesses, manufacturers, farmers, workers, and consumers. In addition, there is a strong and increasing political will to strengthen the instruments that adequately and effectively protect IPR by improving the Brazilian legal framework and regulatory structure, law enforcement efforts, international cooperation initiatives, and activities supported by the private sector.

There is also a general sense that permanent improvements are necessary in order to keep up with the ever-changing pattern of IPR infringement. Concrete results from the efforts and resources that have been applied so far to fight those illegal activities clearly indicate that Brazil is on the right track.

### IPR Protection and Promotion, and Innovation Policy

The era during which the lack of adequate and effective IPR protection and promotion was used as an industrial policy tool is long gone in Brazil. Investments in research and development (R&D) and innovation are now identified as driving elements to increase competitiveness and to pave the way to a 21<sup>st</sup> century knowledge-intensive creative economy. As a corollary, Brazil has been putting great emphasis in strengthening its IPR system so as to create a friendly environment that stimulates innovation.

In this sense, the Brazilian Innovation Act, inspired by the U.S. Bayh-Dole Act, sets forth measures to promote R&D and innovation aiming at enhancing capacity building, sustaining technological auto-sufficiency, and fostering industrial development in Brazil. So far, results have proved extremely positive with the gradual increase in the number of Brazilian requests for patents to the United States Patent and Trademark Office (USPTO).

In addition to that, innovation policy is now a fundamental pillar of the Brazilian Production Development Policy (PDP), which aims at increasing private investment in R&D and, therefore, improving innovative action in Brazilian companies through various financial mechanisms.

Innovation is also a key element of the 13-item guideline outlining the basis of President Dilma Rousseff's priorities. Guideline #8 sets a goal to transform Brazil into a scientific and technological powerhouse in the next few years. In order to achieve such an ambitious outcome, the Brazilian Federal Government intends to expand resources devoted to R&D and innovation in areas as different as biotechnology, robotics, information technology, health and pharmaceuticals, biofuels, and renewable energy.

Brazil is strategically committed to promoting innovation as a means to increase its private sector competitiveness as well as to achieve its social and economic development goals. Brazilian policymakers widely recognize that IPR protection and promotion are essential components of any modern innovation policy.

#### Legal Framework Established by the Brazilian Federal Government

The Brazilian current legal framework on IPR protection and promotion results from a consistent 16-year legislative effort, as seen on the table below:

YEAR	LAW NUMBER	LANDMARK LEGISLATION
1995	8974 (January 5, 1995)	Biosafety Act
1996	9279 (March 14, 1996)	Industrial Property Act
1997	9456 (April 25, 1997)	Plant Varieties Act
1998	9609 (February 19, 1998)	Software Act
1998	9610 (February 19, 1998)	Copyrights Act
1998	9695 (August 20, 1998)	Counterfeit Pharmaceuticals Crimes Act
2002	10603 (December 17, 2002)	Trade Secrets Act
2003	10695 (July 1, 2003)	Anti-Piracy Act
2004	10973 (December 2, 2004)	Innovation Act
2005	11105 (March 24, 2005)	New Biosafety Act
2007	11404 (May 31, 2007)	Integrated Circuits Act
2009	11903 (January 14, 2009)	Pharmaceuticals Traceability Act

The framework fully complies with all international rules and commitments undertaken by Brazil, in particular within the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). In fact, in several aspects it adds to the minimum standards agreed to internationally.

It is also worth noting that Brazil has forgone its TRIPS-related special and differential treatment (SDT) rights embodied in Article 65 of the Agreement and implemented it along with the developed countries in 1996 – long before the January 1<sup>st</sup>, 2000 deadline for developing countries and the 2005 deadline exception for specific technology areas.

In addition to its successful past achievements, Brazil has been putting great effort in improving its own domestic laws. Among the proposals currently under consideration by the Brazilian Congress to amend IPR statutes and increase IPR protection are:

- i. House Bill 333/99: amends the Industrial Property Act to increase penalties for crimes against trademarks, patents, and geographical indications, as well as unfair competition. It is currently being discussed under urgency status rules;

- ii. House Bill 2729/03: increases the penalty for crimes against software copyrights, trademarks and patents. It is currently being discussed under priority status rules;
- iii. House Bill 3378/04: amends the Industrial Property Act to allow private criminal action on IPR violation to be filed on the grounds of new evidence provided by interested parties.
- iv. House Bill 4961/05: establishes the patentability of materials and substances extracted from natural living beings and biological materials by granting them the status of inventions or utility models.
- v. House Bill 5057/09: authorizes expert examination by sampling obtained by statistical methods in the context of investigations of IPR criminal violations. The Bill is currently being discussed in conjunction with Bill 2729/03; and
- vi. House Bill 8052/11: amends the criminal procedure rules in order to expedite the pursuit and trial of crimes against copyrights. It is currently being discussed under priority status rules in conjunction with Bill 2729/03.

It must be said that IPR-related congressional action in democratic societies takes time due to the complexity of issues being considered, as well as the vast number of stakeholders involved. However, a small procedural difference between the rules of the House and the Senate in Brazil – when compared to their equivalent in the United States – is sometimes used as “evidence” to undervalue Brazilian efforts. Differently from the U.S. legislative system, once a bill is introduced in the Brazilian Congress it does not need to be re-introduced in succeeding Congresses if it was not enacted into law. Therefore, a number of bills date from the end of the 1990s to the mid-2000s. In the United States, legislation that sometimes takes decades to be completed does not have to face the same situation as each Congress lasts for only two years, and bills need to be re-introduced.

Besides the legislative efforts to amend IPR statutes, the Brazilian Federal Government, led by the Ministry of Culture (MinC), is strongly engaged in reviewing the Copyrights Act of 1998. In this context, public consultations were held during 2010 and public discussions are currently underway so as to analyze proposals for the modernization of the federal copyrights legislation. Initiation of legislative procedures to amend the Act is expected to take place within the next months. Among other provisions aimed at updating the Brazilian copyrights legislation, the bill includes a “notice and take down” clause to help curb Internet piracy.

On top of the abovementioned solid legal framework, Brazilian judicial courts have been consolidating the adequate and effective protection of IPR by interpreting the domestic legislation in a broad manner. As a clarifying example, the State of São Paulo Court of

Justice (TJSP) has recently awarded a decision finding that commercial establishments, such as shopping malls, are responsible for monitoring and supervising the activities conducted by their associates, and therefore should be liable for damages when products infringing IPR are sold in their stores (TJSP, 5<sup>th</sup> Chamber, Appeal N. 622.881, May 2009).

### Regulatory Structure Established by the Brazilian Federal Government

#### *National Institute of Industrial Property (INPI)*

The National Institute of Industrial Property (INPI) is the Executive Branch agency responsible for granting patents and registering trademarks, computer programs, industrial designs, geographical indications, transfer of technology, and commercial franchising contracts.

Bearing in mind the relevance of innovation in Brazil's development strategy and the worldwide increase in the number of requests for patents, INPI has been making great progress in reducing its backlog when it comes to the process of examining and granting trademarks and patents.

Among other reasons, INPI's success is due to (i) the hiring of several new patents and trademarks examiners; (ii) an extensive administrative and information technology restructuring (e-trademarks system); (iii) the adoption of an automated registry model for trademarks based on the Industrial Property Automation System (IPAS) from the World Intellectual Property Organization (WIPO); and (iv) the signing of technical cooperation agreements with major patent offices, such as those in the United States and Europe. In addition to such developments, in 2010 INPI has also (v) received further resources in order to provide more efficient services through the enactment of Law 12274, the so-called INPI Staffing Act of 2010; and (vi) published guidelines and a practical handbook for the analysis of trademarks aiming at enhancing transparency, predictability, and uniformity in decision making.

As a result, INPI has been successful in reducing the backlog for trademarks and patents. Although requests for trademarks have risen about 16% in 2010, the backlog in this area was of approximately 2 years. Moreover, irrespective of the increase of nearly 15% in the number of requests for patents, INPI has managed to reduce the patent backlog in 12 months in 2010 when compared to 2009. It has also recently announced its intention to grant patents within approximately 4 years by 2015 as part of the Institute's newly published priority action plan for 2011-2015. INPI also intends to conclude a Memorandum of Understanding (MOU) with USPTO in 2011 in the context of the Patent Prosecution Highway (PPH) with a view to further reducing the backlog for patents.

It should be noted that since 2009 INPI acts as an International Searching Authority (ISA) and as an International Preliminary Examination Authority (IPEA), which

contributes to simpler and cheaper requests for patents worldwide. A similar status is only held by fourteen intellectual property offices around the world.

Finally, it should be noted the remarkable work INPI develops in conjunction with the Judiciary in the fields of capacity building, provision of IPR information, and participation in judicial proceedings conducted by IPR specialized district courts.

#### *National Health Surveillance Agency (ANVISA)*

The National Health Surveillance Agency (ANVISA) is involved in the public effort to fight counterfeit drugs. In April 2010, ANVISA launched a national public campaign under the motto "True Medication" ("Medicamento Verdadeiro") in order to raise awareness about the risks connected to the consumption of counterfeit drugs – and to help consumers identify fake products. As part of the campaign, numerous seminars and workshops have been organized in cities all over Brazil, and educational material has been provided to public officials at different levels of government.

ANVISA has also been implementing the National Drug Control System (SNCM) according to the Pharmaceuticals Traceability Act of 2009, which allows the electronic traceability of all pharmaceutical products manufactured and consumed in Brazil. According to the Agency, 53,575 units of counterfeit and smuggled drugs, and 62.9 tons of drugs without registration were seized between January and August 2010.

#### *The Roles of INPI and ANVISA in the Brazilian IPR System*

It should be restated that INPI is the only agency responsible for examining the conditions for granting patents, even in situations involving public health issues, such as those related to pharmaceutical products and processes. In these cases, while INPI is in charge of analyzing the patentability criteria (novelty, inventive activity, and industrial applicability), ANVISA limits itself to conduct a public health risk assessment.

INPI and ANVISA are two different agencies with distinct and non-overlapping institutional missions. Although both intervene during the pharmaceutical patent application process, their roles differ. INPI analyzes the patentability requisites and ANVISA seeks to protect public health by exercising sanitary control in accordance with TRIPS Article 27.2. Therefore, there is clearly no "dual examination" on the granting of a patent, as alleged by some interested parties in the context of the Special 301 process. Indeed, such conclusion was confirmed by the Federal Attorney General in a groundbreaking legal opinion issued in October 2009 (N° 20/PGF/AE/2009), and reaffirmed by a recent legal opinion issued in January 2011 (N° 337/PGF/EA/2010).

#### *National Council Against Piracy and Intellectual Property Crimes (CNCP)*

The Brazilian regulatory structure also comprises the National Council Against Piracy and Intellectual Property Crimes (CNCP), a consultative body within the Ministry of



Justice (MJ). The Council, consisting of members from both public and private sectors, issues guidelines to the formulation of a national plan against piracy and other IPR violations.

According to CNCP's National Plan to Combat Counterfeiting (2009-2012), its strategic projects and actions include:

- i. "City Free of Piracy": a pilot project to encourage local governments to create mechanisms to reduce piracy;
- ii. "Trade Against Piracy": an initiative aimed at engaging local stores and shopping malls in the fight against piracy;
- iii. Partnerships with internet providers: to prevent works protected by copyrights to be distributed without proper legal authorization. Such proposal has already been approved by the Brazilian Attorney General's Office;
- iv. Training and capacity building seminars: for federal, state, and local government officials as well as for university students. In 2010, the program reached 1,009 officials and 218 students;
- v. "National Trademarks Database": to be made available to government officials engaged in monitoring IPR violations and tax evasion. The initiative was approved by the Council and is currently under development; and
- vi. Technical cooperation agreement with ANVISA: to exchange information and fight pirated and counterfeit goods subject to sanitary surveillance. Signed in 2009, the agreement resulted in joint actions involving CNCP, ANVISA, the Brazilian Federal Police (DFP), and the Brazilian Federal Highway Police (DPRF), thus significantly contributing to the increase of drug seizure in Brazil.

#### *Inter-Ministerial Group on Intellectual Property (GIPI)*

Another key organization which is part of the Brazilian regulatory structure is the Inter-Ministerial Group on Intellectual Property (GIPI), an interagency body responsible for examining issues connected to the Brazilian adherence to international conventions and agreements related to IPR, as well as to the harmonization of Brazil's domestic IPR legislation.

#### *Regulation of Compulsory Licenses*

Finally, a word must be said about the regulation of compulsory licenses, an issue that has been raised by interested parties in the context of the Special 301 process. This particular provision of the Brazilian law is both legal and legitimate. Furthermore, Brazil has demonstrated its good faith and non-abusive practice in handling situations related

to its use in order to improve public access to medication. To date only one compulsory license has been issued.

The potential use of compulsory licenses by the Brazilian government is directly connected to public health crisis, in particular the HIV/AIDS epidemic. Article 7 of the TRIPS affirms that the protection and enforcement of IPR should take place in a manner conducive to social and economic welfare. Article 8 further asserts that in formulating and amending their laws and regulations, countries may adopt measures necessary to protect public health and nutrition.

TRIPS Article 31 regulates the use of compulsory licensing, although the legal text includes the phrase “other use [of a patent] without authorization of the rights holder” as a means to refer to this policy tool. It establishes the requirements for the use of such mechanism and states that the right can be invoked in cases of national emergency or in circumstances of extreme urgency, among other situations. Article 5 of the Doha Declaration on TRIPS and Public Health of 2001 further clarified these cases.

In addition to the legal basis of Brazilian government actions when taken in accordance with international agreements, it is also important to stress that Brazil has discussed the compulsory licensing mechanism use in good faith and in a non-abusive way. The HIV/AIDS public health crisis is real. It is not a deceiving justification to try to avoid international commitments on IPR. And Brazil has now clearly established a tradition of social policies to fight the country’s malaises as reflected in its commitment to find the right balance between social and economic welfare goals.

The Brazilian HIV/AIDS program is worldly renowned for its effectiveness in combating this public health crisis. It is part of a mosaic of other renowned social policies such as the conditional credit transfer program to poor families (*Bolsa Família*); the world’s largest youth nutrition program (*Merenda Escolar*), recognized as a model by the United Nations Food and Agriculture Organization (FAO); and the multi-faced approach to the elimination of child and forced labor, recognized by the U.S. Department of Labor (DOL) in 2009 for its notable success.

Notwithstanding, the Brazilian private sector has also been ready to act as a facilitator whenever its engagement may help the Brazilian government and other interested parties in finding creative solutions to issues related to compulsory licensing. In 2006, for instance, FIESP actively worked to craft a mutually advantageous arrangement between the Brazilian Ministry of Health and a U.S. pharmaceutical company regarding the production and commercialization of a HIV/AIDS antiretroviral drug. In 2007 and 2008, FIESP was involved in another similar effort.

Finally, it is important to note that even members of the U.S. Congress consider USTR’s traditional approach to the issue inconsistent with health policy priorities and the country’s international commitments. In that sense, two resolutions were introduced in the 110<sup>th</sup> Congress expressly requiring the federal government to “honor the

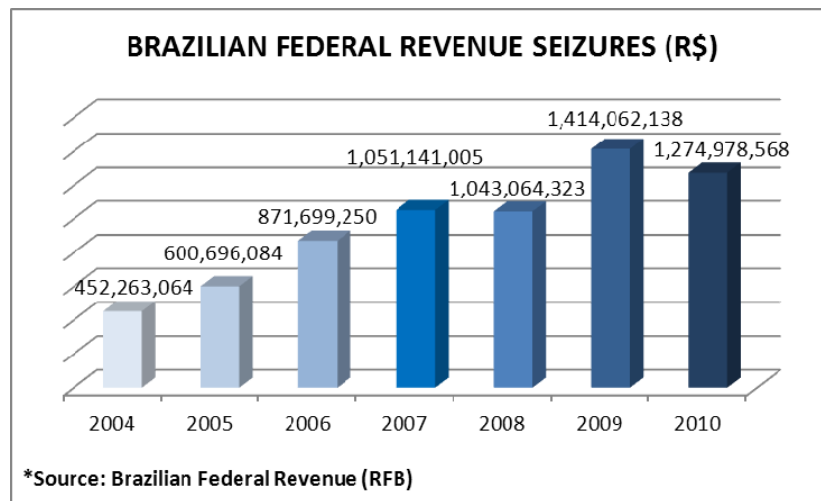
commitments the United States made in the 2001 World Trade Organization Doha Declaration on the TRIPS Agreement and Public Health, which allows member states of the World Trade Organization to use 'to the full' the flexibilities in the Agreement on Trade-Related Aspect of Intellectual Property Rights (in this resolution referred to as 'the TRIPS Agreement') 'to protect public health and, in particular, to promote access to medicines for all,' including the issuance of compulsory licenses on grounds determined by member states." Resolution S. RES. 241 was introduced in the Senate on June 20, 2007 by Senator Sherrod Brown (Democrat – Ohio) and co-sponsored by another 5 members. Resolution H. RES. 525 was introduced in the House on June 28, 2007 by then Representative Thomas Allen (Democrat – Maine, 1<sup>st</sup> District) and co-sponsored by another 11 members.

Law Enforcement by the Brazilian Federal Government

Significant law enforcement efforts by the Brazilian Federal Government are yielding increasing concrete results over the years.

*Brazilian Federal Revenue (RFB)*

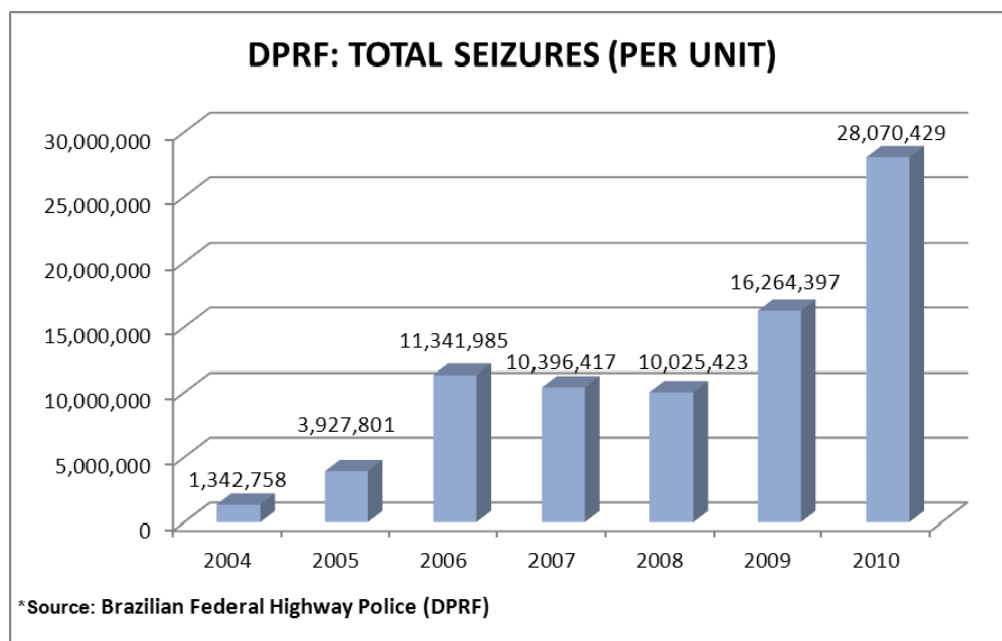
Official data indicates that since 2004 the total value of goods seized by the Brazilian Federal Revenue (RFB) has been growing steadily. In 2010, the value was of approximately R\$ 1.3 billion as a result of 2,223 surveillance and repression operations.



PRODUCT	GOODS SEIZED (R\$)
Weapons and Ammunition	190,453.85
Cigarettes	93,906,589.29
Electronics	115,468,626.49
Toys	17,562,018.91
Sunglasses	68,937,030.66
Clothing	68,441,229.22
<b>SEIZED VEHICLES</b>	<b>106,120,019.68</b>

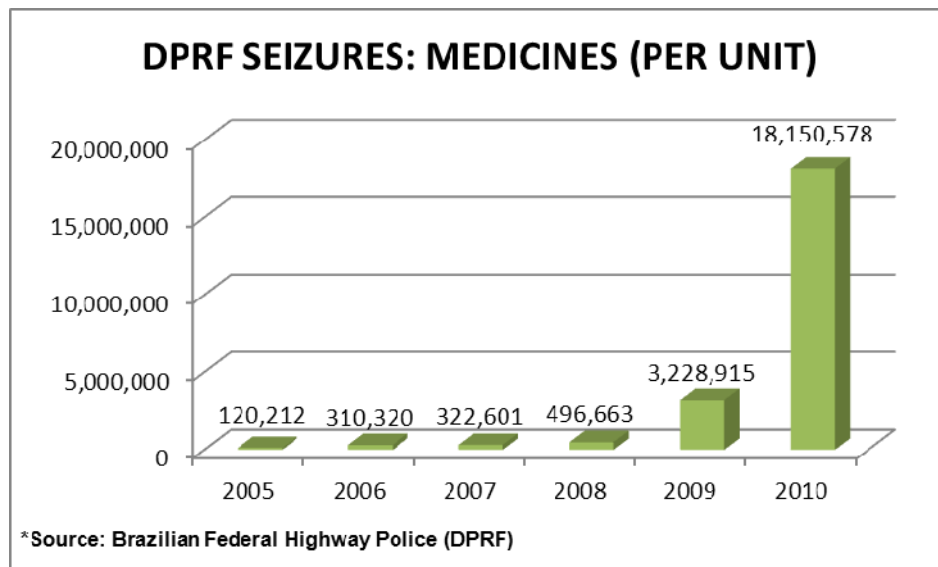
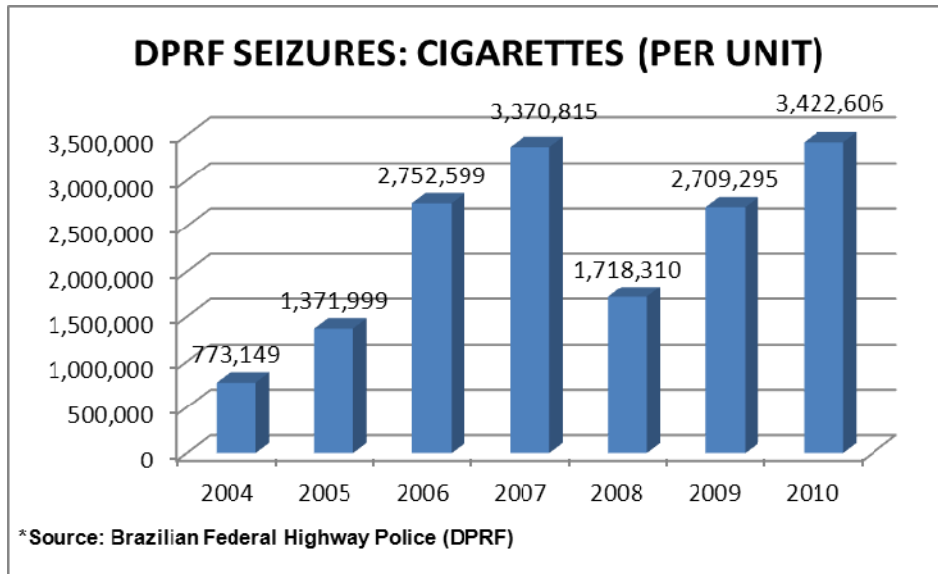
### *Brazilian Federal Highway Police (DPRF)*

In 2010, the Brazilian Federal Highway Police (DPRF) seized more than 28 million units of counterfeit goods, a record almost 73% higher than registered in the whole year of 2009:



As for the list of goods, it should be noted the striking amount of pharmaceutical products seized by DPRF, which jumped from 3.2 million units in 2009 to 18.1 million units in 2010.

<b>PRODUCT</b>	<b>UNITS SEIZED</b>
Beverages	106,670
CD/DVDs	5,799,680
Cigarettes	3,422,606
Electronics	393,428
IT Equipment	98,613
Medicines	18,150,578
Fuels	98,854



*CNCP*

Such actions are reinforced by a website and a toll free number created by CNCP to collect and analyze complaints.

*Public Ministry (MP)*

The Public Ministry (MP) also acts on several fronts to fight IPR violations and other transgressions connected to organized crime. In this context, the National Group for Fighting Criminal Organizations (GNCOC) was created as a working group to gather the MP intelligence structures of all states as part of an overarching plan to disrupt criminal organizations, and to fight IPR violations. In addition to the state and federal MPs, operations ran by GNCOC often include members of the DPF, DPRF, RFB, Brazilian state

revenue authorities, the Council for Financial Activities Control (COAF), the Secretariat of Economic Law, the Brazilian Intelligence Agency (ABIN), and other governmental bodies.

### *Judicial Bodies*

Enforcement improvements are also being pursued with regard to judicial activities. The National Council of Justice ("CNJ"), comprised of fifteen representatives from the public and private sectors, is responsible for improving the quality and efficiency of public judicial services. Among its priorities is the assurance of expeditious and deterrent sentences. As a result of its actions, the conclusion of trials, including those involving IPR, has been reduced in approximately 60% from January 2009 to December 2010. In addition, discussions to implement structural reforms in the Brazilian legal codes, such as the Criminal Procedure Code (CPP) and the Civil Procedure Code (CPC), are underway with a view to enhancing the Brazilian judicial system.

### Border Enforcement by the Brazilian Customs

Due to the relevance of border enforcement, especially in combating IPR violations and other forms of unfair trade, Brazil is putting great effort in enhancing its border controls. One step in this direction is RFB's decision to implement a "Customs Security, Control, and Simplification Program" (PASS) to speed, facilitate, and increase security in international trade.

An important element of PASS is compliance with the World Customs Organization (WCO) "SAFE Framework of Standards to Secure and Facilitate Global Trade" ("SAFE Framework"). The SAFE Framework is structured on (i) customs-customs and (ii) customs-business partnerships. Its objectives include: (i) to establish standards that enhance the security and facilitation of global supply chains; (ii) to enhance the role and capabilities of customs to meet the challenges and opportunities of the 21<sup>st</sup> century; and (iii) to strengthen cooperation between customs administrations to improve their capability to detect high risk consignments.

Besides improvements in the legal framework, Brazil is also devoted to modernize its customs structure. In that context, the Federal Government is planning to improve customs' premises as well as to buy 101 scanners, vehicles, and helicopters. Moreover, the RFB has also established stricter technical and operational requirements to allow the functioning of areas where transactions, storage and customs clearance take place. The new standards contribute to a more efficient border control in accordance with WCO standards.

### Law Enforcement by Brazilian Local Governments

The Brazilian local governments are playing an increasingly important role in the protection and promotion of IPR. For example, CNCP has been supporting States to

create new and improve existing specialized police stations that address IPR violations, such as the Police Station for the Fight Against Immaterial Property Crimes (DRCPIM) in the State of Rio de Janeiro, which in 2010 seized approximately 3 million units of counterfeit products.

CNCP has also met with Delegates of the Civil Police and of the State Secretaries of Public Security to identify bottlenecks in the Brazilian criminal IPR legislation with a view to drafting a comprehensive bill to be sent to the National Congress proposing changes to current statutes.

Moreover, as mentioned above, CNCP is strengthening local governments' actions by helping them to create mechanisms to prevent and control piracy as part of the "City Free of Piracy" project. In December 2009, cooperation agreements were signed with the mayors of São Paulo and Curitiba. In August 2010, a similar agreement was signed with the Government of Brasília, Brazil's federal district. CNCP also held the "First Brasília Training Program against Piracy" for 293 local government officials. Following the training program, the federal district registered the largest seizure (5 million) of counterfeit CDs and DVDs in just one day, in addition to arrests of around 30 members of the Chinese mafia.

The cities of Rio de Janeiro, Ribeirão Preto, Belo Horizonte, and Recife are also expected to sign cooperation agreements with CNCP during this year.

#### International Cooperation by the Brazilian Federal Government

The Brazilian Federal Government has been pursuing multiple actions on the international cooperation front to protect and promote IPR, emphasizing approaches in three areas: (i) educational; (ii) economic; and (iii) repressive. In 2011 and 2012, Brazil intends to strengthen its cooperation with strategic partners, as well as to foster closer ties with other developing countries.

In this sense, Brazil has actively participated in governmental bilateral working groups to address IPR protection and promotion, having held meetings with the following strategic partners:

- i. United States: Brazil and the United States have continuously exchanged information on IPR under the dialogue mechanism between the Ministry of External Relations (MRE) and the USTR. In the 2010 meeting, the "City Free of Piracy" project achievements were the main issue discussed as far as IPR enforcement is concerned;
- ii. China: The first informal meeting of the Brazil-China Working Group on Intellectual Property was held in October 2009, focusing on technical cooperation to combat piracy and counterfeit, and on the implementation of educational

measures. In April 2010, the Working Group was officially established, and annual meetings were agreed to under an MOU signed by both countries.

The goals of the MOU are: (a) to strengthen the bilateral cooperation on IPR issues; (b) to expand coordination in multilateral forums; and (c) to exchange information on IPR national laws and regulations.

In the two following meetings held by the Working Group the parties exchanged information on specific cases regarding IPR compliance, and emphasized that, besides further repressive action, the bilateral fight against piracy and counterfeiting should also encompass economic and educational measures;

- iii. The European Union (EU): Brazil has been holding annual meetings with the European Union since 2008 to exchange experiences on IPR issues. The last meeting took place in December 2010, when Brazil reiterated its concern with the infringement of artists copyrights in EU countries; and
- iv. Japan: Brazil has also been meeting with Japan since 2008. Last year, both countries engaged in cooperation projects to enhance IPR enforcement.

As for Paraguay, in December 2009, the Brazilian Congress enacted a Legislative Decree 983/09 approving the creation of the Brazil-Paraguay Bilateral Intelligence Group on Piracy, Counterfeiting, and Smuggling of Pirated and Counterfeit Products. The MOU, which is currently under appreciation by the Paraguayan Congress, seeks to enhance cooperation and coordination between authorities from both countries involved in fighting IPR crimes (i.e. DPF, DPRF, RFB, MRE, MP, and MJ). Once the agreement is ratified by the Paraguayan Congress, Brazil and Paraguay expect to conduct more efficient operations to prevent, investigate, and halt such violations, as well as to identify, track, block, and recover assets connected to them.

Furthermore, in order to reduce the illegal trade of goods at the Brazil-Paraguay border, the Brazilian government created the Unified Tax Regime (RTU), which simplifies the payment of federal taxes for micro and small companies engaged in international trade with Paraguay (Law 11989/09). In December 2010, RFB regulated the procedure of qualification and accreditation of companies under the RTU. As a consequence, the Brazilian Federal Government expects to encourage informal traders – the so-called "sacoleiros" – to formalize their businesses, and reduce unfair and illegal trade practices, including IPR violations.

Finally, international cooperation by the Brazilian Federal Government also includes the signature of cooperation agreements on innovation with France, Japan, South Korea, and Sweden.



## Activities Supported by the Brazilian Private Sector

The private sector plays a prominent role in the protection and promotion of IPR in Brazil.

In this context, since 2006 FIESP has been nurturing a fruitful partnership with RFB, INPI, CNCP, and important representatives from the private sector, such as the Brazilian National Forum Against Piracy (FNCP), the Brand Protection Group (BPG), the Brazil Legal Institute (IBL), the Brazil Steel Institute (IABr), among others. The goal is to provide government officials with valuable information from the private sector that will assist them in the fight against IPR infringement and other illegal and unfair trade practices. Moreover, the initiative allows the private sector to better understand the challenges faced by the government, and, consequently, enhance its actions.

In 2006 and 2007, these initiatives were held exclusively for the purpose of the training of customs agents. However, due to successful results, since 2008 they were extended to other government officials such as members of the Judiciary, the MP, DPRF, and DPF. The 2010 program was developed by FIESP in partnership with RFB, CNCP, and INPI, and included visits to 6 ports, 2 airports, and a workshop held in conjunction with the Public Ministry of the State of Rio Grande do Sul (MP/RS).

The successful results of the program can be translated into the following numbers:

<b>YEAR</b>	<b>GOVERNMENT OFFICIALS TRAINED</b>	<b>PORTS, AIRPORTS, AND BORDER REGIONS VISITED</b>
2006	364	12
2007	712	17
2008	251	6
2009	20	1
2010	360	9
<b>TOTAL</b>	<b>1,707</b>	<b>45</b>

The 2011 training seminars schedule includes visits to 13 ports, airports, and border regions. Moreover, as part of the Brazil Intellectual Coalition, created in 2009 in partnership with the Brazilian Association of Intellectual Property (ABPI), the American Chamber of Commerce in Brazil (AMCHAM), the U.S. Chamber of Commerce (USCC), the Brazilian Research-based Pharmaceutical Manufacturers Association (Interfarma), Prospectiva, and INOVA, FIESP is envisaging to promote seminars for members of the Judiciary to raise awareness on the relevance of IPR promotion and protection.

Another initiative of the Brazilian private sector was the organization of the third edition of the Triborder Seminar by the FNCP, in November 2010. In this event, entities from the public and private sectors from Brazil, Argentina, Paraguay, and Uruguay discussed cooperation opportunities to fight piracy, counterfeiting, and irregular imports. As a

result of this initiative, in 2010 RFB registered in Foz do Iguaçu, a major triborder city, a record seizure of counterfeit goods of nearly US\$ 118 million. The superintendence of the 9<sup>th</sup> Fiscal Region of RFB, in charge of the Brazilian states of Paraná and Santa Catarina, was responsible for the seizure of R\$ 343,783,336.25 in counterfeit goods.

FNCP also established its “Click-Complaint”, a website tool for anonymous complaints involving IPR violations that works as a direct channel for information and support regarding piracy. The program has recorded 310 complaints within one year.

In partnership with INPI, staff members of the National Manufacturing Sector Training Service (SENAI) and the Euvaldo Lodi Institute (IEL), a private sector-funded think tank linked to CNI, were trained to help entrepreneurs deal with technological information and patent-related issues. The program also offered specific courses to journalists, teachers, and SENAI's students. Also in the field of educational activities, SENAI hosts an annual technical-cultural event called INOVA-SENAI, where teachers and students showcase products and processes they have created. In 2010, from the 86 projects showcased in the São Paulo Round, 15 were referred for patenting at INPI.

Because of the indisputable need to spread information about the harmful consequences of piracy and other IPR violations, AMCHAM, with the institutional support of CNCP, has implemented a project to educate students from age 7 to 14 (*Projeto Escola Legal*), consolidating its belief that educational measures are essential to legal compliance. The project focuses primarily on the importance of the IPR concept, highlighting the problems caused by piracy. In 2010, the project was implemented in 5 cities and covered 81 schools, reaching 13,200 students and 1,006 educators. Since 2007, the initiative has already reached around 35,000 students.

In its fight against book piracy, the Brazilian Association of Reprographic Rights (ABDR), alongside with several important publishers, launched the “Teacher Folder” (“Pasta do Professor”) a system that allows the legal reproduction of excerpts of books while protecting copyrights. The initiative is aimed mainly at eradicating irregular book photocopying in universities.

In the Internet field, ABDR and the National Syndicate of Book Publishers (SNEL) have established a Digital Piracy Department that monitors the illegal reproduction of books. Until August 2010, the Department removed 42,673 Internet links that allowed illegal downloads of books.

### Brazilian Private Sector and Innovation Policy

Considering the important role played by the private sector in consolidating a culture of respect for IPR in Brazil, CNI and its affiliated institutions, in partnership with INPI, launched in 2010 the Intellectual Property Program for Innovation in Industry. This program is the largest dissemination and capacity-building initiative for strategic use of IPR in Latin America.

The program establishes a positive agenda to influence and raise the profile of topics related to IPR as well as fighting piracy in Brazil. Its activities are based on two main issue-areas: economy and education.

- i. Economy: the goal is to turn business knowledge and innovation into assets of legally protected economic value. This way, intangible intellectual property assets can be marketed with due legal security, expanding the protection available to investments and making it possible for businesses to have a return on their invested capital.
- ii. Education: the goal is to make different segments of Brazilian society aware of the importance of IPR. The protection of intellectual property rights is directly related to the generation of wealth by organizations that invest in creativity and innovation. Therefore, actions are aimed at making Brazilians more aware of aspects related to the production, protection, respect, and management IPR.

In its first year of implementation, the initiative achieved major results at the national level:

- i. Publication of three IPR guides using appropriate approaches and languages for specific audiences: business leaders, journalists, teachers, and elementary and high-school students in Brazil;
- ii. Enrollment of over 15,000 young people and adults for online free-of-charge courses on IPR
- iii. Organization of three national seminars: "Innovation and Intellectual Property" in Rio de Janeiro; "The importance of Intellectual Property to the Brazilian Industry" in São Paulo; and "Creativity, Innovation and Intellectual Property – a Seminar for Journalists" also in São Paulo; and
- iv. IPR training of almost 500 employees of manufacturing business associations.

## **2. FAIR AND EQUITABLE MARKET ACCESS**

Section 182 of the Trade Act of 1974 determines that the USTR identifies, on an annual basis, foreign countries that deny fair and equitable market access to United States persons that rely upon intellectual property protection (19 USC 2242(a)(1)(B)).

According to this Section's special rules for identifications, the USTR must identify such situation only if it finds that there is factual basis for the denial of fair and equitable market access as a result of either (1) a violation of international law or agreement, or (2) the existence of barriers (19 USC 2242(b)(3)). The violation of international law or agreement deems to exist only if the United States and the foreign country are parties

to the same agreement and the latter violates it (19 USC 2242(d)(3)(A)). A barrier deems to exist if the use of laws, procedures, practices, or regulations constitute discriminatory non-tariff trade barriers (19 USC 2242(d)(3)(B)).

Finally, Section 182 requires that the USTR take into account the history of intellectual property laws and practices in the foreign country (19 USC 2242(b)(4)(A)), as well as efforts of the United States, and the response of the foreign country, to achieve adequate and effective protection and enforcement of intellectual property rights (19 USC 2242(b)(4)(B)).

Brazil does not incur in either of the situations abovementioned. On the contrary, Brazil's trade policy has been favoring gradual and non-discriminatory liberalization of the country's domestic market and has been remarkably consistent since the adoption of the Constitution of 1988, and across six different Administrations: Sarney (1985-1989), Collor de Mello (1990-1992), Itamar Franco (1992-1994), Cardoso (1995-2002), Lula (2003-2010), and Rousseff (2011-2014).

From 1988 to 1993, Brazil implemented an aggressive unilateral liberalization strategy. In 1985, the nominal average tariff was above 50%. After the reform, it was progressively reduced to 15%, where it has stayed for almost two decades with a temporary small increase during the mid-1990s due to international financial crises that affected the Brazilian economy. The current nominal average tariff in Brazil is 13.6% (with a trade weighted average tariff of 8.6%), considerably lower than the country's maximum bound tariff level for agricultural (55%) and non-agricultural (35%) goods in the WTO. In addition to the reduction of tariffs, the Collor de Mello Administration, in particular, eliminated all discriminatory non-tariff barriers that existed.

The tariff reform was further locked in through the creation of the MERCOSUR framework in 1991, which established a free trade area with Argentina, Paraguay, and Uruguay, and the adoption of the Common External Tariff (TEC) in 1995. Brazilian commitments under the Uruguay Round of Multilateral Trade Negotiations, concluded in 1994, further strengthened the reform, providing the necessary stability for domestic and foreign companies engaged in trade and investment activities with Brazil.

Moreover, Brazil's monetary stabilization in the mid-1990s through the implementation of the Real Plan, coupled with a post-1999 three-pronged macroeconomic policy based on floating exchange rate, inflation targeting, and primary surpluses, created the basis for a strong currency and additional economic liberalization. In other words, since 2003, Brazil's currency – the Real – has been in a consistent path towards overvaluation, thus creating real market access for U.S. companies in addition to the reduction and/or elimination of tariff and non-tariff barriers. Real's strong position drastically contrasts with that of other currencies, including the U.S. dollar and the Chinese renminbi.

## WTO Doha Development Round

The factual basis demonstrates that the Brazilian average tariff, as applied, is considerably lower when compared to other developing countries. However, in the context of the Special 301 process some interested parties in the United States complained of high tariffs applied to certain products. Although the Brazilian private sector considers it a legitimate claim from an economic perspective, it is outside the scope of Section 182 of the Trade Act of 1974. In the case of tariffs, only a violation of international agreements to which both the United States and Brazil are parties falls under this Section.

Brazil, as the United States, is an original contracting party to the General Agreement on Tariffs and Trade of 1947 (GATT 1947) and a party to the WTO Agreement. Therefore the country is bound by all WTO covered agreements, including GATT 1994, that incorporated GATT 1947 and subsequent decisions. As Brazil does not apply any tariff inconsistent with its commitments, as expressed in the country's Schedule of Concessions, any claim of violation is unfounded.

However, Article XXVIII bis, Paragraph 1, of GATT 1947 also commends that members of the WTO periodically engage in tariff negotiations with a view to reduce them on a reciprocal and mutually advantageous basis. According to the letter and spirit of this provision, Brazil joined the United States in launching the Doha Development Round, in November 2001. According to the Doha Declaration mandate, reduction of agricultural and non-agricultural tariffs and non-tariff barriers are one of the main goals of the current negotiations. Therefore, Brazil and its private sector encourage all interested parties to faithfully engage in such negotiations so that a mutual acceptable and balanced outcome may be achieved, thus increasing market access on a reciprocal basis.

Since 2001, Brazil has demonstrated increasing flexibility towards an ambitious and balanced Doha Round agreement with unequivocal support from its private sector. In July 2008, the country was the first to accept a proposed core issues agreement presented by the WTO Director General, Pascal Lamy, during the Group of 7 informal negotiations.<sup>1</sup> This fact was recognized, among others, by the National Association of Manufacturers (NAM) and the U.S. Chamber of Commerce, the leading business associations in the United States.

As part of its commitment to an ambitious and balanced outcome, Brazil has also been calling for a strong political message of support from G-20 Presidents since the group's first summit in Washington, DC, in 2008.

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<sup>1</sup> The Group of 7 members was composed of Australia, Brazil, China, the European Commission, India, Japan, and the United States.

## Unilateral Tariff Suspension Mechanism

In addition to the ongoing trade negotiations, Brazil consistently operates a unilateral tariff suspension mechanism that can be used by any domestic or foreign company. Differently from the U.S. model, by which tariff suspension proposals are gathered in a single Miscellaneous Tariff Bill (MTB) that needs to be enacted by Congress, thus being affected by electoral and political cycles, the Brazilian mechanism is solely operated by an Executive Branch agency.

The Brazilian Chamber of Foreign Trade (CAMEX), the inter-agency structure that coordinates Brazil's trade policy, is responsible for accepting or rejecting tariff suspension requests that were first reviewed by the Foreign Trade Secretariat (SECEX) of the Ministry of Development, Industry, and Foreign Trade (MDIC). If a request is accepted, a new "ex" tariff classification is created for that specific good and its tariff is reduced from the applied level to 2%.

The so-called "Ex-Tariff" mechanism applies to IP-intensive goods, such as capital goods, IT and telecom equipment. In the last few years, a number of requests were approved by CAMEX. Most of them have a direct and positive impact on U.S. exports, as the country is one of Brazil's major suppliers in these strategic sectors.

In 2008, CAMEX Resolutions 44, 45, and 52 reduced tariffs for 4 information technology and telecommunications goods (ITTG), 484 capital goods (CG), 22 integrated systems (IS), and 216 related parts. The average tariff reduction was 12%, with original applied tariffs as high as 20%. According to estimates by FIESP, of the total items with suspended tariff, the U.S. is Brazil's first supplier in 162 cases (second only to Germany) and its second supplier in another 235 cases (more than any other country). Using import demand elasticity data provided by the World Bank's World Integrated Trade Solution (WITS), FIESP further estimated imports increase for the five categories of products within the range of 12% to 17%.

From 2003 to 2010, the Brazilian Federal Government authorized a total of 13,125 "ex" tariff requests amounting to almost US\$ 21 billion in imports and over US\$ 137 billion in associated investment. On average benefited imports represented roughly 15% of associated investment, although in specific years they reached as high as 25% (2008).

## Domestic Taxes

In the context of the Special 301 process some interested parties also highlighted that the domestic tax system of Brazil hinders market access. Again, although the Brazilian private sector recognizes it as a legitimate concern from an economic perspective, it falls outside the scope of Section 182 of the Trade Act of 1974. In managing its tax system, Brazil does not violate any international agreement to which the country and the United States are parties to, nor does it create discriminatory non-tariff barriers. In fact, Article 152 of the Constitution of 1988, in regulating the power to tax, dictates that

no Brazilian state, the Federal District or any local government can establish any differentiation in taxing any good or service based on their origin or destiny. In other words, the Constitution provides for a national treatment clause that is valid both with regard to goods for export and import, and to goods from different regions within the country.

Nonetheless, the Brazilian private sector recognizes that the tax burden is an important issue both to domestic and foreign companies. The Lula Administration has twice proposed tax reforms. The first one was in 2003, and was aimed at eliminating the so-called “tax war” among different Brazilian states that takes place through the manipulation of state-level tax systems. It was approved in a considerably lighter version and, among other outcomes, resulted in the elimination of the cumulative nature of the Social Security Financing Contribution (COFINS). The second one was introduced in 2008 and aimed solely at simplifying Brazil’s tax structure, being revenue-neutral for the federal as well as for state and local governments. Both faced strong disagreement in Congress, but the Brazilian private sector continues to play a major role in shaping a tax reform that will improve the country’s competitiveness and its business environment for domestic and foreign companies.

#### Brazil-U.S. Bilateral Engagement

Finally, it is important to highlight that Brazil has, for many years, engaged bilaterally with the United States in good faith to address trade and investment concerns raised by American and Brazilian companies. This commitment can be seen in the number of dialogues and institutional mechanisms created in the last decade, solely focused on trade and investment policy, trade and investment promotion, and trade and investment facilitation issues. They are as follows:

<b>DATE OF INCEPTION</b>	<b>BILATERAL MECHANISM</b>	<b>U.S. GOVERNMENT AGENCY</b>	<b>BRAZILIAN GOVERNMENT AGENCY</b>
2000	Consultative Commission on Agriculture	Department of Agriculture (USDA)	Ministry of Agriculture, Livestock, and Food Supply (MAPA)
2001	Consultative Mechanism on Trade and Investment	United States Trade Representative (USTR)	Ministry of External Relations (MRE)
2005	Commercial Dialogue	Department of Commerce (DOC)	Ministry of Development, Industry, and Foreign Trade (MDIC)

2007	Economic Partnership Dialogue	Department of State (DOS)	Ministry of External Relations (MRE)
2007	U.S.-Brazil CEO Forum	White House and the Department of Treasury (TREAS)	Chief of Staff of the President and the Ministry of Development, Industry, and Foreign Trade (MDIC)

In 2001, the Consultative Mechanism on Trade and Investment was primarily established to handle Brazil-U.S. IPR disputes in the WTO at that time. In addition, Brazil and the United States are reported to be investigating the possibility of negotiating a bilateral Trade and Investment Framework Agreement (TIFA) that would increase the channels to address trade and investment concerns, including an increased participation of the private sectors of both countries.

### 3. OTHER SPECIAL 301 PROCESS-RELATED ISSUES

The Brazilian private sector believes that three other import issues – not directly related to the proceedings of Section 182 of the Trade Act of 1974 – must be addressed due to their relevance and to the U.S. government and private sector interest in them.

#### International Negotiations

In the context of the Special 301 process, some interested parties complained of Brazil's positioning when it comes to negotiations in international fora such as FAO, the World Health Organization (WHO), the WIPO, and the WTO. According to them, the country would be engaged in undermining international law related to IPR protection and promotion. This concern has also been shared by some agencies of the U.S. government, and discussed extensively with the Brazilian private sector in numerous occasions.

As in the United States, the trade policy-making process in Brazil is contentious. Different agencies within the Brazilian government and different interest groups in the Brazilian society, including businesses, consumers, social movements, indigenous people, and nongovernmental organizations, have natural discrepancies in their approach to the wide range of IPR-related issues. Nonetheless, the Brazilian private sector believes that the official Brazilian positioning in rulemaking exercises at the international level must not be confused with Brazil's commitment to adequately and effectively protect IPR and to secure fair and equitable market access for persons that rely upon IPR protection.



It is important to point out that since 2009 Brazil seems to have adopted a more moderate approach in international negotiations, demonstrating openness to engage in a concrete discussion on the much needed reform of the WIPO Patent Cooperation Treaty (PCT). A positive move in Brazil's position was also noted in the last sessions of WIPO's Advisory Committee on IPR Enforcement, as well as in the context of the G8 + G5 dialogue, the so-called "Heiligendamm Process".

The Brazilian private sector appreciates the more moderate stance taken by the Brazilian government in international negotiations, but notes that they do not fall under the scope of Section 182 of the Trade Act of 1974. Moreover, international negotiations fora are what they intend to be: spaces where countries can freely exchange views and discuss changes in law and approaches to issues of concern for the parties involved. These exercises shall not, and cannot in a fair basis, be taken as a measurement of Brazil's commitment. They must not overshadow concrete steps taken by the Brazilian government and its private sector in the last decades.

### IPR and Climate Change

International negotiations on climate change have also become an important forum for IPR-related issues. The Bali Action Plan of 2007, in particular, provides for negotiations related to transfer of technology, and some developing countries have introduced proposals that try to address the issue by adapting the current intellectual property protection regime to new challenges faced by both developed and developing countries in taking action to mitigate climate change and adapt to it.

As stated before, the Brazilian private sector believes that this is a legitimate exercise. However, in light of concerns raised by the United States' private sector, as well as from members of the U.S. Congress, it considers it necessary to better explain its own position on the issue.

Both CNI and FIESP, the leading manufacturing sector trade associations in Brazil, presented to the Brazilian government their formal position on the issue prior to the 15<sup>th</sup> Conference of the Parties to the United Nations Framework Convention on Climate Change (UNFCCC) / 5<sup>th</sup> Meeting of the Parties to the Kyoto Protocol (KP), in Copenhagen, in December 2009.

In its document, CNI stated: "Protection of intellectual property rights is essential to stimulate investment in research, development, and innovation. It is important that international commitments, in incorporating mechanisms to foster the transfer of technology, protect intellectual property rights. The protection of these rights is crucial to the reduction of technology cooperation risks devoted to low-carbon innovation. At the same time, incentives for technology transfer to medium, small and micro companies shall be created, and shall take into account respective implementation capacity of these companies."

In its document, FIESP stated: “[It is a FIESP goal to] create incentives to the transfer of intellectual property rights as a tool to foster innovation in low-carbon technologies, thus securing the developing countries effective access to mechanisms aimed at maximizing global efforts to mitigate greenhouse gases emissions. The low-carbon technology transfer models in discussion shall achieve this goal in conformity with international trade law.”

Prior to the 16<sup>th</sup> Conference of the Parties to the UNFCCC / 6<sup>th</sup> Meeting of the Parties to the KP, in Cancun, in December 2010, both CNI and FIESP reaffirmed their commitment with IPR protection by emphasizing the role played by innovation in the new green economy.

In its document, CNI stated: “[The] Brazilian industry has been continually investing in R&D to produce new equipment that can reduce energy consumption in the industrial process. More recently, investments in improving the materials used in the productive process, such as biomaterials, deserve special mention. For example, the Brazilian petrochemical industry developed a technology for producing plastic from renewable materials and recently set up a plant for producing 200,000 tons of ‘Green Polyethylene’. This thermoplastic resin will contribute toward the capture of 2.5 tons of CO<sub>2</sub> equivalents for each ton of polyethylene. The first factory alone – which began to operate [in 2010] – will contribute towards the capture of 500,000 tons of CO<sub>2</sub> equivalents/year. The bioplastic is already being marketed, replacing products which generate higher emissions in different sectors, such as automobiles, toys, packaging, etc.”

In its document, FIESP stated: “The protection of intellectual property rights has to be fostered as a tool to promote innovation in the low-carbon technology sector. At the same time, and particularly to developing countries, effective access to technologies that maximize global GHG mitigation efforts has to be secured.”

In sum, the Brazilian private sector believes that IPR connected to climate change mitigation and adaptation must be protected, but also that effective support in terms of technology transfer must take place. In addition, any mechanism devoted to address this issue shall not impose “one size fits all” model to developing countries, as domestic circumstances differ greatly among them.

#### U.S. – Upland Cotton Case

The U.S. government and its private sector have consistently demonstrated concern with the prospect of Brazil's use of “cross-retaliation” measures in connection to the WTO *U.S. – Upland Cotton* case. A number of American companies and business associations have repeatedly discussed this issue with the Brazilian government, as well as with the Brazilian private sector.

The possibility of suspension of concessions or other obligations under the WTO covered agreements by Brazil, including with regard to United States persons' IPR, does not fall under the scope of Section 182 of the Trade Act of 1974. It is a right conferred to the country by the WTO Dispute Settlement Body (DSB) in accordance with Article 22.2 of the Dispute Settlement Understanding (DSU), and Article 4.10 of the Agreement on Subsidies and Countervailing Measures (ASCM).

The matter at stake is not whether Brazil exercises its rights, but whether the United States will comply with succeeding rulings on the inconsistency of its domestic support programs with the WTO covered agreements. In almost 10 years of dispute, the United States failed to bring its measures in compliance with the WTO covered agreements, in particular the Agreement on Agriculture (AA) and the ASCM. It only partially addressed the issue by eliminating the so-called "Step 2" program one year after the reasonable period of time stipulated by the DSB.

Furthermore, there is no hierarchy between the WTO covered agreements, that is, compliance with TRIPS provisions is not more important than compliance with the provisions of the AA and the ASCM. As the Appellate Body stated in the WTO *Argentina – Footwear* case, the covered agreements are "[...] "integral parts" of the same treaty, the WTO Agreement, that [according to its Article II.2] are "binding on all Members."" (WT/DS121/AB/R, Paragraph 81).

Nonetheless, the Brazilian private sector believes that the Brazilian government has shown great flexibility in trying to solve the dispute, including through the disposition of finding a solution in the framework of the Doha Development Round. Moreover, it made preparations to implement its right to suspend concessions or other obligations in a fair, equitable, and transparent manner, including through the use of public consultations by CAMEX. The Brazilian private sector has also been engaged in exploring creative solutions to the dispute.

A Provisional Executive Order (MP) empowering the Brazilian government to exercise its right to suspend concessions or other obligations related to IPR was issued by President Luiz Inácio Lula da Silva in February 11, 2010 and converted to Law 12270 of June 24, 2010. The Law provides the necessary legal basis for the implementation of cross-retaliation. However, it does not mandate such measures, but only implements a right conferred to Brazil by the DSU since 1995 (i.e. to cross-retaliate under certain conditions). Furthermore, the Law is not a blank check to the Brazilian Executive Branch. It only authorizes the use of cross-relation measures related to IPR if they were previously authorized by the WTO Dispute Settlement Body (DSB).

The Law does not hinder the possibility of finding a mutually acceptable solution to the dispute through dialogue and negotiation. In fact, Brazil and the United States reached consensus on a temporary solution to the dispute that took the form of an exchange of letters between MRE and USTR, a MOU on a Fund for Technical Assistance and Capacity Building, and a Framework for a Mutually Agreed Solution.

The Brazilian private sector, as well as the Brazilian government, expects that the U.S. Congress fully implements WTO rulings by the time it approves the next Farm Bill in 2012.

#### **4. THE LEGITIMACY AND LEGALITY OF THE SPECIAL 301 PROCESS**

The Brazilian private sector considers it is only natural for the U.S. to raise concerns regarding IPR protection and promotion as a substantial part of its economy – and its jobs creation – is heavily dependent on innovation. The establishment of the Special 301 process by the USTR under congressional authority seems to reflect this reality.

Nonetheless, it is also important to take into account the legitimacy and legality of the Special 301 process as it is based solely on foreign countries' policies and practices assessment, but not on an evaluation of U.S. IPR policy, particularly at the international level.

According to the WTO official record, 28 of its 420 disputes were related to IPR. Of these 28 disputes, the U.S. was a respondent in five while Brazil was a respondent in only one. Moreover, according to a Congressional Research Service (CRS) report on "WTO Dispute Settlement: Status of U.S. Compliance in Pending Cases" dated January 29, 2010, the United States has ten cases pending compliance with WTO rulings, two of which related to IPR, specifically copyrights and trademarks. These facts seem to indicate a level of inconsistency between U.S. demands towards its trade partners and the country's own practice. This inconsistency tends to erode the legitimacy of unilateral reviews such as those conducted under the Special 301 process.

Furthermore, the recent conclusion of the Anti-Counterfeiting Trade Agreement (ACTA) negotiations between the U.S., the European Commission (EC), Japan, and a few non representative developing countries adds uncertainty to the exact goals of the United States IPR policy at the international level. While ACTA negotiations were clearly established as a G-8 outgrown process, the U.S. did not show any interest in involving a larger number of countries represented in the G-20 – G-8's successor as the premier international economic cooperation forum. On the contrary, it seems that these countries, including Brazil, were purposefully excluded from these negotiations. It should be noted, however, that a careful review of the most recent ACTA draft disclosed last December shows that most of its TRIPS-plus provisions are consistent with the Brazilian legislation.

Coupling this with the fact that ACTA negotiations were surrounded by secrecy, that its obligations raised concerns regarding constitutionality even among members of the U.S. Congress, that it is not yet clear if the TRIPS agreement allows any kind of WTO-Plus agreements related to IPR, and that the United States clearly evaded a multilateral process within the WTO or the WIPO, generates doubt about U.S. intentions. In fact, plurilateral agreements negotiated by a small like-minded group of countries tend to be

used as tools to create loopholes in multilateral trade rules, as Brazil painfully experienced in the past with regard to the Organization for Economic Co-operation and Development (OECD) Arrangement for Officially Supported Export Credits and its connection to the ASCM Annex I letter (k) loophole. In that sense, the conduction and conclusion of ACTA's negotiation seems to indicate a level of inconsistency between U.S. alleged commitment to support a multilateral rules-based trading system and the country's practice. This inconsistency again tends to erode the legitimacy of unilateral reviews such as those conducted under the Special 301 process.

Finally, a word must be said about legality. The DSU states in its Article 23.1 that: "When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding." In other words, the DSU both ensures the exclusivity of the WTO vis-à-vis other international fora and, more importantly, protects the multilateral system and WTO members from unilateral conduct.

In addition, DSU Article 23.2(a) goes beyond that obligation to establish that in such cases as described in Article 23.1, a WTO member shall: "[N]ot make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding [...]." Again, the DSU is clear in stating that no determination of a violation of international trade rules can be made outside the WTO dispute settlement system.

When read in conjunction, DSU Articles 23.1 and 23.2(a) seem to establish that the unilateral determination by the U.S. of an IPR-related violation by a trading partner through the Special 301 process is not consistent with WTO rules. This is a fact that has to be taken into consideration.