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TAGS: EIND, ETRD, BR  
SUBJ: INDUSTRIAL PROPERTY PROTECTION IN BRAZIL:  
- PART I, HISTORICAL OVERVIEW AND ROLE OF  
- INPI

INTRODUCTION

1. THIS IS THE FIRST REPORT IN A FIVE-PART SERIES ON INDUSTRIAL PROPERTY PROTECTION IN BRAZIL. IT PROVIDES AN HISTORICAL OVERVIEW OF PATENT PROTECTION IN BRAZIL AND DESCRIBES THE ORGANIZATION AND FUNCTIONS OF THE RIO-BASED NATIONAL INSTITUTE OF INDUSTRIAL PROPERTY (INPI). SUBSEQUENT CABLES WILL DEAL WITH PATENTS, TRADEMARKS, TECHNOLOGY TRANSFER, AND COPYRIGHT ISSUES. MANY OF THE ISSUES TOUCHED ON IN THE FIRST PART WILL BE DEVELOPED MORE FULLY IN THESE MORE SPECIFIC CABLES.

SUMMARY

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2. INTELLECTUAL PROPERTY PROTECTION IS AN IMPORTANT

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UNITED STATES DEPARTMENT OF STATE  
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BILATERAL ISSUE, CLOSELY RELATED TO DISPUTES OVER INFORMATICS, PHARMACEUTICALS, AND THE U.S. TRADE DEFICIT WITH BRAZIL. OVER THE PAST THREE MONTHS, ECONOFF HAS MET WITH BUSINESS REPRESENTATIVES, GOVERNMENT OFFICIALS AND LOCAL LAWYERS TO GAIN A BROADER UNDERSTANDING OF THIS COMPLEX ISSUE. AN OVERALL IMPRESSION GLEANED FROM THESE DISCUSSIONS IS THAT THE BRAZILIAN VIEW OF INDUSTRIAL PROPERTY PROTECTION IS DETERMINED BY ITS GOALS OF TECHNOLOGICAL DEVELOPMENT AND ECONOMIC GROWTH. THIS ORIENTATION LEADS TO FREQUENT CONFLICT WITH U.S. COMMERCIAL INTERESTS AND, OCCASSIONALLY, WITH INTERNATIONAL ACCORDS. END SUMMARY.

#### HISTORICAL OVERVIEW

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3. BRAZIL WAS THE FIFTH NATION IN THE WORLD TO ENACT A PATENT LAW, IN 1809, AND WAS A FOUNDING PARTY TO THE PARIS CONVENTION FOR THE PROTECTION OF INDUSTRIAL PROPERTY IN 1883. DESPITE THESE HISTORICAL PRECEDENTS, INDUSTRIAL PROPERTY PROTECTION WAS LARGELY IRRELEVANT BEFORE WORLD WAR II BECAUSE BRAZIL REMAINED A BASICALLY AGRARIAN SOCIETY. INDUSTRIALIZATION DID NOT BEGIN IN EARNEST UNTIL THE 1950'S, WITH THE IMPLEMENTATION OF IMPORT SUBSTITUTION POLICIES AND THE DEVELOPMENT OF MAJOR INDUSTRIES SUCH AS STEEL, SHIPPING AND AUTOMOBILES.

4. SMALL BRAZILIAN PHARMACEUTICAL COMPANIES WERE ALSO CREATED DURING WWII WHEN THE SUPPLY OF MEDICINE UNCLASSIFIED

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FROM EUROPE AND THE U.S. WAS INTERRUPTED. GENERALLY, THESE FIRMS DID NOT INVEST IN RESERCH AND DEVELOPMENT AND USED UNSOPHISTICATED TECHNOLOGY. IN THE LATE 1950'S, EUROPEAN AND AMERICAN PHARMACEUTICAL COMPANIES BEGAN TO ENTER THE BRAZILIAN MARKET, IN MANY CASES BY BUYING EXISTING BRAZILIAN FIRMS. COMPETITION FROM THE MULTINATIONALS, COMBINED WITH DECAPITALIZATION CAUSED BY THE HIGH INFLATION OF THE EARLY 1960'S, LED BRAZILIAN PHARMACEUTICAL COMPANIES TO DEMAND PROTECTION FROM THEIR GOVERNMENT. IN PARTICULAR, THEY CLAIMED THAT PATENTS HELD BY

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MULTINATIONALS AND PROTECTED UNDER A 1945 BRAZILIAN LAW WERE BLOCKING THEIR ACCESS TO THERAPEUTIC SUBSTANCES. AT THE TIME, THESE SUBSTANCES WERE READILY AVAILABLE FROM PRODUCERS IN ITALY, WHICH DID NOT RESPECT PHARMACEUTICAL PATENTS.

5. AN EMOTIONAL NATIONAL DEBATE ENSUED, WITH THE NATIONAL INDUSTRY DEMANDING THAT THE GOB ABOLISH PATENT PROTECTION FOR PHARMACEUTICALS. IN 1969, A PATENT INFRINGEMENT CASE BROUGHT BY A MNC AGAINST THE SUBSIDIARY OF AN ITALIAN FIRM PROVIDED THE CATALYST FOR CHANGING BRAZILIAN LAW. AT THE SAME TIME, PRESIDENT COSTA E SILVA BECAME ILL AND WAS SUBSTITUTED FOR ONE MONTH BY A THREE-MAN MILITARY GOVERNMENT. THE BRAZILIAN PHARMACEUTICAL FIRMS USED THIS OPPORTUNITY, AND THEIR INFLUENCE IN THE MINISTRY OF HEALTH, TO OBTAIN APPROVAL FOR A DECREE LAW PROHIBITING PATENTS FOR PHARMACEUTICALS AND FOODSTUFFS.

6. THE 1969 DECREE LAW CONTAINED OTHER PROVISIONS WHICH MADE IT UNWORKABLE, INCLUDING A REQUIREMENT

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TAT PATENT HOLDERS SUBMIT EVIDENCE TO THE PATENT OFFICE EVERY YEAR TO PROVE THEY WERE WORKING THE PATENT. THE PATENT OFFICE WAS INCAPABLE OF PROCESSING THE EXTRA PAPERWORK REQUIRED BY THE DECREE. CONSEQUENTLY, THE PATENT OFFICE WAS PLACED UNDER INTERVENTION, AND A NEW ORGANIZATION, THE NATIONAL INSTITUTE OF INDUSTRIAL PROPERTY (INPI) WAS CREATED. THE DECREE LAW WAS REPLACED BY A NEW LAW, THE INDUSTRIAL PROPERTY CODE (NO. 5772) IN DECEMBER 1971. THE NEW LAW ELIMINATED SOME OF THE MORE ONEROUS PROVISIONS OF THE 1969 DECREE, BUT CONTINUED THE PROHIBITION ON PATENTS FOR PHARMACEUTICALS AND PROCESSED FOODS. INPI WAS ORGANIZED ALONG THE LINES OF THE GERMAN PATENT OFFICE, WHICH PROVIDED TECHNICAL ASSISTANCE IN TRAINING EXAMINERS AND SETTING UP A PATENT BANK.

ROLE OF INPI  
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7. INPI IS HEADED BY A PRESIDENT, CURRENTLY MAURO ARRUDA, WHO REPORTS TO THE MINISTER OF INDUSTRY AND COMMERCE (MIC). THE INSTITUTE IS DIVIDED INTO DIVISIONS WHICH REFLECT ITS BASIC FUNCTIONS: PATENTS, TRADEMARKS, CONTRACTS AND ADMINISTRATION. EACH DIVISION IS HEADED BY A DIRECTOR, WHO IS RESPONSIBLE FOR THE ADMINISTRATION OF THE TECHNICAL STAFF. AT PRESENT, INPI'S TOTAL STAFF OF ABOUT 100 IS HARD-PRESSED TO KEEP UP WITH THE INCREASE IN PATENT AND TRADEMARK APPLICATIONS. IN 1985, INPI RECEIVED

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10,000 PATENT REQUESTS, 51 FROM BRAZILIAN FIRMS OR INDIVIDUALS. IT PRESENTLY HAS 70,000 REGISTERED PATENTS, OF WHICH 57 ARE HELD BY FOREIGNERS. FURTHERMORE, LAST YEAR INPI RECEIVED 63,000 REQUESTS TO REGISTER TRADEMARKS, AN INCREASE OF 26 OVER 1984. BRAZIL CURRENTLY RANKS THIRD IN THE WORLD (AFTER JAPAN AND THE U.S.) IN THE NUMBER OF TRADEMARK REQUESTS RECEIVED PER YEAR. INPI IS HEADQUARTERED IN RIO DE JANEIRO, BUT REGIONAL OFFICES ARE PLANNED FOR BELO HORIZONTE, SAO PAULO AND PORTO ALEGRE.

8. THE CODE OF INDUSTRIAL PROPERTY GRANTS CONSIDERABLE AUTHORITY TO INPI. PERHAPS ONE OF THE MOST CONTENTIOUS PROVISIONS IS ARTICLE 33, WHICH ALLOWS INPI TO GRANT COMPULSORY LICENSING TO THIRD PARTIES IN CASES WHEN A PATENT HOLDER HAS NOT EFFECTIVELY USED A PATENT IN BRAZIL WITHIN THREE YEARS OF THE DATE OF ISSUANCE, OR WHEN USE WAS INTERRUPTED FOR MORE THAN ONE YEAR. IMPORTATION IS NOT CONSIDERED USE OF THE PATENT UNDER THE TERMS OF THE CODE. ACCORDING TO LOCAL PATENT ATTORNEYS, INPI HAS INVOKED ARTICLE 33 ONLY ONCE, IN THE MONSANTO UNCLASSIFIED

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CASE, WHICH WILL BE DISCUSSED IN GREATER DETAIL IN PART II.

9. ARTICLE 49 ALLOWS INPI TO CANCEL (CADUCAR) A PATENT IF THE PATENT HOLDER HAS NOT USED THE PATENT WITHIN FOUR YEARS, OR WHEN SUCH USE WAS INTERRUPTED FOR TWO CONSECUTIVE YEARS. SIMILARLY, THE CODE GRANTS INPI THE AUTHORITY TO CANCEL TRADEMARKS WHICH WERE NOT USED FOR TWO OR MORE YEARS IMMEDIATELY PRECEDING THE DATE ON WHICH THE CANCELATION ACTION IS FILED. INPI DEFINES NON-USE OF TRADEMARKS AS THE FAILURE TO MARKET THE PRODUCT IN BRAZIL. DUE TO STRICT IMPORT RESTRICTIONS IMPOSED BY THE GOB, FOREIGN FIRMS HAVE EXPERIENCED DIFFICULTIES IN FULFILLING THE USE REQUIREMENT. THESE PROBLEMS WILL BE DISCUSSED MORE THOROUGHLY IN PART III.

10. IN THE AREA OF TECHNOLOGY TRANSFER, INPI HAS ASSUMED POWERS WHICH ARE NOT EXPLICITLY CONFERRED TO IT BY THE CODE. ARTICLE 126, THE ONLY SECTION WHICH

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MENTIONS THE ISSUE, SIMPLY REQUIRES THAT ALL TECHNOLOGY TRANSFER CONTRACTS BE REGISTERED WITH INPI. LAW NO. 5648 OF 1970, WHICH CREATED INPI, ALSO AUTHORIZES INPI TO ADOPT MEASURES "CAPABLE OF ACCELERATING AND REGULATING THE TRANSFER OF TECHNOLOGY." BASED ON THESE TWO ARTICLES OF LAW, INPI HAS DEVELOPED A SERIES OF ADMINSTRATIVE RESTRICTIONS WHICH GIVE IT VIRTUAL VETO POWER OVER CONTRACTS ENTERED INTO BY FOREIGN AND BRAZILIAN FIRMS. PART IV WILL EXAMINE THESE RESTRICTIONS.

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11. IN THE PAST SEVERAL MONTHS, INPI HAS BECOME CAUGHT UP IN A POWER STRUGGLE BETWEEN THE MINISTRY OF SCIENCE AND TECHNOLOGY (MCT) AND THE MIC. MCT MINISTER RENATO ARCHER HAS BEEN PUSHING HARD TO HAVE INPI TRANSFERRED TO HIS DOMAIN. HE CLAIMS THAT PRESIDENT SARNEY SIGNED A DECREE AUTHORIZING THE TRANSFER OF INPI TO THE MCT ON FEBRUARY 14, BUT ITS PUBLICATION WAS DELAYED BY MIC MINISTER JOSE CASTELO BRANCO. ARCHER REPORTEDLY IS INTERESTED IN GAINING CONTROL OVER INPI'S PATENT AND TECHNOLOGY TRANSFER CONTRACT OPERATIONS, WHICH, WHEN COMBINED WITH SEI, WOULD GIVE THE MCT COMPLETE CONTROL OVER THE GOB'S HIGH TECHNOLOGY POLICY.

12. COMMENT: INPI IS FREQUENTLY ACCUSED, BY BRAZILIAN AS WELL AS FOREIGN FIRMS, OF BEING POORLY MANAGED AND, IN THE LATTER CASE, HOSTILE TOWARDS  
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FOREIGN INTERESTS. ACCORDING TO LOCAL LAWYERS, INPI HAS BECOME MORE EFFICIENT IN RECENT YEARS AND IS PROCESSING A HIGHER VOLUME OF PATENT AND TRADEMARK APPLICATIONS MORE EFFICIENTLY. MARGARIDA MITTLEBACH, DIRECTOR OF PATENTS, FEELS THAT INPI IS UNDERSTAFFED, BUT INSISTS THAT THE TUNAROUND TIME FOR PATENTS AND TRADEMARKS COMPARES FAVORABLY WITH PATENT OFFICES IN THE U.S., WESTERN EUROPE AND JAPAN. CLEARLY, THE ADMINISTRATION OF INPI HAS IMPROVED SINCE EARLY 1985, WHEN ITS PRESIDENT WAS REMOVED FOLLOWING A MAJOR SCANDAL IN WHICH HE WAS ACCUSED OF INVESTING EMPLOYEES' SALARIES IN THE OVERNIGHT MARKET AND USING THE PROCEEDS TO START A PRIVATE BANK. WITH RESPECT TO INPI'S ALLEGED BIAS, ONE LOCAL LAWYER NOTED THAT INPI BASES ITS DECISIONS ON A VERY STRICT INTERPRETATION OF THE CODE, WHICH WAS WRITTEN TO GIVE BRAZILIAN FIRMS THE MAXIMUM ADVANTAGE. IN CASES WHERE INPI HAS EXCEEDED THE INTENT OF THE ACT, THEY HAVE GENERALLY BEEN OVERRULED BY THE FEDERAL COURTS, WHICH CONSTITUTE AN IMPORTANT RECOURSE FOR FOREIGN FIRMS.

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LAWYERS WE CONSULTED SAID LEGAL CHALLENGES, WHILE  
SLOW AND COSTLY, CAN BE AN EFFECTIVE REMEDY TO INPI'S  
MORE EGREGIOUS ACTIONS.

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