



February 8, 2013

To: Paula Karol Pinha
Director for Intellectual Property and Innovation
Office of the United States Trade Representative
1724 F Street, NW
Washington, D.C. 20508

Re: 2013 Special 301 Review

Dear Ms. Pinha,

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) hereby submit our joint report 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 31, 2012.

UNDERSIGNED BUSINESS ASSOCIATIONS

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. 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 undeniable. 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 fifth consecutive year that the USTR remove Brazil from the Special 301 Watch List.

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

Respectfully,

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)

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1. ADEQUATE AND EFFECTIVE PROTECTION OF INTELLECTUAL PROPERTY RIGHTS

Section 182 of the Trade Act of 1974 determines that the USTR must identify, 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 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 a three-pronged cumulative test.

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 (IPR) (19 USC 2242(b)(4)(B)).

None of the abovementioned situations is applicable to Brazil. On the contrary: there is an increasing 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. Moreover, 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.

1.1 Brazilian Society Consensus

As a strong emerging economy, Brazil has become a major player in international economic transactions, not only at the end-side, attracting massive flows of foreign investment, but also, increasingly investing abroad. This brings a cultural change, whereas not only foreigners are concerned with IPR protection in Brazil, but more and more Brazilians now identify the importance of a solid IPR system, and its correlation with innovation and, ultimately, economic growth. This shift of approach is part of an initiative, greatly sustained by the Brazilian Government, to stimulate a "culture of intellectual property and innovation", anchored in an increased protection of IPR, and the inclusion of such concept in all levels of formal education.

This leads to a greater reliance of multinationals and national companies in the ability of the Brazilian legal, regulatory and judicial framework to achieve high standards in IPR

protection and deliver effective and adequate protection. Furthermore, long-term policies are equally endeavored, both by the private and public sectors, to protect and promote a stronger intellectual property system, as a road to lead Brazil into a knowledge and innovative economy.

Indeed, there is a growing consensus within the Brazilian society on the relevance of IPR protection and promotion as a determining factor for the social, economic and sustainable development for the country. Accordingly, acts, policies, or practices that infringe these rights are perceived as threatening to consumers' life, neglecting health and safety standards, and harmful to manufacturers and IPR owners.

Furthermore, IPR violations are increasingly identified by the Brazilian society as major harmful practices to the economy and society. These violations 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 and creative economy.

Therefore, actions to fight counterfeiting, piracy, and other IPR violations are being praised by society and intensified all across the country, with better results each year. Additionally, the press has been playing an active role in identifying and publicizing such actions and putting the issue under the spotlight, contributing to an increased awareness within the Brazilian society. On top of that, widespread campaigns of education are also being formulated, resulting in a national policy embracing a real and shared effort towards a more solid and efficient system of IPR protection.

It is also worth noting that IPR protection is no longer pursued as a standalone priority for the Administration, 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 political will to strengthen the available instruments designed to protect IPR, together with a real strategy to improve the Brazilian legal framework and regulatory structure, law enforcement efforts, international cooperation initiatives, and activities supported by the private sector, bringing a number of reformative actions that are in line with this policy goal.

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

1.2 IPR Protection, Promotion, and Innovation Policy

The era in which the lack of adequate and effective IPR protection 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 21st century knowledge-intensive economy.

As a corollary, Brazil has been placing great emphasis in strengthening its IPR system in order to create an 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. On top of that, the 2005 Brazilian "Good Act" seeks to create a favorable business environment for technological innovation.

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

In accordance with Guideline #8, innovation policy was defined as a fundamental pillar of the current industrial, technological, service and foreign trade policy of Brazil, known as "Plano Brasil Maior". Released in August 2011, the objectives of the Plan include: (i) massive financing for innovation purposes; and (ii) the reform and expansion of the legal framework on innovation.

So far, results from these initiatives have proved extremely positive, with a gradual increase both of Brazilian companies' investment in R&D, and of the number of Brazilian requests for patents in other countries, including to the United States Patent and Trademark Office (USPTO).

In sum, Brazil is strategically committed to promoting innovation as a means to increase its private sector competitiveness. Brazilian policymakers widely recognize that IPR protection and promotion are essential components of any modern innovation policy.

1.3 Brazilian Legal Framework Established by the Brazilian Federal Government

I) The existing legal framework

The current legal framework on IPR protection and promotion is the result of a consistent 18-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
2005	11196 (November 21, 2005)	Good Act
2007	11484 (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 provides altogether a higher level of protection than what is actually required by the minimum international standards contained in that agreement.

It is also worth noting that Brazil has forgone most of its TRIPS-related special and differential treatment rights, embodied in Article 65 of the TRIPS Agreement, and implemented the agreement along with the developed countries in 1996 – long before the January 1st, 2000 deadline for developing countries and the 2005 deadline exception for specific technology areas. Thus, Brazil had less time to adapt to the new rules required by the multilateral agreements, but undertook the challenge to implement such changes immediately upon signing, without resorting to the differentiated treatment to which it was entitled.

II) Legislative bills and proposals under analysis

In addition to its successful past achievements, Brazil has been putting great effort in improving its domestic laws. Among the proposals currently under consideration by the Brazilian Congress to 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. The text was approved by all Committees, and forwarded to the Plenary for voting;

- ii. House Bill 2729/03: increases the penalty for crimes against software copyrights, trademarks and patents, and amends rules of the criminal procedure code to expedite the prosecution and trial of crimes against copyrights. Among the improvements, the Bill provides for the destruction of seized goods and reproduction equipment prior to commencement of criminal proceedings. The Bill, currently discussed under urgency status, was approved by the House of Representatives and has been forwarded to the Senate;
- 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. It is currently being discussed under priority status rules;
- 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 2177/11: establishes the new National Code of Science, Technology and Innovation, which consolidates and improves Brazilian legislation on the matter. A Special Commission was created in 2012 and charged with the issuance of an opinion on the subject;
- vi. Senate Bill 464/11: suspends activities of companies involved in forgery, tampering or alteration, among other practices, of pharmaceutical drugs, cosmetics and similar products. The Bill was approved by the Senate and has been forwarded to the House of Representatives;
- vii. Senate Bill 162/11: creates a national anti-piracy policy for products subject to sanitary surveillance, and enables the Federal Police to investigate acts of forgery, corruption, tampering or alteration of therapeutic or medicinal products. The Bill was approved by the Senate and has been forwarded to the House of Representatives;
- viii. Senate Bill 368/11: expands the jurisdiction of the Federal Police to investigate the crimes of forgery, corruption, and tampering of pharmaceutical drugs, including its sales on the Internet. The Bill was approved by the Senate and has been forwarded to the House of Representatives; and
- ix. Senate Bill 236/12: reforms the Brazilian Penal Code. A Commission of Jurists is responsible for drafting the new Criminal Code, which, among other improvements, increases the penalty for copyright infringement, commercial use, without authorization, of intellectual works, crimes against patents, and crimes

against trademarks. Additionally, new crimes were included, such as intellectual plagiarism. Public hearings will be held in March and April to discuss the Bill, and the project is expected to be voted in June.

It is important to mention 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 minor procedural difference between the rules of the House and the Senate in Brazil – when compared to their equivalent in the United States – is sometimes illustrated as a shortcoming, and underscores Brazilian efforts. Nevertheless, 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 legislatures 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 do not face the same situation, as each legislature lasts for only two years, and thus bills not approved need to be re-introduced.

III) The reform of the Brazilian copyrights law

Besides the legislative efforts to amend IPR statutes, the Brazilian Federal Government, through the Ministry of Culture (MinC), is strongly engaged in reviewing and updating the Copyrights Act of 1998. In this context, public consultations were held during 2010 and 2011 to open discussions regarding the modernization of the federal copyrights legislation. The preliminary bill is currently under analysis in the Civil House of the Presidency of the Republic. Moreover, legislative procedures to amend the Act are expected to initiate this year. Among other improvements, the bill shall include a “notice and take down” clause – inspired by the U.S. Digital Millennium Copyright Act – to help curb Internet piracy.

IV) The Board of Advanced Studies and Technology Assessment

In order to strengthen public policies and to provide the legislative with guidelines, in 2003, the Board of Advanced Studies and Technology Assessment (CAEAT) was established, as a technical and advisory body within the House of Representatives. The CAEAT is composed of 11 parliamentarians, who are dedicated to the analysis and identification of strategic issues that could potentially increase innovation in the country.

Accordingly, the Board conducts activities involving the promotion of seminars, exhibitions, publications, workshops, among others, with the collaboration of researchers from different areas. Aiming to foster innovation and intellectual property protection, four seminars on Technological Innovation, Intellectual Property and Patents were held by CAEAT in August 2011, as well as a series of debates on patent legislation and the future of technological innovation in Brazil.

In continuation of this movement, the Council also held in May 2012 its fifth seminar on

patents and innovation, entitled "Patents and the Future of National Drug Industry", in which officials of the Judiciary, Academia, the Ministry of Health, among other federal agencies participated.

1.4 Regulatory Structure Established by the Brazilian Federal Government

I) National Institute of Industrial Property (INPI)

a) Introduction

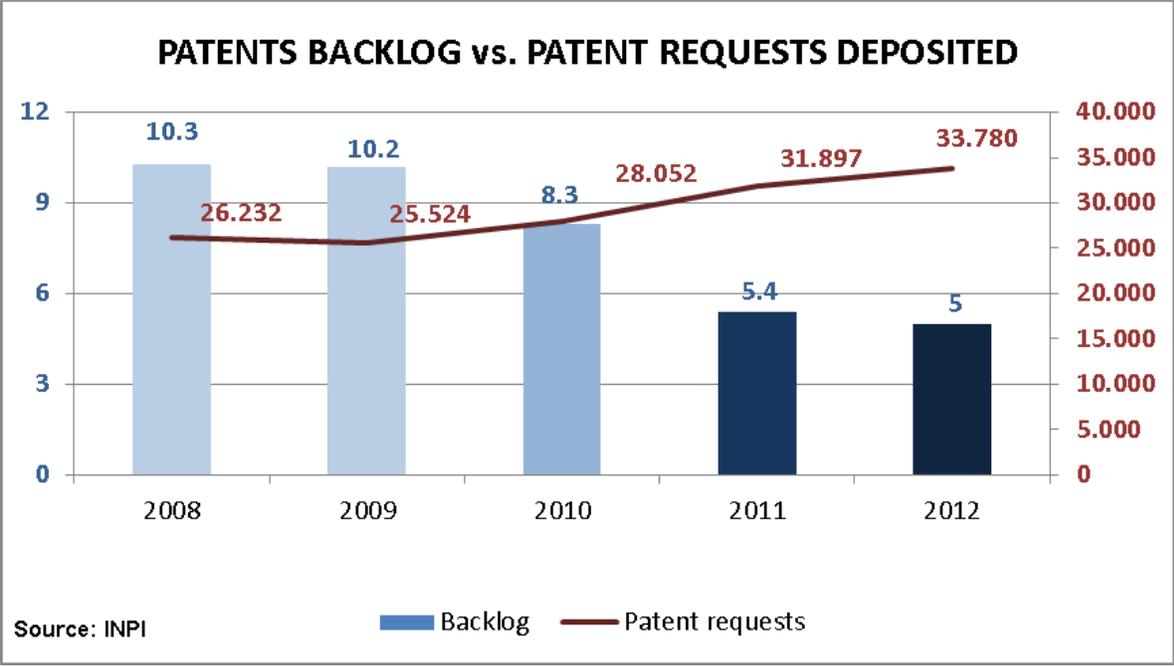
The National Institute of Industrial Property (INPI) is the Executive Branch agency responsible for granting patents and registering trademarks, computer programs, industrial designs, geographical indications, transfer of technology, and commercial franchising contracts. The Institute plays a fundamental role in creating a more favorable environment for IPR.

The Brazilian IP system has already achieved some great numbers. For instance, INPI's historical data, from 1998 until 2012, shows that the global application of patents has increased more than 100%, from 14,970 applications in 1998 to 33,780 in 2012. Coupled with that, the number of applications of non-residents made through the PCT is noteworthy, presenting a 312% increase during the same period.

Bearing in mind the relevance of innovation in Brazil's development strategy, associated with a worldwide increase in the number of patent requests, INPI has been making great progress in reducing its backlog in the process of examining and granting IPR. During the period of 2008-2012, INPI has managed to effectively reduce the patent backlog by more than half (from 10.3 years to 5 years in 2012), a 53.4% decrease.

In 2012, requests for patents rose 6%, while time to grant those patent requests decreased to an average of 5 years per patent application, a comparable average to that of developed countries, ensuring Brazil is on track to meet INPI's goal of granting patents within 4 years by the year 2015 (in accordance with INPI's priority action plan 2011-2015).

As the graph below illustrates, from 2008-2012, there was a double trend: the growing number of patent requests deposited and, concomitantly and inversely, the reduction in INPI's patent backlog.



b) Modernization and reform in INPI’s platforms: more efficiency in its services

In November 2012, INPI established an electronic patent system known as “e-Patent”, an important innovation that will further contribute to this progressive backlog decrease. In addition to allowing the filling of patent applications through the internet, the system will simplify the procedures and decrease the time and costs associated with a patent request. Implementation is scheduled for the beginning of 2013.

Similar to the “e-Trademarks” system, the new mechanism aims at modernizing and facilitating the way INPI provides its services. The filling of patent requests online will significantly reduce the paperwork involved in a patent request, becoming a more efficient, less burdensome way to obtain a patent, as well as greatly reducing its average application processing time. The new technology was awarded the “XI Electronical Government Excellence Prize (E-Gov)”, an initiative that highlights the best actions taken in terms of electronic points of contacts and online interfaces between the government and civil society. The award is a sign of the new system’s ability to modernize, innovate and increase transparency.

INPI has also organized specialized training courses, and has published significant information and useful material on its website, for practitioners to prepare and acquire the skills to use the new tool once it becomes operational.

Within the same framework, a set of several other electronic tools have been created, forming an ensemble of 7 different systems which, taken individually or as a whole, greatly improve the treatment and processing of patent and copyright requests.

For instance, the “e-Vista” is a service in which non-confidential data and documents of patent applications are made available online. The tool provides real time access to the documents, allowing greater transparency. Additionally, the “e-Opinion” is a mechanism in which one can obtain access to the opinions INPI has published. Finally, the “Preliminary Opinion on Patentability” is another pilot project, in which a “pre-analysis” of a patent request is made by a patent examiner, with the publishing of a report. Subject to eligibility requirements, the service allows for the petitioner of a patent to obtain a quicker preliminary review of the request.

Furthermore, following an international consensus on the necessity of stimulating the development of environmentally-friendly technologies, INPI designed another pilot project, establishing an accelerated procedure for patent requests when their object covers green technologies (such as renewable energies, conservation, transportation, and waste management). This is a recognition of the relevance of patent protection as a mechanism to foster innovation of green technologies. Brazil became the first among emerging economies to propose a “fast-track” examination system, which was implemented in April 2012. In addition to fostering innovation, these initiatives constitute a strong instrument within Brazil’s national policy to combat climate change, as it facilitates the availability of environmental technology in the market.

INPI's strategic focus is efficiency and quality in the rendering of its services. To attain its objectives, in accordance with its Priority Action plan 2011-2015, INPI is currently undergoing examination for the hiring of 242 new patents and trademarks examiners. Moreover, the House of Representatives has already approved the opening of 485 new vacancies, exclusively for technical divisions of INPI. The Bill is currently under consideration by the Senate.

Moreover, the implementation of an automated registry model for trademarks based on the Industrial Property Automation System (IPAS) from the WIPO, as well as the publishing of guidelines that enhance transparency, predictability, and uniformity in decision making, also contribute to INPI’s general strategy, as outlined in its Action plan. In that sense, the elaboration, publishing and dissemination of General Guidelines in the areas of Trademark Analysis and of Patent in Biotechnologies provide operators easier access to the Institute’s information regarding these matters.

c) International and institutional cooperation: INPI’s actions with other IPR Entities

During the last few years, INPI has maintained an active international cooperation agenda, multiplying contacts with several other intellectual property agencies, which culminated in the celebration of various international cooperation agreements, seven of which were signed last year.

An example of such initiative was a Roadshow, in August 2012, dealing with the Protection of Intellectual Property in Brazil and in the US. The program was organized under USPTO’s and INPI’s Memorandum of Understanding, signed in 2008. This

cooperation agreement sets forth a collaborative framework, creating an interface where both institutes can disseminate information regarding their respective IPR systems. The general idea is to bring the two institutions closer together and maintain a constant flow of exchange of experience and best practices, notably by an exchange of staff and personnel.

Other instances of international cooperation engaged by INPI are also noteworthy, especially those involving other Intellectual Property Authorities worldwide, such as the Agreement between INPI and the State Intellectual Property Office of China (SIPO), establishing a range of activities over a five-year period. INPI is also studying the creation of an Intellectual Property Group in conjunction with other BRICS countries.

An agreement was also signed with EPO, the European Patent Office, as a five-year plan that aims to strengthen the cooperation between both authorities in key areas like patent examination, administration procedures, office automation, among others.

A similar agreement was signed between INPI and CIPI, the Canadian Intellectual Property Office, in which the parties are committed to enhancing contact and experiences related to their national intellectual property systems, while exploring possible joint initiatives to stimulate discussions on topics relevant to IPR.

A similar Cooperation Agreement, celebrated between INPI and the Japanese Patent Office (JPO), focuses on a range of activities directed towards capacity building, for Intellectual Property Examiners, as well as the private sector, highlighting the importance of proper "Intellectual Property management" as part of a business strategy, and improvement of intellectual property analysis for JPO and INPI examiners.

On the other hand, INPI also pursues a multilateral agenda, as demonstrated, for instance, by the recently signed Mediation Agreement with WIPO, providing for the creation of a Mediation Center for the Resolution of IPR disputes. With this initiative, an adequate forum will be created within the Institute where IPR-related matters can be brought and disputes can be resolved with a "technically oriented" judgment, thus avoiding recourse to judicial litigation. Around 80 mediators received training from WIPO, and INPI held a series of workshops to expose and discuss practical aspects concerning recourse to Mediation in IPR. The project is being implemented, with the first cases currently undergoing selection. The initial selected cases are expected to be brought before the newly created mediation center in the first semester of 2013. In parallel, INPI participated in technical missions last year in the European Union, in order to exchange experiences in IPR mediation and acquire skills and knowledge necessary to the conduction of IPR mediation.

Meanwhile, INPI is also a strong supporter of the Brazilian accession to the Madrid Protocol of International Registration of Marks. In this sense, the president of INPI has already recognized that the institute is ready for implementing the Madrid Protocol in

Brazil. In fact, there is an ongoing interaction between public and private sectors in anticipation of the adoption of the Protocol in Brazil.

Finally, in the context of the Patent Cooperation Treaty (PCT), it should be noted that since 2009 INPI acts as an International Searching Authority (ISA) and as an International Preliminary Examining Authority (IPEA), which contributes to simpler and cheaper requests for patents worldwide. A similar status is held by seventeen intellectual property offices around the world, only five of them in developing countries (Brazil, India, Russia, China and Egypt).

This results in an extensive network where these entities can exchange and discuss best practices and experiences, and creates a forum for enhanced contact between them. These examples illustrate INPI's vigorous strategy of increasing international cooperation, while the number of agreements signed, covering a wide range of activities, is a sign of its success.

II) 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 for the formulation of a national plan against piracy and other IPR violations.

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

- i. "City Free of Piracy": a pilot project to encourage local governments to create mechanisms to reduce piracy;
- ii. "Legal Markets": an initiative to reduce or eradicate the trade of illegal products at commercial markets by regulating their operation;
- iii. "Trade Against Piracy": a project aimed at engaging local stores and shopping malls in the fight against piracy;
- iv. "Combating Piracy Gateway": an interactive communication gateway, including promotional and educational campaigns;
- v. Partnerships with internet providers: proposal approved by the Brazilian Attorney General's Office, which seeks to prevent the distribution of works protected by copyrights without proper legal authorization; and
- vi. Training and capacity building seminars: seminars for federal, state, and local government officials as well as for university students.

III) Inter-Ministerial Group on Intellectual Property (GIPI)

Another key organization that 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. The Group establishes a forum for institutional cooperation within the Government, where the main Public Bodies/Agencies find an important platform for technical coordination and the shaping of policy decisions.

IV) Regulation of Compulsory Licenses

A word must be said about the regulation of compulsory licenses, an issue that has been repeatedly 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 a 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 the Brazilian government's 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 to 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 notable 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-faceted approach to the elimination of child and forced labor, recognized by the U.S. Department of Labor (DOL) in 2009 for its considerable success.

Finally, 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.

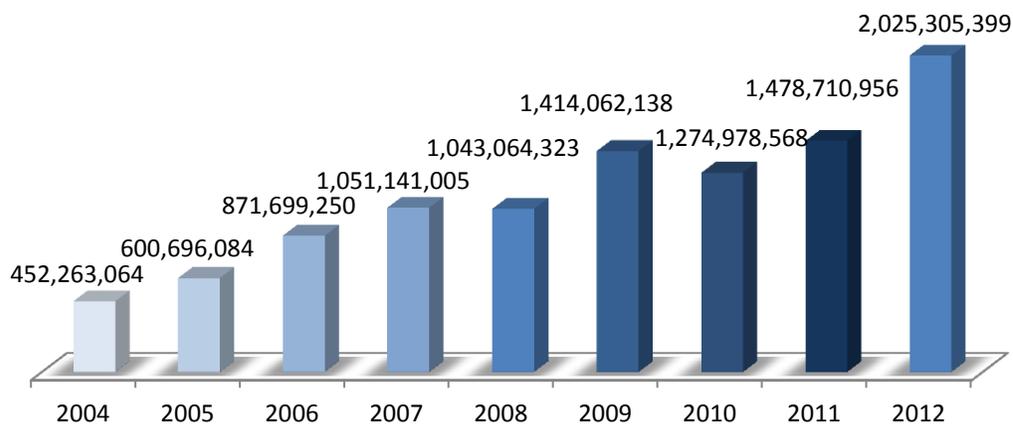
1.5 Law Enforcement by the Brazilian Federal Government

Significant law enforcement efforts by the Brazilian Federal Government have been yielding concrete results over the years, as explained below.

I) 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 2012, such value was of approximately R\$ 2,025,305,399, a record high, and representing a 36.5 % increase in comparison with 2011. Such seizures result from cases of forfeiture, fiscal charges for criminal purposes and surveillance and repression operations, including IPR violations.

BRAZILIAN FEDERAL REVENUE SEIZURES (R\$)



*Source: Brazilian Federal Revenue (RFB)

The main goods seized in 2012, and their estimated values, are reflected in the table below:

PRODUCT	GOODS SEIZED (R\$)
Seized Vehicles	147,729,228
Cigarettes	13,450,384,70
Watches	71,436,158
Electronics	117,950,699
Clothing	78,255,471
Sunglasses	50,256,914
Other products	1,425,226,544
TOTAL	2,025,305,399

In 2012, the value of destroyed goods was of approximately R\$ 522,527,027. In this way, the RFB avoids circulation of products that are potentially harmful to health and the environment, and inhibits crimes that lead to tax evasion and unfair competition to the industry.

It should be noted that the Superintendence of the 9th Fiscal Region of the RFB, in the tri-border area of Brazil, Argentina, and Paraguay, where one of the most critical points for combating piracy is located, was responsible for the record seizure of more than R\$ 214 million in counterfeit goods in 2012.

II) Brazilian Federal Highway Police (DPRF)

In 2012, the Brazilian Federal Highway Police (DPRF) managed to seize a great number of counterfeit goods, including cigarettes, CDs and DVDs, medicines, electronics, fuels, IT equipment, and beverage.

PRODUCT	UNITS SEIZED
Cigarettes	3,13 million
CD and DVD ´s	225,704
Medicines	671,967
Electronics	81,652
Fuel	184,211
IT equipment	81,652
Others	28,432,171

III) Public prosecutors ("Ministério Público")

Public Prosecutors (MP) act on several fronts to fight IPR violations and other criminal offenses connected with organized crime. In this context, the National Group for Fighting Criminal Organizations (GNCO) was created as a working group joining the

MP intelligence structures of all Brazilian states, as part of an overarching plan to disrupt criminal organizations and to fight IPR violations.

Joint operations ran by GNCOC with 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 are multiplying and gaining more importance.

In 2012, the group underwent a restructuring in order to achieve a more effective line of action, as well as increasing its visibility within society. Thus, the GNCOC model became simplified, consisting of three permanent structures: operations, intelligence and the GNCOC School, a national school that promotes roaming training for prosecutors.

IV) Judicial Bodies

Enforcement improvements are also being pursued with regards 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. One of its top 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 gradually reduced. In 2013 the Council determined, as one of its main goals, that Tribunals must deliver more judgments than the number of cases brought in 2013, with some Courts setting specific targets (ranging from 50% to 90% of proceedings brought since 2008).

Moreover, institutions attached to the Judicial Power, such as the Brazilian Bar Association (OAB), the "Escola Paulista da Magistratura – EPM " (The Magistrate's School of the State of São Paulo), and its counterpart in Rio de Janeiro, namely, the "Escola da Magistratura do Estado do Rio de Janeiro – EMERJ", have promoted several events, debates and seminars, providing judges, attorneys general, prosecutors, and practitioners with an opportunity to thoroughly discuss trends in IPR enforcement and regulation and ways to improve it.

Some of the events organized include: a 3-day Workshop organized by the EMARF (Escola da Magistratura Regional Federal) of the 2nd Region, entitled "The Intellectual Property Law and its Strategic Administration", in collaboration with INPI and the American General Consulate in Rio de Janeiro. The Workshop had, among its participants, representatives of the American Judiciary and WIPO. Other undertakings include: the holding of a Seminar on "Industrial Propriety and development: the Judiciary's role", organized by EMERJ, and the Seminar "Intellectual Propriety in debate", held by EPM.

The Brazilian Judicial System and IPR

Recognizing the strategic importance of an IP enforcement system, Brazil has seen the emergence of specialized division in Courts, granting exclusive jurisdiction to hear subject-specific cases, such as IPR. In fact, Brazilian Intellectual Property Law allows for the creation of these specialized Chambers, as pertained Article 241 of Law nº 9279/96.

On December 2011, two Reserved Chambers were established within the Appellate Court of State of São Paulo (TJ-SP), specialized in Business and Commercial Law, with jurisdiction to hear, among other subjects, cases on industrial property (including such cases where one of the parties is a public legal entity, as the São Paulo's Appellate State Court recently decided). One specialized Chamber was also granted jurisdiction on industrial property disputes, within the Appellate Court of the State of Rio Grande do Sul (5th and 6th Civil Chambers).

Adding to the already existent specialized IP Courts in the States of Rio de Janeiro, namely, the 35th, 37th, 38th and 39th Federal Courts, these Chambers will allow more technically sound judgments and more in-depth judicial analysis, with the emergence of a coherent jurisprudence and Judges more familiar with the complexities and technicalities arising from IPR disputes, thus allowing better decision making and better observance of the particulars of IPR litigation.

In addition, discussions to implement structural reforms in the Brazilian legal codes are underway, its main objective is to significantly improve the Brazilian judicial system.

For instance, the Criminal Code (CP) is undergoing a substantial reform, part of which establishes higher sanctions for the violation of the Intellectual Property Law, as well as the inclusion of new conduct previously not considered criminal.

In turn, the new Civil Procedure Code (CPC), currently under discussion, focuses on expediting the rendering of decisions and reducing the backlog in judicial processes, by instituting some procedural mechanisms that will effectively address these points and facilitating access to a fair and effective trial.

These legislative initiatives will increase protection of IPR, by creating a framework that facilitates criminal and civil IPR enforcement, and, most importantly, deters infringement of IPR.

V) Border Enforcement by Brazilian Customs

It is noteworthy that customs control accomplished by RFB is not limited to fiscal and taxation matters, it also ensures an adequate protection to the economy and, more generally, to society. One of the underlying aspects of this protection afforded is IPR protection.

Due to the relevance of border enforcement, especially in combating IPR, Brazil is putting great emphasis in enhancing its border controls. Accordingly, the governmental industrial policy "Plano Brasil Maior" includes considerable efforts to strengthen border enforcement and, more broadly, fight illegal practices. As IPR violations are usually associated with other forms of illegal trade, it is likely that the plan will significantly contribute to inhibit IPR violations.

As part of the current governmental effort, in 2011 the RFB and the MDIC have jointly created the "Intelligence Group on Foreign Trade" (GI-CEX) so as to deploy inter-ministerial coordinated trade intelligence to curb illegal practices in imports. GI-CEX seeks: (i) to identify evidences of illegal trade practices (including IPR violations); (ii) to propose guidelines, and measures to detect and avoid these practices; and (iii) to improve communication and cooperation with other governmental agencies engaged in international trade.

In August 2012, the RFB created the National Center for Customs Risk Management ("Centro Nacional de Gestão de Riscos Aduaneiros – CERAD"), an Intelligence Unit attached to GI-CEX, to which the following competencies have been attributed: (i) to monitor fraud in foreign trade, all the while proposing measures to improve actions to combat it; and (ii) to be the Government's interlocutor with all the State Agents that deal with foreign trade, including the National Health Surveillance Agency (Anvisa).

That same month, FIESP and the Brazilian National Forum Against Piracy – FNCP held a meeting in CERAD's headquarters. On that occasion, private sector entities had the opportunity to present to the Agency's technical agents some of the problems that their sectors are facing with unfair trade practices.

RFB actions and IPR: significant examples

Another significant step which increases border enforcement is the RFB's decision to implement a "Customs Security, Control, and Simplification Program" (PASS). The system, in compliance with the World Customs Organization (WCO) "SAFE Framework of Standards", will guarantee adoption of safety standards internationally agreed upon to ensure supply chain security and facilitate global trade. The proposed regulation on this program is currently under analysis. Essentially, an Authorized Economic Operator will intervene to avoid the occurrence of counterfeiting and other activities which violate IPR, as well as to deter fiscal fraud, and promote a more safe and transparent environment for international trade operations.

Additionally, as mentioned above, Brazil is reviewing its Copyrights Act of 1998. In accordance with TRIPS Article 51, the Brazilian preliminary bill includes a provision that allows customs authorities to suspend imports in case of evidences of IPR infringement. It also requires the customs authorities to notify the IPR owners. Such notification includes relevant details on the importer that allows IPR owners to pursue appropriate action.

VI) 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 in the creation of new, specialized police stations that address IPR violations, as well as improving the existing ones (for instance, the Police Station for the Fight Against Immaterial Property Crimes (DRCPIM) in the State of Rio de Janeiro).

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, suggesting changes to current statutes.

Moreover, as mentioned above, the 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. Such project aims to decentralize the efforts against IPR violations, boosting actions to curb the domestic consumption of illegal goods. In this sense, several joint operations were conducted amongst local, state and Federal public bodies. Six state capitals and three other Cities have already adhered to the program: São Paulo, Rio de Janeiro, Curitiba, Belo Horizonte, Cuiabá, Vitória, Várzea Grande, Osasco and Brasília. Recife and Florianópolis are expected to join in 2013. The goal is to extend the "City Free of Piracy" project to the 12 host cities of the 2014 FIFA World Cup, and later to other strategic cities, considering the location of the main ports, airports and border areas.

In this regard, a technical cooperation agreement was signed in June between the Ministry of Justice of Brazil and FIFA, with a view to developing strategies for the protection of trademarks and products marketed in the competitions of the 2014 FIFA World Cup host cities. Besides, training courses to identify original products and recognize pirated ones will be offered to public officials of the host cities. Since 2010, approximately three thousand public servants have been trained to prevent and combat crimes that violate intellectual property rights.

According to the Committee to Combat Piracy, Smuggling and Tax Evasion of the Secretary of Urban Security of the Mayor of the City of São Paulo, the first city to join the project, between December 2010 and October 2012 the city of São Paulo seized more than 78 million of goods, of which about 53 million were seized in shops and are valued at more than US\$ 1 billion, while 25 million illegal products were seized in the streets.

Between January 2009 and March 2012, the city of Rio de Janeiro undertook actions to curb the sale of illegal products, resulting in the seizure of approximately 500,000 pirated media. The work of the Special Secretariat of Public Order of Rio de Janeiro occurred prior to the signing of the agreement with the federal Government to join the

“City Free of Piracy” project. At the local level, CNCP offers training of public officials. Since 2010, approximately three thousand public servants have been trained to prevent and combat crimes that violate IPR.

1.6 International Cooperation by the Brazilian Federal Government

The Brazilian Federal Government has been pursuing multiple international cooperation actions in the areas of IPR protection and promotion, emphasizing approaches in three domains: (i) educational; (ii) economic; and (iii) repressive. In 2013, 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, 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 March 2011, during the first visit of President Obama to Brazil, both countries signed a Trade and Economic Cooperation Agreement (TECA), which establishes a Working Group that will annually meet to discuss bilateral trade issues, including IPR. The first meeting of the Working Group is expected to take place in 2013.

In 2012, members of the Office of Integrated Security (GGI) and the Metropolitan Civil Guard (GCM) received training conducted by agents of the U.S. government, with the aim of improving the work of combating piracy. The construction of a bilateral agreement for exchange of experience and knowledge in the fight against piracy was discussed.

In the same year, representatives of the Committee to Combat Piracy of São Paulo conducted a technical visit to the Patent and Trademark Office of the United States, where they were introduced to the U.S. activities to combat piracy. On that occasion, there were discussions on the possibility of trainings and exchanges in both countries, in order to improve the knowledge of the agents about the best practices in combating crimes against Immaterial Property.

- ii. China: At its 2012 meeting, the Brazil-China Working Group on Intellectual Property discussed the IPR legislation in Brazil and China, as well as ways for strengthening the bilateral cooperation on IPR. Both countries have agreed on the relevance of economic and educational measures in the fight against piracy and counterfeiting. They have also exchanged information on specific cases regarding IPR compliance.

In June 2012, Brazil and China signed a Ten-year Cooperation Plan, which will strengthen the cooperation in terms of IPR protection and effective enforcement,

within the Working Group on Intellectual Property. In order to do so, the Plan aims to promote legislative and institutional aspects of IPR, the fulfillment of civil, administrative and criminal measures, as well as performing technical cooperation in multilateral forum and among emerging countries.

- iii. The European Union (EU): Since 2008, Brazil has been holding annual meetings with the EU to exchange experiences on IPR issues. The last meeting took place in September 2012, when the representatives of the EU once more recognized the Brazilian government's efforts in combating IPR violations. The latest "IPR Enforcement Report" published by the EU Commission found that "substantial improvements have been noted [in Brazil], in the wake of the IPR Dialogues established between them and the Commission". The report, which ranks countries into three categories depending on the progress made, places Brazil in a position that includes those with the greatest improvements in IPR protection.
- iv. Japan: Brazil has also been meeting with Japan since 2008. In October 2012, there was a meeting of the Trade and Investment Promotion Joint Committee, which dealt with IPR issues relevant to both countries, including actions to combat piracy and counterfeiting.
- v. Argentina: In October 2012, a bilateral dialogue meeting was held between Brazil and Argentina to address IPR issues. Among the main topics discussed were the national policies against forgery and piracy, as well as actions undertaken by both countries within the World Customs Organization (WCO).
- vi. Paraguay: the Brazil-Paraguay Bilateral Intelligence Group on Piracy, Counterfeiting, and Smuggling of Pirated and Counterfeit Products, which is expected to come into force soon, is currently under ratification proceedings before the Paraguayan Congress, having already been approved in Brazil in 2009 (Legislative Decree 983/09). The MOU seeks to enhance cooperation and coordination between authorities from both countries in fighting against IPR crimes (i.e. DPF, DPRF, RFB, MRE, MP, and MJ), and will contribute towards 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, including IPR violations, 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 and encourages informal traders – the so-called "sacoleiros" – to adhere to the new mechanism (Law 11989/09). The RTU is already in force, with the Normative Instruction 1245/12 regulating custom controls proceedings in this matter.

Additionally, in 2012, Brazil signed a "South-South" Cooperation Agreement, providing that over R\$ 2 million will be invested in activities towards capacity building in developing countries, through partnerships with Brazil. The Regional initiative involves several other Latin American countries, with INPI acting as the Executor of the Agreement, and will carry a number of technical missions, among other cooperation initiatives.

Within this same context, the celebration of another regional agreement, "Prosur", will allow for simultaneous and collaborative examination of patent, trademark and geographical indication deposits, speeding up their analysis among member States.

1.7 Activities Supported by the Brazilian Private Sector

I) The Federation of Industries of the State of São Paulo (FIESP)

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 Brazil Legal Institute (IBL), the Brazil Steel Institute, the Intellectual Capital Institute (ICI), among others. The goal is to provide government officials with valuable information from the private sector concerning IPR infringement and other illegal 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 2012 program was developed by FIESP in partnership with RFB, CNCP, and INPI, and included visits to the ports of Vitória-ES, Paranaguá-PR and Salvador-BA, and to the airport of Campinas-SP.

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

YEAR	GOVERNMENT OFFICIALS TRAINED	PORTS, AIRPORTS, AND BORDER REGIONS VISITED
2006	364	12
2007	712	17
2008	251	6
2009	20	1
2010	360	9
2011	340	10
2012	100	4
TOTAL	2,147	59

The 2013 FIESP training seminars schedule will include visits to other major ports, airports, and border regions.

Another important initiative is the organization of “Dialogues with the Judiciary on International Trade”. The program targets a joint effort between the Judiciary and the main interlocutors of Brazilian foreign trade, in an opportunity to exchange and discuss information and experiences on this matter and thus turning the subject more approachable for Judges and practitioners alike. Hence, the issue of intellectual property is also addressed.

The first event was held in October 2012 by FIESP in partnership with the Federal School of Magistracy of the 1st Region (Brasilia). The seminar was attended by speakers of FIESP, the Ministry of Development, Industry and Foreign Trade, the National Treasury Attorney-General's Office of the 4th Region and the Federal Judiciary School of the 1st Region. The project schedule aims to go to other regions over the next year.

II) National Confederation of Industry (CNI)

By invitation of the Ministry of Justice, CNI presented to sixty judges from around the country its program “Intellectual Property for Innovation in Industry” and the Enterprise Movement for Innovation (MEI) IPR business agenda during the First International Seminar on Combating Piracy. The event took place in October in the city of Foz do Iguaçu, Paraná, a constant *locus* of government actions to combat this type of crime.

The opportunity was used to publicize the work and commitment of CNI and industry in promoting culture and the protection of IPR in the country. It is a unique initiative of

the CNCP and the National School of Magistrates (ENM). In the event, judges and representatives from the executive branch and the federal law enforcement agencies discussed, with various business sectors representatives, the implementation of legislation that protects copyright, trademark and other IPR assets. The group reviewed the laws and jurisprudence of the courts with the aim of improving the protection system as well as repressive actions at borders, airports, ports and roads.

To contribute to the dissemination of IPR technical knowledge, in 2013 CNI will launch another publication under its IPR program, this time dedicated to the professionals at the Judiciary. This initiative was warmly welcomed by members of the School of the Judiciary, and is now under negotiation between CNI and representatives of the Brazilian judiciary.

Enterprise Movement for Innovation (MEI)

In 2011, MEI's business leaders set the agenda to stimulate innovation in Brazil. IPR stands out as the first of ten points on the agenda. The specific objectives of the IPR agenda are: (i) to strengthen the perception that the IPR regime is central to the efforts of innovative companies, (ii) to identify the key issues affecting the IP regime in Brazil; and (iii) to propose improvements to Brazilian intellectual property related policy.

Following MEI's IPR agenda, CNI promoted an updated discussion on Brazil's accession to the Madrid Protocol. The event was attended by representatives of the INPI, the World Intellectual Property Organization (WIPO), and the Intellectual Property Office of the United Kingdom (UKIP), in addition to business leaders from major groups and companies. It was an opportunity to stimulate and support the business leadership in the integration process of Brazil to the IPR international context with the adoption of international regulatory frameworks, including the Madrid Protocol. The evaluation was unanimous that Brazil should also be part of this agreement, which has Brazil's main trading partners as signatories.

III) Brazilian National Forum Against Piracy (FNCP)

The Brazilian National Forum against Piracy and Illegality is a nonprofit civil association that works with specific focus on intellectual property protection and legitimate trade, fighting several illegal practices.

Among other educational campaigns, FNCP has published the Consumer's Guide in partnership with the Foundation for the Protection and Defense of Consumers (PROCON) of the State of São Paulo, giving valuable information on how to identify and avoid illegal products. FNCP also held numerous training seminars in partnership with the RFB, MPs of several States, Department of Federal Police, Civil and Military States Police, among others.

Besides the educational campaigns, the Forum also fully supports various repressive actions, supporting the operations of the Office of Integrated Management of the City Hall, acting at the city of São Paulo in combating illegal trade. Since 2010, integrated action were organized, between government agents of the federal, state and municipal level, resulting in more than 50 integrated operations.

IV) National Manufacturing Sector Training Service (SENAI)

SENAI also has an important role in helping jumpstart innovation and the consciousness of the necessity of intellectual property protection in a cross-country basis. Not only was the free-of-charge learning courses on IPR kept, but also, SENAI is investing R\$ 1,5 billion (US\$ 650 million) in 23 innovation centers, distributed over different states from the north to the south of Brazil; the goal is to achieve an investment of R\$ 2,5 billion after the private sector's financial contribution. All the centers will be fully operational by the end of 2014.

Those innovation centers are crucial under the long-term policies for intellectual property protection. We understand that it is only through education and dissemination of the importance of the role intellectual property plays that we will effectively guarantee its protection. Therefore, those centers represent another important element of action pursued by the private sector that will inevitably achieve a higher ground for IPR in Brazil.

The centers will not only constitute another way for small and medium enterprises (SME's) to participate in the profits arising from the development of new technologies and products, which in turn requires protection of IPR and a solid intellectual property system, but also, the young technicians and the individual developers will take part of this revolution. We sustain the idea that it is important for all economic sectors to realize that the intellectual property system can serve them as well as any other big national or multinational company. There is no better way to enforce and consolidate IPR than to show its potential beneficiaries that their use can generate profit and altogether lead to another group of social benefits.

To assure that those centers will achieve their purpose, the whole design and implementation process is being taken in association with the Massachusetts Institute of Technology and the Fraunhofer Institute, a German institute that already holds 60 researchers and development centers all over the world.

V) American Chamber of Commerce (AMCHAM)

AMCHAM has established an "Intellectual Property Task Force", since 2003. Under this program, it elaborates an annual report where it reviews and analyses INPI's actions, providing a general panorama of the level of IPR protection in Brazil. Also, AMCHAM has recently organized a contest, in partnership with USPTO and the American Consulate in Rio de Janeiro, to award a video which campaigns against piracy, highlighting the

importance of combatting it. In fact, AMCHAM pursues an active educational campaign to raise awareness on the importance of an IPR environment which favors investment and private initiative.

The “Legal School” project (“Projeto Escola Legal”), launched by AMCHAM, aims to train teachers about the importance of the concept of intellectual property. The initiative is based on awareness of children and young people, who are cautioned about the problems induced by the practice of piracy. In six years, the project acted in 254 schools (232 public and 22 private), trained 3,363 teachers and was attended by 42,279 students in 7 cities (São Paulo, Campinas, Porto Alegre, Goiânia, São Bernardo, Blumenau and Caieiras)

VI) 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 IPR 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 of IPR.

The third year of the intellectual property Program maintained its constant effort of dissemination and capacity-building initiatives, following the great results already achieved in 2012:

- i. Three new IPR guides are in their final stages and will be published in the first semester of 2013. The new publications, as those of 2012, will also target specific audiences and thus use technical language: one for judges and the Judiciary branch; one for exporter businessmen and another for the fashion industry.

ii. The CNI, INPI and SENAI's initiative led to the enrollment of over 146,878 young people and adults for free-of-charge learning courses on IPR in its first 22 months. The partial numbers also show an increase of 5% from 2012 over 2011. These results confirm the continual interest of young Brazilians in learning about IPRs and its related aspects. The ongoing success of the initiative keeps promoting the building of a culture of protection and respect for IPR, generating direct benefits for industry development.

iii. Organization of two national seminars: "Intellectual Property: Where are we locally and globally?" in Brasília, and "The Bioeconomy Forum" in São Paulo, which was an avant garde initiative in Brazil taken by the CNI together with Harvard Business School, helping to illustrate and promote for a diverse audience (industry, government and press) the necessity of intellectual property protection, specially related to the development of emerging technologies in the future.

VII) Internet and Book Piracy

The 2012 Special 301 Report states its concern about "the widespread availability of pirated and counterfeit products in Brazil, especially pirated books, and about the growing challenge of piracy over the Internet".

Firstly, it should be stressed that online piracy poses intricate challenges to public and private sectors all over the world. Accordingly, solutions to the problem are complex and sometimes even controversial. Suffice it to say that discussions over the Stop Online Piracy Act (SOPA) in the United States have drawn opposition from many, including traditional IPR supporters, in relation to what tools are the most appropriate to fight piracy over the Internet.

Nevertheless, it should be stated that Brazil is making significant progress in fighting Internet and book piracy. As mentioned before, the Brazilian Federal Government is strongly engaged in reviewing its Copyrights Act of 1998, which is expected to include a "notice and take down" clause, largely inspired in the U.S. Digital Millennium Copyright Act. The proposed clause states that internet service providers have the duty to remove illegal content from the Internet once they are notified by the copyright owners. When failing to act accordingly, Internet service providers may be jointly liable for damages resulting from the display of the unauthorized content.

Thus, the "notice and take down" clause would allow an expedited extra-judicial mechanism that: (i) facilitates procedures to fight copyright and other illegal content, ensuring faster and less costly measures; (ii) eliminates the need to resort to the judiciary; (iii) clearly delimits the scope of liability of Internet service providers; and (iv) ensures Internet users the right to request the disputed content to be restored, thereafter assuming liability for its display.

The Brazilian Judiciary is also committed to the adequate and effective protection of IPR in the digital environment. As an example, the Superior Court of Justice (STJ) has awarded leading decisions regarding the liability of Internet service providers and web hosting for damages from IPR violation, in line with the "notice and take down" clause that shall be included in the revised Copyrights Act (STJ, 3rd Chamber, Special Appeal REsp 1193764 / SP, August 2011; STJ, 3rd Chamber, Special Appeal REsp 1186616 / MG, August 2011).

In addition, the CNCP has continued to pursue strategic partnerships with Internet service providers. By encouraging dialogue amongst official government agencies, the music and film industries, and internet providers, the CNCP aims to establish mechanisms for cooperation between internet providers and rights holders with a view to prevent the distribution of pirated product.

Regarding the private sector, the Brazilian Association of Reprographic Rights (ABDR), alongside with several important publishers, implemented the "Teacher's Folder" project ("Pasta do Professor") – a system that allows the legal reproduction of excerpts of books while protecting copyrights. The initiative, aimed mainly at eradicating irregular book photocopying in universities, gathers about 34 associated publishers' houses and 70 imprints. Until August 2012, over 500,000 pages of academic material were printed and delivered to affiliated institutions.

Another project, also focused on combating piracy of books, is the "My Library" initiative, which, unlike the above mentioned "Teacher's Folder", operates within a digital environment ("cloud computing"). Through a consortium agreement between four of the leading publishers of academic books in Brazil, "My Library" provides a platform for Internet access to technical and scientific content.

ABDR and the National Syndicate of Book Publishers (SNEL) have also established a Digital Piracy Department that monitors illegal reproduction of books. From August 2009 through February 2010, the Department removed 17,916 Internet links allowing illegal downloads of books. During its campaign against illegal copies in 2010, 10,927 book copies, 40,000 digital copies, and 25 computers were seized.

Private sector efforts against online piracy also include a specific department of the Film and Music Anti-Piracy Association (APCM), which monitors websites for IPR offenses, and requests the removal of illegal audiovisual and music content. Latest data available indicates the withdrawal of 1,329,142 links with musical and audiovisual illegal content in 2010. During 2010, internet service providers withdrew 24,637 illegal content provided by torrent websites, 255,626 provided by blogs and 55,111 postings available on social networks. Public authorities also seized 25,596,836 pirated CDs and DVDs in the same year.

In addition, the Report Portal on Software Piracy was created in November, in order to combat the use or resale of programs without proper licensing. Qualified lawyers will

investigate the complaints and will be reporting to the legal areas of software developers and local judicial authorities when irregularities are detected. The initiative is a partnership between the Brazilian Association of Software Companies (ABES) and The Software Alliance (BSA).

Software industry data show that, in 2011, 680 actions were taken to combat commercial violations to intellectual property and 3.1 million illegal media was seized. Additionally, in the first half of 2012 there were 208 actions in the country, which resulted in the seizure of over 316,000 pirated media programs. Besides, more than 15,000 advertisements for pirated software were also removed from the internet in this six-month period.

2. FAIR AND EQUITABLE MARKET ACCESS

2.1 Introduction

Section 182 of the Trade Act of 1974 determines that the USTR identify, 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 situations 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 is deemed 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 is deemed to exist if the use of laws, procedures, practices, or regulations constitutes 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 the 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)).

Neither of the abovementioned situations applies to Brazil. 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, 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, excluding a

temporarily small increase during the mid-1990s due to international financial crises that affected the Brazilian economy. 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 a floating exchange rate, inflation targeting, and primary surpluses, created the basis for a strong currency and additional economic liberalization.

In the context of the Special 301 process, high tariffs and barriers on entertainment software and foreign ownership restrictions and content quota bills on the audiovisual sector were raised as issues of market access by interested parties, and must be addressed.

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 entertainment software in Brazil, namely, videogame products, as barriers to market entry. Although this complaint could be considered 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, like 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 the 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.

The recently enacted Law 12.485, commonly known as the Pay TV Law, created to develop the Brazilian audiovisual sector, was also mentioned by interested parties, as an issue of market access, in the context of the Special 301 process. While there is no empirical evidence to substantiate the claim, it was argued that the Pay TV Law's national content requirement will push consumers towards illegitimate sources of content.

The Pay TV Law does not affect Brazil's commitments to the protection of intellectual property and does not impose discriminatory non-tariff trade barriers to international content providers, thus is outside the scope of the Special 301 process.

However, we must clarify that, although the law, when in full effect, will require that three and a half hours per week of local content be broadcasted through Pay TV, the requirement will be limited in scope and no limits will be imposed on international content. The new law also allows telephone companies to distribute cable TV programming, consequently increasing the reach of both international and national legitimate content providers to a greater number of consumers. The Brazilian Agency of Telecommunications (Anatel) recorded an increase of 1.39% (222,007) of pay TV subscription in December 2012, a month after the start of the new law's implementation.

Finally, Brazil's continuous efforts in combating piracy are irrefutable. The creation of mechanisms of protection of IPR, and the development and enforcement of anti-piracy measures have, as mentioned previously, produced substantial results. For example, in 2012, the Brazilian Federal Highway Police (DPRF) seized 2,252,704 units of counterfeit media products, while the Brazilian Federal Revenue (RFB) seized the equivalent of US\$9,253,346.90 in counterfeit media.

2.2 Brazil-U.S. Bilateral Engagement

It is important to highlight that Brazil has, for many years, engaged bilaterally in good faith with the United States 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. The main dialogues and mechanisms are as follows:

Date of Inception	Bilateral Mechanism	U.S. Government Agency	Brazilian Government Agency
1994	Joint Commission on Science and Technology Cooperation	U.S. Office of Science and Technology Policy (OSTP)	Ministry of Science, Technology, and Innovation (MCT)
2000	Consultative Commission on Agriculture	Department of Agriculture (USDA)	Ministry of Agriculture, Livestock, and Food Supply (MAPA)
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 Commerce (DOC)	Chief of Staff of the President and the Ministry of Development, Industry, and Foreign Trade (MDIC)
2010	<u>Global Partnership Dialogue</u> * Science, Technology, and Innovation Working Group * Cyber and ICT Working Group	Department of State (DOS)	Ministry of External Relations (MRE)
2011	<u>Agreement on Trade and Economic Cooperation</u> * Intellectual Property Rights and Innovation Working Group	United States Trade Representative (USTR)	Ministry of External Relations (MRE)
2011	Partnership for the Development of Aviation Biofuels	Federal Aviation Administration (FAA) and the Department of Energy (DOE)	The National Civil Aviation Agency (ANAC) and the National Agency of Petroleum, National Gas and Biofuels (ANP)
2011	<u>Strategic Energy Dialogue</u> * MOU to Advance the Cooperation on Biofuels * Partnership for the Development of Aviation Biofuels	U.S. Department of Energy (DOE)	Ministry of Mines and Energy (MME)
2011	Economic and Financial Dialogue	White House	Federal Executive Branch
2012	<u>Defense Cooperation Dialogue</u> * Defense Bilateral Working Group	U.S. Department of Defense (DOD)	Ministry of Defense
2012	Homeland Security Dialogue	Department of Homeland Security (DHS)	Ministry of External Relations (MRE)

* Among others

In 2001, the Consultative Mechanism on Trade and Investment was primarily established to handle Brazil-U.S. IPR disputes in the WTO. 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.

In March 2011, during the first visit of President Obama to Brazil, ten bilateral agreements were signed comprising several different areas of cooperation, such as air transport, peaceful use of outer space, education, and biofuels. The most important of

those was the Agreement on Trade and Economic Cooperation (ATEC), which aims to "enhance cooperation, expand trade and strengthen economic relations between the parties". This agreement established a joint commission responsible for developing the work plan annexed to the agreement. The work plan includes key issues regarding the bilateral trade and economic relations, such as trade and investment facilitation, sanitary and phytosanitary measures, technical barriers to trade, technical capacity building and intellectual property rights. In 2012, ATEC agreed on the terms of reference for two working groups, the investment and the intellectual property rights (IPR) and innovation working groups. The IPR and innovation working group aims to:

- cooperate on IPR and innovation issues,
- promote economic growth,
- promote cooperation within the TRIPS agreement,
- promote effective copyrights, and
- promote the exchange of experiences at the technical level.

The investment working group held its first meeting in September of 2012 and the IPR and innovation working group was established last October and awaits its first meeting. The creation of ATEC's IPR and innovation working group is a major step towards the advancement of the Brazil-US bilateral dialogue. As a high level dialogue, the IPR working group will serve as a launching pad for discussion, cooperation and significant exchange of experiences that will also include the technical level staff.

2.3 Investments

Consistent improvements to Brazilian IP protections have unequivocally affected the flow of foreign direct investment in IP-intensive industries in Brazil. According to the U.S. Bureau of Economic Analysis (BEA), in 2011, the U.S. direct investments in Brazil totaled approximately US\$71,101 billion, an increase of US\$22,294 billion since 2007.

Although, the increase is relatively consistent across multiple industries, the U.S. investments in the Brazilian information sector, as a percentage of total U.S. direct investment in Brazil, doubled between the years 2007 and 2011.

Similarly, in 2007, 4.75% of the total U.S. investment in Brazil was directed to the transportation equipment sector, which includes IP-intensive activities such as the manufacturing of motor vehicles, aerospace products and parts, amongst others. In 2011, the U.S. investments in this sector accounted for 9.67% of the total U.S. direct investments in Brazil, an increase of 103.68%.

Increase in IP-intensive sectors clearly shows that confidence in Brazilian intellectual property protection is growing significantly. Moreover, the upward trend reveals that the current investment climate and the intellectual property rights protections framework in effect have not served as a deterrent to such investment flows.

Balance of Payments and Direct Investment Position Data (Brazil)				
U.S. Direct Investment Abroad, U.S. Direct Investment Position Abroad on a Historical-Cost Basis				
Bureau of Economic Analysis				
By Country and Industry (NAICS) (Millions of Dollars)				
Total Amount of U.S. Direct Investment in Brazil				
Sector	Subsectors	2007	2011	Increase
Information		\$1,963	\$5,715	\$3,752
Manufacturing	Chemicals	\$5,583	\$6,445	\$862
	Computers and electronic products	\$1,984	\$2,106	\$122
	Electrical equipment, appliances, and components	\$58	\$110	\$52
	Other Manufacturing	\$6,468	\$10,742	\$4,274
	Transportation Equipment	\$2,317	\$6,875	\$4,558
Manufacturing Total		\$20,212	\$31,848	\$11,636
Professional, scientific, and technical services		\$628	\$1,265	\$637
All Industries Total		\$48,807	\$71,101	\$22,294
Percentage of the Total Amount of U.S. Direct Investment in Brazil				
Sector	Subsectors	2007	2011	Increase
Information		4.02%	8.04%	99.85%
Manufacturing	Chemicals	11.44%	9.06%	-20.76%
	Computers and electronic products	4.06%	2.96%	-27.13%
	Electrical equipment, appliances, and components	0.12%	0.15%	30.19%
	Other Manufacturing	13.25%	15.11%	14.00%
	Transportation Equipment	4.75%	9.67%	103.68%
Manufacturing Total		41.41%	44.79%	8.16%
Professional, scientific, and technical services		1.29%	1.78%	38.27%
All Industries Total		100.00%	100.00%	***

3. OTHER SPECIAL 301 PROCESS-RELATED ISSUES

The Brazilian private sector believes that two other import issues – not directly related to the proceedings of Section 182 of the Trade Act of 1974 – must be addressed due to the U.S. government and private sector’s interest. These issues are international negotiations and the legitimacy and legality of the Special 301 process.

3.1 International Negotiations

In the context of the Special 301 process, some interested parties complained about Brazil’s positioning when it comes to negotiations in international fora such as FAO, the World Health Organization (WHO), the WIPO, and the WTO. These interested parties have expressed concern that Brazil may be 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 on 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 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 to international negotiations, demonstrating openness to engage in a robust discussion on the much needed reform of the WIPO Patent Cooperation Treaty (PCT).

In addition to the mediation agreement, that provides the creation of a Mediation Center for the resolution of IPR disputes, recently signed by INPI and WIPO, Brazil also participated on a number of WIPO related activities during the past year, including:

- The International Conference on the Strategic Use of Intellectual Property by the Sport Industry
- DA Project on South-South Cooperation on IP and Development, Training Program on Mediation of Trademark Disputes
- WIPO/INPI/CADE Roundtable on Intellectual and Competition Law
- The 2012 ASPI Congress
- Inter-Ministerial Group for Intellectual Property
- WIPO First Inter-Regional Meeting to Discuss IP Governance, GRTKF and Copyright and Related Issues

In the WIPO First Inter-Regional Meeting, the government of Brazil and WIPO signed an MOU for the promotion of South-South cooperation in the field of IP through concrete projects and initiatives to be undertaken with other developing countries and LDCs.

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.

In addition, the protection and promotion of IPR affects fundamental social and economic aspects of several countries, especially in developing nations. Any discussion on the matter must take into consideration each country's singularities and their right to development. So far, Brazil has shown a deep commitment towards the IPR set of rules agreed to in the WTO TRIPS Agreement, which is the product of a multilateral negotiation that respects each party's specificities and duties. Any further advance on this matter should also be negotiated in a similar environment of dialogue.

3.2 The legitimacy and legality of the Special 301 Process

The Brazilian private sector considers it 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 assessments, not on an evaluation of U.S. IPR policy, particularly at the international level.

According to the WTO's official record, 38 of its 455 disputes were related to IPR. Of these 38 disputes, the U.S. was a respondent in six 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 April 23, 2012, the United States has 14 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 practices. 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 Brazilian legislation.

Coupling this with the fact that ACTA negotiations were shrouded in 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 and 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 negotiations 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.