

Changes in Licensing Law In Brazil

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President Collor keeps campaign promises: Brazil changes approach favoring technology transfer

Time to his campaign promises, President Collor has taken decisive steps to change Brazil's (long a one of the world's most closed economies) to a country whose markets are wide open to foreign investments, leading to what could be termed a new "industrial revolution." The basic principles of these changes are contained in the "General Directives for the Industrial and Foreign Trade Policies," issued in June 1990, three months after Collor took office.

These Directives indicate that the main objectives are aimed at, *inter alia*, eliminating government interference in the private sector, improving productivity, exposing Brazilian businesses to international competition by lifting import bans, lending support to technological development, stimulating the association (joint ventures) of Brazilian companies with foreign companies, altering the existing "market source" mechanisms, reviewing current legislation, including the information technology law and the patent and trademark law.

It is appropriate to briefly review the background that led to the policies Collor placed into effect, particularly excerpts from his "Plan of Action."

In November and December 1990, 62 million voters in Brazil were given their first opportunity in 29 years to choose their president. They did so in a surprisingly colorful fashion, considering that the two final candidates, Fernando Collor de Mello and Luiz Inacio Lula da Silva, were representing divergent ideologies that could be labeled as at the right and left of the ideological climate at the final stage of the

campaign was a clear reflection of this conflict.

Collor, who at the beginning of the campaign was the unquestionable underdog, is subsequently becoming the political phenomenon, rewarded in gaining 50% of the votes against Lula's 4%. He set two records: The youngest Brazilian president and the highest number of popular votes ever given a Brazilian president — 35 million against Lula's 11 million.

Notably, he seems to possess the adequate ingredients for the job. He is 48 years of age, politically and financially independent, shrewd, energetic, very determined and an adept leader. If only he would have thought that these skills could come so handy when negotiating with, for example, U.S. Trade Representative Carla Hills. Actually, this will apparently not be necessary. After working here in Washington she referred to Collor as "articulate, charming and sincere."

THE PRESIDENT'S VIEWS

The following are certain extracts taken from a "Government Plan of Action" prepared and signed by the new President, from which we can perhaps reach conclusions as to what can be expected from the Collor government. Here are Collor's views:

On Government Protectionism

"... Government action has always placed emphasis on protection, a fact which has often resulted in isolating the internal market from international competition in order to create conditions for its development."

"Rather than promote artificial mechanisms that protect inefficiency, the desired industrial policy should focus on technological cap-

ability and selective incorporation of technical progress, in such a manner as to permit the competitive integration of the Brazilian economy into the international scenario. This means that Brazilian industry must gradually increase its level of exposure to international competition, be it through pressure of imports, or by the removal of incentives which facilitate the placing of Brazilian products in markets."

On Foreign Capital

"... The model to be adopted shall stress the promotion of cooperation between state, national, private and foreign capital, replacing the system of government bureaucracy and controls that prevails today. The implementation of this industrial policy shall require the centralization of the government entities involved, the reduction of their number and the coordination of their actions."

PATENTS

The "General Directives for the Industrial and Foreign Trade Policies," issued by the Collor Government, clearly determined that the current patent and trademark law, the rate of 10% shall be "revised."

It is also expressly stated in the Directives that the government plans to enter to Congress a draft of a new patent and trademark law with the proposed changes. The Directives provide that "amongst the changes that will be made aimed at improving the contracting, protecting and transferring of technology in the domain of the code of industrial property, the granting of patent protection to

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pharmaceutical production processes and products shall be given special emphasis."

Simultaneously with these Directives, the government issued an inter-ministerial ordinance by means of which a commission was set up to prepare the draft of the new patent and trademark law, in line with the policies of the new General Directives.

This commission is chaired by the president of the Brazilian Patent and Trademark Office (BPI), as the representative of the Justice Department, two representatives of the Economy, Treasury and Planning Departments, a representative of the Storage Office and a representative of the Secretariat of Science and Technology.

There can be no doubt at this stage that Brazil will grant patents to pharmaceuticals. The crucial question is when will this happen and around this particular issue the lobbying battle has begun, in the hope of influencing one way or another the inter-ministerial commission.

On the one side, defending the position that patentability should occur gradually in 10 to 15 years, stand the Association of National Laboratories (ALANAC) and the Brazilian Association of Fine Chemical Industry (ABRINAC). On the opposite side, in favor of immediate patentability is the Association of Pharmaceutical Industries of Brazil (INTERABMA), formed in 1986. Its members are foreign pharmaceutical companies operating in Brazil.

The matter of when patentability of pharmaceutical production methods and products will become a reality ends with the Brazilian congressional lawmakers who were elected in October 1990. But what can be predicted with a certain degree of accuracy is that, since Collor's presidential inauguration as a conclusion in 1994, he will be placing all pressure on Congress to approve legislation that will grant patentability to pharmaceuticals before he steps down from office.

The Brazilian Association of Industrial Property, ABPI, has prepared a draft of a new patent and trademark law, now in the hands of

the Inter-ministerial Commission. This draft has entirely abolished the non-patentability provisions of Article 9 of the current Patent and Trademark Law. According to the ABPI draft, all inventions are patentable, provided the subject matter thereof is of practical or industrial use, is new, and contains inventive activity.

It can hardly be expected that the Inter-ministerial Commission or Congress will give the green light to such provisions of the ABPI draft. However, it will be a tough struggle all the way through regional approval, and if patents are finally granted to pharmaceuticals this will be a definite step to place Brazil in harmony with international standards of patent protection.

TRADEMARKS

There are many aggrieved problems facing foreign trademark owners in Brazil. Many of their well-known trademarks and difficulties in successfully opposing at the administrative level. Trademark applications would seem to top the list.

Earlier for coffee, *Vit 60* for clothes, McDonald's for restaurants are a few examples. Until recently, not much could be done to prevent registration of these marks for goods totally unrelated to those associated with these famous marks.

Since they were not officially declared to be well-known by the Trademark Office and the goods were not related, the opposition failed, with the result that pirates were encouraged to continue filing.

Close to 70,000 trademark applications were filed in 1989, many of which were pirate applications, filed for the purpose of registering the mark for a profit or merely to take a free ride on the fame of the mark. Due to the ever-increasing number of these pirate applications and the general industry they created, quite unexpectably, officials at the Trademark Office decided to apply the previously dormant provisions of the Trademark Law relating to the repression of unfair competition. In the past, the understanding had always been that issuing unscrupulous competition could only

be involved by court action.

The new policy, which has shown maturity on the part of the Trademark Office, is to reject pirate applications based on the provisions relating to the repression of unfair competition — Article 20 of the Code.

The fact that pirate applications are now being mostly rejected based on these provisions comes as a relief and perhaps as a sign that better days are ahead for trademarkers during the Collor government, which is expected to clarify the long-standing myth that trademarks are too narrow in covered markets.

The draft of a new trademark law prepared by the ABPI includes provisions to the effect that special protection shall be granted to well-known marks. Based on these marks, oppositions or appeals can be filed against the registration of trademarks that reproduce or imitate these well-known marks, even if the goods or services are different.

The draft also provides that if the well-known trademark is not registered in Brazil, the owner thereof is compelled to apply for its registration within 90 days counted from the date of filing of the opposition or, in the absence of an opposition, from the filing date of the appeal from the allowance of the third party's application to register the identical or similar mark.

If these provisions of the ABPI draft are approved by the Inter-ministerial Commission and Congress, great credit is due to the government for their inclusion in the new Code of Industrial Property, the golden days of Brazilian trademark protection will be over.

UPDATING

In line with the Brazilian government's intention to review the patent and trademark law, a task force or subcommittee coordinated by BPI has been recently working on the new guidelines for it. Because this subcommittee has the responsibility of submitting its recommendations to the Inter-ministerial Commission or in charge of preparing the draft of the new patent and trademark law.

The members of this subcommittee are individuals representing the Foreign Office, the Economy, Treasury, and Planning Departments, the Secretary of Science and Technology, representatives of the Institute of Applied Economic Research, IPEA, and of the Central Bank of Brazil, BACEN.

One of the main concerns of this subcommittee has been to simplify the operational procedures relating to the contracting of technology transfer from abroad and to adapt the guidelines to the principles of the new government's general directives for the industrial and foreign trade policies. For this purpose, it seems to be the general consensus that the rules and regulations currently governing technology transfer must be changed and a new normative act prepared.

As all know of the tremendous difficulties in obtaining approval of technology transfer and foreign agreements in Brazil, Executive interference in the wording of these agreements and generalized restrictions have made many foreign potential suppliers of technology and investors simply scratch Brazil off the map as a hopeless country for conducting business.

The lack of flow of new technology into the country is evidently causing serious damage to the development of local industry. Brazilian authorities have become con-

cerned with this ever-increasing technological gap and they are very gradually becoming more lenient when examining agreements.

It now seems to be INPI's policy, which apparently has support of the subcommittee, to permit parties to technology transfer agreements to decide, without INPI's interference, on the price to be paid for technology being transferred. In addition to this, prior analysis of agreements will apparently no longer be compulsory and records of agreements simplified and expedited. Restrictions, however, still appear to be focused on the guarantee that must be given by the supplier to the recipient of the technology as regards performance of the technology and infringement of third party's industrial property rights. This is a critical issue and should be incorporated into the new guidelines.

CONCLUSION

The Patent and Trademark Law currently in force in Brazil was created in 1971, at the height of the military regime. As would be expected under these circumstances, the law was strongly marked by protectionist and paternalistic influences. The many rules all powerful and complex had to be established to avoid abuses, particularly from multinationals doing business in Brazil.

For political reasons, over the

years, the government has been reluctant to grant adequate protection for industrial property rights. One of the fears is that if such protection were granted, local Brazilian companies would be placed at a disadvantage in relation to multinationals. This is evidently a mis-conception. It underestimates the capacity of Brazilian companies to compete, produce competitive and good-quality goods, and overlooks the basic principles of reciprocity and fair play.

The new Collor government is interested in altering this picture. Based on the new general directives for the industrial and foreign trade policies, it is clear that Collor intends to place Brazil in line with the international business community and here are his own words which confirm this view: "... We wish to create opportunities within and outside the country to enable us to carry out investments that strengthen our commercial and productive relationship with the rest of the world, investments that will technologically develop our industries, and permit the new to emerge from the constraints of the old."

With the proposed new Patent and Trademark Law looming ahead as well as the more liberal changes in the rules and guidelines governing licensing, Brazil should finally incorporate a new era of development and prosperity.