

Restrictions to intellectual property rights and public policy

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We are experiencing interesting times in Brazil today. When Lula was first elected president, the markets feared the worst: annulment of concession contracts, a review of the privatization process and possible renationalization; control of royalties transferred abroad; violation of intellectual property rights; and so on. As the administration tackled this lack of confidence, it has waned through President Lula's two terms.

The situation today is unprecedented. Never before have had foreign investors had so much confidence in Brazil. According to IBGE (Brazilian Institute of Geography and Statistics), we have the best economic environment in Latin America: January 2010 data indicated a 7.8 index for Brazil compared to the average of 5.6 for the region. Our growth indicators are sound: the OECD has cited Brazil as the only one of its 26 member countries to be spared by the crisis; and ahead of us there is the Soccer World Cup and the Olympic Games, with all the infrastructure projects they imply.

Yet Brazil is now ready to restrict and

even revoke the intellectual property rights of corporations or individuals residing in the US; that is the aim of the Presidential Provisory Measure No. 482/10 (02/10/2010). This could discourage investments in Brazil because of unfavorable investor perceptions of the certainty of our laws and the quality of the business environment.

Trade retaliation

The provisory measure was issued because the US has not complied with the rulings of the WTO Dispute Settlement Body rulings in a complaint Brazil filed in 2002 concerning US government subsidies to cotton producers (dispute WT/DS 267). The Brazilian government seems not be satisfied with retaliating by simply increasing customs duties on US products. Its plans to act on US intellectual property rights would affect compensation for inventive work involved in, for example,

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computer software, films, books, chemical products, and pharmaceuticals.

This is a case of “cross-retaliation,” a situation where the object of the reprisal is not directly related to the wrongful practice that originally caused damages. If Brazil applies restrictions on intellectual property, it would constitute the first case of cross-retaliation in international trade.¹

We should praise the transparency of the process and the proposal for dialogue on this that our Foreign Trade Chamber (CAMEX) has advanced. Through Resolution No. 16 (published in the Official Gazette on 03/15), CAMEX opened a public consultation procedure “on the measures of suspension of concessions or the country’s obligations concerning intellectual property and other rights,” to give civil society the opportunity to express its position within 20 days. Now parties affected, as well as researchers and experts on the subject, need to come forward.

The central issue is whether we should retaliate by restricting or revoking patents, and if so which patents should be targeted. Should we leave the choice to the discretion of public officials, who could be influenced by natural political pressures? Or should the choice be guided by public policy-based criteria?

My proposal here is partial, but follows the lines of the one CAMEX advanced regarding which US products should be subjected to increased import duties. The list excludes, for example, equipment and machines, because Brazil does not want to increase their cost to our production sector. It generally includes products considered to be luxury goods, such as motor boats, luxury automobiles, motorcycles, and perfumes. Setting aside the debate on whether wheat should be included, the list in general terms has great social appeal and expresses a concern for avoiding increasing prices to the poor.

Competition

I believe we can also use this cross-retaliation instrument to promote good public policy. Why subsidize some sectors through state-owned financial institutions, if I can revoke a patent? From a microeconomic perspective, subsidies distort competition whereas revoking patents encourages competition by eliminating a barrier to entry in a sector that generates great market power and distorts prices.

Let us consider pharmaceuticals. The argument is simple: Someone has decided that it is desirable to invest in pharmaceuticals.² Let us then make this investment less expensive to society. It is definitely less costly to use the opportunity provided by cross-retaliation to restrict intellectual property rights than to promote industrial policies

that have a cost to the treasury and distort competition.


Another very controversial issue is the timing of the eventual suspension of cross-retaliation, which is by nature temporary. If the US lifts the cotton subsidies, will we have to reinstate the intellectual property rights that applied before the retaliation? On this, even WTO's interpretation is somewhat ambiguous in terms of whether retaliation is simply dissuasive, or whether it also has a compensatory aspect associated with the damages caused.³ Nonetheless, even if we are forced to proceed to an immediate withdrawal of the sanctions if the US complies with the WTO ruling, even if there has not been enough time to produce the pharmaceuticals locally, revoking the patent would already have paid off by allowing cheaper imports.

The question then would be which pharmaceutical patents to suspend. The first part of the answer has to do with whether there are available in the international market generic products of proven quality that we can import legally. The second has to do with not discouraging pharmaceutical research on diseases that are particularly prevalent in poor countries.

I have argued elsewhere that there is a need for greater incentives to research and development (R&D) in pharmaceuticals to combat neglected diseases (malaria, Chagas disease, leishmaniasis, dengue, cholera, etc.). I have also argued that developing countries should together commit to not using mandatory licensing for patents in those areas. Thus, if we end up retaliating by restricting intellectual property rights, we should focus on pharmaceuticals that are useful in fighting diseases that affect rich as well as poor countries, pharmaceuticals for which the markets in poor countries are less important. There are cases in which revoking

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patents will have minimal negative impact on the incentives to innovation while favoring access for millions of poor patients to expensive medicines.

If we act cautiously, there is much to gain from applying intellectual property retaliation in pharmaceuticals. But we should make it clear to the world that for neglected diseases intellectual property rights will be strictly enforced in Brazil. And we will not import such pharmaceuticals produced in violation of intellectual property rights in other countries, or of doubtful quality. With some basic public policy criteria, it should be possible to reconcile trade retaliation with international rules, widening access to good and cheap pharmaceuticals and retaining incentives to R&D related to neglected diseases.. 

¹ On two other occasions WTO has allowed the use of cross-retaliation, but in both cases the retaliation did not materialize because the parties came to an agreement.

² Pharmaceuticals have been included in the list of four strategic sectors in the industrial development policy of the Lula administration.

³ Visit the institution's site: www.wto.org/english/res_e/booksp_e/analytic_index_e/dsu_08_e.htm#article22B