



## **The Wolf and the Stork**

How Brazil's Breaking of U.S. Drug Patents Threatens  
Global Trade and Public Health ©

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### **The Wolf Shows Its Teeth**

There is a famous fable penned by the French author La Fontaine, which holds as important a lesson for adults as it does for children. The story involved a Stork which came upon a gorging Wolf that was choking frantically on a bone that had lodged precariously in his windpipe. Sensing the Wolf's urgency, the Stork expeditiously removed the bone from the Wolf's throat. Thereafter, he asked for compensation. The Wolf was truly dumbfounded by this request. After all, he had bestowed the Stork with the gift of life by not eating him. The Wolf then chased the Stork away, narrowly failing to kill him in the process. The Stork stood warned that the Wolf would not be so kind to him in the future.

A similar scenario has arisen in Brazil today. The U.S. pharmaceutical companies, which have for many years brought patented medicines to Brazil to help fight the dreaded AIDS disease, now find themselves being chased away by the Brazilian government. And they observe in horror and bewilderment how their hard-earned property could be expropriated simply with the swipe of a pen.

The recent bill, unanimously approved by the lower house of the Brazilian legislature, proclaims "non-patentable" all pharmaceutical products and processes for the treatment and prevention of AIDS and a vast array of related diseases. Although this bill must follow certain parliamentary procedures before it can become a law, its very existence creates a bad political and legal precedent and needs to be addressed. Hopefully the bill will be never be implemented.

### **No to the State Sponsored Piracy**

Should Brazilian politicians decide to pursue this course of action any further, they ought to be aware that the world will likely interpret it as a state-sponsored piracy that contravenes both the spirit and the letter of international trade law – specifically, the WTO TRIPS rules. Certainly, the TRIPS and some related decisions and declarations provide derogations from the protections ordinarily afforded intellectual property such as drug patents, but there remain strict rules to follow in order to invoke them. This is neither the appropriate place nor the appropriate time to engage in a full legal refutation of the issues. However, even a brief review of these trade rules



will confirm that the Brazilian draft law is without legal foundation. Brazil has yet to proclaim the existence of a national emergency, and the bill's overbroad and imprecise text places no limits whatsoever on the list of drugs not yet invented that may ultimately be affected, or on their quantity, origination, destination, labeling, etc. The Brazilian draft law simply proclaims that an unspecified class of drugs and ingredients will no longer be patentable. All WTO Members should take note – while it may only be drugs needed for AIDS treatment and prevention that are today deemed non-patentable, it may be other drugs needed for malaria, tuberculosis and other epidemics tomorrow. The flood gates may soon be wide open.

Is there a genuine national AIDS emergency in Brazil? What criteria must first be satisfied in order for Brazil to declare one? How long will such emergency last? Brazil is certainly not any worse off than the U.S. as concerns AIDS. Should we now expect that the U.S. government will soon expropriate foreign pharmaceutical patents in America?

Even if a national emergency were found to exist, why has Brazil not used the compulsory licensing procedure? The Brazilian Health Ministry representative, Mr. Jarbas Barbosa claims that this act of breaking patents is tantamount to mandating and declaring a compulsory license on American companies' drug patents based on the existence of a national emergency or other urgent circumstances. This is not true. As noted above, no such emergency or urgency justifying the need for compulsory licensing has yet been declared. And none of the flexibilities or conditions, including notification, set forth within the WTO TRIPS Agreement to facilitate the use of compulsory licensing have either been invoked or followed. Perhaps, Brazil now finds that it is just too difficult to abide by the very same internationally agreed upon rules that it had previously negotiated and consented to. Or, perhaps, as is most likely the case, Brazil has more ambitious goals, other than helping the sick and the poor - namely, to become a world power in pharmaceuticals.

### **An Emerging Global Power Should Not Steal**

Obviously, the question here is not about curing people, but about money. Yet, it would be a mistake to assume that Brazil is concerned foremost with the profitability of the American pharmaceutical companies. Rather, Brazil, a growing world power in its own right, seeks to carve a global niche for itself.

Brazil is a country similar in size to the USA. It desires to become a permanent member of the UN Security Council, and boasts a well-developed pharmaceutical industry. In fact, Brazil is already producing eight of the 15 drugs for its federally funded anti-AIDS cocktail, though it still does not invest enough in research and development. Yet, why should it bother to do so, if it can take for itself the results of a one billion U.S. dollar investment – this is the average cost of developing a new drug – for free. After all, chasing the Stork away after having received the benefit of its services is the logic of the Wolf.



By declaring as non-patentable costly foreign pharmaceuticals developed to prevent and treat AIDS, Brazil will not only violate international trade law, but it will also effectively chase away the American patent holders. Had Brazil chosen instead to issue compulsory licenses, even at a much reduced price, it would still have been compelled to recognize the underlying patents. But, this it did not wish to do. Apparently, the most expedient way a country such as Brazil may establish itself as an aspiring new world power is to treat drugs as non-patentable.

### **The False Issue of Prices**

It is obvious, furthermore, that the price of AIDS drugs is not really an issue anymore. As Yale scholar Richard C. Levin has noted, most of the large global producers of AIDS treatments have already dramatically lowered the prices of the standard AIDS cocktail in developing countries to near \$1 per day, which is very close to Indian generic drug prices. In Professor Levin's estimation, at this point, it is more a drug access and delivery question than a drug price question – "it is not the international patent regime that is preventing universal access to drug therapies; it is the crushing poverty of the nations most heavily infected..." Even the WTO and the WHO agree. They recognize that, while "reducing drug prices will make them more affordable to the population, the lack of an efficient structure for delivery will prevent an abundant supply of cheap essential drugs from saving many more lives."

We do not here discuss the need for additional aid and infrastructure development, nor do we discuss the more important distribution and corruption problems that plague Brazil's national AIDS program. We also do not address national management failures or misplaced national priorities, which, in this case, may constitute the most important concerns of all.

We must question, however, why Brazil has decided to act in the manner that it has, considering that the prices of the imported AIDS drugs it has been able to secure have already been reduced by up to 76 percent (%) of their cost. Paying 24 percent (%) of the price of a world class medication is certainly a good trade deal, and trade brings order. And, we must ask whether even greater benefits are possible if such an order were destroyed. Obviously, without trade rules, there cannot be trade violations. In that event, Brazil would be free to start its own drug production based on the stolen patents of American pharmaceutical companies, and to reap the economic benefits from both the domestic Brazilian and global export markets that it establishes.

There are other indications that Brazil's draft law has little, if anything, to do with providing cheap medicines to the sick and the poor; one need only consider the Brazilian ruling class' attitude towards the foreign assistance it was offered in terms of AIDS prevention and treatment. The U.S. government, for example, recently offered \$40 million of free assistance on the condition that Brazil's AIDS program include more rigorous AIDS prevention measures, in addition to AIDS treatment. Brazil ultimately turned down this aid proposal. It refused to oppose the commercial sex industry as needed to address the issue of prevention as the U.S. offer had



stipulated. The Brazilian Health Ministry AIDS program director, Mr. Pedro Chequer, called the U.S. government's offer "theological, fundamentalist, and Shiite."

Brazil has made much political noise by essentially stating that it was offended by intrusive Bush Administration aid requirements mandating that behavioral elements (AIDS prevention/abstinence) be incorporated into its national AIDS treatment program. In truth, both the Clinton and the two Bush Administrations have required this as a condition of their generous AIDS aid programs extended to developing countries to stem the AIDS epidemic. In other words, nothing has changed as far as U.S. policy is concerned. (And the fact remains that the U.S. is the biggest single contributor the global fight against AIDS.) Rather, what has changed is Brazil's attitude.

### **Brazil's Ambitions to Develop a Global Drug Industry**

Brazilian politicians, trying to win support for the newly proposed legislation, claim that the cheaper drugs created on the basis of the stolen patents will be distributed locally. However, Brazil's actions speak louder than its politicians' words. It appears that Brazil endeavors to steal the foreign drug technology (know-how) that it cannot develop on its own in order to secure a share of the growing global generic drug market.

Since at least 2002, Brazil has been exporting generic AIDS drugs to sub-Saharan African countries. While these actions may have been initiated for humanitarian reasons, they appear to have evolved into a burgeoning export market for Brazil that has taken on a life and *raison d'être* of its own. For example, during his 2003 and 2004 bilateral trade-enhancing trips to Africa, H.E. Brazilian President Lula signed generic AIDS drug cooperation agreements with every country he visited, and promised to help build pharmaceutical plants in Mozambique and Namibia to produce generic AIDS drugs. During his most recent trip to Africa during April 2005, Mr. Lula finally admitted the truth to the global media: that he will seize American drug patents so that Brazil can become a generic drug exporter to the world.

### **Trade Issues Disguised as Health Issues**

The Brazilian positions on world trade issues suggest that the proposed non-patentability law is part of a bigger game. They go far beyond the issue of AIDS treatment and the domain of public health. Indeed, Brazil seeks to position itself as a leader of the developing countries in the Doha Round trade negotiations. And, Brazil has made bellicose statements to the developed countries within the framework of such negotiations. They have been warned, for example that, unless they grant broader market access to Brazilian and other developing country agricultural exports and/or reduce their agricultural subsidies (e.g., on cotton), the U.S. pharmaceutical industry's cherished intellectual property rights will remain at risk. Indeed, a recent Los Angeles Times article quoted Brazilian farm lobbyist and former Brazilian government trade official Pedro de Comargo Neto as saying that, it was Brazil's strategy to draw additional U.S. industries with



intellectual property piracy concerns into the fray (a trade battle) to negotiate a better trade deal for Brazil.

This development seems to corroborate the remarks of Mozambique's President Joaquim Chissano and South Africa's President Thabo Mbeki made during Brazilian President Lula's 2003 and 2004 African trips. According to Chissano, "the role of Brazil will be crucial in our efforts against...farm subsidies and in the struggle to obtain access for our products to the markets of the developed world". In addition, Mbeki referred to the 'Brasilia-Pretoria-New Delhi axis' "as a way to confront the powerful countries, not only within the framework of the WTO but also in international policies." And even President Lula himself has stated that, "We want to develop a strategic policy with the rest of Africa, with China, Russia, India, and Mexico... This would guarantee that developing countries at the World Trade Organization (WTO) can negotiate equitable market access for their products." Apparently, in President Lula's mind, such thinking should also extend to generic drugs. During Mr. Lula's April 2005 trip to Nigeria, for example, he mentioned that, besides expanding bilateral technical cooperation, Brazil and Nigeria intend to alter the stance of the World Health Organization (WHO) with regard to the prequalification of generic drug manufacturers.

Brazil does not hide its ambitions to become a global force in the pharmaceutical industry. Commendable as that goal may be, it cannot be achieved by stealing the intellectual property of other nations. In the event Brazil's AIDS drugs are developed on the basis of stolen patents, they will constitute *stolen* drugs, not generic drugs. This kind of politics is not as new as it may appear. The former communist countries also engaged in expropriations of patents. Initially, it looks like a great move – you invest zero and you earn billions. But we now know how this story ends. Such a country is eventually isolated both politically and economically - it suffers sanctions, loses resources and incentives for national research and innovations, loses from being denied trade benefits, and experiences health problems and social distortions. One must also remember that nationalized property never serves the masses – only the elite enjoy it.

### **AIDS and Trade War**

The proposed Brazilian law should not serve as a bargaining chip or leverage on other trade issues. For example, it would appear that Brazil has learned a thing or two from Ecuador about how to use cross-retaliatory measures to ensure that it receives a better settlement deal following the adoption of an adverse WTO ruling. In this case, Brazil won a WTO dispute it had brought against the U.S. on cotton subsidies, but the U.S. has not yet complied with the ruling. Anticipating that the U.S. would either continue its noncompliance or offer to Brazil a less than satisfactory deal (i.e., non-suspension of agricultural subsidies), Brazil has likely raised the threat of AIDS drug patent abrogation to gain negotiating leverage. However, Brazil's proposed action would be far more problematic than Ecuador's prior action to secure a more favorable EU settlement offer in the Ecuador Bananas dispute, which WTO arbitrators had approved. In



contrast to the present case involving technology-rich drug patents, Ecuador was permitted to cross-retaliate by suspending TRIPS protections on several categories of intellectual property that did *not* include technology transfers. Given this important difference between the two cases, Brazil's brinksmanship could inadvertently start a major trade war with the United States and the world. This will likely have serious consequences for Brazil. There are many legal, economic and political options available to the U.S., unilateral as well as multilateral, statutory as well as institutional. Therefore, not only would it be unwise for Brazil to engage in such a trade war, but also self-defeating.

### **The Carrot, Not the Stick, Will Encourage Drug Innovation**

And one final observation – it may be the most important one. The AIDS epidemic is a real peril. It is not a sphere of human activity that should be governed by nationalistic feelings or greedy ambitions. Expropriation of pharmaceutical patents harms the underlying research. It is impossible to remain at the cutting edge of the types of innovation necessary to ensure the continued discovery of new drugs, if companies are denied an adequate return on investment (ROI) from their prior inventions. The patents are like carrots placed in front of the scientists and investors to encourage them. If you remove the carrots, regulators are left only with sticks. History teaches us about what happened to countries that did not protect their intellectual property. It is not by chance that the land of the free, where the patent system is respected, is the most prosperous one. If Brazil has global ambitions, it should not choose to pursue them by expropriating the patents of others. This is especially true in the present case involving the AIDS epidemic, where the negative consequences are likely to be global and disastrous. In other words, Brazil would be wise to heed the lesson of the Wolf and the Stork. If it does not, not only will the welfare of the Wolf and the Stork be endangered; rather, everybody will likely suffer and AIDS and the HIV virus will continue its march on the planet.

The ITSSD believes that there are politicians in Brazil that understand that this course of action should be reversed. And, we stand ready to work with them for the benefit of the Brazilian people, global trade, and humanity.