

What Honeymoon? Trade Relations Between China and Brazil

By Liz Cannon, Immigration Attorney

ABSTRACT

Contrary to the impression that many writers and media outlets have promulgated over the last few years Brazil and China are not providing each other with preferential treatment to the detriment of other nations. Historically the two countries had often seen themselves as partners linked by common desires for economic development and world political recognition. In truth theirs is as nuanced as the relations between any two states. It is necessary to examine their past and more recent trade and investment relations to understand China and Brazil's present positioning and possible future dealings. This examination must be thorough and take into account not only the promises between the countries but also whether such promises are realized. As well it must consider trade barriers and legal issues that affect each country's ability to accomplish trade and investment goals. A deeper look can develop understanding of trade between these two countries and in fact all countries in the contentious world market.

... (p.21)

For its own part, Brazil must address impediments to trade and investment such as its own problems with judicial corruption and convoluted regulatory and licensing systems.⁸⁹ Just as China has bureaucratic areas that suffer from a lack of transparency, Brazil can improve its ability to give access to information. Both China and the US (in nearly identical language) bemoan the system of import licensing in Brazil, SISCOMEX.⁹⁰ Many goods receive automatic licenses through this system, but an estimated 40% do not,⁹¹ including beverages and many foodstuffs.⁹² The problems in the system are a lack of specific information about why licenses were denied and, perhaps most defeating, a lack of specific information on what is needed to license products.⁹³ The documentation to register products can also stifle movement of goods, such as how some pharmaceuticals require full testing in Brazil even if they have already gone through such testing before.⁹⁴ Another area with limited transparency is government procurement programs, wherein it is not clear how goods are given preferential status.⁹⁵ Brazil has yet to be a signatory to the WTO Agreement on Government Procurement⁹⁶ and losing such a large market for unclear reasons could cause China to pressure Brazil to sign on or even cause it to initiate or participate in complaints to the WTO. Brazil has to address these issues of transparency in its regulations and their implementation or risk reactions from China and other countries, including possible retaliatory measures that would only harm Brazil's export capabilities.

Brazil must continue to address its own issues with intellectual property (IP) rights. This invokes the issue of reciprocity again. China has been much maligned for its lack of IP protections. **However, if Brazil is to demand protections from China in the future it must work to ensure the same is done on its own soil. For years other WTO members cited Brazil as not meeting its commitments to protect intellectual property rights.**⁹⁷ The International Intellectual Property Alliance (IIPA) estimated losses in Brazil from piracy in 2005 to total more than USD 858.5 million.⁹⁸ The numbers for 2006 show that in areas such as software, levels of piracy have increased and in books held steady, even as levels in music have fallen.⁹⁹ The IIPA has also warned that too few criminal cases are being pursued, they often take three years or more to be decided, too few convictions have been made, and that convictions often amount to small fines or community service.¹⁰⁰ This seemed to be changing as Brazil continued a crackdown on counterfeiting and piracy that even gained recognition by the Office of the United States Trade Representative.¹⁰¹ Note, that same month Brazil issued a compulsory license for Merck & Co.'s HIV/AIDS medication Efavirenz in of 2007.¹⁰² This allows, in

accordance with WTO regulations, the production of generic versions of the drug in Brazil while the patent holder's rights have yet to expire. It is also a demonstration of Brazil's multi-faceted approach to IP protection, as it couches the recent compulsory license in the country's need for adequate treatment in the face of a national AIDS crisis, even while castigating vendors of pirated CDs.

Brazil may be justified in issuing the compulsory license but it is nonetheless possible that another WTO member could bring a complaint because of it. It is also possible that another country could bring a complaint based on the fact that Brazil requires its health ministry, ANVISA, to give approval to pharmaceutical patents.¹⁰³ This is in fact an issue of import to China, which argues Brazil is in violation of Article 27 of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).¹⁰⁴ Whether either of such complaints would be successful is unknown, but it is clear that Brazil must continue to focus on enforcement on pirated goods or it could face a similar action as China is currently with the U.S.'s case before the WTO.¹⁰⁵

89 Heritage Foundation and Wall Street Journal Index of Economic Freedom, <http://www.heritage.org/research/features/index/country.cfm?id=brazil> (last visited Nov 26, 2007).

90 China.org's Foreign Market Access Report 2006 supra; and The U.S. Trade Representative 2007 Report on Brazil available at http://www.ustr.gov/assets/Document_Library/Reports_Publications/2007/2007_NTE_Report/asset_upload_file150_10930.pdf.

91 The Economist Intelligence Unit, Country Profile Brazil 2007.

92 A comprehensive list of what goods do or do not receive an automatic license is available at <http://www.desenvolvimento.gov.br/sitio/seceX/opeComExterior/impProcedimentos/impProcedimentos.php>.

93 The U.S. Trade Representative 2007 Report on Brazil; supra at 2.

94 Id.

95 Id. at pg. 3.

96 Signatories can be viewed at the WTO website http://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm.22

97 For a scathing overview on Brazil's IP history see, Lawrence A. Kogan, *Brazil's IP Opportunism Threatens U.S. Private Property Rights*, 38 U. Miami Inter-Am. L. Rev. 1, 2007.

98 IIPA 2006 Special 301 Report, Brazil, 2, available at www.iipa.com/rbc/2006/2006SPEC301BRAZIL.pdf.

99 IIPA 2007 Table of Estimated Trade Losses and Piracy Levels for 2006, available at www.iipa.com/pdf/IIPA2007TableofEstimatedTradeLossesandPiracyLevelsfor2006AMERICAS060607.pdf.

100 IIPA 2006 Special 301 Report, Brazil, supra at 11.

101 Latin Business Chronicle, Brazil & IPR: One Step Forward, One Step Back, May 7, 2007, available at <http://www.latinbusinesschronicle.com/app/article.aspx?id=1189> .

102 Id.23

103 Lei No. 10196/01 Art. 229-C.

104 China.org's Foreign Market Access Report 2006, supra note 30.

105 World Trade Organization, "DSB Establishes a Panel on China's Protection of IPR," World Trade Organization News, Sept. 25, 2007, available at http://www.wto.org/english/news_e/news07_e/dsb_25sep07_e.htm .