

Statement by Brazil. TRIPS Council.
“Intellectual Property and Innovation”.

Thank you Chairman,

When Brazil asked for an item on “Intellectual Property and Innovation” to be included in the agenda of this session of the TRIPS Council, together with the US delegation, its primary intention was to help set the stage for a debate, without prejudging any outcome whatsoever.

That debate is, in our view, more than welcome: it is necessary, right here, right now.

Right here, at the TRIPS Council, as, willy-nilly, the interface between innovation and intellectual property rights is being increasingly discussed in several different places, in the press, in universities, in parliaments, particularly in developed countries. The issue is also being hotly contested in the courts. The general public, in turn, has also been voicing opinions to such an extent that, as a result, public policy makers have been urged to reconsider the broader question of the scope and depth of disciplines for protection of intellectual property rights, especially, but not only, in the area of enforcement of copyrights in the digital environment.

These issues are not being properly discussed here, at the WTO, nor in WIPO. It is time we do it, right now, if only for the simple reason that possibly our only certainty today, at times of persistent uncertainties about the world economic outlook, is that sustained growth in the world economy will essentially depend on how fast and on how effectively a stream of innovation is converted into gains in productivity and welfare. In a new

book recently published and entitled “Private Rights and Public Problems: the Global Economics of Intellectual Property in the 21st Century”, Professor Keith E. Maskus, from the Peterson Institute of International Economics, stresses that... (quote) “We live in a global knowledge economy and the key to ‘winning the future’ is to excel at turning what we discover and learn into marketable new products and technologies. Innovation, adaptation, and the use of new technologies are the primary drivers of growth within economies and across international borders”. (end of quote)

Mr. Chairman,

This agenda item has been phrased in broad terms, “Intellectual Property and Innovation”, with the clear intention to give room to any member country to bring its own perspective to the debate, from any angle it may consider appropriate.

It is important, however, for the sake of clarity and precision, to recall briefly the key concepts as the Brazilian delegation sees them.

Intellectual Property refers, of course, in this Council, to the full body of provisions of the WTO TRIPS Agreement. Less clear, however, seems to be the concept of innovation.

Let me start by observing that the TRIPS Agreement itself refers to innovation only once, in its Article 7 on “Objectives”, according to which ... (quote) “The protection and enforcement of intellectual property rights should contribute to the promotion of technological *innovation* and to the transfer and dissemination of technology, to the mutual advantage of

producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations” (end of quote).

Not only does innovation appear only once in the TRIPS agreement. In Article 7, the noun “innovation” is qualified by the adjective “technological”. The text of the TRIPS agreement does not refer to all forms of innovation, but only to a particular form of innovation, that is to say, technological innovation.

Moreover, the TRIPS agreement uses invention in place of innovation several times in Section 5, on Patents, especially on Articles 27 (on Patentable Subject Matter) and 29 (on Conditions on Patent Applicants). There must be a reason for this choice of words, of invention rather than innovation on section 5, certainly implying that invention is a more clearly circumscribed and stricter category than innovation is, and that inventions alone are eligible for patent protection.

Indeed, innovation is a much broader concept in scope. Take, for example, the definition contained in the 2012 issue of “The Global Innovation Index”, a joint report and ranking published yearly by the INSEAD Business School and the World Intellectual Property Organization (WIPO). It recognizes that (quote) “...there is awareness that the definition of innovation has broadened – it is no longer restricted to R&D laboratories and to published scientific papers. Innovation could be and is more general and horizontal in nature, and includes social innovations as well...Today innovation capability is seen more as the ability to exploit new technological combinations and embraces the notion of incremental innovation and ‘innovation without research’”...(end of quote).

Having clarified the concepts at hand, I would like to make some remarks on the interplay between intellectual property and innovation.

My first comment is that any in-depth discussion on this topic must be based on the realization that the granting of *exclusive* intellectual property rights can only be justified to correct a potential failure in the markets of technology and knowledge.

That correction of situations of market failure entails costs for society. By establishing monopolies, however provisional they may be, protection of intellectual property can impair market efficiencies in allocating production factors and resources. To compensate for the possible costs of misallocation, the intellectual property system demands, in return for the granting of *exclusive* or monopolistic intellectual property rights, full disclosure of the know-how of the protected invention in such a way that society as a whole may benefit from it and build upon it.

This essential trade-off to the patent system has another component: to be able to apply for it, inventions must be, according to Article 29, novel, useful and non-obvious. Not all innovations or inventions should be entitled to patent protection. This is clear enough. However, what exactly should be protected and how to translate the three conditions for patent application in Article 29 into national legislation and regulations remains one of the most intractable and divisive issues whenever one discusses the current international patent system.

Against this background, the greatest challenge for public policy makers in any country is arguably how to design a theoretically “optimal” system that

would be capable of generating incentives for investment in innovation while at the same time minimizes losses caused by the granting of IP rights.

The challenge is compounded by the fact that intellectual property is far from being the single element driving innovation. It is only one in a larger mix of different tools that promote innovation. The Global Innovation Index, for example, refers to the importance of linkages and the right infrastructure for innovation, to the fact that collaboration, the flow of ideas among different innovation players, and access to knowledge are ever more important ingredients of innovation. It also refers to (quote) “innovation eco-systems that have become more complex and are now built on more internationalized, collaborative, and open innovation models and knowledge markets” (end of quote). Finally, the report recognizes that experiences and lessons in designing policies to promote innovation are still scarce.

In any event, the fact remains that innovation is heavily influenced by factors other than intellectual property, such as the industrial capacity of any country, the quality of its education, and access to raw-materials, to name but a few. Similarly, the level of protection afforded by any intellectual property system is not the only element stimulating technology absorption by developing countries. The capacity and existing skills to absorb those technologies in the receiving country cannot be underestimated.

It follows from those considerations that the mere increase in the degree of IP protection and enforcement rules does not provide, by itself, a strategy capable of leading to higher levels of innovation output. Higher IP protection does not translate automatically into more innovation. Reality is

far more complex, as always, and intellectual property must be placed within the overall framework of public policies for innovation.

Exceptions and limitations have a key role to play in calibrating national IP systems in such a way that individual goals of each country can be realistically pursued and eventually met. Other mechanisms to mitigate the potentially adverse impact of IP protection have to do with containing its effects on key areas such as public health and in the interface with competition policy.

If it is true and beyond doubt that a properly calibrated IP system is likely to play a positive and indeed key role in promoting the technological and social development of any country, a dysfunctional system may prove an impediment to innovation.

The granting of frivolous patents may do enormous harm to R&D activities and disrupt the necessary flows across innovation chains. This is especially true today, when most meaningful inventions are the combined result of the integration of a series of small innovations increasing efficiency or productivity incrementally only. Patent protection granted to a series of incremental innovations can in fact create uncertainty and thereby prevent breakthrough inventions from actually becoming a reality. A unbalanced IP system is particularly negative in the area of public health and access to medicines, in which the preservation of the flexibilities contained in the TRIPS agreement must be preserved, as reaffirmed in the Doha Declaration on the TRIPS agreement and Public Health.

From the perspective of developing countries, the Development Agenda approved by WIPO in 2007 is a valuable input to the debate on the

relationship between Intellectual Property and Innovation. Its recommendations establish, for example, that any new norm-setting activity in the field of IP must be preceded by an assessment of its impact on national development policies and strategies.

In my own country, Mr. Chairman, the shaping of the intellectual property system has been largely associated, over the past two decades, to the overall set of public policies to promote innovation and increase the competitiveness of the business sector. One of its stated aims is to make it possible for companies as well as research and technological institutions in Brazil to take full advantage of IP protection as one of the pillars to support innovation.

The importance of patents for scientific and technological advancement has been expressed repeatedly by President Dilma Rousseff.

The same perspective is to be found in statements by leaders and relevant players in Brazil's industrial sector, in particular in the agenda of the Business Movement for Innovation ("Mobilização Empresarial pela Inovação - MEI) that has been put in place by the National Industry Confederation.

Government policies targeted at science and technology are to be found in the National Strategy for Science, Technology and Innovation for the period 2012-15. The restructuring and modernization of the National Institute of Industrial Property (INPI) is part of the strategy. More information on the modernization of the INPI can be found in the current issue of *The Economist*, the British newspaper.

Priority sectors within the National Strategy for Science, Technology and Innovation are Information and Communications Technology, Pharmaceutical Products, oil and gas, aero space and segments relating to the green economy and social development.

Around 1.2% of Brazil's GDP is invested in R & D at present. This percentage is projected to be increased to 1,8% of GDP by 2014.

In South America, Brazil has contributed to disseminating a culture of intellectual property and to promoting cooperation among national patent offices. The so-called PROSUR Project is one example of such efforts by Brazil to engage in international cooperation in its own region.

In concluding, Mr. Chairman, as we approach twenty years of the adoption of the TRIPS agreement, it is timely, in our view, to undertake an assessment of its implementation and of its real benefits for all countries. The adoption of the TRIPS agreement was not the "End of History". As Professor Maskus has put it in his new book: (quote) "Anyone who thought a decade ago that the TRIPS agreement would settle international debates once and for all on the wisdom of increasing global intellectual property rights standards was sorely mistaken" (end of quote). That debate is arguably more live today than ever. And especially in the developed countries themselves. Let us bring it here.

Thank you