

## The December 31, 2012 Extension of the 2008 U.S. Farm Bill May Result in Brazil's Imposition of Intellectual Property Retaliatory Countermeasures Against the United States

In 2009, the World Trade Organization (WTO) authorized Brazil's adoption of "cross-retaliation" countermeasures against the United States for the illegal subsidy of U.S. cotton farmers by the U.S. Government. It was the third time in its history that it allowed an offended country to apply countermeasures unrelated to the subject matter of the WTO treaty under dispute.<sup>1</sup> In this instance, Brazil was granted the right to sanction the United States through one of its most important and sensitive industries: the protection of intangible assets via the granting of Intellectual Property (IP) rights.

Nearly four years later, the year-long extension of the 2008 U.S. Farm Bill, until a full bill can be passed, may now result in Brazil's application of the cross-retaliation countermeasures authorized by the WTO. In light of that, the Brazilian Government is expected to decide, by way of nationwide public referendum, on the exact retaliatory action to be taken.

Should the public referendum take place, it would be the second time relative to this specific dispute. In 2010, Brazilians were summoned to opine on a number of countermeasures, namely: (i) reducing the term of IP rights; (ii) establishing IP right compulsory licensing (without compensation); (iii) increasing patent and trademark registration fees and; (iv) creating a compulsory registration over works subject to authorship and neighboring rights.<sup>2</sup>

Additionally, the Brazilian Government may apply the countermeasures authorized by Brazilian Federal Law No. 12,270, of June 24, 2010, which regulates IP cross-retaliation, such as the postponing of the commencement of IP right protection or the temporarily blocking of the remittance abroad of royalties or any other sort of remuneration involving IP rights commercialization in Brazil.

The origin of this dispute dates back to 2002, when Brazil challenged the U.S. subsidies policy before the WTO's Dispute Settlement Body, arguing that the United States was overprotective of its agriculturists to the detriment of Brazilian farmers. In March 2005, the WTO concurred with the position held by Brazil, deeming U.S. subsidies to violate the provisions of two of its international treaties: the WTO Agreement on Subsidies and Countervailing Measures (ASCM) and the WTO Agreement on Agriculture (AoA).

The U.S. Government did not change its subsidies policy despite the WTO decision and, resultantly, Brazil once again went before the WTO. In 2008, the dispute was submitted to WTO arbitration. In 2009, after one year of deliberation, the final WTO Arbitration Panel ruling was awarded in favor of Brazil.

Following the WTO Arbitration Panel ruling, the Brazilian Government called the 2010 public referendum mentioned above. Despite having called the public referendum, Brazil did not implement any of the countermeasures authorized by the WTO as in that same year a Memorandum of Understanding was executed between Brazil and the United States whereby the United States committed to amend its subsidies programs and to provide approximately US\$ 150 million annually in "technical assistance and capacity-building for Brazil's cotton sector." Both countries would cooperate and exchange information so as to best facilitate adjustment of the U.S. subsidies policy by the expiration of the 2008 Farm Bill on September 30, 2012.

<sup>1</sup> In the previous two WTO disputes, the first concerning the importation, sale and distribution of bananas (Ecuador vs. European Community) and second being The Antigua-United States Online Gambling Dispute (Antigua vs. United States), the WTO authorized the use of cross-retaliation countermeasures, which countermeasures were, however, not implemented.

<sup>2</sup> According to Section 18 of Brazilian Federal Law No. 9,610, of February 9, 1998, authorship and neighboring rights are granted in Brazil to artistic, scientific and literary works, regardless of registration.

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As the deadline approached, the discussions held in the U.S. Congress regarding the new Farm Bill to be voted upon raised strong concerns within the Brazilian Government as the 2012 Farm Bill would provide for even heavier U.S. cotton-specific subsidies. At a meeting of the WTO's Dispute Settlement Body in October 2012, Brazil agreed not to impose any countermeasures until the United States defined its new subsidies policy. The recent decision to extend the 2008 Farm Bill for another year may, however, change this scenario.

Should the Brazilian Government call the public referendum as is expected, any party concerned should express its opinion about the position that should be adopted, preferably represented by civil or professional associations. Information on referendum procedure may be provided by CAMEX (the Council of Ministers of the Brazilian Chamber of Foreign Commerce) resolution.

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