

REVIEW OF LEGISLATION

Responses from Brazil to questions posed by Canada and Switzerland

Addendum

By means of a communication from the Permanent Mission of Brazil, dated 4 June 2003, the Secretariat has received responses to the questions posed by Canada and Switzerland, as previously circulated in documents IP/C/W/314/Add.1, IP/C/W/239, and IP/C/W/239/Add.2, respectively. The communication received from Brazil was circulated as an advance copy for the Council's meeting on 4-5 June 2003.

CANADA

1. What recourse do right holders have in respect of wilful trademark counterfeiting or copyright piracy on a commercial scale, as required by Article 61 of the TRIPS Agreement?

The Brazilian legislation establishes mechanisms for effective action against trademark counterfeiting and copyright and related rights piracy through applicable special and general laws. The following are examples of provisions in Brazil's legislation that deal with the matter:

- (a) Articles 189, 190 and 196 through 207 of Law No. 9.279 of 1996;
- (b) Articles 12 and 13 of Law 9.609 of 1998;
- (c) Articles 184 to 186 of the Penal Code, as well as its general part, covered by Articles 1 through 120;
- (d) Articles 394 to 405, 498 to 502, 524 to 530 and 593 to 603 of the Penal Process Code.

2. What protection does your copyright legislation afford to "foreign works"?

Exactly the same protection granted to "national" works, as established by Article 2 of Law 9.610 of 1998 in accordance with the Berne Convention.

SWITZERLAND

A. PATENTS

Response to Question 3:

Does your law, in accordance with Article 27.1 in combination with Article 31 of the TRIPS Agreement, consider importation as "working a patent" (and therefore preclude compulsory licensing, if a product is being imported)?

Brazil does not agree with such an interpretation of Article 27.1 of the TRIPS Agreement. The rule that prohibits discrimination between products that are imported and those that are locally produced derives from the rule of national treatment of goods of the 1994 Marrakesh Agreement. Compulsory licences granted under Article 31 – which deals exclusively with the conditions of use of compulsory licences and not the grounds for the issuing of compulsory licences – are based, on the other hand, on Article 5 of the Paris Convention for the Protection of Industrial Property, and therefore aimed at preventing abuses of rights, such as "for example, failure to work."

Ad response to question 1:

In your answer, you mention that under Article 10 IX of the Brazilian Industrial Property Law (Law 9279 of May 14, 1996) all or part of natural living beings and biological materials found in nature, even if isolated therefrom, including the genome or germoplasm of any natural living being, are not considered to be inventions. Does this mean that inventions relating to such subject matter, even if fulfilling the conditions of patentability, i.e. novelty, inventive step and industrial applicability, are nevertheless excluded from patentability according to your law? If so, please explain how this complies with the obligation of Article 27.1 of the TRIPS Agreement prohibiting discrimination as regards patentability between different fields of technology.

Article 10 IX of Brazil's Industrial Property Law (Law 9279 of May 14, 1996) establishes that "all or part of natural living beings and biological materials found in nature, even if isolated therefrom, including the genome or germoplasm of any natural living being, and the natural biological processes", are not considered to be inventions or utility models. The question by Switzerland is not clear regarding the reference to "inventions related to such subject matter". According to Article 8 of the Industrial Property Law, "an invention is patentable if it satisfies the requirements of novelty, inventive step, and industrial application". The scope of Article 10 IX relates to subject matter that does not fulfill the basic criteria of patentability set out in Article 27.1, as it relates to naturally-occurring subject matter, including those that were merely isolated from nature. Therefore, Article 10 IX is fully consistent with Article 27.1 of the TRIPS Agreement.
