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***CHANGING THE PATENT SYSTEM
FROM THE PARIS CONVENTION TO THE TRIPS
AGREEMENT
The Position of Brazil***

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CHANGING THE PATENT SYSTEM
FROM THE PARIS CONVENTION TO THE TRIPS AGREEMENT
The Position of Brazil
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Preface

The WTO has set itself the task of comprehensively restructuring the international trading system. That this aim is not only about continuing liberalisation and deregulation can be seen most clearly in the negotiations over intellectual property rights, where there is no sign of liberalisation. Cicero Contijo shows that negotiations are being carried out with the intention of "tightening up norms, imposing standards and strengthening monopolies". In examining this contradiction, the author of this study describes the historical development of international intellectual property rights from the Paris Convention of 1883 to the WTO's TRIPS Agreement. Whereas at the outset, the requirement of disclosure of the invention and the recognition of the principle of local production were considered founding principles, international patent law soon evolved increasingly and exclusively in the direction of property protection rights. This concept of intellectual property primarily secures the utilisation rights of the copyright holders and does not concern itself with other aims such as development or health. The debate over the fight against HIV/AIDS has thrust this questionable aspect of the international copyright system into the consciousness of a much wider public.

Contijo's report focuses on Brazil's attempts to move the international system of intellectual property rights and copyright towards a more development-oriented stance. In doing so, he shows that the current regulations were not and are not the only option. In their interesting proposal to WIPO (World Intellectual Property Organization), Brazil and Argentina have introduced a more development-orientated regulatory system for intellectual property which outlines a possible political alternative to the existing situation. This makes the position of Brazil and Argentina extremely interesting and controversial in the discussion of patent regulation within the WTO. It also remains to be seen whether the Doha round will live up to its claim of being a development round in regard to this strand of the negotiations. The author sees little sign of that happening, and sees furthermore the necessity of placing the apparently intractable question of intellectual property rights at the centre of a broader debate.

Thomas Fatheuer
hbs rio de janeiro

1.FREE TRADE versus MONOPOLIES

At the beginning of the 19th century, Europe saw a serious debate between the monopolists, who were in favour of the patent system, and those in support of free trade, meaning minimal restrictions on the exchange of goods and services. The controversy was so huge that Switzerland and the Netherlands revoked their intellectual property rights; Germany followed in 1869, revoking its law from 1817, which was only reinstalled in 1910. It became evident that a monopoly-based protection system for inventions and a free trade system could not coexist without serious difficulties. They represent antagonistic and conflicting positions because they are pulling in different directions.

Two centuries later, free trade has more supporters than ever before, a phenomenon that has been labelled globalisation. The revolution of the information and communication technologies, amplified by pressure from the leading countries, particularly the United States, has forced the other countries to implement changes. They have been forced to open their frontiers, reduce tariffs, accept foreign competitors in their domestic markets and admit a debate on market accessibility (including public acquisitions and uncontrolled financial transfers). This overwhelming movement renders obsolete the import-substitution growth projects and clearly diminishes the sovereignty of each country.

This globalisation should go together with a strong opposition to the intellectual property protection systems; it should dilute the principles and concepts that support the protection of inventions, above all those of foreign nationals, which guarantee monopolies in third-country markets. One would have expected the patent system to come under pressure; and the underlying property theory to have been substituted by compensation theories that admit some type of benefit for the inventor, under the complete exclusion of monopoly grants.

None of this has happened. Not only have free trade and patent protection not been represented as antagonistic movements. On the contrary, they have been presented at the same time and on the same forum (GATT, later converted into WTO). We commented on this amazing contradiction in an article published in March of 1995:

"It must be remembered that the idea of the TRIPS agreement totally contradicts the other agreements signed in the GATT framework which are directed at eliminating barriers, demolishing monopolies and abolishing the subsidies system - in the spirit of liberalisation advocated by the industrialised countries. The appearance of the TRIPS agreement is a part of the efforts to achieve more rigid norms, impose standardisation and consolidate monopolies. This will have an impact on one of the most valuable economic agents at the end of the millenium: human knowledge. The markets are opened, but, on the

other hand, the system in place to produce new technologies is consolidated and strengthened (it is no coincidence that the system concentrates in the countries that demand better protection for the right holders of intellectual property)." (Gontijo 1995, p.181)

The theoretical justification is presented these days as the "Market-Failure" theory, which tries to portray patent-derived monopolies as an exception in the market economy. Recognising that disclosing inventions would give equal conditions to all competitors, while preventing inventors from being compensated for the costs incurred, temporary user-monopolies arise as a solution. This doctrine is explained in Wendy J. Gordon, "Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors", and J.H. Reichman, *Charting the Collapse of the Patent-Copyright Dichotomy: Premises for a restructured International Intellectual Property System*.

An ingenious theory, but it does not take into account less rigid means to compensate inventors.

The state can act in two ways to stimulate creation:

a) by socialising the creation costs and risks, the state pays the creator a financial indemnity. The underlying assumption is that the investor will invest in the new creation. The Brazilian law of 1830 provided this form of compensation.

b) by the private appropriation of the results through the legal construction of artificial exclusivity (of which patents are an example). Transferable rights of exclusive use and benefit are thus created.

A third alternative to substitute patents is also being discussed because of its greater flexibility: inventors are granted a non-exclusive right, but they have the right to demand a price for the use of the disclosed information, yet no right to prohibit its use. This includes the "inventor certificates" (used in Mexico and the former Soviet Union for inventions with industrial application) and the "plant breeders' certificates" used by the International Union for the Protection of New Varieties of Plants (UPOV) that are applied to inventions in the sector of seeds and crops.

This type of inventor compensation that Carlos Correa calls "paying public-domain" deserves a more detailed examination since it may become an interesting alternative to patents, at least for some economic sectors, and for certain countries. (Correa 2000, p. 248/251).

1.1. The Paris Convention and the Legislative Freedom of Member States

The Paris Convention, which aimed at harmonising - as far as possible - intellectual property legislation in the different countries has been one of the most successful treaties so far, due both to the impressive number of its members as well as the long time it has existed without substantial change.

More than 150 countries have adopted the Paris Convention, which goes back to 1883, when it was signed by eleven members, among them Brazil.

The main reason for this success is that the Convention did not try to level national laws or establish the reciprocity principle for national treatment. On the contrary, it stipulated a vast legislative freedom for each country and only required the equal treatment of nationals and foreigners (national treatment principle). Its other basic principle, priority, was in reaction to a more practical than theoretical question. To prevent elements of a patent application from being irregularly appropriated, and to prevent conflict between two or more inventions concerning the same matter, a priority period was established. This means that applicants who submit an application in one member state have a priority period (currently 12 months) to file an application in other member states. During this period no other application, publication or exploitation of the invention will invalidate their application.

As a result, although it is not mentioned in the original text, the principle of patent independence was established, whereby decisions of a country regarding an application or a patent do not have any impact on the treatment by other member states. These principles - agreed in 1883 - stayed in place for more than a century.

1.2. Compulsory Disclosure and Exploitation of Patents in the Country of Origin

The official text of the Paris Convention stipulated the complete disclosure of inventions, and due to the experience of the leading countries, the effective exploitation of patents. In fact, the English Statute of Monopolies only granted patents to inventors who would produce their invention in the country.

The question of effective use had been at the centre of discussions between Austria and the United States at the Vienna Conference (1875). The US demanded that imports should be included as effective use of patented goods.

The Paris Conference (1878), which elaborated the text of the treaty, established that patents could be revoked after a certain period in the absence of local production.

A number of countries, including the United States, England, Germany, Canada, Hungary and Austria were not among the original signatories of the Paris Convention because they objected to the adoption of compulsory local exploitation in the original art. 5: "Importation by the patentee into the country where the patent has been granted of articles manufactured in any of the countries of the Union shall not entail forfeiture of the patent. However, the

patentee shall be subject to the obligation to use his patent according to the laws of the country where he imports the patented articles."

This definition, which gives member states the right to demand local exploitation of patented articles and processes, is a consequence of the experiences of the leading countries. The legislations of all modern industrialised nations used to contain an obligation of local exploitation, which in the period of their industrialisation was the main objective of the patent system. Patents were granted to develop the exploitation of natural resources and increase the numbers of skilled workers and engineers; the aim was to establish new industries, or new technologies for those already existing. In the United States, a law from 1886 determined that the patents of foreign inventors had to be exploited on US territory. This rule also applied in England, France and Germany. In time, the international trade of these countries increased and they reduced the application of this requirement. However, most countries (except the US) maintained some legal regulation on compulsory local exploitation.

The subsequent revisions of the Paris Convention kept compulsory local exploitation; the text was altered in the sense that the absence of local exploitation is considered a sanctionable infringement by the patentee.

This issue remains the central point of the debate on patentees' duties.

1.3. The Strong Nullity and the Weak Compulsory Licence

The threat arising from patent revocation through exhaustion was the first instrument of 20th century intellectual-property-law to be implemented to enforce the compulsory local exploitation of patents. After the declaration of exhaustion a patent becomes public domain. This permits every person or company to exploit the invention. In these cases, the monopoly is exhausted and any product can compete on the market on equal terms. This corresponds to the situation of countries where the inventor did not patent an invention already patented in the country of origin.

Even before the Paris Convention came into being, legal provisions on nullity due to failing local exploitation existed, among other countries in France, Mexico and Tunisia. When the Convention was signed, it was decided that the import of patented products produced in other member states should not entail the loss of this right. At the same time compulsory local exploitation was confirmed.

Nullity is a powerful legal instrument because it automatically comes into force after the period for local exploitation has ended and the absence of local exploitation has been proved. For this reason it has gradually been substituted in the revisions of the Convention by the compulsory licence.

The compulsory license is one of the instruments the state can use to act on a patent monopoly provided it is in the public interest. It is less drastic than patent revocation through nullity and permits use by others under certain conditions, with a remuneration established by the state. From the legal point of view, the patent monopoly is substituted by the right to receive financial compensation for the use of the invention.

Its first historical appearance was at the Vienna Convention in 1873 for "cases where the public interest made it necessary", and in 1877 it was incorporated into German law. It was not mentioned again until it reappeared in the version of the Hague in 1925, where its goal was to prevent "the abuse that might arise from the practice of the exclusive right conferred by the patent, for instance, by the absence of effective exploitation"; from then on, almost all countries have adapted their laws to incorporate it. In time, it occupied the space that had formerly belonged to revocation through nullity because it was a less drastic measure than the latter.

In contrast to nullity, its practical use is problematic in that it is necessary to find another company of the respective branch willing and capable to produce the product or process without the assistance of the patent-holding company, only equipped with the official authorisation.

The Stockholm Revision (1967) of the Paris Convention brought a modification which made it even more difficult to apply the compulsory licence: it established that the licence should not only be non-exclusive, but that it had to be refused if the holder could justify his inaction with legitimate reasons. The automatic implementation of the instrument disappeared and the rejection by its potential applicants increased.

It is unlikely that a private entrepreneur would have the courage to invest in a factory project to produce an invention under a compulsory licence if there was any doubt that his market would be exclusive, at least for a certain period. A production project requires investment, construction works, buying equipment, hiring staff - all this on the basis of the market that will be served. If the licence is non-exclusive, the holder could decide at any time to produce locally or to grant a voluntary license, which would oblige the compulsory licence holder to compete with other producers. Considering that the patent holder still has the marketing power of his brand it becomes clear that the chances of a non-exclusive compulsory licence are quite slim. Under these circumstances, using the compulsory licence as a means to prevent abuse by patent holders proves totally ineffective. It becomes a blunt knife with the extra disadvantage that the right holders know about it.

Once the compulsory licence had been transformed into a complex and impractical instrument the next step was to find a way to strip the instrument of nullity of its efficiency.

The solution came with the text of the Stockholm revision which conditioned the application of nullity to the prior use of the compulsory licence as laid down in art. 5.3: "The nullity or extinction of a patent may not be declared before a period of two years has expired, beginning with the grant of the first compulsory licence". The required prior compulsory licence, granted extremely rarely, means that the strong instrument of nullity is practically inapplicable.

1.4. The TRIPS Agreement: Rigid Monopolies in Times of Free Trade

From 1979 the US showed its dissatisfaction about what it saw as insufficient protection for intellectual property. The US tried to transfer the discussions to GATT (General Agreement on Tariffs and Trade) to strengthen protection mechanisms for patent holders' rights. Several countries opposed this move and it was only included into the agenda in 1989, after Brazil and India gave their consent. These countries had insisted that the WIPO (administrator of the Paris Convention) and not GATT was the appropriate forum for the discussion of intellectual property.

The US proposal which was negotiated by GATT was arranged around three topics: the definition of minimum standards (art. 9 - 40), the introduction of implementation mechanisms (art. 41 - 61) for member states (administrative and judicial proceedings) and the creation of a strong international arbitration system (art. 63 and 64). All this was in contrast to what the Convention had established. Instead of just two basic principles, a large number of concepts and requirements had to be adopted by all members' legislations in a kind of standard law. Rigid rules were imposed as to how the different national administrations and legislations had to act regarding the enforcement of the new intellectual property rules. And finally, a vast and practical dispute-settlement system to avoid any differences arising from industrial property questions remaining unresolved because of questions of national sovereignty.

As could be expected, there was a very strong adverse reaction, especially from the developing countries. The project meant huge changes to the existing laws, all aimed at a higher level of protection for patents and trademarks.

Since it was generally understood that many countries, particularly in the developing world, were not in favour of the new agreement on intellectual property, much effort was necessary to achieve its approval.

"To advance the negotiations in all the areas of the Uruguay Round, the director-general of GATT presented the Dunkel text as an essential part of the negotiations. The director-general presented the document as an "all-or-nothing" agreement because he was determined to prevent it from being divided into several parts that the members could vote separately. This requirement proved useful for achieving the TRIPS agreement, since the

United States and other industrialised countries could use concessions in the agricultural or textile areas requested by the developing countries to obtain an appropriate TRIPS agreement" (Doane, p. 476).

1.5. The End of Nullity and the Introduction of the Compulsory License

The TRIPS document mentions nullity only once: it defines that judicial review must be available in any decision to revoke or forfeit a patent.

As for the compulsory licence, the term does not even appear in the text; it was replaced by the euphemistic phrase "other use without authorisation of the right holder". Apart from the above-mentioned exceptions in the Stockholm text of the Convention (non-exclusiveness and justification with legitimate reasons), the treaty weakens the instrument to fight abuse even further with additional determinants: it establishes that the proposed user must first have tried to obtain a licence from the right holder; that the use must predominantly supply the domestic market; that the licence has to be revoked when the circumstances under which it was granted cease to exist; and that the right holder has to be appropriately compensated.

As to the right of states to demand the local exploitation of patented products or proceedings, the text is not very clear on this issue. Article 27.1 of TRIPS established a confusing provision that appears to exclude the further use of this alternative:

"Art. 27.1 - (...) Subject to paragraph 4 of Article 65, paragraph 8 of Article 70 and paragraph 3 of this Article, patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced".

The first impression may lead to the belief that the requirement of local production has been banned. Some authors believe that the obligation for local exploitation cannot be required any longer from the right holders, and Carlos Correa puts it like this:

"The compulsory-license granting system of many countries could also be affected by the prohibition to discriminate due to the country of origin (local production or import). The authors of this document wanted to dilute the obligation to exploit the patented inventions, one of the traditional pillars of the patent system". (Correa 1996, p. 136).

However, there is also a differing interpretation, according to which art. 27.1 refers to a different problem. For Figueira Barbosa:

"TRIPS certainly stipulates a compulsory license on the grounds of insufficient work, within the principles and limitations of art. 5A of the Paris Convention, even when, in the spirit of 'Paris plus', it informs that the license has to aim 'predominantly (at) the supply on the domestic market' (art. 31.f.)" (Barbosa 1999, p.189).

Referring to art. 27.1, Correa states that the text was in reaction to a complaint in the EU preparatory document for the TRIPS negotiations. According to the EU document, the US legislation contained proceedings that discriminated against foreign nationals in legal disputes on the counterfeiture of imported goods. The EU also protested against the preferential treatment of activities on US territory by US legislation, which grants patents to the 'first-to-invent' to the detriment of the 'first-to-file' of European law; this was complemented by restricting the patent validity to US territory. This is what Barbosa says:

"An interesting part of the document exclusively deals with the discrimination against imported goods. It is divided into two important subjects: (a) discriminating proceedings, and (b) preferential treatment for activities on national territory. There can be no doubt that, on both issues, the complaints pointed mainly at the US (...) The result could not come as a surprise; and article 27 of TRIPS ends with the often quoted and rephrased words: "...patent rights (shall be) enjoyable without discrimination as to the place of invention (...) and whether products are imported or locally produced." (Barbosa 1999, p. 184).

As two experts on the subject prove, both interpretations are possible.

Add to this that TRIPS seems to deal with this issue in another part; without repeating the Paris Convention texts, TRIPS establishes in art. 2.1:

"In respect of Parts II, III and IV of this Agreement, Members shall comply with Articles 1 through 12, and Article 19, of the Paris Convention (1967)."

From this we can deduce that the matter referred to the Convention, always in its Stockholm version (1967):

Art. 5. (2) "Each country of the Union shall have the right to take legislative measures providing for the grant of compulsory licenses to prevent the abuses which might result from the exercise of the exclusive rights conferred by the patent, for example, failure to work."

Based on these arguments, diplomats of the Brazilian Ministry of Foreign Affairs assured the Senate (Upper House) in the course of discussions for the National Congress (Lower House) approval of TRIPs that the failure to work remained an abuse by the right holder. Therefore, this understanding was preserved in the text referring to art. 68 (1), I of the Patent law.

2. THE CONSEQUENCES OF TRIPS ON DEVELOPING COUNTRIES

The standardisation of the different national legislations that results from the ratification of the TRIPS agreement does not take into account the relevant differences between developing and developed countries.

Edith Penrose already drew attention to this in her classic book:

"Non-industrialised states do not derive any direct benefit from granting patents for inventions that have already been patented and exploited abroad. The only possible economical advantage is that they might provide some kind of incentive for the introduction of foreign technology (Penrose 1974, p.200).

Extremely few companies have the necessary technological capacity, and the few existing research and development centres in the developing countries focus their efforts on technological adaptation projects. The number of inventions is therefore limited. Global statistics prove that 90% of all patents are registered in the name of persons or companies based in industrialised countries. In the case of Brazil, just 5% of the patent applications belong to Brazilian right holders (10% if registered designs are included). These figures prove that in developing countries, the national systems are designed to serve the rights granted to foreign companies and foreign nationals. This is different from the situation in industrialised countries, where national and foreign companies are on a similar level.

The conclusion is that standardising intellectual property rights at a high level does not benefit the companies in developing countries at all; on the contrary, it stimulates inventions in companies from developed countries, thus freezing and perpetuating the ever-increasing technological gap.

In developing countries, the protection of intellectual property can only be justified by the full disclosure of the patented inventions and if the respective states are entitled to demand the local exploitation of these inventions, which not only means to use the human and natural resources of the respective countries, but also to improve the absorption of advanced technologies.

2.1. Patents as Market Reservation

Without a detailed disclosure of patented technologies and without local exploitation of the inventions, the perverse aspects of the intellectual property protection become evident. For developing countries, the system becomes an obstacle in the advancement of local companies, as well as artificially generating price-rising circumstances for patented products.

It would be less damaging for developing countries if inventors kept the secret of their inventions; better than the current situation in which - shielded by monopolies - they do not locally exploit their inventions and still dominate the markets. If the inventions were kept secret, there would at least exist the chance of finding a technical solution on the basis of trial and error. Under the patent system the monopoly obstructs and slows down the efforts.

“A monopoly granted either to an individual or to a trading company has the same effect as a secret in trade or manufactures”. (Smith)

Market reservation does not only slow down development, it also leads to price rises. Since in developing countries there are fewer competitors, there are many sectors where patented products have little competition and are consequently overpriced.

"In the case of patents, there is no reduction of a previous liberty (typical of economic monopolies) but the exercise of economical power expressed in the capability to raise prices". (Posner, p.16)

Interestingly, studies of international bodies confirmed that developing countries have a disadvantage with regards to applying intellectual property protection.

“In principle, IPRs create market power by limiting static competition in order to promote investments in dynamic competition. In competitive product and innovation markets awarding of IPRs rarely results in sufficient market power to generate significant monopoly behavior. However, in some circumstances a portfolio of patents could generate considerable market power through patent-pooling agreements among horizontal competitors. In countries that do not have a strong tradition of competition and innovation, strengthening IPRs could markedly raise market power and invite its exercise” (Maskus/ Lahonel).

Monopolies such as those from IPRs tend to price rises in any country. However, due to the restricted number of competitors, the tendency is higher in developing countries. Furthermore, the tendency is for patent holders to seek similar prices in all their markets. A patented computer chip will cost more or less the same (in US \$) in New York and Karachi. Otherwise, traders would buy the chip in Pakistan and resell it in New York. Since people have a much lower income in Pakistan than in New York, the result of the price rise is much more significant for the population of the poor country than for that of the rich country.

2.2 Prices for Products that Cannot be Substituted

The phenomenon of price rises for patented products is even more vicious when there are no similar products. The prices for various mobile phone devices show but a weak influence from the patented model. In addition

to not being of imperative necessity, the different models substitute each other at least partially, which reduces the impact of the patent monopoly on the product price. However, when it comes to a really radical invention representing a new product without substitutes, with an inelastic demand, the monopoly enables the right holder to set prices far above the incurred costs. In this case, prices reach the limits of the consumers' paying capacity, sometimes even exceeding it. In a market economy, high prices would attract new investors, which would lead to a reduction in consumer prices. In a patent-monopoly economy, there is no access for other competitors, so prices stay artificially high for the duration of the patent validity.

It is important to note that the studies which support patent systems do not take into account the non-existence of similar products for monopolistic price setting. This phenomenon is confirmed by the specialists' statement submitted to the General Assembly of the United Nations:

“In particular, it was no longer considered that an exclusive right necessarily conferred market power. Often there were enough substitutes in the market to prevent the intellectual-property holder from actually gaining market power. The availability of substitutes was an empirical question that could only be determined on a case-by-case basis.” Rapport (1998) of the Working Group on the Interaction between Trade and Competition Policy to the General Council, Wt/Wgtcp2/8, 8 dec 1998.

Some authors stress the absence of studies on the lack of similar products in patent monopolies. “For much of this century, courts and federal agencies regarded patents as conferring monopoly power in a relevant market. A 'relevant market' is an antitrust term of art that is used to determine which products compete with one another. Historically, substitute products were not considered in the analysis of whether patents confer monopoly power”. (Anthony 2000, p. 1).

2.3 The AIDS Issue. Rejecting the Patent System.

Though the states deal with the question of IPRs, it is the large companies dedicated to research and production which are really interested in standardising, widening and guaranteeing the application of these rights. It is well-known that the semiconductor (integrated circuits topography) and software industries, and - most of all - the pharmaceutical (drugs) industry promoted the huge transformation of replacing the Paris Convention with the TRIPS agreement when the WTO was created.

For the drug-producing industries TRIPS was a huge success. Almost half the states in the world (among them nearly all developing countries) believed that, due to their impact on human life, the state should not grant monopolies on inventions in the pharmaceutical and nutritional sectors.

Countries like Spain and Italy, among other developed countries, only introduced patents for the pharmaceutical sector in the second half of the 20th century. From 1971 to 1996, Brazilian legislation did not permit the patenting of pharmaceutical and nutritional processes and products or chemical products. Since TRIPS came into force, the subject has admitted no discussion. And as long as the agreement is in force, it will be impossible to avoid patents on pharmaceutical processes and products, according to the provisions of the first part of art. 27.1 "...patents shall be available for any inventions, whether products or processes, in all fields of technology...".

It is in the pharmaceutical sector where the perverted characteristics of monopolies are most evident. While in the other industrial sectors abuses by patent holders can entail economic and financial damage, drugs and food products have an impact on the very lives of people. Furthermore, it is in this sector where the absence of similar products causes the most disproportionate price rises. New drugs for old diseases are typical examples of an inelastic demand. New cancer drugs tend to have no similar products. And the patients' demand for this new drug is only limited by their own and even their families' purchasing power.

The worldwide spread of AIDS clearly illustrates this. It is an extremely serious condition that affects individuals of all ethnic and social backgrounds and has a high mortality rate in African countries, due to the lack of available drugs. The drugs are there, and in the US, the "kit" is sold at US\$10,000 per patient-year. Most of the African countries where the disease is prevalent have an annual per-capita income of less than US\$ 500. The combined health budgets of these countries lie far below the sum needed to buy the AIDS drugs.

Where generic drugs do exist, they cost just a tiny fraction of the prices charged by the companies that hold the patents. According to a report by the Panos Institute, a non-profit organisation based in London, "in January 2001, the South African HIV-AIDS activist Zackie Ahmat went to Thailand to buy 5,000 pills of the generic version of an anti-fungal drug patented by the US pharmaceutical Pfizer. He paid \$0.21 for each pill. In South Africa, the patented version cost US\$13".

The pharmaceutical companies refuse to provide these countries with drugs at reasonable prices. They fear that the drugs might be diverted for resale in industrialised countries. And, that the tax payers there might discover how much they are paying for the monopoly included in patents.

Various countries, including Brazil, have tried to find a solution in the framework of the WTO. Although the "Doha Declaration", signed by government ministers on November 14, 2001, clearly established the supremacy of health issues over patent-protection rights, there was neither a follow-up nor any practical consequences. The exceptions and prerequisites moderate the document and the necessary provisions are not laid down in

detail; combined, these factors mean that the African tragedy that kills 600 South Africans daily has condemned these populations to a new, cruel form of "apartheid".

Brazil has a serious AIDS problem, too. To this day, tough negotiations with the patent-holding companies, together with Brazilian companies producing the necessary generic drugs, have permitted the Brazilian state to fulfil its legal duty of guaranteeing the free treatment of every AIDS patient. At the moment there are serious worries about the future of the programme. New patented drugs are being launched at high prices. With respect to new drugs, the production of generics that up until now has relied on India and Thailand is being affected by the new Indian law of 2005 that seeks an adaptation to the TRIPS agreement by permitting patents on pharmaceutical processes and products. Until 2005, Indian legislation did not allow patents in the nutritional and pharmaceutical sectors, as was the case with Brazilian legislation until 1996.

There is a strong tension in the TRIPS agreement between the IPRs on the one hand, and the request of developing countries for cheap drugs on the other hand. If the request of the developing countries is not attended to, TRIPS might come under question because of the very sector that fought hardest for the agreement - the pharmaceutical industry. Monopolies on drugs that lead to prices unacceptable for poor countries may be perceived as an exaggeration of patent-holders' rights, thus creating a movement against the patent system.

3. THE BRAZILIAN STANDPOINT

Brazil looks back on a long tradition of applying the patent system and participating in international intellectual property agreements. With the deed of January 28, 1809 signed by King Dom João VI., Brazil became the fourth state to adopt an industrial property law, after England (Statute of Monopolies, 1623), the United States (1790) and France (Law on the Privilege for Inventions, 1791).

It also belonged to the 11 original signatories of the Paris Convention, in 1883.

Art. 179, 26 of the 1824 constitution stipulated that: "inventors shall have the ownership of their discoveries or products. The law shall guarantee them a temporary exclusive privilege or compensate them for any loss they may endure from the popularisation."

The law of August 28, 1830 stipulated patents only for nationals. Foreign nationals interested in the local exploitation of their inventions were called "introducers", and they were offered subsidies - not a monopoly. Since the law which was necessary to release the subsidy sums was not passed, the

government ministers went on to grant patents to foreign nationals, too, "ad referendum" of the legislative power. The same law introduced the exhaustion instrument for patents that had not yet been locally exploited after a period of two years.

Law nr. 3129 of October 14, 1882 lengthened the period for the event of exhaustion from two to three years and introduced the priority principle (set at seven months) that would be confirmed by the Paris Convention in the following year.

The Brazilian government approved the subsequent revisions of the Paris Convention, with the exception of the Stockholm revision of 1967, to which it has only adhered from 1992. The Stockholm revision created the requirement of a prior compulsory licence as a precondition for exhaustion, which contradicted the Brazilian view on the issue. Furthermore, the compulsory licence became non-exclusive by default, which removed its efficiency. In view of this, Brazil remained associated to the Convention under the Hague revision (1925), just like Poland and the Dominican Republic.

In 1970, the Brazilian government approved Law nr. 5,648, which converted the DNPI into the National Intellectual Property Institute; its aim was to carry out on national territory the norms regulating industrial property taking into account its social, economic, juridical and technological functions. A year later, the government approved Law no. 5772/71, which introduced the new Industrial Property Code.

In 1975, the World Intellectual Property Organisation (WIPO), the administrator of the Paris Convention, initiated a new revision of the Convention, which had its origin in a UN document from 1964 ("The Role of Patents in Developing Countries") that the Brazilian government had initiated. The revision was aimed at modifying the Convention text so as to permit a differentiated treatment for developing countries. To start, the committee established its principal objectives of a) achieving a reasonable balance between the right of patent holders and development; b) promoting the efficient use of the patents; c) improving the creation and transfer of technology in and to developing countries; d) controlling cases of abuse of the system.

The negotiations went on until 1979, when the parties came to an agreement that was finally approved at the Ministerial Meeting in Nairobi in 1981. To the general surprise of all, the text that had been negotiated for five years before its final approval was completely rejected by the US delegation in Nairobi. With this began the application of the US decision to move the IPR issue from WIPO to GATT, where developed countries have more persuasive power, since there they can link IPRs to trade topics.

These historical observations prove that Brazil has always been involved in the discussion of intellectual property at an international level.

They also prove that the country always understood the patent system as a contract between the state and the inventor, according to which the inventor receives a temporary exclusive monopoly in exchange for the full and detailed disclosure of the invention, as well as its local exploitation. Brazil has never agreed to grant exclusive rights just to stimulate the creation and multiplication of inventions.

For the Brazilian government, the patent system has to be an instrument of industrial policy, and as such, the rights granted to the patent holders have their counterparts in unequivocal obligations that have to be fulfilled.

3.1 Local Exploitation as the Right of the State

The late affiliation in 1992 to the Stockholm revision of the Paris Convention has to be seen as an accident resulting from the pressure the Brazilian government had been exposed to in the early 1990s. As a result of the increasing pressure, Brazil abandoned its traditional allies (among them India) in the fight against the TRIPS project. After the approval of TRIPS in the context of the creation of the World Trade Organisation (WTO), the draft law approved by the National Congress was criticised because it went even further, in some aspects, than TRIPS itself.

However, even in this very draft law that was criticised as being too lenient, Brazil maintained its position according to which the local exploitation of patents can be required by states that grant patent privileges. Law nr. 9279/96, art. 68 which provides for the implementation of compulsory licences stipulates: "A compulsory licence is also indicated in the case of: I - non-exploitation of the patent on Brazilian territory due to lack of production or incomplete production of the product, or also the lack of use of the patented process,- excepting cases of economical non-viability, when the import shall be accepted; or II - that the commercialisation does not satisfy the market needs."

The United States questioned this legal disposition at the WTO, alleging that it contradicted TRIPS in its article 27.1: "...patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced".

The controversy was overcome by mutual understanding before the installed WTO panel judged it. The United States withdrew its complaint on June 25, 2001, while Brazil committed itself to informing the US government whenever it wished to apply this legal provision against a US company.

Brazil had strong arguments on its side. In addition to the point that the text of art. 27.1 of TRIPS is not clear, it was stressed that the content of art. 2.1

refers the issue to the text of the Paris Convention: "In respect of Parts II, III and IV of this Agreement, Members shall comply with Articles 1 through 12, and Article 19, of the Paris Convention (1967)."

The article 5.(2) of the mentioned document reads as follows: "Each country of the Union shall have the right to take legislative measures providing for the grant of compulsory licenses to prevent the abuses which might result from the exercise of the exclusive rights conferred by the patent, for example, failure to work."

The provision of the Brazilian law criticised by the United States clearly complies with the document of the Convention, which it quotes almost literally.

3.2. Prevent TRIPS plus and Act in the WTO for a Modification of TRIPS

After the creation of the WTO and the approval of TRIPS, various bilateral or regional trade agreements were negotiated that included clauses relating to intellectual property, extending the rights guaranteed by TRIPS to patent holders. The NAFTA agreement between the USA, Canada and Mexico, the agreement signed by the US and Caribbean countries, and the agreement between the US and Jordan are a few examples.

As far as Brazil is concerned, the country deals with intellectual property issues in five different forums: in the WTO, Mercosur, with the European Union, with the United States and in the WIPO. In the WTO, in meetings on specific aspects of TRIPS that were scheduled when the agreement had been approved. In Mercosur, in discussions which aim at a potential harmonisation of the different member states' laws dealing with the subject. With the European Union, in an attempt to build a common market with Mercosur. With the United States, in the initiative that aims at building a common market with all the countries on the American continent, except for Cuba. And in the WIPO, where various projects related to intellectual property are in progress.

The correct proceeding would be to concentrate all negotiation efforts in the WTO (and according to the subsidiarity principle in the WIPO), to correct the excesses of TRIPS, and to avoid treating the matter in other negotiations. Discussing the same issue in various forums rather weakens the Brazilian position and leads to concessions which may be reflected in future WTO negotiations.

An intellectual property committee was created in the SGT-7 group of Mercosur (related to industry). For a start, a harmonisation protocol on trademarks, declarations of origin and appellations of origin was signed, but the National Congress rejected it. A protocol on patents is on its way (though

progress is slow); a protocol on dispute settlement was signed and is already in force in Brazil. A protocol on the harmonisation of industrial design standards has made considerable progress. This document reduces the bureaucratic requirements of international procedures; it complies with TRIPS provisions, and for the first time, the theory on the exhaustion of industrial design rights is applied in the Mercosur area.

In this forum, there is no risk of coming to a TRIPS plus situation. It is expected that after a period of standard harmonisation, Mercosur will try to establish a consensus on some issues, which could help with negotiations in other forums. It is important that the Mercosur countries insert such issues in their national laws to legitimise their claims in other forums.

In future negotiations, certain topics should be included in all national laws of the Mercosur countries: the right to see the local exploitation of patents as an obligation of the right holder, restrictive commercial clauses as an abuse of the right holder, and the recognition of the exhaustion of rights through parallel imports.

With the European Union, the issue of intellectual property was included at the request of the EU delegation. The last meeting of both delegations took place in Buenos Aires in March of 2004. It was the 12th meeting of the bi-regional negotiation committee. In the section on IPRs in the concluding report, each delegation presented its own priorities:

The priorities of the European Union are:

1. To maintain a high level of protection for intellectual property, showing the need to sign and apply the new WIPO treaties (Copyright Treaty - WCT -, and Performers and Producers of Phonograms Treaty - WPPT-) as well as protection for new plant varieties through the UPOV,
2. Implementation in the national legislations of the enforcement measures stipulated by TRIPS,
3. Cooperation,
4. Geographic indications. This issue is considered preferential.

Mercosur set up the following priorities:

1. Connections between TRIPS and the Convention on Biodiversity,
2. Connections between TRIPS and public health,
3. Connections between TRIPS and rules on unfair competition practices,
4. Technology transfer: improve the chapter on cooperation and set up a list of measures that contribute to technology and innovation transfer.

Obviously, the European Union has two main preoccupations: to apply pressure on Mercosur to sign and apply the new WIPO treaties (WCT and WPPT), as well as a proposed agreement on wines (widening the rights linked to appellations and declarations of origin).

As regards Mercosur, there is an interest in finding an appropriate balance between the rights and obligations of right holders, as well as in improving the technological capacities of the receiving countries. Mercosur is obviously worried about the fact that concessions in bilateral or regional treaties on intellectual property issues create precedents in the line of TRIPS plus that may eventually surface in the WTO, forcing the country to concessions in addition to those it has already made in TRIPS.

Although the Brazilian government prefers to discuss the IPRs within the framework of the WTO, negotiations with the European Union continue. They are following a slow pace because they are being hampered by more important discussions between the parties on the agricultural subsidies of EU countries.

The FTAA negotiations (Free Trade Area of the Americas) are somewhat behind schedule, seeing as they should have ended by 2005. The chapter on intellectual property introduced on the initiative of the US delegation presents a novelty: instead of demanding substantial changes in the rights for right holders, so as to bring about a TRIPS plus agreement, the US proposal puts emphasis on the attempt to move Mercosur to insert the so called "enforcement clauses" of the TRIPS agreement (art. 41 - 61) into its national legislations.

The existing documentation on the current negotiating stage (FTAA.ngip/w/80/Ver.2, part III) shows that the main focus of the US proposals aims at enforcement issues that seem to go far beyond the scope of the negotiation of industrial property. Imposing the inclusion of legal provisions in the internal legislation of each country entails serious problems. In this field, each concession means creating new arguments in support of yet more concessions. Issues such as handling indemnisations for losses and damages (art. 2.3, 4.4), restrictions on the liberty to define certain legal periods (art. 3.2), proceedings of judicial authorities concerning the seizure of goods (art. 4.3, 4.4), limiting the factors states have to justify enforcement difficulties (art. 1.9), should not be used as bargaining stock in international negotiations. Such a move would risk a breach of the constitution and may restrict the action of national judiciaries.

Since 2003, the Brazilian delegation for the FTAA negotiations has declared vis-à-vis the US delegation that Mercosur did not want to keep the negotiations on intellectual property at the same level as the discussions on market access that are the core of the FTAA. For the topics that are considered accessory, bilateral agreements are planned, if necessary. Concentrating the negotiations on market access would be a viable way to bring the negotiations back to a desirable pace. The USA appears to have agreed to this form of negotiation some time ago, as the Brazilian foreign minister confirmed in a statement quoted by the newspaper "Jornal do Brasil": "For Amorim, the immovable basis for the negotiation is the one sealed in Miami, in 2003 that can be resumed as follows: concise general norms and openness for wide

negotiations according to the interests of each country or block. The US is also totally committed to the Miami parameters, said the Brazilian ambassador in Washington, Roberto Abdemir". (Jornal do Brasil, p. B 7)

Unless there are fundamental changes in the course of negotiations, there can be no plans to deepen the issue of intellectual property in the FTAA.

The World Trade Organisation (WTO) is the main discussion forum for intellectual property and the negotiating efforts should be concentrated there, after the wise decision by Brazil to avoid discussing intellectual property in bilateral or regional forums.

The TRIPS agreement, in force since 1994, stipulates that certain of its provisions are to be revised. In addition to the provision in art. 27.3.b concerning protection for plants and animals, which shall be reviewed four years after the implementation date of the WTO agreement, the organisation has already been asked for a statement on a solution that will enable the poorest countries, which have insufficient or no pharmaceutical production capacity at all, to reduce the prices of drugs for the serious diseases that affect them (Doha Declaration). At the moment, no general revision is planned; this might be delayed until 2005, the anticipated end of the period given to the developing countries to fully implement the content of TRIPS (art. 66.1 of TRIPS).

Brazil has an interest in the following issues, which will be proposed in due time for their discussion in the framework of TRIPS:

1) Local exploitation: A clear statement that member states can require in their legislations that patent holders have the obligation of local production of patented processes and products. Not meeting this obligation has to be considered as an abuse by the right holder, as already established in the provisions referring to the compulsory licence.

2) Defining that authorities can declare revocation through nullity without having previously to grant a compulsory licence. This proposal consists of returning the nullity to the situation that had been established by the Paris Convention in the Hague revision to which Brazil had been associated until 1992. Nullity is a stronger instrument than the compulsory licence when it comes to exerting pressure on the right holders to produce locally, due to an automatism that exempts parties from prior negotiations. Furthermore, considering the difficulty in finding competent applicants for compulsory licences in developing countries, the only remaining instrument for the state to stimulate local production is nullity.

3) The Technological Development of Developing Countries

TRIPS mentions the transfer and dissemination of technology as one of its recognised objectives, giving it the same significance as the promotion of technological innovation,(art. 7).

However, after the part on principles and objectives, the text maintains complete silence with respect to concrete provisions aimed at stimulating

technology transfer and a productivity increase at the licensed companies, as a means to widen the technological and economical development of the country.

There are three provisions that could have a positive impact: 1) tax incentives of the member states for patent holders who exploit their patents in a developing country through licences for nationals; 2) financial incentives of the member states for technical staff of the licence holders from developing countries to undergo professional training in the country of origin; 3) commitments to ensure that publicly funded research benefits are available for all, including the developing countries. Suggestions no. 1 and 3 appear on p. 26 of "Integrating Intellectual Property Rights and Development Policy" by the Committee on Intellectual Property Rights of the United Kingdom.

3.3 The Brazilian-Argentinian Initiative in the WIPO

Although the principal discussion forum on IPRs is the WTO, the main initiative in which Brazil is currently involved in is the World Intellectual Property Organisation, WIPO. This organisation, which was emptied of substance with the arrival of the WTO, seeks to engage in highly relevant parallel programs. Among them is the coordination of discussions in the framework of the Standing Committee on the Law of Patents (SCP) to establish the text of a Substantive Patent Law Treaty (SPLT), which deserves much attention.

The text under discussion raises patent protection standards considerably and creates obligations that could not easily be met by developing countries. Not only that, the initiative only considers the rights of patent holders, attempting to define and widen them and secure their application without ever engaging in the needs of the countries where such patents will be applied, especially in the developing countries.

It seems to be a repetition of what happened with TRIPS. In spite of having put on equal footing the incentive for promotion of technological innovation and the transfer and dissemination of technology (art. 7), the text centres completely on incentives and compensations for producers, never showing any interest in technology transfer or a balance between rights and obligations.

Worried about a situation where the interests of developing countries are only present in the initial provisions that voice their wishes and good intentions, without a corresponding commitment in the binding provisions, Brazil and Argentina formulated a highly substantial proposal to be submitted to the WIPO general assembly to set up a WIPO development agenda.

This document was presented on 26 August, 2004 and was registered under WO/GA/31/11.

The document starts out by stressing the need for development of the LDCs (least developed countries) as one of the main challenges for the international community. Many declarations signed at international meetings confirm this interpretation.

It recognises the importance of technological innovation, science and creative activities as the basis of welfare and material progress. Nevertheless, statistics prove that an ever-increasing knowledge gap still separates rich and poor countries. Intellectual property should act as an instrument to promote not just technological innovation, but also the transfer and dissemination of technology. In practice, however, its application has been unbalanced, since the need to transfer and disseminate technology has received little attention. Studies prove that in many cases the costs certain countries sustain from the patent system exceed the benefits they derive from it.

To correct this imbalance, the proposal demands the inclusion among the WIPO goals and attributions of the quest for development of its member states. In practice, this means incorporating the preoccupation with development in all its activities, instead of restricting itself to promoting the protection of intellectual property.

One of the anticipated measures is to revise the founding convention of the WIPO to guarantee that the development dimension is unequivocally included as an essential element of the working programme of this organisation.

The proposal demands practical measures. It requests that the Substantial Patent Law Treaty (SPTL) project discussed in the Standing Committee on the Law of Patents (SCP), which will lead to a significant increase in patent-protection standards, takes into account the proposals of the developing countries as a means to reduce the costs of its implementation. The inclusion of the developing dimension in the Standing Committee should be aimed at preserving the flexibilities related to public interest, using the provisions of art. 7 and 8 of the TRIPS agreement.

It also requested that technology transfer, considered as an important goal in the TRIPs agreement, be an issue in the WIPO work. It hopes for the definition of measures that will secure an effective technology transfer to the developing countries, for instance, the use of the results of publicly funded research in developed countries.

Finally, it requests that the preoccupation with the development of the member states be stressed in the studies which aim at imposing enforcement measures in member states, while respecting their legal systems. And that the help and technological cooperation offered by the WIPO to developing countries in the field of intellectual property answer the overriding goals of the UN, which include the holistic development of its member states.

The proposal presented by Brazil and Argentina with the support of several other countries that call themselves "Friends of Development" has the necessary substance to be seriously considered and have an impact on current programs, even including the scope of the WIPO work, because it proposes changes in the proper objective of this organisation.

Brazil has the authority to make this proposal, due to its history of participation in and contributions to the forums of intellectual rights protection: the country was one of the 11 original signatories of the Paris Convention, to which it has belonged without interruption ever since. The UN study "The Role of Patents in Developing Countries" goes back to a Brazilian initiative that led to the revision work of the Convention initiated in 1975, which aimed at making flexible the Convention terms and adapting them to conditions in developing countries. Finally, it already started adhering to the WTO TRIPS agreement in 1994, applying it immediately to its national law, making no use of the 10 year adaptation period it was entitled to both as a developing country and because it had included new sectors in the patent regulations (art. 65, 2 e 4 of TRIPS).

Its history of participation provides Brazil with the necessary authority in international forums to present innovation initiatives like this one at the discussions on intellectual property.

4. CONCLUSIONS

In the past 150 years, intellectual property has undergone constant and deep changes, always towards the confirmation and extension of the rights of right holders, reducing the preoccupation with their obligations almost to the point of their disappearance. At no point in history has there been a successful attempt to shift the weight towards an equilibrium that would take into account the direct interests of the developing countries and their consumers. (The attempt to amend the Paris Convention to reserve a differentiated treatment for developing countries failed after five years of negotiations at the Nairobi conference in 1982.

From a period when the local exploitation of inventions was required as a fundamental precondition for granting or keeping a patent (used by England, Switzerland, France, the United States and others), we have arrived at a moment in history where such a requirement is considered illegal, as happened when the United States made a complaint at the WTO against Brazil for having included this interpretation in its patent law.

From a period when nullity was a normal and efficient instrument for securing local exploitation, we have come to a phase where the compulsory

licence has replaced nullity, turning it into dead paper for the benefit of patent holders.

From a period when the compulsory licence was presented as a state instrument capable of preventing abuse by right holders, we have come to a compulsory licence that can no longer be applied in practice due to the changes in its nature, which have made it non-exclusive and necessitate financial compensation.

From a period when each country had the right to independent intellectual property legislation as a financial-policy instrument that defined in which sectors it would allocate monopoly rights, with their respective duration and conditions, we have now come to an international agreement where all economic sectors have patent protection with rights standardised at a high level, and with no restrictions for the right holders.

Still worse, the negative impact of the transformations has been felt strongest in the developing countries. The compulsory high-level standardisation did not take into account that income is lower in these countries. That the monopoly effect is often strengthened by the fact that in many developing countries new inventions do not compete with similar products. That the gap between them and the industrialised countries increases daily because of the limitations in industry and research centres in developing countries. And that the patent system has the very same effect on them as a market reservation.

Add the fact that some of these inventions belong to the area of drugs and food that have a direct impact on the life and the dignity of human beings.

The TRIPS agreement includes objectives that would have restricted the perverse effect of the patent system on developing countries when applied in practice. In art. 7 it presents as its main objective, alongside technological innovation, the transfer and dissemination of technology in a way to produce social and economic welfare and establish a balance between rights and obligations. But this objective disappears in the following provisions, i.e. the norms that constitute the treaty.

It is clear that developing countries are not interested in a patent system that does not include the possibility of a demand for local exploitation. It is clear that a system without flexibility has a negative impact on development. It is unreasonable to grant 20-year monopolies without any retribution, just to serve the principle of inventor compensation and to stimulate the promotion of inventive activities. To grant market reservation for products that only arrive in a country through imports, without any specific benefit, goes against human reason.

This is why the actions of Brazil in the negotiations on intellectual property have had so many repercussions and why it has received so much

support. To demand the inclusion of the development dimension in the treaties that govern the practical application of intellectual property helps to support the international system of intellectual property. To demand an effort be made towards the objective of facilitating the transfer and dissemination of technology contributes to the acceptance of TRIPS, at a lower cost to developing countries. The interpretation that local exploitation can be required by a patent-granting country should not be considered erroneous. In the middle of last century, the great Paul Roubier taught us that: "if the state accepts to give the inventor a monopoly to exploit (a patent), it is under the condition that there is an efficient exploitation (of the patent)" (*Le droit de Propriété Industrielle*, 1952).

The next years will tell if a treaty that is as biased as TRIPS, in a sector that is as sensitive as that of technological innovations, and as important for developing countries, will have a long life expectancy. The success story of the Paris Convention, with its flexibility with respect to the legislation of each member state, leads us to believe that TRIPS has to become more flexible with regard to developing countries, so that they all can benefit from the creation of new inventions.

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FDCL is a non-profit organization, which was founded in 1974. With its activities FDCL wants to promote the exchange of knowledge and information on issues related to Latin America within politics, humanities, culture and education and in this way contribute to a mutual understanding of the people across borders. It sees itself as part of the German solidarity movement and serves as an information and communication center for individuals and groups who want to gather information on Latin America or become active and work on a specific topic. Many different solidarity groups, country committees, groups of migrants, media projects related to Latin America (like the Latin American News (Lateinamerika Nachrichten)) and initiatives dealing with development aid work “under the roof” of FDCL.

FDCL sees its solidarity and information work regarding Latin America as inseparable from the necessity to help shape politics here “at home.” As a part of this, the issue of human rights is a special focus of FDCL’s work. With respect to development issues, apart from the respective lobbying, FDCL concentrates on domestic education and

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