

*Denis Borges Barbosa**

BRIIC – Laying a New Patent System

Many patent offices, and some more than others, receive foreign filings in greater numbers than domestic ones. WIPO's Indicators for 2011 assign 39.5% of all patents granted on a worldwide basis to non-resident applicants. The 2009 edition of the same document notes that "from the list of the top 20 patent offices, the share of non-residents in total patent grants varied from more than 95% in Malaysia, Mexico and Hong Kong (SAR, China) to below 13% in the Democratic People's Republic of Korea and Japan".

Brazil ranks in the lower segment of domestic patents filings. On the other hand, the number of resident applications for Plant Varieties Protection (PVP) comes in conversely at around 70%, as there is significant local agricultural research. This discrepancy possibly explains why the Brazilian Government has been considering an increase in PVP rules; at the same time, it is contemplating whether a fallback of the patent system to strict TRIPs levels is now advisable.

Under the Paris Convention structure, there was broader leeway regarding such policies. The 1884 treaty allowed considerable space for national policies, which led some countries to extensive experiments, as for instance the denial of chemical product patents in Germany or the withholding of all patent grants in Switzerland, in both cases during significant periods of time. But even under the standards of TRIPs, countries may – and are possibly tempted to – adjust their IP systems considering the relative interests of local innovation and the benefits of immersing in a global economy.

In this context, it can be argued that some local practices, such as a more lenient examination in a patent office or tougher enforcement measures of a specific legal system, may be utilized to assist a strong domestic innovation thrust. Even applying strict "national treatment" standards, i.e. treating foreign and domestic applicants alike, such kind of policies are liable to favor domestic interests – without infringing treaty rules – in those cases where local patents have a high percentage of grants. The U.S. patent system, even after its recent developments, could perhaps illustrate this hypothesis.

With the emergence of the BRIIC economies (Brazil, Russia, India, Indonesia and China), and particularly after patent filings in China shot up to sky-high levels, some experts have begun questioning whether such policies are sustainable. As noted by Frederick Abbott in a conference on these issues held at Florida State University in early April:

You may recall a lesson learned by Japanese companies, which initially were quite put off by American companies bringing IP claims to prevent Japanese companies from entering the US market. Then, the Japanese learned how to hire expensive US lawyers to enforce their own patents, and became major users of the U.S. IP enforcement system. Chinese companies are at the early stages of their patent accumulation. I may not live to see it, but I would not be surprised if 15 or 20 years from now there are demands in the U.S. Congress to restrain Chinese enterprises from enforcing patents in the United States.

* Ph.D.; Catholic University of Rio de Janeiro.

Analyzing the same prospect, Peter Drahos believes that: “The US will, in forging a response, draw heavily on antitrust principles and remedies, much as it did in the last century when international cartels threatened its economic interests.”¹ Either analysis indicates a possible reaction against the use of the patent system *as is*.

Professor Abbott assumes that BRIIC should be expected to act exactly as the major patent-holding countries do. This means that they would be using patents not only as a legal means to obtain a return on their investment in innovation, but also as market tools – that is to say, as positive instruments to assure that innovation enters into markets as well as a negative agent to deny opportunities to competitors. The recent controversies around the iPad trademark, which started in litigation in mainland China to be extended to Santa Clara Superior Court, raises this kind of consideration.

No doubt, any new entrants in the top league will inherit an unhinged system. Patents are no longer a dedicated innovation tool. Particularly within the U.S. market, but certainly not only there, patent thickets create market impacts quite distinguished from the effects of the technology protected by the patent. Abbott’s and Drahos’s anticipation certainly take into account those two distinct uses of the patent system, and the latter’s suggestion emphasizes the market disturbance as the most important element to take into consideration.

Brazil will not act immediately as a major player in the OECD’s patent market; only some 500-plus Brazilian patents used the PCT system in 2011, and no explosion of local patent filings is to be expected in the short run. But Indian and especially Chinese patents will certainly flood the OECD patent systems in the near future. As Professor Geertrui Van Overwalle noted in the same meeting in early April, this will exert a centrifugal force in the developed countries’ patent structure.

Some analysts feel that the danger of such flooding would be the appearance of China as an “industrial policy bogeyman”. The steep growth of local patents in China, aided by Government subsidies, may be felt so. But the adaptability of BRIICs’ style may transform domestic industrial policy into market instruments abroad. No one is particularly worried with the invasion of BRIICs’ innovation, issuing of not from industrial policy, at least for the time being.

Therefore, the announced BRIIC invasion may help to lay the foundations of a renewed patent system. The new players may learn too fast to use or misuse the present patent system, in its dual functionality. If the old stories about the virtues of the patent system as inducing innovation are true, fighting patent thickets and other market gadgets as some sort of technology derivatives (to be curbed as the financial species) may prevent BRIIC from overwhelming the old-time patent holders.

There should be no fear of centrifugal forces in a fair system. England invented

¹ Queen Mary Law Paper No. 105/2012.

football (soccer) in order that Brazil could master the World Cup many times.
But the English team keeps playing well, and fans keep enjoying it.