

# Intellectual Property and Standards in Brazil

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# What can be said

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No specific IP + standard setting policies

- At this moment, there is no Federal public policy in Brazil dealing with the relations of the Intellectual Property system and Standard-Setting Processes.



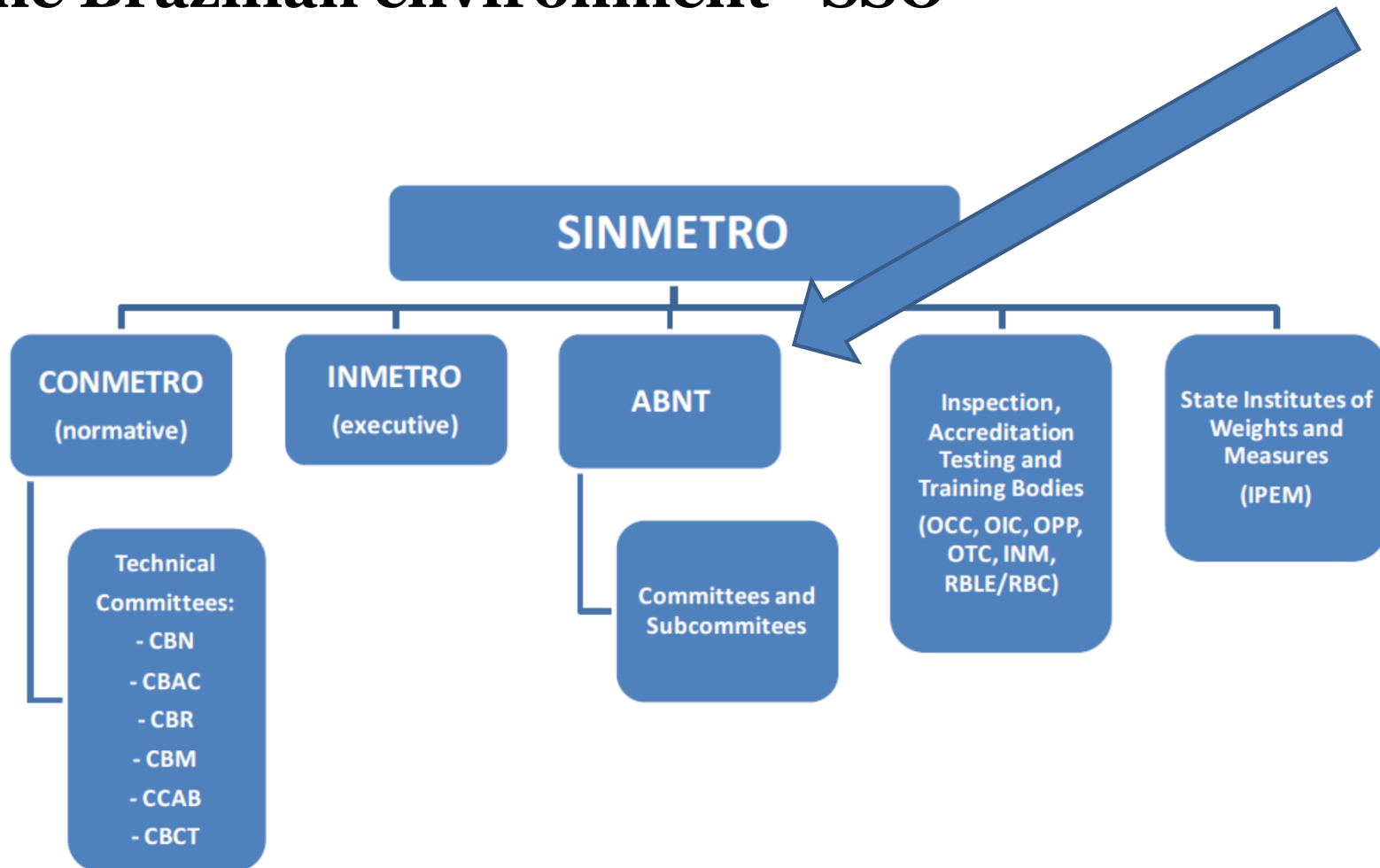


# No specific IP + standard setting policies

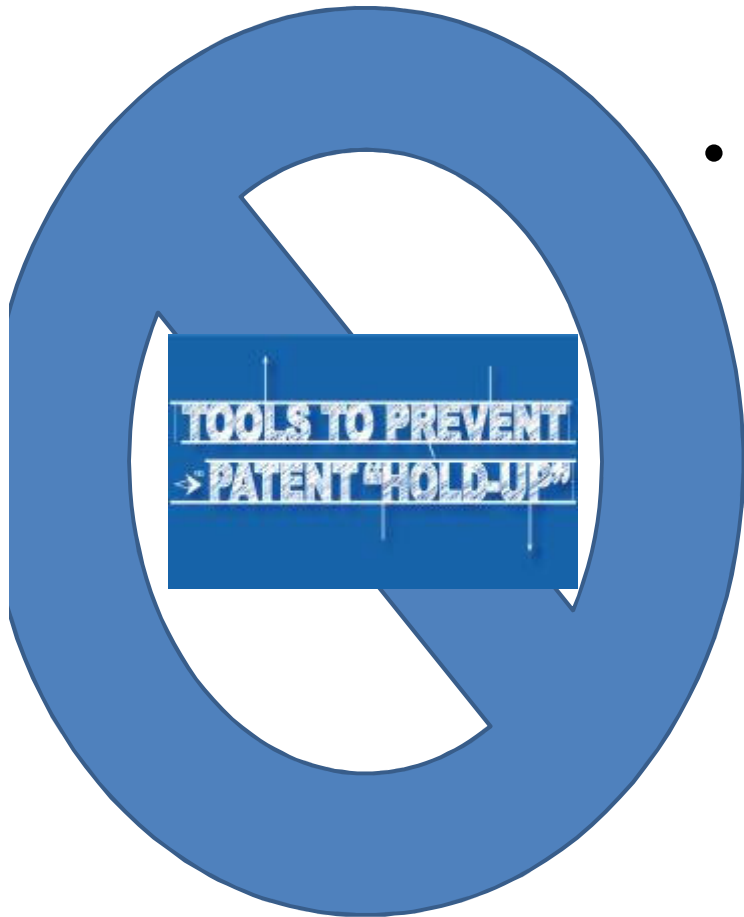
- Although lacking as yet a uniform Intellectual Property Policy , the Brazilian Federal Government has been striving to create and enforce a coherent Innovation and Development strategy and standard setting is a relevant portion of this drive .
- **Lack of institutional opportunity for enforcing any integrated policies is not the cause:**
  - The Brazilian Standard-Setting authority (Inmetro) and the Patent and Trademark Office (INPI) are sister agencies belonging to the same Ministry, and for most of their history sharing the same premises in Rio de Janeiro. This institutional and even physical proximity did not resulted in any common set of policies on the subject of this study.
- **Irrelevance of the matter in the Brazilian environment is not the cause:**
  - The Interdepartmental Steering Group has discussed the issue more than once. The Brazilian Foreign Office has furthermore followed closely China's claims within the WTO system related to standard-setting issues , but without direct interference in the pertinent procedures .
- On the other hand, only very recently the interface between Intellectual Property and competition policies has captured the attention of the Brazilian antitrust authorities .

WHY?

# The Brazilian environment - SSO



## The Brazilian environment -SSE



- As to the interface of such standard-setting activities with IP and competition concerns, **there is no formal procedure either in CONMETRO legislation or internal ABNT rules to assure that in every pertinent case a specific protocol should be followed.**

However, at least in some recent cases the antitrust authorities were called to participate.



# Recent evolution of national institutions

- **National participation in international/multilateral SDOs**
- ABNT is connected with the relevant International standard-setting organizations.
  - At Mercosur level, ABNT is a member of the AMN - Associação Mercosul de Normalização, together with the Instituto Argentino de Normalización, Instituto Nacional de Tecnología y Normalización, Instituto Uruguayo de Normas Técnicas, IBNORCA (Bolivia) and INN (Chile).
- INMETRO, the Federal executive agency in charge of issuing technical regulations:
  - IAF (International Accreditation Forum); IAAC (Interamerican Accreditation Cooperation); ILAC (International Laboratory Accreditation Cooperation); OIML (International Organization for Legal Metrology); IATCA (International Auditor and Training Certification Association); and BIPM (Bureau International des Poids et Mesures). The agency INMETRO also has cooperation agreements with the following entities: UKAS (United Kingdom Accreditation Service); NIST (National Institute of Standards and Technology) and PTB (Physikalish Technische Bundesanstalt).
- There are no published programs contemplating institutional participation in industry-generated standards, either locally or abroad

# Recent evolution of national institutions

- **Evolution of public purchase system**
- Brazilian standard-setting system has not subject to any overhaul in the last decade. Up to this moment, there was no institutional reaction to the emergence of industry-generated standards and its influence in Government purchasing processes or on the Brazilian economy as a whole.
  - However, from December 2010, Brazilian Public Contract Law was changed in such a way as to allow technology and industrial policy considerations to be introduced as a relevant award motive
  - Some specific sectors were covered by specific statutes modifying the public contract law intending to induce new technologies, for instance, **the defense sector**. The National Law dealing with the **2014 World Soccer and 2016 Olympics** (Law 12.462/2011) also took new and significant steps to create a more ductile public contract law.
  - Also in **Ministry of Health**, Public-private partnerships for the development of alternative and new technologies, dispensing tenders whenever the purchase of goods is conditioned to the generation or transfer of technology to public (federal or state) laboratories

**Extremely**



We are pleased to accept all Government Purchase Orders.





# Recent evolution of national institutions

- *Effects of standard setting in Brazilian Public Contracting*
- In Brazil, **Government procurement resources are estimated to cover 10% of GDP** , and mobilize key sectors that adjust to the demands set out in the bidding documents . In this sense, is the enormous responsibility of public managers responsible for defining the rules to ensure free competition, without losing sight of the interest in having the best product or service, at the lowest price .
- According to the National Public Contract Law , art. 15, I whenever possible, purchases must follow a *ad hoc* standardization of material and services internal to the specific Governmental entity, taking into consideration “technical compatibility and performance, subject, where applicable, the conditions of maintenance, service and warranties” .

GDP (current US\$)  
\$2.477 trillion 2011  
Population, total  
196.7 million

# Recent evolution of national institutions



a Federal entity closely linked to the President of the Republic

## ***Open Standards as a policy option***

The Instituto Nacional de Tecnologia da Informação (National Institute of Information Technology) – ITI, is a Federal entity closely linked to the President of the Republic; one of its chief purposes is to create the basis for a Federal policy towards the adoption of open standards software for the Brazilian Federal Government . It is a procurement policy.

## ***E-PING: A proposal taken from a Massachusetts statute***

<http://www.governoeletronico.gov.br/acoes-e-projetos/e-ping-padroes-de-interoperabilidade>

### » **Brazil**

- Brazil has implemented an e-PING architecture defining a minimum set of assumptions, policies and specifications governing the use of Information and Communication Technology (ICT) in the federal government and establishing conditions of interaction with the other branches and spheres of government and society in general . [Comments of GTW Associates -AUGUST 5, 20, Patent Standards Workshop , Project No. P11-1204



# Recent evolution of national institutions

- *Open Standards as a policy option*
- **AUGUST 5, 20**
  - **Patent Standards Workshop , Project No. P11-1204**
- **[Microsoft's attack on Brazilian national sovereignty: Wikileaks, Microsoft, ODF and OpenXML](#)**
- September 9th, 2011
- A few days ago we were all surprised by [a document leaked at CableGate](#), exchanged between the US embassy in Brazil and the American Government in 2007. According to this cable, Microsoft made serious accusations against the Brazilian government, and despite of the attempt to play the 'silly Microsoft' at the meeting, they indirectly asked for an intervention of the American Government to halt the spread of ODF in Brazil, to win the Brazilian support for the approval of OpenXML in ISO, to halt the partnership between the Brazilian technical committee and other committees discussing the international standard at that time, to reduce the influence of Brazil in the international debate on OpenXML
- <http://homembit.com/2011/09/microsofts-attack-on-brazilian-national-sovereignty-wikileaks-microsoft-odf-and-openxml.html>



# Recent evolution of national institutions

- **TBT concerns related to IPR**
- INMETRO is the agency designated to act as the WTO Enquiry Point in Technical Barrier issues . The most conspicuous issue relating TBT and IPRs is a recent sanitary regulation of tobacco products, which affects particularly trademark holders. According to WTO ,
- Brazil has introduced a new draft regulation establishing the maximum permissible levels of tar, nicotine and carbon monoxide in tobacco products, and prohibiting the use of all additives in these products  
([G/TBT/N/BRA/407](http://www.wto.org/english/press/p/20101129_bra407.htm) – notified to the WTO on 29 November 2010).
  - Information found at:  
<http://www.inmetro.gov.br/english/international/focalPoint.asp>. Visited June 20, 2012.
  - Found at:  
[http://www.wto.org/english/news\\_e/news11\\_e/tbt\\_24mar11\\_e.htm](http://www.wto.org/english/news_e/news11_e/tbt_24mar11_e.htm). Visited Aug. 11, 2012.

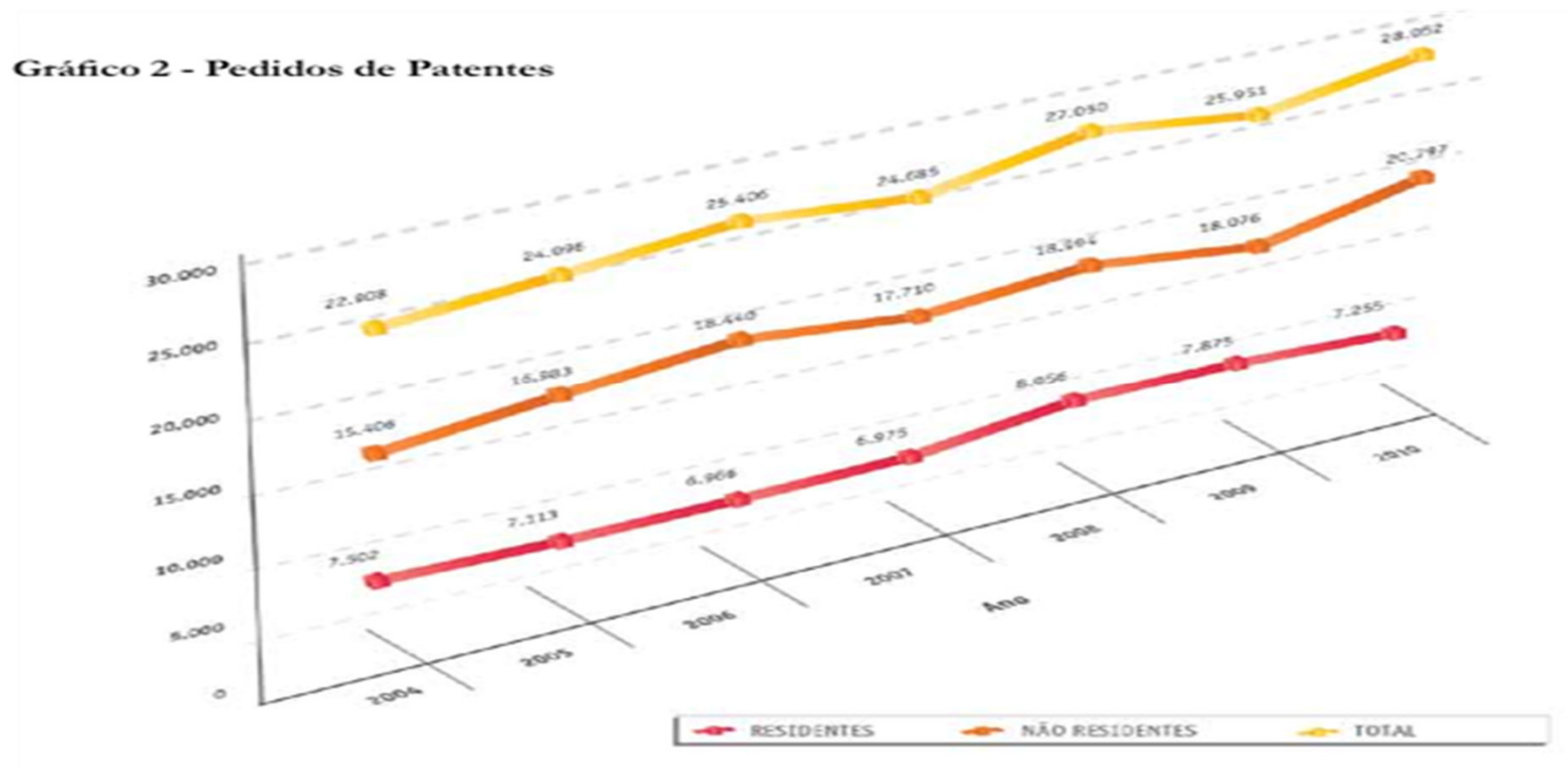


# Recent evolution of national institutions

- **Evolution of the patent system**
- In a recent study it was noted:
  - Brazil is listed among the emerging markets, and a potential prime player in the Intellectual Property field. Although the country has a long history and have been displaying its continued interest in the patent system, it should not be expected that Brazilian patents should be flooding the patent offices of OECD countries, as Chinese and to a lesser extent Indian filings are to be soon.
- A crucial aspect of public policies regarding patent in Brazil (as in many other countries) is **the unbalance between local and foreign filings and patent grants**

# Recent evolution of national institutions

- Evolution of the patent system



# Recent evolution of national institutions

- Evolution of the patent system

APPLICATIONS	2004	2005	2006	2007	2008	2009	2010
Patent Invention - IP	6.291	6.334	6.057	6182	6866	6308	6935
Resident	3.929	3.902	3.823	3.976	4.752	4.335	4.202
Non-Resident	2362	2.432	2.234	2.206	2.114	1.973	2.733
Utility Model - UM	3.480	3.126	3.048	2.874	3.208	3.381	2.945
Resident	3.433	3.075	2.996	2.840	3.152	3.349	2.857
Non-Resident	47	51	52	34	56	32	88
Addition Certificate - AC	118	118	113	136	135	128	119
Resident	111	112	106	122	122	122	115
Non-Resident	7	6	7	14	13	6	4
Patent Cooperation Treaty -PCT	13.019	14.518	16.188	15.493	16.841	16.134	18.052
Resident	29	24	41	37	30	69	81
Non-Resident	12.990	14.494	16.147	15.456	16.811	16.065	17.971
TOTAL	22.908	24.096	25.406	24.685	27.050	25.951	28.051



# Recent evolution of national institutions

- **The INPI role in screening technology and other IP contracts**
- Since the late 60's, Intellectual Property licenses and other technology contracts have been subject to Government screening in Brazil.
- Initially such analysis concerned the tax and exchange aspects of such agreements; eventually the screening of restrictive business practices was included. When the INPI (Brazilian Patent and Trademark Office) was created in 1970, the powers to screen such contracts were delegated to the new agency, and new discretionary powers, including the possibility of rejecting the agreement on the basis of Brazilian industrial policy, were added to the prior ones. A Supreme Court Case declared the new powers constitutional. According to the 1996 Industrial Property Law, the discretionary powers were excluded from INPI purview.
- **Although now deprived from discretionary powers, the Brazilian PTO has kept an extensive role, and the exact understanding of such Governmental action may be particularly important to some investment decisions regarding Brazil.**
- Borges Barbosa, Denis , Technology Contracts in Brazil: The Patent Office Screening Rôle (May 24, 2012). Available at SSRN: <http://ssrn.com/abstract=2151435>





## Recent evolution of national institutions

- **Local Antitrust Treatment of standards developed internationally or generated locally**
- In a limited number of cases, standards developed on an International basis were brought to the screening of Brazilian Antitrust Authority (Cade). Even though such decisions would not express any public policy towards standard-setting and IP, they reflect the Brazilian legal environment regarding this issue.



# Recent evolution of national institutions

- **Local Antitrust Treatment of standards developed internationally or generated locally**
- **The patent pool cases analysed by the Brazilian Antitrust Authorities**
- Up to this moment, the Brazilian Antitrust Authorities have screened three patent pool relevant cases. The pertinent content of the precedents were mentioned above.
  - The Videolar case
  - The Gradiente Case - 3C DVD pool,
  - The One Red Case
- **The Tacographs case**
  - The Tacographs case, decided 18/8/2011 , in a sham litigation issue, "use of normative conflict between the National Transit Council - CONTRAN, and the National Institute of Metrology, Standardization and Industrial Quality - INMETRO, to propose actions requiring the judiciary, with a request of injunction, the suspension of Ordinances DENATRAN who had approved the electronic tachographs produced by the Representative" .

## Hold-up and transferability of obligations in standard setting

- Under the Brazilian legal system, patents can only be sold or otherwise transferred to third parties by means of a specific action by the Patent and Trademark Office.
- On the other hand, patent pools as a licensing agreement may be only effective towards third parties after record with the same agency ; any obligation resulting from such arrangement would automatically impose onto any buyer or assignee, provided that the licensing agreement specifically states as to that transferability



## A case study: when Brazil failed to set a 100% national standard



- By 2006, a series of Federal measures were directed to developing **a domestic standard for digital TV**. This proposal was developed at the margin of Government SDO and ABNT procedures. Some decisional factors eventually led to subscribing to a non-domestic standard; however, the defective planning of the IP considerations was a relevant item of putting aside the Brazilian alternative.
- To this date, this is the only conspicuous case study to consider under the general purview of this research. Our analysis would take into consideration this issue.



## **A case study: when Brazil failed to set a 100% national standard**

- A plurality of conflicting national interests was at play in this context since 1998.
  - The **broadcasting industry** has its own agenda,
  - the diffuse interest of **civil society** was voiced by NGOs,
  - **Telecom Industry** had another agenda as had the **Electro-electronic** sector.
  - **Academy**, which may to a certain extent be important whenever the need of specific technology is required, had its own interests.
- By 2006, a political change - an alliance with the broadcasters -, Government stressed *portability* and *mobility* over all social considerations, and chose the Japanese standard.



## Implications for US interests

- Why are there so few SDOs that have an IP policy?
  - At this stage of Brazilian development, **there is no coherent and integrated IP policy either in Government or within the representative trade associations**, which in Brazil are particularly important in interfacing with Government.
  - Initiatives like GIPI, the Interdepartmental IP steering group, have not as yet achieved a lead even less the control of IP matters..
  - **The IP theme is however much more present within Brazilian society (industry, society or Government) than any time before.**
  - This report is unable to discern at present any strategy by private industry to slow down or prevent the emergence of such a policy.



## Implications for US interests

- Is it due to a shortage of innovation and production in the Brazilian ICT and other key industries?
  - Although innovation in transformative industry (as opposed to the agro industrial sectors) is not the most significant aspect of the Brazilian economy, Government investment in R&D and innovation have been growing on a significant rate. The institutional environment suffered an entire overhaul since 2006, after the Innovation Law was published, and this changing has not been interrupted since then.
- Are there simply no difficult issues in licensing patented standardized technologies so the need to manage the problems has not come up?
  - The report on two cases brought by Brazilian corporations to the competition authorities challenging the licensing of International patented standardized technologies indicate that the present business methods (at least in the relevant sectors) are not working so smoothly for Brazilian economy



## Implications for US interests

- Are there shortcomings in the law that has discouraged this emergence?
  - It does not seem that special statutory provisions were required up to this moment in other countries to allow for a more efficient interplay between IP and standard-setting concerns. Brazil has no legal provisions covering this issue, either discouraging or inducing such interplay.
- Are there *no* ongoing discussions in the public and/or private sector, to try to deal with these issues.





## Concluding

- This author is not able to find any specific aspect of the present Brazilian standard-setting procedure or the IP system that might directly impact on US interests in this context.
- However, **the different roles of Government and industry in Brazil and United States may eventually cause the future policies for conciliating IP and standard-setting appear to be less market-oriented and industry-generated.**
- In the digital TV case, telecom and electro-electronic industries had a quite constrained role; the fact that different public policy concerns (or perhaps, political considerations) had been at play when setting the standard may signify that Brazil has and shall be expected to have a different approach from US to the problem at stake.
- **These distinct strategies, rhetorical concerns put aside, do not imply that Brazil and US interest are or may become opposite.**