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## International Trade v. Intellectual Property Lawyers: Globalization and the Brazilian Legal Profession

Vitor Martins Dias

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**INTERNATIONAL TRADE V. INTELLECTUAL PROPERTY  
LAWYERS: GLOBALIZATION AND THE BRAZILIAN  
LEGAL PROFESSION**

Vitor Martins Dias\*

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#### ABSTRACT

*In the context of globalization, this work analyzes a distinctive characteristic of the Brazilian legal profession. Namely, intellectual property (IP) lawyers, who played important roles in opening the Brazilian economy and who were key players in cross-border transactions, are now losing ground to their peers with respect to expertise in international trade. The thesis of this article is that the manner in which Brazilian lawyers are being educated is problematic. Generally, Brazilian legal education has become degraded and provincial. Yet, Brazilian international trade lawyers, unlike Brazilian IP lawyers, have overcome their deficient legal training by seeking legal education abroad. By traveling overseas, especially to the United States, international trade lawyers are exposed to an education and a set of best practices that stress not just domestic law from one or another country, but laws from different jurisdictions. International trade lawyers in Brazil are now “global lawyers,” which enables them to deal more effectively with their country’s expanding economy, and it supports the argument that globalization matters for both today’s law students and the legal profession.*

## I. INTRODUCTION

The year 2014 marked the fortieth anniversary of the seminal article “Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States,”<sup>1</sup> authored by David Trubek and Marc Galanter. This work has been lauded and cited worldwide as a remarkable piece for those interested in law and development. It has also been praised for discussing the impact of legal education and reforms on the promotion of economic and social development.<sup>2</sup> Trubek and Galanter discussed the relationship between law and development (how it was supposed to work, and how it really worked).<sup>3</sup> In sum, they observed that there was a gap between the expectations and the outcomes of developmental reforms that occurred in developing countries during the 1960s.<sup>4</sup>

Trubek and Galanter examined how scholars (including themselves) were at the forefront of the “moderniz[ation]” of legal systems<sup>5</sup> in “third world”<sup>6</sup> countries. Their objectives should have been accomplished by the implementation of legal reforms and changes in legal education in those countries. With respect to the latter, curriculum updates and innovative teaching techniques introduced by

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1. See David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 4 WIS. L. REV. 1062 (1974).

2. See David M. Trubek, *Law and Development: 40 Years after Scholars in Self Estrangement—A Preliminary Review*, UNIV. WIS. LEGAL STUDIES RESEARCH PAPER No. 1255 (2014).

3. See Trubek & Galanter, *supra* note 1. See also Jayanth K. Krishnan, *Professor Kingsfield Goes to Delhi: American Academics, the Ford Foundation, and the Development of Legal Education in India*, 46 AM. J. LEGAL HIST. 447 (2004) [hereinafter Krishnan, *Professor Kingsfield*] (describing several legal education changes in India since the middle of the twentieth century); Jayanth K. Krishnan, *Academic SAILERS: The Ford Foundation and the Efforts to Shape Legal Education in Africa, 1957-1977*, 52 AM. J. LEGAL HIST. 261 (2012) [hereinafter Krishnan, *Academic SAILERS*] (discussing the development and outcomes of legal education reforms in several African countries).

4. See Trubek & Galanter, *supra* note 1.

5. *Id.* at 1067.

6. *Id.* at 1068.

foreign scholars helped train the “third world”<sup>7</sup> countries’ legal elites. As such, these elites carried out measures to ensure an efficient legal system for businesses and an accessible judicial system for the needy.<sup>8</sup>

The initiatives mentioned above relied on substantial funding from development agencies, mainly the United States Agency for International Development (USAID) and the Ford Foundation.<sup>9</sup> These organizations provided the necessary resources that made these projects possible.<sup>10</sup> Such reforms, however, were short-lived. Economic and political instability emerged in countries such as Brazil and India for different reasons, albeit with one common root: the legal reforms did not achieve the expected results.<sup>11</sup> Consequently, human and financial capital became scarce, and scholars who engaged in such projects lost their interest in researching law and development as well as in working on related policymaking initiatives.<sup>12</sup>

The lack of studies on law and development persisted until a few years ago, when academics started to devote their efforts to this field once again.<sup>13</sup> Financial systems, capital markets, legal education, judicial reforms, and globalization have been part of the agenda of

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7. *Id.* at 1083-1088.

8. *Id.* See also David M. Trubek, *Reforming Legal Education in Brazil: From the Ceped Experiment to the Law Schools at the Getulio Vargas Foundation*, UNIV. WIS. LEGAL STUDIES RESEARCH PAPER NO. 1180 (2011) (describing the classroom environment in Brazil and how legal education should educate lawyers concerned with economic and social issues, for example, by emulating clinical and pro bono activities that were common to the American legal system).

9. See generally, Trubek, *supra* note 8; Krishnan, *Professor Kingsfield goes to Delhi*, *supra* note 3; and Krishnan, *Academic SAILERS*, *supra* note 3.

10. See generally, Trubek & Galanter, *supra* note 1; Trubek, *supra* note 8; Krishnan, *Professor Kingsfield goes to Delhi*, *supra* note 3; and Krishnan, *Academic SAILERS*, *supra* note 3.

11. See Trubek & Galanter, *supra* note 1. See generally THE NEW LAW AND ECONOMIC DEVELOPMENT (David M. Trubek & Alvaro Santos eds., 2006) [hereinafter THE NEW LAW AND ECONOMIC DEVELOPMENT] (explaining the rise of a new moment of law and development studies).

12. See generally THE NEW LAW AND ECONOMIC DEVELOPMENT, *supra* note 11.

13. *Id.*

those interested in this new “moment”<sup>14</sup> of law and development. Brazil is one of the countries that have garnered the attention of several scholars—including David Trubek and some collaborators of his most recent works.<sup>15</sup> Nevertheless, intellectual property (IP) in Brazil and its relevance to law schools have not stimulated researchers to the same degree.<sup>16</sup> Although some scholars have looked at IP through a law and development perspective, by highlighting the importance of IP law to a country’s developmental path,<sup>17</sup> they have not analyzed issues relating to the legal education of IP lawyers in a country like Brazil. Other studies, have thoroughly assessed the extensive training of Brazilian international trade lawyers.<sup>18</sup> This in-

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14. See David M. Trubek & Alvaro Santos, *The Third Moment in Law and Development Theory and the Emergence of a New Critical Paradigm* in THE NEW LAW AND ECONOMIC DEVELOPMENT, *supra* note 11 at 1, 2-3 (explaining the three different moments in law and development [L&D] theory and what has changed since the L&D movement started in the 1950s and 1960s).

15. See generally THE NEW LAW AND ECONOMIC DEVELOPMENT, *supra* note 11; LAW AND THE NEW DEVELOPMENTAL STATE: THE BRAZILIAN EXPERIENCE IN LATIN AMERICAN CONTEXT (David M. Trubek et al. eds., 2013) [hereinafter LAW AND THE NEW DEVELOPMENTAL STATE]; and DIREITO E DESENVOLVIMENTO: UM DIÁLOGO ENTRE OS BRICS (David M. Trubek & Mario G. Schapiro eds., 2012) [hereinafter DIREITO E DESENVOLVIMENTO].

16. It is important to mention that the scholarship on law and development has analyzed IP in Brazil in several ways—for example, its relevance to innovation and finance for R&D—but not with special attention to legal education in IP. See *infra* note 17.

17. See Alvaro Santos, *Carving Out Policy Autonomy for Developing Countries in the World Trade Organization: The Experience of Brazil & Mexico*, 52 VA. J. INT'L L. 551 (2012) (highlighting the distinctions between the Brazilian and Mexican experiences in using the WTO as a means of promoting developmental trade policies); Monica Steffen Guise Rosina, Fabrício Polido & P. Guimarães, *Propriedade Intelectual: Potencialidades e Fragilidades do Ambiente Jurídico-institucional Brasileiro para a Inovação* in DIREITO E DESENVOLVIMENTO, *supra* note 15, at 135 (discussing the problems of Brazil’s institutional arrangements that hinder R&D in the country within a comparative perspective); and Michelle Raton Sanchez Badin, *Developmental Responses to the International Trade Legal Game* in LAW AND THE NEW DEVELOPMENTAL STATE, *supra* note 15, at 246 (analyzing that the civil society alongside some legal professionals in Brazil have been able to find alternatives to enhance intellectual property development in the country).

18. See generally Gregory Shaffer, Michelle Raton Sanchez & Barbara Rosenberg, *The Trials of Winning at the WTO: What Lies behind Brazil's Success*, 41 CORNELL INT'L L.J. 383 (2008) (analyzing how Brazil’s lawyers have been trained to become litigators at the WTO and why they have succeeded in that arena);

vestigation, therefore, aims to fill that gap in this literature by bringing legal education and legal training in IP to the center of this debate and by discussing the differences between the legal practice in international trade and IP in Brazil.

This comparison between IP and international trade is relevant because IP norms are important to any country's cross-border transactions as well as its developmental path.<sup>19</sup> Patent, trademark, and copyright laws serve as important tools to attract foreign investment and develop a country's domestic industry and its network of services.<sup>20</sup> Furthermore, globalization has been part of IP's trajectory, and international treaties have historically regulated transnational commerce of rights over inventions and works of authorship.<sup>21</sup> Accordingly, international trade and IP have worked hand in hand for centuries. In Brazil however, this relationship has been recently marked by an interesting characteristic: international trade lawyers have aptly handled and succeeded in IP trade disputes derived from

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Rubens E. Glezer et al., *Transforming Legal Capacity in Brazil: International Trade and the Myth of a Booming Practice* at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2683561](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2683561) (revealing the perception of international trade lawyers about their training and also of the market in this field).

19. See generally PAUL GOLDSTEIN & MARKETA TRIMBLE, *INTERNATIONAL INTELLECTUAL PROPERTY LAW, CASES AND MATERIALS* (3rd ed., Foundation Press 2012); Rochelle Cooper Dreyfuss, *Fostering Dynamic Innovation, Development and Trade: Intellectual Property as a Case Study in Global Administrative Law*, *ACTA JURIDICA* 237, 282 (2009); Diepiriye A. Anga, *Intellectual Property Without Borders? The Effect of Copyright Exhaustion on Global Commerce*, 10 *BYU INT'L L. & MGMT. R.* 53 (2014); CARLOS ALBERTO PRIMO BRAGA ET AL., *INTELLECTUAL PROPERTY RIGHTS AND ECONOMIC DEVELOPMENT*, parts 63-412 (World Bank Pubs. 2000); David M. Gould & William C. Gruben, *The Role of Intellectual Property Rights in Economic Growth*, 48 *J. DEV. ECON.* 323 (1996); Ha-Joon Chang, *Intellectual Property Rights and Economic Development: Historical Lessons and Emerging Issues*, 2 *J. HUM. DEV.* 287 (2001); Francesco Laforgia et al., *IPRs and Technological Development in Pharmaceuticals* in *THE DEVELOPMENT AGENDA: GLOBAL INTELLECTUAL PROPERTY AND DEVELOPING COUNTRIES* 307, 307 (Neil W. Netanel ed., 2009) (providing broad lenses to the analysis of IP in the developing world); Bruno Salama & Daniel Benoliel, *Pharmaceutical Patent Bargains: The Brazilian Experience*, 18 *CARDOZO J. INT'L & COMP. L.* 633, 686 (2010); Daniel Benoliel & Bruno Salama, *Towards an Intellectual Property Bargaining Theory: The Post-WTO Era*, 32 *U. PA. J. INT'L L.* 265, 368 (2010).

20. See GOLDSTEIN & TRIMBLE, *supra* note 19.

21. *Id.*

the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), whereas Brazil's domestic regulation of IP rights that has resulted from this treaty has failed to foster Brazil's development.<sup>22</sup>

Indeed, there are two groups of scholars who have analyzed this situation. Some authors focus on international trade and the positive ramifications of Brazil's trade policies and lawyering in transnational disputes over IP rights.<sup>23</sup> In parallel, other academics specifically concerned with IP have discussed how Brazil has wrongly harmonized its domestic IP laws with international treaties. Some legal scholars have also questioned whether Brazil needs to strengthen its national research agenda in order to better prepare IP professionals.<sup>24</sup>

The present study argues that the victorious strategy of international trade of IP rights stems from the legal training that lawyers who work in this field have received, which has not happened to IP lawyers. Namely, investigations on the capacity building of Brazilian trade lawyers have showed that these professionals have received both legal education and practical training at elite organizations outside of Brazil.<sup>25</sup> Also, a recent research study highlighted that this capacity building has successfully worked for Brazilian legal professionals.<sup>26</sup> While these inquiries on international trade and the legal profession in Brazil exist, similar studies on international IP and IP lawyers are still missing.

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22. See Badin, *supra* note 17; Salama & Benoliel, *supra* note 19, at 676; and Esteban Donoso, *Application of a Mechanism of Proportional Rewards towards Global Innovation*, 4 N.Y.U. J. INTELL. PROP. & ENT. L. 105, 112 n.23 (2014).

23. See Santos, *supra* note 17; and Badin, *supra* note 17.

24. See Salama & Benoliel, *supra* note 19; and Donoso, *supra* note 22. See also Julia Paranhos & Lia Hasenclever, *A Proteção Patentária e a Interação Empresa-Ict no Sistema Farmacêutico de Inovação Brasileiro*, 29 RADAR - TECNOLOGIA, PRODUÇÃO E COMÉRCIO EXTERIOR 39 (2013); and Paula Wardi Drumond Gouvea Lana, *Interação entre Direito da Propriedade Intelectual e Direito da Concorrência: o Instituto de Patentes Pipeline e seu Impacto na Concorrência do Mercado de Antiretrovirais no Brasil*, 3 RDC 181 (2015).

25. See Glezer et al., *supra* note 18; and Shaffer, Sanchez & Rosenberg, *supra* note 18.

26. See Glezer et al., *supra* note 18.



With that said, although legal professionals have been aware of the international component of IP practice, distinctive characteristics of Brazilian lawyers who work in these complementary fields—IP and international trade—have been noted and thus need special attention.<sup>27</sup> Hence, this study will analyze this “boundary-blurring”<sup>28</sup> aspect of international IP and will explore its impact on the Brazilian legal profession.

The legal profession is known for its liberal values.<sup>29</sup> Lawyers have been active players in advocating for economic liberalization and the rule of law in several countries.<sup>30</sup> Law schools, by their turn, have provided the environment for those ideals to be discussed. Accordingly, the initial step to understand the practice of IP law in Brazil is by analyzing Brazilian law schools. Since this work is concerned with globalization and a small portion of the Brazilian legal profession is internationalized, it will look at legal education in IP at elite Brazilian law schools. In sum, whether Brazilian IP lawyers have been properly educated in IP is a question that needs scrutiny.

That claim is relevant to Brazil’s development because Brazil has been politically engaged in IP matters, both domestically and

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27. See Jayanth K. Krishnan, Vitor M. Dias & John E. Pence, *Legal Elites and The Shaping of Corporate Law Practice in Brazil: A Historical Study*, LAW & SOC. INQUIRY (forthcoming) (describing the process of globalization of the legal profession and how an important IP lawyer and his partners were instrumental in opening the Brazilian economy).

28. See Sida Liu, *The Legal Profession as a Social Process: A Theory on Lawyers and Globalization*, 38 LAW & SOC. INQUIRY 670, 676 (conceptualizing boundary-blurring within the legal profession).

29. See LAWYERS AND THE RISE OF WESTERN POLITICAL LIBERALISM: EUROPE AND NORTH AMERICA FROM THE EIGHTEENTH TO TWENTIETH CENTURIES (Terence C. Halliday & Lucien Karpik eds., 1997) [hereinafter LAWYERS AND THE RISE OF WESTERN POLITICAL LIBERALISM]; and FIGHTING FOR POLITICAL FREEDOM: COMPARATIVE STUDIES OF THE LEGAL COMPLEX AND POLITICAL LIBERALISM (Terence C. Halliday, Lucien Karpik & Malcolm Feeley eds., 2007) [hereinafter FIGHTING FOR POLITICAL FREEDOM].

30. See LAWYERS AND THE RISE OF WESTERN POLITICAL LIBERALISM, *supra* note 29; FIGHTING FOR POLITICAL FREEDOM, *supra* note 29; and Krishnan, Dias & Pence, *supra* note 27.

globally.<sup>31</sup> The Brazilian government has historically signed international treaties,<sup>32</sup> attempted to modernize the Instituto Nacional da Propriedade Industrial (INPI), which is Brazil's patents and trademarks office,<sup>33</sup> and reformed its domestic norms to foster research and development (R&D) and innovation within the country.<sup>34</sup> Moreover, with respect to IP disputes, Brazil has litigated and has also been a defendant in international forums, such as the World Trade Organization (WTO).<sup>35</sup> After all, both IP and international trade are deemed to be complex practices that need specialized legal professionals.<sup>36</sup>

Indeed, globalization has increased the complexity of those related fields, and Brazilian lawyers have become experts in both IP and international trade, albeit with a particular characteristic.<sup>37</sup> On the one hand, after the TRIPS Agreement and the strengthening of WTO's dispute settlement body, Brazilian international trade lawyers have thrived.<sup>38</sup> Brazil has been championed for its success in handling transnational disputes over IP rights and the TRIPS Agreement.<sup>39</sup> On the other hand, the harmonization of domestic norms with the TRIPS Agreement has not been seen so positively, and this work argues that this situation may stem from the legal training that IP lawyers receive in Brazil.<sup>40</sup> Inasmuch as there exists a market for international legal services in IP, Brazilian lawyers should be prepared to provide these services accordingly. However, it is unclear

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31. See Badin, *supra* note 17; Krishnan, Dias & Pence, *supra* note 27.

32. See Krishnan, Dias & Pence, *supra* note 27, at 7.

33. See LEANDRO MALAVOTA, *A CONSTRUÇÃO DO SISTEMA DE PATENTES NO BRASIL: UM OLHAR HISTÓRICO* (2011) (making a historical assessment of patent protection in Brazil).

34. *Id.*

35. See Badin, *supra* note 17.

36. See Fabiana Luci de Oliveira & Luciana de Oliveira Ramos, *General (In-House) Counsels in Brazil: Career, Professional Profile and a New Role*, FGV Direito SP Research Paper Series No. 119 (2015) (explaining the structure of in-house counsel in Brazil); and Shaffer, Sanchez & Rosenberg, *supra* note 18.

37. See Badin, *supra* note 17.

38. See Shaffer, Sanchez & Rosenberg, *supra* note 18.

39. See Badin, *supra* note 17; Santos, *supra* note 17.

40. See Paranhos & Hasenclever, *supra* note 24; Lana, *supra* note 24; Salama & Benoliel, *supra* note 19; and Donoso, *supra* note 22.

whether Brazilian law schools have been properly educating their students, and whether IP lawyers have found other ways of obtaining legal capacity in IP, as it has happened with international trade lawyers.

Regarding the capacity building that Brazilian international trade lawyers have received, they have been extensively trained after they graduated in Brazil.<sup>41</sup> Namely, the vast majority of Brazil's international trade legal professionals have pursued advanced law degrees outside of Brazil.<sup>42</sup> Also, they have worked at respected multilateral organizations and global law firms abroad.<sup>43</sup> These legal practitioners have stated that Brazil's strategy of capacity building has been effective and that it has been instrumental to Brazil's triumph in international trade disputes.<sup>44</sup> This work will assess whether or not similar initiatives that have targeted Brazilian IP lawyers exist and what conclusions can be drawn from the legal training in international IP in Brazil.

Bearing that in mind, the present work intends to make a descriptive analysis of how IP has been taught at select elite Brazilian law schools. The existing literature on legal education states that very little has changed in the manner by which law is taught in Brazil, in spite of the effects of globalization on the Brazilian legal market.<sup>45</sup> Initiatives outside the law schools' boundaries will thus be similarly assessed. Therefore, this study will examine whether global forces that have guided Brazil's new development "moment"<sup>46</sup> have also demanded more legal knowledge and hence a better legal education on international IP in Brazil, and whether law schools have followed this process.

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41. See Shaffer, Sanchez & Rosenberg, *supra* note 18; Glezer et al., *supra* note 18.

42. *Id.*

43. *Id.*

44. *Id.*

45. See Trubek, *supra* note 8; see generally AVENTURA E LEGADO NO ENSINO JURÍDICO (Gabriel Lacerda, Joaquim Falcão & Tânia Rangel eds., FGV 2012).

46. See Trubek & Santos, *supra* note 14.

It is important to note that the practice of IP law in Brazil, as well as in other countries, is deemed to be highly specialized.<sup>47</sup> Few law firms repeatedly appear in legal profession rankings. Further, the firms receive work from in-house general counsels who have only limited experience in IP matters.<sup>48</sup> Thus, in order to succeed in this market, IP lawyers need to become experts in a variety of aspects of patents, copyrights, and trademarks, which are regulated by domestic norms and international treaties.<sup>49</sup> Consequently, in addition to being well educated at elite law schools, IP lawyers also need to be global lawyers.<sup>50</sup>

The body of this work is divided into five sections. The first section will discuss the structure of legal education and the situation of IP within the law school curriculum in Brazil. Secondly, an analysis of Brazil's copyrights, trademarks, and patent laws will be conducted. After having described the pertinent IP laws in Brazil that have been affected the most by globalization, the third and fourth sections will assess the effects of globalization on Brazil's IP market, with special attention to the TRIPS Agreement and Brazil's international trade strategies derived from this treaty.

The fourth section will focus on the education of the elite of Brazil's IP lawyers, also discussing the consequences of education related problems on Brazil's development. What international IP lawyers can learn from the experience of international trade lawyers will be featured in this section, explaining how international trade lawyers complete their international training outside of Brazilian law schools. Thus, capacity building programs that have been created to

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47. See Oliveira & Ramos, *supra* note 36 at 10; Glezer et al., *supra* note 18; Robert W. Gomulkiewicz, *Intellectual Property, Innovation, and the Future: Toward a Better Model for Educating Leaders in Intellectual Property Law*, 64 S.M.U. L. REV. 1161 (2011); Stephen C. Hicks, *Global Alternatives in Legal Education for a Global Legal Profession*, 3 PARALLAX: J. INT'L PERSPECTIVES 47 (2006).

48. See Oliveira & Ramos, *supra* note 36 at 10.

49. See Gomulkiewicz, *supra* note 47; and Hicks, *supra* note 47.

50. *Id.*

enhance Brazilian international trade lawyers' skills will be summarized, and a comparison with IP lawyers will be made. For further details on the methodology, please refer to Appendix A.

Finally, the conclusion will discuss how further research can benefit from this study. Furthermore, it will call for the establishment of an agenda to provide better training to IP lawyers in Brazil, which can draw upon what has been found regarding international trade lawyers.

## II. LEGAL EDUCATION IN BRAZIL: AN OVERVIEW

Access to education at all levels has been a longstanding problem in Brazil.<sup>51</sup> The complications begin before admissions to college. Namely, the needy struggle to register their children in public schools.<sup>52</sup> Even when they succeed in doing this, these educational organizations do not provide an appropriate preparation for students to pursue a university degree—mainly because of the lack of resources and qualified teachers, which leads many poor students to leave the regular educational track.<sup>53</sup> Those who persist in spite of all the hurdles need to compete for a place in a university with those who have had the opportunity to attend a private school, which usually offers better support and training than the public schools.

The competition among students of public and private schools becomes particularly difficult when poor students seek admissions into a public university, because public higher education is the main (and sometimes the only) option for those who come from public schools. Therefore, the access to higher education for poor people

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51. See THOMAS E. SKIDMORE, *BRAZIL: FIVE CENTURIES OF CHANGE* (Oxford Univ. Press 1999).

52. See FGV/IBRE Centro de Políticas Sociais, *Tempo de Permanência na Escola*, Marcelo Cortês Neri coord. (2009); FGV/IBRE Centro de Políticas Sociais, *O Tempo de Permanência na Escola e as Motivações dos Sem-Escola*, Marcelo Cortês Neri coord. (2009). Although these works have similar findings, they shed light on different reasons for dropout.

53. *Id.*

in Brazil is extremely challenging, which is worsened when one seeks elite degrees such as law.

Law schools have been considered the elite of higher education in Brazil since the Portuguese empire (1500-1822).<sup>54</sup> Due to the inheritance of Portugal's social norms, Brazilian society was extremely unequal, and only members of the highest social strata had access to legal education.<sup>55</sup> In addition, higher education was not a priority for the crown, and the education of the elites living in Brazil was concentrated in Europe for several years.<sup>56</sup> In fact, the first Brazilian law schools were founded only in 1827, when Brazil was already an independent country.<sup>57</sup> Two schools were established in that year, one in São Paulo and another one in Recife (on the Brazilian Southeast and Northeast, respectively).<sup>58</sup>

Since then, there has been an increase in the number of law schools in the country,<sup>59</sup> yet not changing the fact that a law degree remains a status symbol and those who earn it are usually in the upper social classes.<sup>60</sup> The growth in the number of law schools generated a stratification of the legal careers, a phenomenon that worsened due to the fact that the majority of law schools in Brazil are of low-quality.<sup>61</sup>

Drawing upon the government's Census on Higher Education, a recent study authored by a prestigious Brazilian university—São Paulo Law School of Fundação Getulio Vargas (FGV Direito SP)—reveals the quantitative aspects of law schools and law professors in

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54. See Joaquim Falcão, *Lawyers in Brazil* in *LAWYERS IN SOCIETY: THE CIVIL LAW WORLD* 400 (Richard L. Abel & Phillip S. C. Lewis eds., 1988) (describing the growth of law schools and the characteristics of legal careers in Brazil).

55. *Id.*

56. See Frederico de Almeida, *A Nobreza Togada: As Elites Jurídicas e a Política da Justiça no Brasil* (2010) (unpublished Ph.D. dissertation) (on file with the author) (discussing political aspects of having lawyers as members of the Brazilian elite).

57. *Id.* at 97.

58. *Id.*

59. *Id.* at 90-91. See also Falcão, *supra* note 54.

60. See Falcão, *supra* note 54; and Almeida, *supra* note 54.

61. See Falcão, *supra* note 54.

Brazil: there were 1,157 law schools and 40,828 law faculty in Brazil in 2012.<sup>62</sup> Although Brazil has traditionally promoted its public universities, this has not been the case for legal education. Looking at the 1,157 law schools that were operating in 2012, 84% were private and only 16% were public.<sup>63</sup> Those numbers denote that private universities have been the main players in expanding the number of law schools in Brazil.

Even though there are more private than public law schools in Brazil, governmental universities still hold the tradition of being, in general, more respected than private schools.<sup>64</sup> Two reasons explain this perception by the public opinion. First, the Ministry of Education (MEC) evaluates the performance of each university in Brazil with a grade. This evaluation depends upon the performance attained by the universities' students in a national examination named *Exame Nacional de Desempenho de Estudantes* [National Exam on Students Performance]<sup>65</sup> (ENADE). Secondly, Brazilians consider the bar exam pass rates of all law schools.<sup>66</sup> In the end, public universities have usually fared better in both assessments.<sup>67</sup>

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62. See JOSÉ GARCEZ GHIRARDI ET AL., OBSERVATORIO DO ENSINO DE DIREITO at 18, 28 (2013). However, one professor may teach in more than one law school and be counted twice for census purposes. In addition, a law school may have two campuses in different cities and they will be considered two law schools for the census. See Jayanth K. Krishnan & Vitor M. Dias, *The Aspiring and Globalizing Graduate Law Student: A Comment on a Lazarus-Black and Globokar LL.M. Study*, 22 IND. J. GLOBAL LEGAL STUD. 81, 90 (2015).

63. *Id.* at 18.

64. See Falcão, *supra* note 54. See also *Alunos de Públicas Têm Melhores Notas no Exame da OAB*, CONSULTOR JURÍDICO, Apr. 2013, <http://www.conjur.com.br/2013-abr-26/universidades-publicas-melhor-indice-aprovacao-exame-oab> (last visited Aug. 1, 2015) [hereinafter *Alunos de Públicas Têm Melhores Notas*].

65. Translated by the author.

66. Although the passing rate in the bar exam is an important aspect to the reputation of a Brazilian law school, it is not an official measure of quality considered by the government when it decides whether a law school shall exist or not.

67. See *Alunos de Públicas Têm Melhores Notas*, *supra* note 64; and Fundação Getúlio Vargas, *Exame De Ordem Em Numeros* (2014), [http://fgvprojetos.fgv.br/sites/fgvprojetos.fgv.br/files/relatorio\\_2\\_edicao\\_final.pdf](http://fgvprojetos.fgv.br/sites/fgvprojetos.fgv.br/files/relatorio_2_edicao_final.pdf) (last visited Aug. 1, 2015).

Most recently, the MEC and the *Ordem dos Advogados do Brasil* (OAB) [Brazilian Bar Association] have heatedly debated the quality of legal education. These two organizations do not always agree on the meaning of a good legal education. However, it is undeniable that Brazilian students who intend on attending law school care about what both the MEC and the OAB have to say about a university. For this reason, it is important to describe how the law curriculum is organized in Brazil. It is also essential to clarify the role that organizations like the MEC and the OAB play in Brazilian legal education in order to assess elite law schools.<sup>68</sup>

#### A. *Shedding Light on the Law School Curriculum*

In Brazil, education is a constitutional right to be provided by public and private organizations.<sup>69</sup> The *Lei de Diretrizes e Bases da Educação* (LDB) [Guidelines for Education Act], enacted in 1996, establishes the parameters that universities shall follow.<sup>70</sup> The main objectives of higher education in Brazil are: stimulating culture and the development of science; educating professionals of several fields to engage in the development of the Brazilian society; encouraging research and development (R&D); strengthening of traditional knowledge; establishing a permanent agenda of cultural development; concreting knowledge into development of the society; and promoting R&D beyond the university boundaries.<sup>71</sup> In addition to the LDB, there are other rules that regulate specific requirements for universities' degrees, including curriculum.

Historically, Acts 4,024/1961 and 5,540/1968 were the norms that regulated the higher education curriculum.<sup>72</sup> According to these

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68. See generally Adriana Ancona de Faria, *Exame de Ordem Não Serve para Comparar as Escolas*, CONSULTOR JURÍDICO, Jul. 14, 2011, <http://www.conjur.com.falta-indice-consistente-exame-ordem> (last visited Mar 14, 2016).

69. See Brazilian Constitution, 1988, arts. 204-205.

70. See Brazilian Lei de Diretrizes e Bases da Educação, Act No. 9,394/1996.

71. *Id.* at art. 43, I-VII.

72. See Carolina Ramazzina Van Moorsel, *O Ensino do Direito e o curso de Direito no Brasil: um panorama literário e regulatório* 44 (completion of course paper) (on file with the author).



norms, universities and their law schools were expected to follow a strict curriculum model. These standards required that particular courses were taught by law schools. Also, the number of credit-hours assigned to each courses depended upon regulatory permission. Under this model, the law school curriculum was “frozen,”<sup>73</sup> because law schools did not have the freedom to put emphasis on particular courses, programs, and research agendas.<sup>74</sup> Thus, with respect to curriculum, there was virtually no difference between Brazilian law schools. Yet, students who attended prestigious universities were more likely to improve their social networks beyond the classroom. This educational policy resulted in professional opportunities that related much more to personal influence than merits.<sup>75</sup>

After the Constitution of 1988 and the LDB establishing the general framework under which universities should be organized, specific regulation of law schools has been implemented. Since 1996 with the LDB, there has been a movement to make the law school curriculum more flexible. The intent is for universities to start adjusting their courses to regional and international aspects. For example, law schools located in the Brazilian Amazon region would be permitted to focus on issues related to environmental law and traditional knowledge, while universities in São Paulo and Rio de Janeiro would be allowed to emphasize international business transactions, securities regulation, foreign investment, and vice-versa. The law school curriculum would start to be organized under a less strict framework, needing to follow guidelines, as opposed to mandatory courses imposed by the government.<sup>76</sup>

The debate on the flexibility of the law school curriculum has garnered the attention of different players, particularly the MEC and

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73. *Id.*

74. *Id.*

75. See Falcão, *supra* note 54; and Trubek, *supra* note 8.

76. See Van Moorsel, *supra* note 72.

the OAB.<sup>77</sup> Whether law schools shall have more or less freedom to organize their curriculum has been the main point of contention between interest groups and policy makers.<sup>78</sup> On the one hand, some advocates believe that law school curriculums should be exhaustively defined by the regulators,<sup>79</sup> which would establish required courses and give less discretion for law schools on what disciplines should be offered.<sup>80</sup> On the other hand, there were those who urged for more innovation in the curriculum and teaching methods in order to update the Brazilian legal education to regional and international changes.<sup>81</sup> After persisting for a long time, the regulatory framework in favor of more flexibility to the law school curriculum won, and it is important to understand the changes that have been introduced since then.

Although the debate on the changes to universities' curricula dates back to the 1990s, it was only in 2004 that law schools were specifically regulated, when the MEC passed the *Resolução MEC 9/2004* [resolution]. This *Resolução* confirmed the government's intent to empower law schools by permitting them to innovate in their curriculum by introducing courses and methodologies that they understood more suitable for their pedagogical project. This change counted on the support of the Bar, albeit different points of views existed.<sup>82</sup>

The aim was to bring a greater degree of flexibility to the law school curriculum. Unlike under the "frozen"<sup>83</sup> program of study, law schools now must inform the regulators of the courses that they offer by specifying if they are elective or mandatory classes. As a result, "it does not exist a mandatory curriculum [anymore], but law

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77. *Id.* See also Luciana Gross Cunha et al., *Who is the Law Professor in Brazil, and What Does It Tell About the Brazilian Legal Education*, in Third East Asian Law & Society Conference (2013).

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. See Van Moorsel, *supra* note 72.

83. *Id.* at 44

schools shall justify and detail which program of study will be offered [to the students].”<sup>84</sup>

According to Brazil’s current regulatory framework, law schools shall educate law students under a three-tier system, consisting in a “core program,” a “professional axis,” and a “traineeship.” The core program aims to prepare students to have a reflexive thought about law and its relationship with other sciences such as political science, sociology, economics, and anthropology, just to name a few. The professional axis follows the Brazilian civil law tradition, with courses such as civil law, civil procedure, criminal law, criminal procedure, tax law, constitutional law, among others. Lastly, the “traineeship” focuses on preparing students for the real world. Those interested in practicing law participate in internship activities. Those aiming for an academic career focus on scholarly work and advanced research. This three-tier model being a guideline, law schools may choose the tier on which they want to place more emphasis to be able to imprint their mark on educating future lawyers, law professors, or judges.<sup>85</sup>

Although reforms have been pursued, some scholars have debated remaining problems.<sup>86</sup> One might ask whether law schools have taken advantage of having more flexibility to implement their own programs of study and provide a better legal education to their students. The overall opinion to date is that little progress has been achieved.<sup>87</sup> Most Brazilian law schools continue to educate students as they have always done, regardless of the improvements to the

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84. *Id.* at 50 (translated by the author).

85. *Id.*

86. *See generally* DIREITOS HUMANOS, DIREITOS SOCIAIS E JUSTIÇA (José Eduardo Faria ed., Malheiros Editores 2000); Trubek, *supra* note 8; AVENTURA E LEGADO NO ENSINO JURÍDICO, *supra* note 45.

87. *Id.* *See also* Krishnan & Dias, *supra* note 62; JOSÉ GARCEZ GHIRARDI, O INSTANTE DO ENCONTRO QUESTÕES FUNDAMENTAIS PARA O ENSINO JURÍDICO (2012); Trubek, *supra* note 8; AVENTURA E LEGADO NO ENSINO JURÍDICO, *supra* note 45.

curriculum from which they could be benefiting.<sup>88</sup> Since law professors are responsible for teaching the curriculum in the classroom, it is equally important to understand their situation within this context.

*B. Understanding Some Problems of Legal Education in Brazil*

As noted above, Brazil has 40,828 law faculty and the vast majority of law schools were private in 2012.<sup>89</sup> Despite recent developments in the law school curriculum, little attention has been given to law professors, who are instrumental to the success of this educational policy. Likewise, there are no empirical analyses of the methods used to teach law in Brazil, even though scholars have discussed the problems of the Brazilian legal education and how traditional methods have been outdated for a long time.<sup>90</sup>

Drawing upon the data organized by FGV Direito SP, it is possible to analyze the general profile of a law professor in Brazil and draw some conclusions, focusing on three aspects: the type of faculty appointment, the educational level, and whether professors work in a public or private university. From there, one may have a general understanding of what type of education a law professor in Brazil has, how engaged she is in her teaching activities, and how the profile of law professors varies whether working in public or private universities.

Because law is an undergraduate degree in Brazil, those intending to pursue an academic career typically move on to graduate school, to gain needed research and teaching skills. It also gives them a substantial background in a specific field of law that one would be interested in teaching. And it is not uncommon for law

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88. See DIREITOS HUMANOS, DIREITOS SOCIAIS E JUSTIÇA, *supra* note 86; Krishnan & Dias, *supra* note 62; and GHIRARDI, *supra* note 87.

89. See GHIRARDI ET AL., *supra* note 62, at 28.

90. See generally Krishnan & Dias, *supra* note 62; Trubek, *supra* note 8; and DIREITOS HUMANOS, DIREITOS SOCIAIS E JUSTIÇA, *supra* note 86.

professors to hold advanced degrees in either law or in another field, such as economics, sociology, and political science.

Few universities offer Master and Doctoral degrees in law.<sup>91</sup> As of 2012, there were, respectively, 58 Master's and 24 Ph.D. programs in law available in Brazil.<sup>92</sup> Numbers may seem small, but the cohort of admitted students in each program varies depending upon the size of the university and the number of faculty available to teach at the graduate level. Consequently, there is a significant group of law professors who hold Master and Doctoral degrees in Brazil. In 2012, 18,489 professors held Master's degrees and 9,989 held Ph.D. degrees.<sup>93</sup> From the sample of 40,828 law professors, approximately 70% of them attended graduate school, 45% attained the Master level, and 25% earned a Doctoral degree.<sup>94</sup>

These numbers may look good, but what they represent in terms of who is teaching law in Brazil does not necessarily support that assumption. Among all the professors teaching in public law schools, 35% hold a Ph.D.,<sup>95</sup> whereas only 22% of the professors teaching in private schools are doctors.<sup>96</sup> In sum, at both private and public law schools in Brazil, law students are being educated by faculty that are probably in the process of completing their graduate studies and have not reached the doctoral level. Accordingly, the number of highly-educated law professors in Brazil is relatively low, which may result in deficiencies related to teaching methods and research skills to prepare their students properly.

There is another characteristic that may worsen this situation: the types of faculty appointment. Although it is not possible to measure the degree to which a law professor dedicates herself to teach,

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91. It is not uncommon for Brazilian lawyers to pursue an executive education degree after finishing law school, but, in Brazil, this is seen as being more suitable for lawyers seeking to become legal practitioners.

92. See GHIRARDI ET AL., *supra* note 62, at 26.

93. *Id.* at 34.

94. *Id.*

95. *Id.*

96. *Id.* at 35.

some inferences can be made from the data. According to the Brazilian Census on Higher Education,<sup>97</sup> there are four different types of faculty appointment in Brazil: full professor with an exclusive appointment; full professor without an exclusive appointment; adjunct professor; and hourly-paid professor. Similar to the higher education system in the United States, full professors affiliated with one specific department (or school) tend to be more engaged than professors who have multiple appointments within and outside academia.

Although some improvement in the quality of life for academics has been achieved, the overall situation of university professors remains difficult in Brazil.<sup>98</sup> The salaries paid to tenured, full professors, are not as high as compared to other professions. Also, adjunct professors and hourly-hired professors are paid even less.<sup>99</sup> The infrastructure for research is poor and faculty lack the funding to attend conferences and do fieldwork.<sup>100</sup> For these reasons, the academic career is not as attractive as it is in other countries, especially in the developed world.

With that said, adjunct professors and hourly-paid professors are the most common types of faculty appointment that exist in Brazil.<sup>101</sup> Namely, 66% of all law professors are hired as adjunct and hourly-paid faculty,<sup>102</sup> and no more than 6% are full professors with appointment at only one university. 28% of the faculty who are full professors have appointments at other universities.<sup>103</sup> This data supports the argument that the majority of law professors have a primary occupation in addition to teaching law, and this may undermine their academic career in a significant manner. As a result, law

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97. *Id.*

98. See Rogério Rissato, *Baixa Remuneração de Professor Prejudica Ensino*, CONSULTOR JURÍDICO, Apr. 2011, <http://www.conjur.com.br/2011-abr-02/baixo-salario-professor-contribui-decadencia-curso-direito> (last visited Jul. 25, 2015).

99. *Id.*

100. *Id.*

101. See GHIRARDI ET AL., *supra* note 62 at 79-90.

102. *Id.* at 79.

103. *Id.*

professors' commitment to thinking on new methods, updating syllabi, and researching is compromised due to their many obligations beyond teaching.<sup>104</sup>

The situation is even worse regarding private law schools. Whereas public universities rely on 30% of full professors with exclusive appointments,<sup>105</sup> private law schools count on only 2%.<sup>106</sup> Furthermore, adjunct and hourly-paid professors represent 71% of all law professors working for private universities,<sup>107</sup> whereas they are 38% of all scholars working at public law schools.<sup>108</sup> There is an important caveat, however, regarding these numbers. There is a small group of elite law schools that differ from these patterns substantially, and they have been important players in hiring faculty with strong research backgrounds, such as it has been noted by David Trubek when he analyzes the FGV law schools.<sup>109</sup> There is, thus, a difference between the hiring parameters of private and public law schools in Brazil, where the majority of universities seem to prioritize teaching over research.

At last, a quick assessment of where law professors work is also relevant to understand where Brazilian elite lawyers are being educated. Because the majority of law schools are private, it is expected that they have more positions available for legal scholars.<sup>110</sup> Indeed, 83% of legal academic positions are in private universities.<sup>111</sup> This percentage raises some concerns regarding what these professors need to face while teaching at private universities. These schools hold the bargaining power when hiring and retaining law professors. This leaves law faculty without options to negotiate their salaries

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104. See generally DIREITOS HUMANOS, DIREITOS SOCIAIS E JUSTIÇA, *supra* note 86.

105. See GHIRARDI ET AL., *supra* note 62, at 79.

106. *Id.* at 80.

107. *Id.* at 80.

108. *Id.* at 79.

109. Trubek, *supra* note 8.

110. See GHIRARDI ET AL., *supra* note 62, at 24.

111. *Id.*

and conditions for research. Consequently, universities tend to recruit adjunct and hourly-paid professors that have not completed their graduate studies.<sup>112</sup>

If some progress has been achieved regarding curriculum, this does not seem to be the case with respect to law faculty's working conditions. These issues likely influence the performance of both students and universities, as discussed below.

*C. Legal Education Reforms, the Role of Law Professors, and the Performance of Private and Public Law Schools*

Some scholars and lawyers argue that the increase in the number of law schools and their faculty has exacerbated the problem of legal education in Brazil.<sup>113</sup> Considering quantitative parameters, some characteristics are weighted in the assessment of law schools. In 2004, a federal law established the criteria under which universities and their courses are assessed and graded:<sup>114</sup> teaching; research; agreements between universities; students' performance (in national exams); infrastructure and management; and faculty.<sup>115</sup> All these criteria shall be observed holistically.<sup>116</sup> Besides the official rules of evaluation established by the government, social norms also account for the reputation of law schools. For example, the passing rates for the bar exam has an impact on the status of a law school.

Indeed, in Brazil, the MEC and the OAB are relevant in determining whether a law school is reputable or not. Moreover, conventional wisdom and perception toward which schools are considered elite or not also plays an important role in the public perception of Brazilian law schools.<sup>117</sup> Passing rates for the bar exam are relevant in shaping people's opinion. Bearing this in mind, in spite of the big

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112. See Rissato, *supra* note 98.

113. See generally Falcão, *supra* note 54; and DIREITOS HUMANOS, DIREITOS SOCIAIS E JUSTIÇA, *supra* note 86.

114. See Brazilian Lei do Sistema Nacional de Avaliação da Educação Superior, Act No. 10,861/2004.

115. *Id.*

116. *Id.*

117. See Ancona de Faria, *supra* note 68.



debate that exists in Brazil that only the MEC is responsible for grading and regulating higher education, there are practical issues related to how the OAB grades a law school.<sup>118</sup> This evaluation is even more important when students who attend private law schools usually attain lower grades on the government's national exam (ENADE) and when they fail the bar exam.<sup>119</sup>

Currently, the passing rate for the bar exam is below 20%.<sup>120</sup> The existing debate is focused on whether there are problems in the way the exam is prepared and whether law graduates are duly trained to become legal practitioners. This work focuses on the latter question, specifically regarding the education of IP lawyers. Thus, one particular type of assessment of law schools will be used to refine this study's focus on elite law schools: the *Selo OAB Recomenda*, which is a seal granted by the Bar to the law schools that meet specific requirements set forth by the MEC and the OAB.

The *OAB Recomenda* has existed since 2001. However, it was only since 2010 that its methodology was adapted to follow MEC's standards of evaluation of higher education. In 2010, the OAB's Federal Council passed *Portaria* no. 52/2010, which is a regulation that aims to complement the ENADE in the evaluation of law schools.<sup>121</sup> According to the Bar, the *OAB Recomenda* "is a symbolic program ..., and works as a diagnosis, not a ranking, ... that entrusts credibility to law schools."<sup>122</sup> Thus, as it has been argued

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118. It is not uncommon for the legal media in Brazil to report statements issued by the Brazilian Bar with respect to its views on legal education in general and law schools in particular. These online publications include *Consultor Jurídico*, *Migalhas*, and *Última Instância*, and they have several publications regarding these matters.

119. See *Alunos de Públicas Têm Melhores Notas*, *supra* note 64.

120. See Giselle Souza, *Pesquisa da FGV Mostra Perfil dos Candidatos do Exame de Ordem*, *CONSULTOR JURÍDICO*, May 2015, <http://www.conjur.com.br/2015-mai-29/pesquisa-fgv-mostra-perfil-candidatos-exame-ordem> (last visited Aug. 1 2015).

121. See Brazilian Bar Association, *Portaria* No. 52/2010-CFOAB).

122. See *RECOMENDA: INDICADOR DE EDUCAÇÃO JURÍDICA DE QUALIDADE* (4th ed., OAB 2012), at 11 [hereinafter *OAB Recomenda*]. The Author translated this excerpt from: "O Selo OAB Recomenda configura-se como um programa simbólico ... que, longe de ser um ranking ao exercer mais um diagnóstico ... ,

above about people's perception of Brazilian law schools, the OAB attempted to add an empirical component upon which one can rely on and decide the reputation of a law school.

With respect to the *OAB Recomenda*'s methodology, it is a triennial report that is built upon statistical analysis of two main variables: the law schools' grades attained in ENADE and the passing rate in the bar exam. Its sample includes the most recent ENADE exam(s) results and the three most recent bar exam results available. Regarding the bar exam variable, the OAB only includes law schools that had at least twenty students who sat for each of the three most recent bar exams. By using this methodology, the OAB assessed 790 law schools in the last edition of the *OAB Recomenda* report.<sup>123</sup> From 790 observations, only 89 received the *Selo OAB Recomenda*, which represents 7.4% of the OAB's sample.<sup>124</sup> According to the Bar, these are the elite of legal education in Brazil.

Because this work is focused on elite law schools and education in IP, this study will now analyze the curriculum of the 89 law schools recommended by the OAB. This data is relevant to understand where IP lawyers are being educated in Brazil. Although quantitative data for all law schools in Brazil is absent, it can be presumed that, if elite law schools are not properly training lawyers in IP, other universities with less human and financial resources are in an equivalent or an even worse situation.

#### *D. Intellectual Property at Elite Brazilian Law Schools*

Law schools have been granted authorization to organize their curriculum. Moreover, they have found little restriction to hiring professors without advanced degrees. After having analyzed the overall situation of law schools and law professors in Brazil, it is expected that law schools have maintained old teaching techniques

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incorpora a concepção de ... confiança no Direito transitam obrigatoriamente pela credibilidade e qualidade dos cursos jurídicos.”

123. See *OAB Recomenda*, *supra* note 122, at 36.

124. *Id.* at 20.

and outdated curriculum, leaving outside their scope disciplines unrelated to everyday legal practice. This seems to be the case with IP.

By focusing on elite law schools, the *Selo OAB Recomenda* reveals an interesting situation regarding the law schools that are reputable as having law students that are faring well in both the ENADE and bar exam. These schools should be at the forefront of the Brazilian legal education. For this reason, the 89 law schools that received the seal should be fostering innovation in legal education and preparing Brazilian lawyers to become global legal practitioners in some fields. However, this has not been the case with IP.

Different works have highlighted the relevance of IP for a country's socioeconomic development.<sup>125</sup> Experienced lawyers have declared intellectual property as being an extremely complex field; thus, highly-skilled lawyers would be necessary to work in this area.<sup>126</sup> Indeed, the general counsel offices of multinational companies in Brazil have reinforced this perception.<sup>127</sup> Researchers have noted that: “[i]n general, legal departments outsource ... specific and specialized matters (criminal and intellectual property).”<sup>128</sup> Therefore, since IP is considered a complex field, elite lawyers should be receiving an appropriate education while attending law school so that they could be more competitive on the legal market.

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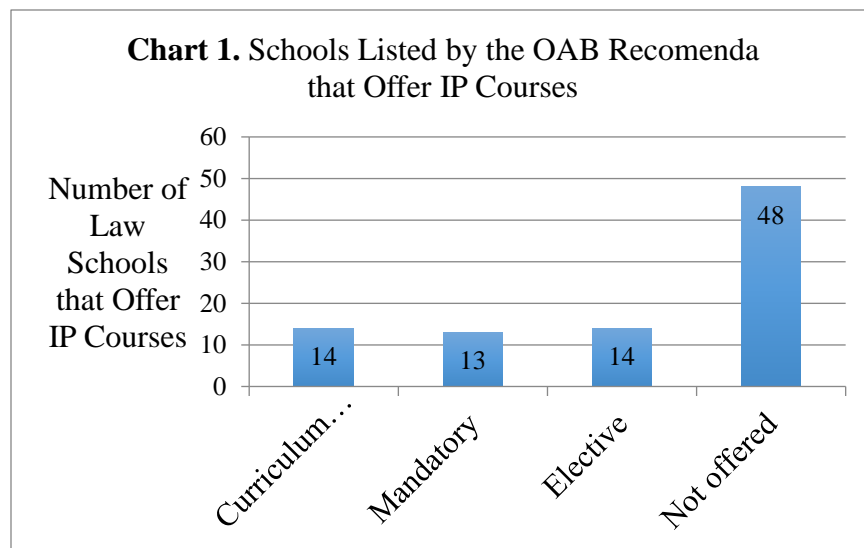
125. See generally GLAUCO ARBIX, *INOVAR OU INOVAR A INDUSTRIA BRASILEIRA ENTRE O PASSADO E O FUTURO* (2007); and GOLDSTEIN & TRIMBLE, *supra* note 19; see generally Dreyfuss, *supra* note 19; Anga, *supra* note 19; PRIMO BRAGA ET AL., *supra* note 19; Gould & Gruben, *supra* note 19; Chang, *supra* note 19.

126. See Oliveira & Ramos, *supra* note 36.

127. *Id.*

128. *Id.* at 31.

In order to understand if lawyers have been trained in IP by the elite law schools in Brazil, the curricula of all 89 organizations listed in the last *OAB Recomenda* report were researched. Fourteen of them do not provide information about their curriculum. The curriculum of the remaining 75 was thoroughly researched to find out whether IP was offered. When law schools have IP in their curriculum, the survey verifies whether IP is a mandatory or an elective course. The results are summarized in the chart below.



Source: Prepared by the author based upon the website of each of the 89 law schools listed in the *OAB Recomenda*.

The findings are impressive. Forty-eight schools out of eighty-nine do not have IP courses, not even specific IP related matters such as copyrights, trademarks, patents, just to name a few. Fifty-four percent of these elite schools are not preparing lawyers to work with IP in their future life. As a result, if law graduates want to seek a career as IP lawyers upon graduation, it is most likely that they will need to be prepared elsewhere than at a law school in Brazil.

With respect to IP being an elective or a mandatory course, it is interesting to note that the numbers of the two categories are similar.

Since IP is not part of everyday lawyering in Brazil and is considered a complex field, it is expected that law schools let the students free to decide whether studying IP or not. The legal market in IP is relatively small, and issues related to IP are usually decided in regions that have been impacted more strongly by globalization.<sup>129</sup> Law schools, in a large part of the Brazilian territory, may or may not have IP as a concern or as a demand from the incoming students. However, it is problematic to see that IP has been neglected by slightly more than 50% of a sample of elite schools in an emerging economy as Brazil. In addition to domestic constraints that may affect Brazil's innovation, which stem from the lack of training, this may also leave Brazilian lawyers less competitive on the global market,<sup>130</sup> once there is a global demand of IP services by companies arriving in Brazil or Brazilian companies seeking to go abroad.

In sum, law schools that should be benefiting from the impact of globalization in Brazil and have the flexibility to structure their curriculum seem to neglect IP, at a time when they should be interested in it. Brazilian lawyers may as a consequence have to receive training in IP outside law school in Brazil.

Despite these shortcomings in legal education, relevant reforms have been addressed to Brazil's IP laws during the 1990s and 2000s, and Brazilian lawyers have fared relatively well on the global IP market. Furthermore, Brazil has been active in litigating IP claims in the international arena, as it will be analyzed in the following sections.

### III. INTELLECTUAL PROPERTY: A SURVEY OF THE BRAZILIAN LEGISLATION

Brazil has long held the tradition of being an active country in protecting IP rights from imitation or infringement, domestically

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129. See Santos, *supra* note 17; Badin, *supra* note 17; Salama & Benoliel, *supra* note 19, at 664-665.

130. On the Brazilian case with respect to competitiveness, see Salama & Benoliel, *supra* note 19; Benoliel & Salama, *supra* note 19, at 311.

and globally. IP started to be secured as early as 1809, when D. João VI, king of Portugal, enacted a patent legislation valid for the crown and its colonies—this rule was “the fourth of its type in the world at that time.”<sup>131</sup> As an independent country, Brazil has maintained this custom. Domestically, especially after the enactment of the Constitution of 1988, significant changes have been made to protect IP rights in Brazil. Internationally, Brazil has signed international treaties on these matters and engaged in transnational disputes at the WTO.<sup>132</sup>

For the reasons mentioned above, this section will focus on a contemporary analysis of Brazil's IP norms. Specifically, the Constitution of 1988 and the rules enacted after its promulgation will be assessed. In addition, although historical international treaties will be briefly described, the analytical emphasis will be put on the TRIPS Agreement, the WTO, and the World Intellectual Property Organization (WIPO) regimes and their effects on Brazil's IP practice.

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131. See Krishnan, Dias & Pence, *supra* note 27, at 14. See also DENIS BORGES BARBOSA, *UMA INTRODUÇÃO À PROPRIEDADE INTELECTUAL* (2010) [hereinafter BARBOSA, *INTRODUÇÃO*].

132. Several authors have discussed how international treaties concerning IP rights have been unfair with emerging economies. After the establishment of the WTO, which is responsible for the enforcement of the TRIPS Agreement, Brazil and other developing countries organized different strategies to resist and fight for fairer terms of international trade of IP. Besides this introductory note, this situation will be thoroughly discussed below. See generally GOLDSTREIN & TRIMBLE, *supra* note 19; Benoliel & Salama, *supra* note 19; Salama & Benoliel, *supra* note 19; Donoso, *supra* note 22; Rochelle C. Dreyfuss, *The Role of India, China, Brazil and Other Emerging Economies in Establishing Access Norms for Intellectual Property and Intellectual Property Lawmaking* (New York Law School, Public Law & Legal Theory Research Paper No. 09-53, 2009); Robert Weissman, *A Long, Strange TRIPS: The Pharmaceutical Industry Drive to Harmonize Global Intellectual Property Rules, and the Remaining WTO Legal Alternatives Available to Third World Countries*, 17 U. PA. J. INT'L ECON. L. 1079, (1996); CARLOS CORREA, *INTELLECTUAL PROPERTY RIGHTS, THE WTO AND DEVELOPING COUNTRIES: THE TRIPS AGREEMENT AND POLICY OPTIONS* (2000).

Similar to what exists in the United States,<sup>133</sup> intellectual property rights are described in the Brazilian Constitution. Copyrights,<sup>134</sup> patents, and trademarks are expressly written in the Constitution. To be sure, authors and their heirs are granted the rights of ownership of their work, which can be publicized and reproduced in accordance with specific legislation.<sup>135</sup> Furthermore, inventors and trademark owners hold similar rights over their inventions and marks, respectively.<sup>136</sup> The 1988 Constitution, therefore, reinforced Brazil's tradition of having IP rights among the country's most-valued rules, and it also provided the legal framework under which legal reforms occurred over the following years in Brazil.

International and domestic political and economic environments, along with the 1988 Constitution, facilitated the changes to IP protection in Brazil.<sup>137</sup> Namely, the establishment of the WTO in 1995 and the signing of the TRIPS Agreement in 1994 strengthened the movement toward legal reforms in Brazil, which resulted in legal changes to its main IP norms.<sup>138</sup> Issues like duration, rights of ownership, and transfer of immaterial rights, among others, have been

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133. See Sean M. O'Connor, *The Overlooked French Influence on the Intellectual Property Clause*, 82 U. CHI. L. REV. 733, 830 (2015) (reflecting on the "IP clause" of the U.S. Constitution, specifically, its article I, § 8, cl. 8).

134. This work will use the word copyrights when referring to author's rights, even though differences exist between these two concepts. After considering the American readership of this work, this choice seems more appropriate. On the historical aspects of the distinctions between the French oriented author's rights vis-à-vis the U.S. oriented copyrights, see generally Jane C. Ginsburg, *Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 TUL. L. REV. 991, 1032 (1989).

135. See Brazilian Constitution, art. 5, XVII and XVIII, a, b.

136. See Brazilian Constitution, art. 5, XXIX.

137. See generally BARBOSA, INTRODUÇÃO, *supra* note 131; Denis Borges Barbosa, *A Legislação De Propriedade Intelectual em Vigor* (2002), <http://egov.ufsc.br/portal/sites/default/files/anexos/27580-27590-1-PB.pdf/> (last visited Aug. 1 2015) [hereinafter Barbosa, *Legislação*] (commenting on Brazil's IP legislation); Salama & Benoliel, *supra* note 19, at 642-43.

138. See BARBOSA, INTRODUÇÃO, *supra* note 131; Barbosa, *Legislação*, *supra* note 137, at 3-6; Salama & Benoliel, *supra* note 19, at 642-45.

changed as a means to fostering Brazil's technological, socioeconomic, and cultural development.<sup>139</sup> Brazil, which had once been a closed market for foreign investment, companies, and goods, is now an open economy.<sup>140</sup> Reforming IP rights is, consequently, instrumental in ensuring the functioning of a free market economy in Brazil.<sup>141</sup>

With respect to specific norms that regulate IP practice in Brazil today, there are copyrights, patents and trademarks, industrial secret, and software acts. There are several different manners to assess these legal mechanisms. Bearing this in mind, this section will follow the analytical organization used by Paul Goldstein and Marketa Trimble in their famous textbook, "International Intellectual Property Law: Cases and Materials." Specifically, Brazilian IP law requirements for protection, duration, remedies and prosecution, and rights of ownership will be summarized. These characteristics will provide important background for the understanding of Brazil's engagement in international IP issues.

#### A. Patents

In Brazil, Act 9,279/96 regulates inventions and utility models that shall be patented and the respective rights that inventors shall be granted. In order to be patented, an invention shall "satisf[y] the requirements of novelty, inventive step, and industrial application."<sup>142</sup> Furthermore, that same norm establishes the first-to-file system as the valid registration proceeding in Brazil.<sup>143</sup> That is, starting from the date of the filing with the INPI [the Brazilian patent

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139. See BARBOSA, INTRODUÇÃO, *supra* note 131; Barbosa, *Legislação*, *supra* note 137, at 3-6; Salama & Benoliel, *supra* note 19, at 642-45.

140. See BARBOSA, INTRODUÇÃO, *supra* note 131; Barbosa, *Legislação*, *supra* note 137; Krishnan, Dias & Pence, *supra* note 27; Salama & Benoliel, *supra* note 19; Santos, *supra* note 17; and HELOISA CONCEIÇÃO MACHADO DA SILVA, DA SUBSTITUIÇÃO DE IMPORTAÇÕES À SUBSTITUIÇÃO DE EXPORTAÇÕES (2004).

141. See Santos, *supra* note 17; Badin, *supra* note 17; Salama & Benoliel, *supra* note 19, at 642.

142. See Lei de Propriedade Intelectual, Act No. 9,279/1996), art. 8.

143. *Id.* at arts. 16 and 17.



and trademark office], patents are valid for twenty years and utility models for fifteen years. The inventor must register the invention either in Brazil or in any other country that has treaties with Brazil to receive patent protection.<sup>144</sup>

Brazil's legislation describes what cannot be patented. Specifically, Act 9,279/96 states that the following items will not receive patent protection: discoveries; theories and methods (surgical, mathematical, accountants, etc.); abstract works; literary, architectural, and aesthetic works; "computer programs *per se*;" information; gaming rules; and living beings and biological substance found in the nature.<sup>145</sup> In addition, an innovation cannot be part of the state of the art of ongoing scientific or industrial processes related to an invention that is in the process to being patented. Under Brazilian law, in sum, to be eligible to receive a patent, it must be an invention that is innovative or is an improvement.

Once a patent has been granted, a patent holder can license the right to use for a third party interested in "producing, using, offering for sale, selling or importing"<sup>146</sup> a product or a process derived from the patent. There are two types of licenses under Act 9,279/96: the voluntary and the compulsory licenses, and they differ from each other significantly.

When a patent holder (licensee) and a third party (licensor) enter into an agreement on the terms of the license, this is the voluntary license. According to Act 9,279/96, the parties may spontaneously seek the INPI with the license contract ready for registration, or the licensee may request that the INPI offer the patent publically as a means of finding a potential licensor interested in utilizing the patented product or process.<sup>147</sup> In both cases, the license contract must be registered with the INPI to become lawful.<sup>148</sup>

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144. *Id.*

145. *Id.* at art. 10, I et seq.

146. *Id.* at art. 42, I, II.

147. *Id.* at arts. 61-67.

148. *Id.* at art. 62 and art. 62, I.

According to the TRIPS Agreement, a compulsory license is a mechanism by which Brazilian laws limit the rights of ownership of a patent holder. When this occurs, the patent holder is required by the INPI to license the product or process. The INPI is entitled to grant a compulsory license in specific cases, which must comply with the TRIPS Agreement. Namely, a compulsory license shall be enforced when: a patent holder uses the monopoly over the product or process in an abusive manner; there is abuse of economic power; there is a dependency of one patent upon another, and when there is a significant improvement of the dependent patent with respect to the earlier patent; situations of public interest or national emergency occur; and when the employee is a co-holder of the patent with her employer.<sup>149</sup> Furthermore, the request for a compulsory license should describe the license fees and payment methods, as well as its duration. And, most importantly, the petitioner must prove why the compulsory license should be granted.<sup>150</sup>

Bearing that in mind, a patent that does not meet the requirements of Act 9,279/96, or that violates any international IP treaty signed by the Brazilian government will be declared null.<sup>151</sup> In addition, one who claims that a patent is illegal can commence an administrative proceeding with the INPI, which will conduct the investigation and declare whether or not the patent is null.<sup>152</sup>

Moreover, the Brazilian judicial system permits unsatisfied claimants to challenge decisions issued by administrative and regulatory agencies, such as the INPI, in courts. Specifically, the plaintiff will need to argue that the administrative proceeding has failed to comply with the due process of law, thus not issuing a fair decision. Ultimately, Brazilian courts may determine the commencement of a

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149. *Id.* at art. 68 et seq.

150. For all the aspects discussed in this paragraph, see Benoliel & Salama, *supra* note 19, at section 2.2.2.1.; and Salama & Benoliel, *supra* note 19, at section II, b (discussing the Brazilian government's efforts to bargain the terms of the usage and enforcement of compulsory license in Brazil, in compliance with Brazilian law and the TRIPS agreement).

151. *See* Act No. 9,279/96, *supra* note 142, at art. 46.

152. *Id.* at arts. 50-54.

new administrative proceeding on the same matter for further proceedings.<sup>153</sup>

Regarding the territorial aspects of IP enforcement, both the INPI and the Brazilian courts need to apply IP rights from abroad within the Brazilian territory. These rights are granted whenever the patent holder, or the licensor, invokes the patent rights in Brazil, provided that the country of origin of the patented product or process has signed a treaty of which Brazil is also a party.<sup>154</sup>

With that said, in numbers, the number of patent and utility model applications registered with the INPI has increased over the past years. However, it is undeniable that there is a gap between applications submitted by resident and non-resident applicants in Brazil.<sup>155</sup> According to the existing literature, the lack of research in IP in Brazil is one factor that leads to this situation.<sup>156</sup>

Table 1 summarizes the WIPO's data on the directory of patents and utility models in Brazil since 2000. This data reveals how the percentage of applications filed by Brazilian residents has decreased in comparison with the same applications that non-residents have registered. Therefore, although the number of patent applications has increased overall, this has not necessarily resulted in the improvement of research conditions in Brazil.<sup>157</sup> Rather, foreign applicants seem to have capitalized on the weakness of R&D in Brazil, as well as on the economic growth that the country has experienced

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153. *Id.* at art. 49.

154. *See* Barbosa, *Legislação*, *supra* note 137.

155. According to the WIPO, the difference between resident and non-resident is the following: "A resident filing refers to an application filed in the country by its own resident; whereas a non-resident filing refers to the one filed by a foreign applicant." *See* WIPO, Statistical Country Profile: Brazil, [http://www.wipo.int/ipstats/en/statistics/country\\_profile/profile.jsp?code=BR](http://www.wipo.int/ipstats/en/statistics/country_profile/profile.jsp?code=BR) (last visited Aug. 1 2015).

156. *See* Eduardo da Motta e Albuquerque & Paulo Brígido Rocha Macedo, *Concessão de Patentes a Residentes no Brasil: 1990/95*, 26(3) PESQUISA E PLANEJAMENTO ECONÔMICO 483, 496 (1996); Salama & Benoliel, *supra* note 19, at 644; Laforgia et al., *supra* note 19, at 309.

157. *See* Salama & Benoliel, *supra* note 19, at 644; Laforgia et al., *supra* note 19, at 309.

over the last years. As of 2013, Brazil ranked 13<sup>th</sup> in number of patent applications by residents, while it ranked 9<sup>th</sup> in the number of applications by non-residents.

<b>Table 1.</b> Patent Applications in Brazil (2000-2013)			
Year	Resident Applications	Non-resident Applications	Proportion of Resident/Non-Resident Applications (in %)
2000	3,179	14,104	18%
2001	3,439	14,410	19%
2002	3,481	13,204	21%
2003	3,866	12,545	24%
2004	4,044	12,669	24%
2005	4,054	14,444	22%
2006	3,956	15,886	20%
2007	4,194	17,469	19%
2008	4,280	18,890	18%
2009	4,271	18,135	19%
2010	4,228	20,771	17%
2011	4,695	23,954	16%
2012	4,798	25,637	16%
2013	4,959	25,925	16%
Source: Adapted from WIPO statistics database. Prepared by the author.			

Conversely, when the number of applications of utility models is considered, the pattern mentioned above changes. That is, Brazilian residents register more utility models than non-residents, as it is outlined in Table 2 (below). The fragility of the research environment in Brazil explains why the number of utility models registered by residents in Brazil is greater than the number of registers filed by non-residents. Namely, transfer of technology by advanced inventors to developers as well as improvements to patented inventions

occur in places where the conditions for innovation are weak, such as it happens in Brazil.<sup>158</sup>

Year	Resident Applications	Non-Resident Applications	Proportion of Resident/Non-Resident Applications (in %)
2000	3,184	94	97%
2001	3,439	95	97%
2002	3,470	59	98%
2003	3,578	55	98%
2004	3,539	56	98%
2005	3,173	57	98%
2006	3,126	56	98%
2007	3,001	37	99%
2008	3,320	62	98%
2009	3,337	41	99%
2010	2,902	87	97%
2011	2,956	124	96%
2012	2,880	117	96%
2013	2,891	141	95%

Source: Adapted from WIPO statistics database. Prepared by the author.

Finally, it has been possible to visualize how the improvements of Brazil's patents laws that arose from globalization have not led to the strengthening of patent practice in Brazil, in particular, in terms of new patent applications by Brazilian residents.<sup>159</sup> Brazilian patent attorneys who should be qualified to advise and litigate on these matters, in accordance with Brazilian and international laws, lack

158. See Keith E. Maskus, *Intellectual Property Rights and Economic Development*, 32 CASE W. RES. J. INT'L L. 471, 479 (2000); Rod Falvey & Neil Foster, *The Role of Intellectual Property Rights in Technology Transfer and Economic Growth: Theory and Evidence* at 42 (United Nations Industrial Development Organization 2006).

159. See Albuquerque & Macedo, *supra* note 156.

the proper preparation while in law school.<sup>160</sup> Moreover, the environment for research that should prepare engineers, physicians, and other types of inventors is similarly deficient.<sup>161</sup> Therefore, although Brazil has been politically active in liberalizing the country's economy and adapting its local laws to global changes, this has not been followed by the improvement of conditions to flourish patent lawyering in particular and to the development of inventions in general.<sup>162</sup> Indeed, trademarks, which do not need extensive research conditions as patents, have thrived in Brazil while the country experienced significant growth during the 2000s.

### *B. Trademarks*

Act 9,279/96 also regulates the protection of marks in Brazil. Similar to the American model of trademarks protection,<sup>163</sup> the rights of ownership of marks shall be acquired by its use. However, marks' owners are required to register a mark with the trademarks authority—the INPI in Brazil—as a means of having the presumption of ownership. That is, unless otherwise proved by concrete and historical evidence that one mark has been historically used without registration, a trademark owner that registered a mark is presumed to and will have priority over the rights of ownership.<sup>164</sup>

With respect to what shall be registered as a mark, Act 9,279/96 adopts a comparable standard that is used for patents. Specifically, the law broadly defines what shall be registered as a mark: “Any distinctive visually perceivable signs that are not included in legal prohibitions shall be eligible for registration as a mark.”<sup>165</sup> Further-

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160. See generally *supra* section II of this article.

161. See Salama & Benoliel, *supra* note 19, at 665-66, 668-69.

162. *Id.*

163. See Stacey L. Dogan & Mark A. Lemley, *Grounding Trademark Law through Trademark Use*, 92 IOWA L. REV. 1669, 1702 (2007) (discussing new approaches to the issue of “trademark use” given new problems that arise from the current economic context).

164. See BARBOSA, INTRODUÇÃO, *supra* note 131, at 705-09, 725-28.

165. See Act No. 9,279/1996, *supra* note 142, art. 122.

more, Act 9,279/96 states that there are services and products, certification, collective, well-known, and famous marks. The INPI is entitled to declare whether a mark is well-known, famous, or shall be entitled to protection under Act 9,279/96.

Regarding international aspects, important differences exist between well-known and famous marks. The regulation of Brazilian and international marks that seek protection under well-known and famous marks standards shall comply with the Paris Convention. The difference between these two types of marks is, in sum: famous marks that shall be protected under the Paris Convention, art. 6*bis* (I), shall be registered in any country that has signed the treaty, whereas well-known marks shall be registered in Brazil.<sup>166</sup>

Due to the lack of details on what is a mark that shall be registered with the INPI, Act 9,279/96 extensively describes what shall not be registered as a mark. In sum, a mark shall not be entitled protection in cases that a mark: is already owned by a third party; is considered immoral and unethical; is misleading to the consumer; or has features that are already protected under Brazilian law.<sup>167</sup>

Upon registration, a trademark owner has the rights of ownership, which shall protect the mark from imitation and any striking similarity of other marks owned by third parties.<sup>168</sup> Consequently, the distinctive signals of the registered mark shall not be copied.<sup>169</sup> Furthermore, the duration of the protection lasts for ten years and can be renewed while the mark is being used—there is no maximum term of protection for marks in Brazil.<sup>170</sup> While a mark is protected, its owner shall use her rights to use the mark or license it for third party use.<sup>171</sup> These are, therefore, the main rights of ownership derived from the registration.

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166. See BARBOSA, INTRODUÇÃO, *supra* note 131, at 759, 768-70.

167. See Act No. 9,279/1996, *supra* note 142, at art. 124, I et seq.

168. *Id.* at arts. 129 and 130.

169. *Id.*

170. *Id.* at art. 133.

171. *Id.* at arts. 134, 135, and 139.

Invalid registration and the infringement of rights of ownership may be challenged in either the INPI or in court.<sup>172</sup> Petitioners who intend to commence administrative proceedings that claim for the nullity of a trademark registration are required to file the request within 180 days from the registration date.<sup>173</sup> As for lawsuits, they must be brought to courts within five years of the date of the registration.<sup>174</sup> Once a court reaches a decision on whether the mark is valid or null, the INPI shall be notified to enforce the legal proceedings with respect to voiding the registration, ceasing the rights of ownership, or transferring the title to whomever is entrusted the ownership in accordance with what the court decided.<sup>175</sup>

Regarding the development of trademarks in Brazil after the reforms of 1996 and the recent economic booming in the country, trademark applications have increased significantly. To be sure, Brazil was ranked the third country with the highest number of trademarks applications by residents in 2007, according to the WIPO's data. Different from patents, however, economic performance has had more of an impact on the development of trademarks than on the environment of adequate legal services and R&D.<sup>176</sup> Thus, although Brazilian residents have been the key players in the growth of trademarks applications in Brazil, non-residents have also benefited from the economic boom in Brazil and intensified the number of trademarks applications as well. In sum, the number of trademarks applications can be noted in the Table below.

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172. *Id.* at Chapter XI, §§ I and II.

173. *Id.* at art. 169.

174. *Id.* at art. 174.

175. See BARBOSA, INTRODUÇÃO, *supra* note 131, at 775-79.

176. See William O. Hennessey, *The Role of Trademarks in Economic Development and Competitiveness* at 1, University of New Hampshire, The IP Mall—Intellectual Property Collection, [http://www.ipmall.info/sites/default/files/hosted\\_resources/Hennessey\\_Content/RoleofTrademarksinEconomicDevelopmentandCompetitiveness.pdf](http://www.ipmall.info/sites/default/files/hosted_resources/Hennessey_Content/RoleofTrademarksinEconomicDevelopmentandCompetitiveness.pdf) (last visited Aug. 3 2015); TRADEMARKS, BRANDS, AND COMPETITIVENESS (Teresa Da Silva Lopes & Paul Duguid eds., Routledge 2010).



**Table 3.** Trademark Applications in Brazil (2000-2013)

Year	Resident Applications	Non-Resident Applications	Proportion of Resident/Non-Resident Applications (in %)
2000	12,999	5,413	71%
2001	15,042	5,814	72%
2002	12,485	5,196	71%
2003	7,726	3,131	71%
2004	9,291	3,201	74%
2005	12,539	5,493	70%
2006	24,459	8,342	75%
2007	102,005	26,540	79%
2008	43,774	16,531	73%
2009	50,778	13,408	79%
2010	52,568	11,969	81%
2011	45,844	14,641	76%
2012	41,670	13,560	75%
2013	27,714	9,197	75%

Source: Adapted from the WIPO statistics database. Prepared by the author.

Similarly to what has happened to patents and utility models, economic liberalization and growth, along with legal reforms that resulted in the Act 9,279/96 have fostered the development of trademarks in Brazil. This environment has attracted foreigners (individuals and corporate entities) interested in protecting their marks in Brazil and Brazilians aspiring to secure their marks from imitation both within the country and abroad.<sup>177</sup> Thus, this context has led to a significant increase in the number of trademark applications in Brazil, and Brazilian nationals have been responsible for 74% of the total applications on average.

177. Michele Copetti, *Registro de Marcas—Propulsor para o Desenvolvimento?* in PROPRIEDADE INTELECTUAL E DESENVOLVIMENTO (Welber Barral & Luiz Otávio Pimentel orgs., 2007).

Therefore, Act 9,279/96 has succeeded in ensuring protection for inventors and trademarks owners. Yet, the research environment and the capacity of providing legal services necessary to the development of patents in Brazil has fared differently from what has been observed in trademarks. According to the data collected for this study, it is possible to conclude that the difference between these two IP rights regulated under the same norm is likely a result of the poor conditions of R&D in Brazil. On the one hand, legal advice and litigation involving trademarks overlap with antitrust and competition matters and can be handled by attorneys with training in other fields.<sup>178</sup> On the other hand, patent lawyering demands skillful professionals alongside patent experts who understand specific characteristics of an invention.<sup>179</sup> Thus, under the same rule, the development of patent related applications and services in Brazil lacks conditions to flourish, even though trademarks experience a different outcome.

In conclusion, the Paris Convention is the main source upon which Brazilian authorities look to for the enforcement of trademarks protection. Thus, Brazilian lawyers shall not be aware of only the domestic aspects of the legislation only, but also of how to protect Brazilian marks abroad and international marks in Brazil. Likewise, this has happened to copyrights laws in Brazil.

### *C. Copyrights*

Although trademarks, patents, and industrial designs are regulated by the same norm—Act 9,279/96—copyrights find safeguard under a specific law: Act 9,610/98. Namely, Act 9,610/98 describes the international scope of protection in Brazil. The first articles of this norm state that copyrights registered in countries with which

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178. For an assessment of the co-evolutionary aspects of antitrust and trademark laws, see Deven R. Desai, *The Chicago School Trap in Trademark: The Co-Evolution of Corporate, Antitrust, and Trademark Law*, 37 CARDOZO L. REV. 551, 620 (2015).

179. See Badin, *supra* note 17.

Brazil has signed treaties in IP matter shall experience protection in Brazil and vice versa. As a result of the international influence on Brazilian IP laws, copyrights also follow the requirements to register and secure copyrighted works that have been set forth by international treaties.<sup>180</sup>

Indeed, the definition of works under the Brazilian copyright legislation is comparable to what is found in the United States<sup>181</sup>: “The intellectual works that are protected are creations of the mind, whatever their mode of expression or the medium, tangible or intangible, known or susceptible of invention in the future, in which they are fixed . . . .”<sup>182</sup> As for the roll of works that shall receive copyright protection under Act 9,610/98, it includes: texts resulted from literary, artistic, or scientific expression; lectures and addresses; dramatic, audiovisual, cinematographic, photographic, drawings, paintings, sculptures, musical, choreographic, and mimed works; drafts and three-dimensional creations related to engineering, architectural, gardening, and geographical works; adaptations, translations, and transformations of original creations that result in new forms of intellectual work; computer programs; and collections or compilations and other forms of collective works.<sup>183</sup>

If a creation falls within one of the categories mentioned above, an author has the right to register her work.<sup>184</sup> However, similarly to what happens with trademarks, the register is not required as a means to protecting a work of authorship.<sup>185</sup> Registration is usually recommended to prove anteriority when a conflict over ownership

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180. See Pedro Mizukami et al., *Exceptions and Limitations to Copyright in Brazil: Call for Reform*, in ACCESS TO KNOWLEDGE IN BRAZIL: NEW RESEARCH ON INTELLECTUAL PROPERTY, INNOVATION AND DEVELOPMENT (Lea Shaver ed., 2008).

181. For an American perspective of copyright law, see CRAIG JOYCE ET AL., COPYRIGHT LAW, 20-28 (2007).

182. See Lei de Direitos Autorais, Act No. 9,610/1998), art. 7.

183. For a complete list of works described in Act No. 9,610/1998, see *Id.* art. 7, I et seq.

184. *Id.* at art. 18.

185. *Id.* at art. 19.

emerges.<sup>186</sup> Finally, authors have several options as to where they shall register their works, which vary according to the nature of the work.<sup>187</sup>

With respect to the rights of ownership, they shall be exercised by the author solely, by a corporate entity duly entitled for that, or in the case of collective works, by more than one author.<sup>188</sup> Authors have moral<sup>189</sup> and economic rights<sup>190</sup> over their works. In terms of the former, they are inalienable and irrevocable, and they refer to the protection of the integrity of the original work and the possibility for the author to claim her rights of ownership at any time. Regarding the latter, they apply to the author's right to benefit from her work by expressly authorizing a third party to use the original work or modify it in order to make it available for public audience—the changes to any work shall comply with the terms agreed with the author and respect her moral rights. And last, if moral and economic rights are violated, or if disputes emerge about the ownership of a certain work, this can be settled administratively or judicially.<sup>191</sup>

Namely, the copyright infringement's proceedings are described in Act 9,610/98. The types of infringement are usually related to conflict of ownership and unlawful reproduction and alteration of the original work without prior consent by the author.<sup>192</sup> Because there are a variety of administrative agencies that are competent to register and analyze copyrighted works, the specific proceedings also vary. Yet, Act 9,610/98 is the main norm that a petitioner shall base upon her claim in order to be successful in the dispute. These are, therefore, the main aspects related to copyright laws that are

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186. See Jane Resina Fernandes de Oliveira, *Educação a Distância e Ciência da Informação: Uma Reflexão sobre os Direitos do Autor* (2006) (unpublished Master's thesis, Universidad de Brasília) (on file with the author) (describing the advantages of registering a work of authorship).

187. *Id.* (outlining some of the organizations with which authors can register their work).

188. See Act No. 9,610/98, *supra* note 182, at arts. 22-23.

189. *Id.* at arts. 24-27.

190. *Id.* at arts. 28-45.

191. *Id.* at arts. 101-110.

192. *Id.* at art. 107, I et seq.; art. 108, I et seq.

discussed in disputes over copyright protection that reach the Brazilian courts. Unfortunately, a comparable set of data, such as the one used to assess patents and trademarks, have not been found for copyrights.

Finally, Brazil has made some progress in adapting its domestic legislation to international parameters of IP regulation, but there are also some flaws.<sup>193</sup> Yet, the flaws are some of the steps needed to secure IP protection for Brazilian companies and multinational corporations based in Brazil. Another relevant aspect is how Brazil has used the international norms and global forums to resolve IP disputes.

#### IV. WHEN INTERNATIONAL TRADE AND IP OVERLAP: BRAZIL AS AN INTERNATIONAL IP RIGHTS DISPUTANT

Brazil has been at the forefront of international protection of IP rights, in particular, because it has signed several international treaties<sup>194</sup> and settled disputes using bodies like the WTO.<sup>195</sup> This tradition dates back to the Berne Convention, which regulates copyrights of artistic and literary works—Brazil is one of the original signatory countries of this treaty.<sup>196</sup> Similarly, Brazil has also signed the Paris and Rome Conventions, on patents and trademarks, respectively.<sup>197</sup> Finally and most recently, Brazil agreed to the terms of the TRIPS Agreement, which governs the international trade of IP related products and services.<sup>198</sup>

Moreover, Brazil has worked closely with international IP organizations, mainly the WIPO and the WTO. Namely, Brazil joined

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193. See Pedro Mizukami et al., *supra* note 180.

194. See Krishnan, Dias & Pence, *supra* note 27.

195. See Badin, *supra* note 17; Santos, *supra* note 17; and Shaffer, Sanchez & Rosenberg, *supra* note 18.

196. See WIPO, WIPO-Administered Treaties: Brazil, [http://www.wipo.int/treaties/en/ShowResults.jsp?country\\_id=23C](http://www.wipo.int/treaties/en/ShowResults.jsp?country_id=23C) (last visited Aug. 4 2015).

197. *Id.*

198. *Id.*

the WIPO in 1975,<sup>199</sup> has been a WTO member since 1995 (the year of its foundation),<sup>200</sup> and had been a party to the General Agreement on Tariffs and Trade (GATT) since 1948.<sup>201</sup> As a member of the most relevant international IP bodies, as an original signatory to important international IP treaties, and as an active reformer of its national IP laws to adhere to international agreements, Brazil has been a key global player with respect to the development of international IP and has used international litigation to fight for a fair global governance of IP rights.<sup>202</sup>

Yet, most of the data on the disputes involving private entities are not disclosed such as, for example, international arbitration. Nevertheless, the WTO makes available all cases that impact directly Brazil's trade policies, Brazilian companies, and global conglomerates that operate in Brazil. Since the TRIPS Agreement regulates international trade involving IP and is governed by the WTO, governmental disputes have usually been brought to the WTO Dispute Settlement Body.<sup>203</sup>

The disputes brought to the WTO provide relevant information to understand what has been demanded of global legal professionals with respect to the TRIPS Agreement. Furthermore, whether Brazilian IP lawyers have been able to meet the expectations of such a qualified legal market is another important question to this analysis, which will be discussed next.

The establishment of the TRIPS Agreement and the WTO regime with its new dispute settlement system posed several chal-

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199. See WIPO, Member States: Brazil, [http://www.wipo.int/members/en/details.jsp?country\\_id=23](http://www.wipo.int/members/en/details.jsp?country_id=23) (last visited Aug. 4 2015).

200. See WTO, Understanding the WTO: Members and Observers, [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (last visited Aug. 4 2015).

201. *Id.*

202. See Badin, *supra* note 17; Salama & Benoliel, *supra* note 19; Santos, *supra* note 17.

203. See Shaffer, Sanchez & Rosenberg, *supra* note 18.

lenges for countries and lawyers, especially those from the developing world.<sup>204</sup> In terms of the former, the TRIPS Agreement deepened the longstanding gap between developed and developing nations concerning fair terms of international trade of IP protected products and services. As for the latter, when conflicts regarding IP issues emerged in international forums, legal professionals in developing countries had to handle these cases while competing with extremely well-prepared lawyers from the developed world. As a result, the asymmetry of powers between developed and developing states became even more evident in this context.<sup>205</sup>

Notwithstanding this unequal relationship between countries and professionals in having fair IP trade regime at the global level, some lawyers from developing countries have been successful in challenging the *status quo* imposed by wealthy economies.<sup>206</sup> That is, while using international forums of dispute settlement, namely the WTO, lawyers based in developing countries have designed interesting litigation strategies and achieved effective results for their countries.<sup>207</sup> For example, Brazil and India gained access to medicine for HIV by using a compulsory license mechanism.<sup>208</sup>

Regarding the Brazilian experience, scholars have analyzed the litigation strategies that have led to the country's favorable outcomes when using the WTO dispute settlement system,<sup>209</sup> including some comprehensive case studies of IP rights cases brought to the

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204. See generally Shaffer, Sanchez & Rosenberg, *supra* note 18; and JOSEPH CONTI, *BETWEEN LAW AND DIPLOMACY: THE SOCIAL CONTEXTS OF DISPUTING AT THE WORLD TRADE ORGANIZATION* (Stan. Univ. Press 2010).

205. For the argument built in this paragraph, see generally Dreyfuss, *supra* note 132; CORREA, *supra* note 132; Graeme B. Dinwoodie & Rochelle C. Dreyfuss, *Designing a Global Intellectual Property System Responsive to Change: The WTO, WIPO, and beyond*, 46 Hous. L. Rev. 1187 (2009); *TRIPS AND DEVELOPING COUNTRIES: TOWARDS A NEW IP WORLD ORDER?* (Gustavo Ghidini, Rudolph J. R. Peritz & Marco Ricolfi eds., Edward Elgar Publ'g 2014); Carlos Alberto Primo Braga, *The Developing Country Case for and against Intellectual Property Protection*, 112 WORLD BANK DISCUSSION PAPERS 69 (1990).

206. See Shaffer, Sanchez & Rosenberg, *supra* note 18.

207. See Badin, *supra* note 17; Santos, *supra* note 17.

208. *Id.* See also Dreyfuss, *supra* note 132.

209. See Shaffer, Sanchez & Rosenberg, *supra* note 18; CONTI, *supra* note 204.

WTO.<sup>210</sup> Brazilian international trade lawyers have been noted as skilled professionals who have won many disputes against other countries where legal education is significantly better and proper training on WTO disputes is provided.<sup>211</sup>

Yet, academics who have observed the aforementioned situation have focused most of their attention on international trade lawyers, leaving international IP lawyers outside of their scope. It seems, in fact, that the latter group has not assumed the leadership of this process. To be sure, the scant references to IP lawyers in Michelle Badin's work appear when she describes that such professionals "greatly supported those [very restrictive] changes in the country's regulation [of IP rights]."<sup>212</sup>

Although the WTO legal proceedings are extremely complex and need specialized litigators to handle the cases, IP has been the central issue that has been discussed in some relevant cases in which Brazil has been a party<sup>213</sup>—specifically, a country can litigate before the WTO in three different ways: being a complainant, a respondent, or a third party.<sup>214</sup> Accordingly, in addition to the legal procedure of the WTO regime, which falls within the scope of "WTO matters" for the literature,<sup>215</sup> the substantive matters of the cases is equally or even more important to build a strong legal argument. Hence, substantial knowledge of IP is an important aspect that lawyers need to be aware of.

Scholars have already noted that international trade lawyers in Brazil have succeeded in using the WTO dispute settlement system.<sup>216</sup> However, this market seems to be occupied by international trade lawyers only. If international IP lawyers had any participation

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210. See Badin, *supra* note 17.

211. See Glezer et al., *supra* note 18; Shaffer, Sanchez & Rosenberg, *supra* note 18.

212. See Badin, *supra* note 17, at 261.

213. See Badin, *supra* note 17; and Santos, *supra* note 17.

214. See Shaffer, Sanchez & Rosenberg, *supra* note 18.

215. *Id.* at 433.

216. *Id.* See also Badin, *supra* note 17; CONTI, *supra* note 204; Glezer et al., *supra* note 18.



in these cases, they were not highlighted in comprehensive studies on these disputes. Such assessment finds basis, for example, when examining Shaffer, Badin, and Rosenberg's work.<sup>217</sup> They analyzed all the cases (until 2008) brought to the WTO by Brazil as well as the cases in which Brazil was a respondent or a third party. They organized their analysis by listing the parties, the file date and stage of the proceeding, the matter in dispute, and the private consultants that were hired.

Indeed, drawing upon Shaffer, Badin, and Rosenberg's work, and using the WTO's database of disputes, the search for IP cases has been refined here. Only disputes over IP rights and the TRIPS Agreement have been analyzed. After having researched all 135 cases that Brazil has participated at the WTO, it was possible to select a sample of thirteen disputes in which the TRIPS Agreement and IP have been mentioned as the point of contention between the disputants. Namely, Brazil filed two cases as a complainant,<sup>218</sup> was the respondent in one case,<sup>219</sup> and participated as a third party in ten cases.<sup>220</sup>

Likewise, similar research on cases that Brazilian claimants have brought to the WIPO Mediation and Arbitration Center has been attempted. Surprisingly, according to the WIPO, a case involving a party (complainant or defendant) from Brazil has never been filed with this WIPO's Center.<sup>221</sup> In order to promote alternative

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217. See Shaffer, Sanchez & Rosenberg, *supra* note 18.

218. See *Brazil v. United States*, DS No. 224 (WTO, Jan. 31 2001); and *Brazil v. European Union and the Netherlands*, DS No. 409 (WTO, May 12 2010).

219. See *United States v. Brazil*, DS No. 199 (WTO, May 30 2000).

220. See *European Communities v. Canada*, DS No. 114 (WTO, Dec. 19 1997); *European Communities v. United States*, DS No. 160 (WTO, Jan. 26 1999); *United States v. European Communities*, DS No. 174 (WTO, Jun. 1 1999); *Australia v. European Communities*, DS No. 290 (WTO, Apr. 17 2003); *United States v. China*, DS No. 362 (WTO, Apr. 10 2007); *Ukraine v. Australia*, DS No. 434 (WTO, Mar. 13 2012); *Honduras v. Australia*, DS No. 435 (WTO, Apr. 4 2012); *Dominican Republic v. Australia*, DS No. 441 (WTO, Jul. 18 2012); *Cuba v. Australia*, DS No. 458 (WTO, May 3 2013); *Indonesia v. Australia*, DS No. 467 (WTO, Sept. 20 2013).

221. The information described here has been provided by the WIPO's and the INPI's officials, which is on file with the author.

dispute resolution (ADR) on IP matters in Brazil, a Memorandum of Understanding between the WIPO and the INPI was signed in 2012 and became effective in 2013.<sup>222</sup> The movement toward establishing a culture of ADR in IP in Brazil is relevant, because it complies with and draws upon the WIPO's guidelines and the successful experience in solving disputes outside of the courts.<sup>223</sup> In Brazil, where conflicts commonly reach the courts, it is important to think about and work on practices to reduce the amount of litigation. With respect to IP, the internationalization of this field in Brazil, thus, has led to this initiative.

Regarding the thirteen disputes within the WTO's dispute settlement body, the legal issues vary. Namely, five cases are about patent rights and IP enforcement. There are seven disputes on trademarks and geographical indication and there is one case about music licensing. Although trademarks represent the majority of cases brought to the WTO, there is one caveat concerning this number: the disputes are related. That is, two conflicts emerged on agricultural products and five on aspects related to the international trade of tobacco. Even though each case has its relevance to Brazil's international trade agenda, in terms of IP, strong emphasis has been put on patent disputes.<sup>224</sup>

Prominent academics such as Alvaro Santos,<sup>225</sup> Bruno Salama and Daniel Benoliel,<sup>226</sup> Michelle Badin,<sup>227</sup> and Rochelle Dreyfuss<sup>228</sup> have noted how Brazil has successfully used international IP norms, especially patent law, to protect its national interests globally and enhance IP protection domestically. The aforementioned authors describe how, for example, the pharmaceutical industry has attempted

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222. See WIPO, WIPO Mediation for Proceedings Instituted in the Brazilian National Institute of Industrial Property (INPI-BR), <http://www.wipo.int/amc/en/center/specific-sectors/inpibr/> (last visited Mar. 10, 2016).

223. *Id.*

224. See Badin, *supra* note 17; Salama & Benoliel, *supra* note 19.

225. See Santos, *supra* note 17.

226. See Salama & Benoliel, *supra* note 19.

227. See Badin, *supra* note 17.

228. See Dreyfuss, *supra* note 150; Dinwoodie & Dreyfuss, *supra* note 205.

to trump the access to medicines in the Global South after the implementation of the TRIPS Agreement.<sup>229</sup> As a result, “TRIPS has had much more positive effects in the North[.] . . . In the life sciences, there is concern that patenting has moved too far upstream. Patents over genes, protein sequences, diagnostic correlations, and other fundamental knowledge allow patentees to dominate broad technological opportunities.”<sup>230</sup>

In response to this process, which stemmed from the TRIPS Agreement, Brazil, India, and China resisted. The effective usage of the compulsory license, international litigation, and new trade agreements in addition to what had been set forth by the TRIPS Agreement were the main forms of opposition.<sup>231</sup> These countries sought to litigate before international bodies as well as draw up policies to ameliorate the asymmetric powers between developed and developing countries.<sup>232</sup> According to Rochelle Dreyfuss, in sum, “as emerging economies move into a leadership position in establishing new practices and advancing their pro-access views, they are sure to challenge the preeminent role of the North in setting world norms for intellectual property protection.”<sup>233</sup>

In conclusion, Brazil has been championed as a victorious user of the international bodies that engage in international IP litigation and lawmaking. Brazil has also conformed its IP laws to international treaties, albeit this raised some concerns within the country—as it will be discussed below. Furthermore, Brazil has ably used legal tools and proceedings to resist and respond to developed countries when conflicts have emerged from agreements such as the TRIPS Agreement. Accordingly, Brazil and its legal professionals seem to have proved that “a developing nation that can ‘lawyer up’ would be at a real advantage not only in regard to drafting and de-

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229. See Badin, *supra* note 17; Dreyfuss, *supra* note 132.

230. See Dreyfuss, *supra* note 132, at 8.

231. *Id.*

232. See Badin, *supra* note 17; Salama & Benoliel, *supra* note 19.

233. See Dreyfuss, *supra* note 132, at 3.

fending legislation, it could also be proactive: it could insist on re-negotiating the Agreement to deal with its development problems.”<sup>234</sup>

However, previous research indicates that the successful results mentioned above is most likely the result of the work of skillful international trade lawyers, not legal experts who specialize in IP.<sup>235</sup> Moreover, the lack of a strong IP research agenda and leading IP lawyers has exposed Brazil's weakness in using patent rights to foster R&D and innovation. Because of the small number of opportunities to receive legal training in IP and international IP in Brazil, this assessment may not be surprising. International trade lawyers have received training and education abroad, namely at American and European law schools, in addition to the training missions at the Brazilian Embassies in Geneva and Washington, D.C.<sup>236</sup> Therefore, Brazilian professionals with expertise in international trade have capitalized on several opportunities they had available to thrive in this niche, which their peers who work in IP did not follow.<sup>237</sup>

Conversely, IP lawyers in Brazil face severe problems in being properly educated in their field, and their international opportunities do not seem to be as plentiful as they are for international trade. Whether IP lawyers have been exposed to and benefited from international opportunities as international trade lawyers have is a question yet to be addressed. Therefore, the next section will thoroughly analyze the profile of elite IP legal professionals in Brazil in order to identify where and how they have been educated and trained, since they do not find this guidance and mentorship at most of the elite law schools in Brazil.

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234. *Id.* at 8.

235. *See* Santos, *supra* note 17; Badin, *supra* note 17.

236. *See* Glezer et al., *supra* note 18; Shaffer, Sanchez & Rosenberg, *supra* note 18.

237. *Id.*

V. THE GLOBALIZING LEGAL PROFESSION IN BRAZIL: THE PRACTICE OF LAW IN INTERNATIONAL IP

As it has been described in the previous section, this work focuses on the elite of IP lawyers in Brazil. Accordingly, a thorough research of publications that rank lawyers and law firms was done as means of compiling a group of highly regarded IP law firms in Brazil. After having selected IP as the area of expertise in the selected references, it was possible to identify thirty law firms that are based in Brazil and are globally known for their IP practice.<sup>238</sup>

An important characteristic of IP firms in Brazil is that they have been historically seen as global law firms,<sup>239</sup> which have been founded by “pioneer-globalizer[s].”<sup>240</sup> To be sure, previous research described how some of these firms implemented advanced and democratic management strategies to help them run their legal businesses in Brazil.<sup>241</sup> For example, they established organizational models based on efficiency and meritocracy.<sup>242</sup> As discussed below, IP lawyers have not engaged in transnational initiatives as international trade lawyers have traditionally done. Conversely, Brazil’s international trade lawyers have recently succeeded in cross-border disputes over IP rights, and they have relied upon significant exposure to international legal education to achieve results. Thus, a comparison between these two groups of legal practitioners may explain the underlying reasons that have led to this situation.

The data reveal that slightly less than 25% of all IP lawyers of this sample have received legal education abroad,<sup>243</sup> namely graduating from master and doctoral programs at universities outside of

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238. Please refer to Appendix A *infra* for further details on the methodology.

239. See Krishnan, Dias & Pence, *supra* note 27.

240. *Id.* at 10. Note also the case of Dannemann, Siemsen, Bigler & Ipanema Moreira, an IP firm that has foreigners amongst its founding partners.

241. See Krishnan, Dias & Pence, *supra* note 27.

242. *Id.*

243. Even though the educational characteristics of the sample analyzed here had been collected from publicly available repositories, in order to secure the names of these professionals and where they work, the data is on file with the author. This information may be provided upon request.

Brazil. In contrast, a recent study on Brazilian trade professionals noted that: “[international trade lawyers have found] incentives for them to study abroad, especially in the U.S. And most of the elite trade lawyers we interviewed have had international experience in graduate courses or internships abroad.”<sup>244</sup>

Moreover, the data show that the size of the cohort of IP lawyers working at elite Brazilian firms is not small, especially considering that IP is seen as a complex area that needs specialized professionals. In a universe of thirty firms, it has been possible to count 517 lawyers who work exclusively in IP. This finding is noteworthy because of the limitations of the data, and, in particular, because the pattern observed in IP is different from what has been found in international trade, which has a small but well-trained cohort of lawyers.<sup>245</sup>

The relatively large number of legal professionals who work in IP in Brazil may stem from different factors. On the one hand, new global demands that have been brought by the opening of the Brazilian economy have strengthened the international facet of IP lawyering that have long existed in Brazil.<sup>246</sup> On the other hand, the recent economic development in Brazil has also increased the need for lawyers to handle domestic IP matters.<sup>247</sup> For example, Brazilian lawyers have noticed growth in the number of administrative proceedings filed with and conducted by the INPI.<sup>248</sup> To be sure, at least one important law firm specialized in IP doubled its size during the 1990s.<sup>249</sup> As a result, law firms with focus on IP have expanded in order to meet an increasing demand. Yet, this advancement has not

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244. See Glezer et al., *supra* note 36, at 9.

245. *Id.* (describing that there exist eleven Brazilian law firms recommended for their international trade practice by Chambers and Partners, and the authors of this study interviewed twenty-one trade professionals working at these firms).

246. See Dreyfuss, *supra* note 132.

247. See Lilian Matsuura, *Especialista em Propriedade Intelectual Brilha na Advocacia*, CONSULTOR JURÍDICO, Oct. 2008, [http://www.conjur.com.br/2008-out-31/propriedade\\_intelectual\\_evidencia\\_advocacia](http://www.conjur.com.br/2008-out-31/propriedade_intelectual_evidencia_advocacia) (last visited Jul. 30 2015).

248. *Id.*

249. *Id.*

been followed by a step toward the internationalization of legal education in IP within Brazilian law schools.

The relevant, though small, percentage of Brazilian IP lawyers educated abroad may be an alarming signal rather than a positive one. Since most law schools in Brazil, in particular the elite ones, do not offer IP courses, when law students start practicing law, their training needs to be provided by either their hiring firms or law schools outside of Brazil. The data presented above suggest that most IP lawyers in Brazil are being prepared within their workplace, because the number of professionals educated abroad is small. This lack of training in law schools, either in Brazil or elsewhere, raises other problems, which will be outlined below.

*A. Lessons from International Trade Lawyers to their IP Colleagues*

Legal professionals have been noted for their liberal values, their role in ensuring a country's rule of law, and their work toward the promotion of economic liberalization. Furthermore, law schools have been the environment to discuss these ideals.<sup>250</sup> Accordingly, legal practitioners specialized in IP should not be any different, especially when they should fight and advocate for a global environment of fair trade of IP rights. However, when lawyers are trained within the workplace, it is expected that they attend to demands brought by clients, leaving behind policymaking issues as well as matters outside of their firms' and clients' scopes.

To be sure, "at the local level," Brazilian IP lawyers used their political capital with the INPI to further the reforms of domestic IP laws that were "even more conservative on behalf of the IP owners in comparison with the WTO rules."<sup>251</sup> Thus, the TRIPS Agreement

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250. See LAWYERS AND THE RISE OF WESTERN POLITICAL LIBERALISM, *supra* note 29; FIGHTING FOR POLITICAL FREEDOM, *supra* note 29; and Krishnan, Dias & Pence, *supra* note 27; YVES DEZALAY & BRYANT G. GARTH, THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES (2002).

251. See Badin, *supra* note 17, at 261-62.

and its aftermath in Brazil suggest that international trade lawyers have aptly brought together private interests and policymaking concerns to the cross-border commerce of IP rights.<sup>252</sup> In contrast, most of IP lawyers have stood aside from this process and the “contributions from civil society movements based in Brazil on Brazil’s foreign policy regarding IP have been limited.”<sup>253</sup>

Specifically, the section above described how the TRIPS Agreement has deepened the asymmetry of powers between developed and developing nations, but Brazil has achieved a relevant position with respect to the international lawmaking of IP.<sup>254</sup> Surprisingly, however, IP lawyers have not taken the lead in this process.<sup>255</sup> If Brazil has been championed as a victorious player in international IP, especially in litigating by using the TRIPS Agreement at the WTO, the successful strategy behind these actions was an international trade plan that was conducted by international trade lawyers, not IP lawyers.<sup>256</sup>

Although previous research on international trade lawyers in Brazil have discussed the flaws in the legal education that these professionals receive in Brazil,<sup>257</sup> specific programs to build legal capacity for trade lawyers have been organized.<sup>258</sup> Namely, prestigious organizations of the Brazilian civil society alongside the government have provided funding and training for international trade lawyers, under a “three pillar’ structure.”<sup>259</sup> In addition to receiving incentives to pursuing advanced degrees at respected European and American universities, these trade professionals have also worked at

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252. See Shaffer, Sanchez & Rosenberg, *supra* note 18.

253. See Badin, *supra* note 17, at 277.

254. See Dreyfuss, *supra* note 132.

255. See Badin, *supra* note 17; Santos, *supra* note 17; Salama & Benoliel, *supra* note 19 (discussing the relative success of Brazil’s trade policy, which included IP rights. Yet, both authors analyze this victory in IP disputes under an international trade perspective, which leads to the conclusion that lawyers with expertise in international law and international trade have led this process).

256. *Id.* See also Shaffer, Sanchez & Rosenberg, *supra* note 18.

257. See Glezer et al., *supra* note 18.

258. See, Shaffer, Sanchez & Rosenberg, *supra* note 18.

259. *Id.* at 423.



Brazilian embassies in places such as Washington, D.C. and Geneva, which have been considered “unique in the realm of trade diplomacy.”<sup>260</sup> In sum, the “three pillar” worked in accordance with the following framework:

The structure consists of a specialized WTO dispute settlement division located in the capital, Brasília (the “first pillar”), coordination between this unit and Brazil’s WTO mission in Geneva (the “second pillar”), and coordination between both of these entities and Brazil’s private sector, as well as law firms and economic consultants funded by the private sector (the “third pillar”). As part of this “third pillar,” the Geneva mission started an internship program for trade specialists from government agencies and young attorneys from Brazilian law firms and business associations.<sup>261</sup>

Likewise, several trade lawyers have worked at global firms and other prestigious organizations in the United States and Europe, apart from the internships at Brazilian embassies.<sup>262</sup> Brazil has, thus, successfully exposed its legal practitioners to educational opportunities in international trade and practical experience at elite organizations.<sup>263</sup> As a result, “the narrative offered by Brazilian [international trade] attorneys shows that they are strongly connected to foreign professionals and work constantly to find foreign clients, generating demand for legal services and expanding contact networks in the area.”<sup>264</sup>

As the above-mentioned initiatives succeeded, it has been noted that the vast majority of Brazilian legal professionals working in international trade law have been extensively trained abroad.<sup>265</sup> These lawyers have exceptional sets of skills in international trade, significant social capital, and they are ready to engage in disputes and

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260. *Id.* at 435.

261. *Id.*

262. *See* Glezer et al., *supra* note 36.

263. *Id.*

264. *Id.* at 33.

265. *Id.*

policymaking in this field, which aligns with the TRIPS Agreement.<sup>266</sup> Conversely, IP lawyers have not achieved the same results as their peers who work in international trade, despite some of the WIPO's and the INPI's agreements to make opportunities available to Brazil's IP lawyers.<sup>267</sup>

*B. Barriers to Having a Global and Effective IP Practice in Brazil*

In contrast to what has been found regarding the capacity building for trade lawyers, the tools available to Brazilian IP lawyers are still limited.<sup>268</sup> Besides the small number of elite law schools that offer IP courses in Brazil, a similar scenario has been noted beyond the law schools' boundaries.<sup>269</sup> That is, in Brazil, civil society organizations and governmental bodies that focus on IP rights are not as structured to train IP lawyers as those engaged in educating international trade professionals. To be sure, when Michelle Badin analyzes the participation of few IP lawyers who have worked alongside the civil society in trade related IP matters,<sup>270</sup> she acknowledges that “[v]ery few groups, such as the Center on Technology and Society of the Getulio Vargas Foundation, have been able to mobilize human and financial resources to participate directly in international conferences and meetings.”<sup>271</sup> Such assessment, therefore, reinforces the advantages of the exposure to international influence that Brazil's IP lawyers should be benefiting.

Regarding the dichotomy between public and private participation in IP initiatives, scholars argue that, in Brazil, most investments in IP derive from public funding, and more specifically, from public

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266. See Shaffer, Sanchez & Rosenberg, *supra* note 18.

267. See Maria Beatriz Amorim-Borher et al., *Ensino e Pesquisa em Propriedade Intelectual no Brasil*, 6(2) REVISTA BRASILEIRA DE INOVAÇÃO 281 (2007).

268. *Id.*

269. *Id.*

270. See Badin, *supra* note 17, at 278-79 (explaining the situation regarding drug policy in Brazil in light of the TRIPS Agreement).

271. *Id.* at 277.

universities.<sup>272</sup> Namely, R&D is commonly funded by the government, and the money is usually managed by public universities and foundations.<sup>273</sup> Civil society is still becoming a relevant player in promoting IP training, which subsequently fosters innovation in Brazil.<sup>274</sup>

In addition, the fact that Brazil's institutional organizations rely heavily on public organizations poses (at least) two related problems. First, funding for research is scarce, and the process of accessing these resources is extremely bureaucratic.<sup>275</sup> Specifically, official organizations, including the academic ones, shall follow strict rules to receive and spend funds, which sometimes do not comprehend the characteristics of innovative R&D projects.<sup>276</sup> Secondly, a foundation or university that implements institutional bypasses to spend the money more efficiently may face accusations related to under-reported consultancy fees to the Brazilian authorities, and their respective leaders may face criminal charges for mishandling public money.<sup>277</sup>

The obstacles mentioned above, along with the weak infrastructure of Brazilian universities, hinder the formation of a strong research environment.<sup>278</sup> This bottleneck in Brazil's capacity to stimulate R&D, innovation, and IP protection raises serious questions about Brazil's chances of becoming competitive. Given the situa-

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272. See generally, Alexandre Pacheco da Silva, *Antes de uma Fundação um Conceito: um Estudo sobre a Disciplina Jurídica das Fundações de Apoio na Cooperação entre Universidade e Empresa* (2011) (unpublished Master's Thesis, *Fundação Getulio Vargas*) (on file with the author). See also Salama & Benoiel, *supra* note 19, at 642 (stating that "the development of a generics industry assisted in government efforts to revamp its network of public laboratories").

273. See Silva, *supra* note 272.

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.* See also Salama & Benoiel, *supra* note 19, at 637 (suggesting that the political "framework in Brazil also favors short-sighted policies in connection with R & D investments in the pharmaceutical industry.").

tion, lawyers have attempted to create legal tools to reduce the bureaucratic steps that universities face in fundraising for research.<sup>279</sup> Namely, legal professionals alongside the academic community have worked to approve Brazil's *Lei de Inovação* [Innovation Act], and they have also promoted legalizing efficient means of receiving and spending money for highly-innovative projects.<sup>280</sup> Apart from a few successful initiatives, however, Brazilian lawyers and scholars still have a long path ahead of them to build and secure efficient ways of gathering and using resources for innovation as well as working toward the strengthening of IP rights in Brazil.

Bearing that in mind, a thorough study analyzed the development of IP training in Brazil.<sup>281</sup> The authors found that few initiatives had been structured, such as the growth of graduate programs in IP. However, most of the steps that have been created comprehend seminars, workshops, and conferences.<sup>282</sup> Yet these short-term programs have been a staple in IP in Brazil. To be sure, the National Conference on Intellectual Property was in its twentieth-six year in 2006, when the aforementioned investigation was conducted.<sup>283</sup>

Moreover, scholars have found that the programs mentioned above had little emphasis on the international component of IP practice. Namely, only one workshop counted on the WIPO's participation.<sup>284</sup> In 2006, the INPI and the WIPO jointly organized a workshop named "Training of Trainers," which sought to provide knowledge to technology and IP managers as well as agents from public and private organizations that worked with the commercialization of intellectual property.<sup>285</sup> However, it is not clear whether

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279. *Id.*

280. *Id.*

281. See Amorim-Borher et al., *supra* note 267.

282. *Id.*

283. *Id.* at 293.

284. *Id.* at 295.

285. *Id.*

and to what extent legal professionals were targeted by this initiative.<sup>286</sup> Therefore, although some domestic measures have paid attention to the global aspects of IP, and few have counted on the participation of professionals from the WIPO, it is unlikely that such actions overcame the problems that legal professionals faced when they aspired to receive training in international IP.

Also, it has not been possible to find any discussion on practical experiences abroad that have been specifically offered to Brazilian IP professionals. It is known that the WIPO has organized summer courses and a professional development program.<sup>287</sup> However, whether there are incentives for Brazilian professionals to enroll in such initiatives, and whether these programs provide practical training to Brazilian lawyers is not known from the WIPO's website.

With that said, although it is not possible to infer from an existing study<sup>288</sup> that the attendees of such programs were already working, they did not mention any possibility for lawyers to work temporarily at the WIPO or at foreign law firms. This lack of options differs from the situation found in international trade, a field in which legal professionals usually have significant work experience at multilateral, public, and private organizations outside of Brazil. As a result, it is expected that IP professionals need to find other ways to receive training in international IP.

The small cohort of Brazil's legal professionals educated abroad, along with the problems in R&D and practical experience in IP, have serious consequences for Brazil's competitiveness in the global economy. To be sure, scholars have noted that, although Brazil has successfully fought for its IP rights at the WTO, Brazil's domestic "IP strategy" following the TRIPS Agreement has not been as efficient as other emerging economies.<sup>289</sup> Namely, this is likely

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286. *Id.*

287. See generally WIPO, WIPO Academy, <http://www.wipo.int/academy/en/> (last visited March 15 2016).

288. Amorim-Borher, *supra* note 268.

289. See Salama & Benoliel, *supra* note 19; Paranhos & Hasenclever, *supra* note 24; and Lana, *supra* note 24.

because Brazilian IP lawyers have long experienced a lack of education and training at Brazilian and foreign law schools. The domestic outcomes of the TRIPS Agreement in Brazil will be assessed in order to explain this dichotomy between international and national IP practices, and why Brazilian trade lawyers have coped where IP lawyers had problems.

Other emerging markets, such as India, have experienced greater advantages from the TRIPS Agreement than Brazil.<sup>290</sup> Article 6 of the TRIPS Agreement was a serious point of contention during the negotiations, with strong opposition from the United States.<sup>291</sup> Namely, the TRIPS Agreement established that developing and the least developed countries might wait between five to ten years to harmonize their domestic norms to the treaty. In the interim, these countries would be allowed to do “parallel importation” of products patented abroad, which means that “in this theory [of international parallel importation] the intellectual property right is consumed as soon as goods are placed in the market, so that they can freely circulate.”<sup>292</sup>

Scholars argue that the underlying reason for that interlude and the parallel import provision was to provide developing countries the possibility to prepare their economic and legal environments to compete with developed nations under equitable, or at least fairer, terms.<sup>293</sup> These conditions, along with the compulsory license mechanism, should provide emerging markets tools to build and strengthen their own patent industries, so that they could capitalize on the entrance of foreign inventions by emulating and enhancing

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290. *Id.*

291. Jerome H. Reichman, *The TRIPS Agreement Comes of Age: Conflict or Cooperation with the Developing Countries*, 32 CASE W. RES. J. INT'L L. 441 (2000).

292. See Vincenzo Di Cataldo, *Parallel importations. New perspectives* at 1, WIPO, 2007, [http://www.wipo.int/edocs/mdocs/sme/en/wipo\\_smes\\_rom\\_09/wipo\\_smes\\_rom\\_09\\_workshop12\\_3.doc](http://www.wipo.int/edocs/mdocs/sme/en/wipo_smes_rom_09/wipo_smes_rom_09_workshop12_3.doc).

293. *Id.* See also Paranhos & Hasenclever, *supra* note 24; Salama & Benoliel, *supra* note 19, at 648; and Lana, *supra* note 24.

them, and to enjoy greater chances of becoming more competitive.<sup>294</sup>

Yet, the literature on the outcomes of the TRIPS Agreement in Brazil suggests that other developing countries have used the agreement's provisions to induce their innovation agenda more efficiently than Brazil.<sup>295</sup> Indeed, Brazil enacted its Patents and Trademarks Act in 1996. Thus, it has not benefited from the window of opportunity to import, improve, and innovate upon previous inventions through parallel importations.<sup>296</sup> Conversely, India introduced its new patent legislation in 2005, almost ten years after the TRIPS Agreement was originally signed.<sup>297</sup> Consequently, India has enjoyed the transitional period to do parallel importations and, hence, boost its patent industry.<sup>298</sup> Therefore, in comparison with Brazil, India has utilized the legal tools set forth by the TRIPS Agreement in favor of its domestic growth, going beyond the usage of compulsory licenses and transnational litigation over IP rights at the WTO.<sup>299</sup>

However, as described above, the TRIPS Agreement's effects on Brazilian IP practice have not been so favorable. Brazilian residents have always designed and registered utility models, whereas non-residents have usually registered patents, a situation that could have been changed following the TRIPS Agreement. These unsatisfactory statistics are likely a result of the problems in IP training at Brazilian law schools in particular and at universities in general. Brazilian IP lawyers have not benefited from capacity building programs that their international trade peers have.

Bearing that in mind, consider the literature that has been discussed in this study. There are, at least, two ways of interpreting what is being said about Brazil's participation in the international IP

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294. *Id.* See also Paranhos & Hasenclever, *supra* note 24; Lana, *supra* note 24.

295. See Paranhos & Hasenclever, *supra* note 24; Lana, *supra* note 24.

296. *Id.*

297. *Id.*

298. *Id.*

299. *Id.*

arena. On the one hand, Brazil has been championed as a prominent player in using international trade tools related to IP rights, particularly the TRIPS Agreement litigation at the WTO.<sup>300</sup> On the other hand, Brazil has not fostered innovation and has not strengthened IP rights as other developing countries did after the TRIPS Agreement, for example, when it enacted its legislation without using the transitional period set forth by the TRIPS Agreement.<sup>301</sup> Therefore, this work's argument is that the success in the "trade aspect" of international IP stems from the participation of skilled international trade lawyers, whereas the legal practice related to the "IP protection aspect" has serious flaws, namely because the legal tools that have been used by Brazilian universities, law schools, law firms, and the government have not created a legal and corporate framework capable of enhancing Brazil's chances to innovate.<sup>302</sup>

This "boundary-blurring"<sup>303</sup> aspect of international IP is a relevant characteristic of the globalization of the legal profession in Brazil. That is, as international trade, IP has its nuances. The two areas of law, however, become connected through the commerce of IP rights that are regulated by international treaties, such as the TRIPS Agreement. Globalization is a major factor that causes this "boundary-blurring" process between legal fields, such as it has been noted here in regard to international IP in Brazil. Namely, "[boundary-blurring is] often observed when a subordinate profession seeks to . . . break into a new area of work."<sup>304</sup> The literature on international trade of IP and domestic regulation of IP rights in Brazil suggests that this "boundary-blurring" process has taken place in Brazil, where international trade lawyers have succeeded in the market of international IP disputes that have arisen from the TRIPS Agreement.<sup>305</sup> Why this has happened is a question yet to be answered by

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300. See Santos, *supra* note 17; Badin, *supra* note 17.

301. See Paranhos & Hasenclever, *supra* note 24; and Lana, *supra* note 24.

302. See Salama & Benoliel, *supra* note 19.

303. See Liu, *supra* note 28.

304. *Id.* at 676.

305. See Santos, *supra* note 17; Badin, *supra* note 17.



further research, but the answer may be related to the problems in the legal training that has been received by Brazilian IP lawyers.

Indeed, both IP lawyers and international trade legal professionals in Brazil are respected for being experts in their respective fields.<sup>306</sup> International trade is deemed to be a small niche, whereas IP has several branches that lawyers can specialize in, and upon which specialized IP firms have expanded.<sup>307</sup> Furthermore, both areas of law share deficiencies with respect to the legal education that legal professionals receive at Brazilian law schools, where lawyers do not find proper training. Thus, although there are similarities between IP and international trade law, there are also striking differences, too. To be sure, a number of studies on international trade lawyers and international trade strategies designed by Brazilian professionals have over time noted that civil society organizations alongside the Brazilian government have efficiently coordinated ways to fill the gaps in legal education and, consequently, build legal capacity for Brazilian trade lawyers.<sup>308</sup> With respect to IP, although Brazilian IP firms have grown following the implementation of the TRIPS Agreement and the enactment of new domestic legislations, this has not resulted in the development of Brazil's IP agenda.

In conclusion, lawyers and law firms that have been noted as historical leaders in the globalization of the legal profession in Brazil<sup>309</sup> have lost their space, which has been dominated by international trade professionals. The lack of creative programs and strong support from the local civil society and government, as well as the small percentage of IP lawyers who have been trained abroad, may be an underlying reason for this conclusion. In Brazil, no specific training program reaches the majority of the legal professionals working in IP. Conversely, although international trade is a field that

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306. See Glezer et al., *supra* note 18; Oliveira & Ramos, *supra* note 31.

307. See Glezer et al., *supra* note 18; Matsuura, *supra* note 247.

308. See Shaffer, Badin & Rosenberg, *supra* note 18.

309. See Krishnan, Dias & Pence, *supra* note 27.

relies on a small group of professionals, almost all of them have received training abroad at elite educational, market, multilateral, and governmental organizations.<sup>310</sup>

It is a fact that Brazil has fared relatively well in its recent development process during the 1990s and 2000s, and IP protection has been crucial to that result. However, when one considers Brazil's performance from a comparative perspective, this context changes. The part of IP practice in Brazil that is unrelated to international trade disputes over IP rights demonstrates that Brazil has lacked efficient IP policies, which may stem from the difficulties in finding efficient legal advice.<sup>311</sup> Both INPI officials and IP lawyers are highly regarded for their deep knowledge of IP,<sup>312</sup> and yet Brazil has not benefited from IP mechanisms derived from the TRIPS Agreement in the same way as other emerging markets.<sup>313</sup> Where IP lawyers have lost space, international trade professionals have succeeded. Legal education in Brazil or abroad may be the first, if not the most important, step that might have affected this competition for this "boundary-blurring" international IP market between Brazilian legal professionals.

## VI. CONCLUDING REMARKS

This work has analyzed the relationship between development, legal education, and the legal profession in Brazil. A specific field of law has been selected as a case study for this assessment: international intellectual property. Several academics have discussed how IP is important for a country's development.<sup>314</sup> Similarly, there

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310. See Glezer et al., *supra* note 18.

311. See Salama & Benoliel, *supra* note 19.

312. See Badin, *supra* note 17 (discussing that the role that the INPI plays in ensuring an efficient IP system is controversial in Brazil. However, the author acknowledges that, for some observers, those who work at the INPI are deemed to be well prepared professionals).

313. See Paranhos & Hasenclever, *supra* note 24; Lana, *supra* note 24.

314. See generally GOLDSTEIN & TRIMBLE, *supra* note 19; Dinwoodie & Dreyfuss, *supra* note 205.

are authors who have long studied law and development.<sup>315</sup> After an interlude in the scholarly works on law and development, several investigations were done to understand the different “moments”<sup>316</sup> of law and development in the developing world.<sup>317</sup> Even with the few studies on IP that exist, legal education in IP has not been the central topic of analysis. Thus, this work has attempted to fill this gap in the literature by proposing an examination of how legal education, international IP, and the legal profession have been working toward Brazil’s development.

The focus on international IP is important to understand how the most globalized part of IP practice has recently worked in Brazil. Accordingly, the first section of this work shed light on Brazil’s elite law schools, and whether they have been training the highest strata of Brazil’s IP lawyers. It has been found that the majority of elite law schools in Brazil do not offer any IP related courses to their students, namely patent, trademark, and copyright law. Because this gap exists, Brazilian lawyers have attempted to find training elsewhere by pursuing advanced law degrees abroad or by receiving training at their law firms.

Bearing that in mind, the second and third sections assessed how globalization has affected important IP laws and IP lawyering in Brazil. In fact, Brazil has been a leader in international IP since the rise of the first international treaties on IP rights. Recently, Brazil has been a relevant player in international IP disputes, especially during the negotiations and after the implementation of the TRIPS Agreement. Patent, trademark, and copyright laws have been updated in order to align with the TRIPS Agreement. Yet, it has been noted that most of the disputes that have arisen from the TRIPS Agreement have been brought under international trade law to the WTO’s dispute settlement body. Therefore, Brazilian international trade lawyers have been at the forefront of international trade law,

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315. See Trubek & Galanter, *supra* note 1.

316. See THE NEW LAW AND ECONOMIC DEVELOPMENT, *supra* note 11.

317. *Id.*

particularly with respect to the TRIPS Agreement. This conclusion results from two main reasons. The first is because of the nuances of legal proceedings regarding international trade. And second, because of the extensive training that Brazilian international trade lawyers have received.

With that said, the fourth section examined the situation mentioned above in a more in-depth manner. One way of assessing why international trade lawyers have occupied a space that might be handled by IP lawyers is the lack of training in the latter area of law. That is, whether Brazilian IP lawyers were going abroad to receive education in IP has been analyzed. It has been found that almost 23% of Brazilian IP lawyers have received education abroad. Conversely, previous research on international trade lawyers revealed that almost all elite legal professionals in the sample researched and received excellent training at highly-regarded law schools in Europe and in the United States.

Looking at this study holistically, several conclusions can be drawn from the primary data and arguments discussed here, which provide relevant information to guide further research on this topic. Namely, ethnographies can be made, which will give a voice to Brazil's IP lawyers and hear their perceptions. Furthermore, globalization has pushed the development of IP to issues related to international trade, which can be seen as a "boundary-blurring" process of the Brazilian legal profession in this specific area of law. Relying upon better training than the one of their IP peers, international trade lawyers have coped with international trade law concerning IP rights. Regarding the international trade aspects of IP, Brazil and its legal professionals have been championed as examples of how to dispute IP rights globally against developed countries. On the domestic characteristics of IP, however, the situation is not as positive.

Indeed, in comparison with other emerging economies, such as India, Brazil has lost some important window of opportunities to capitalize on the TRIPS Agreement. Further research may want to consider analyzing Brazil and India in parallel. Legal education is in

crisis in both countries. However, domestic strategies following the TRIPS Agreement have been effective to boost India's IP industry. The underlying reason behind India's domestic success in IP remains to be addressed.

Brazil has enacted new IP legislations shortly after the TRIPS Agreement was signed. As a result, Brazil did not enjoy the transitional period set forth by the TRIPS Agreement and, consequently, did not extensively use parallel imports to improve its domestic industry. The successful use of compulsory license to obtain medicines and the litigation strategies that have been used at the WTO were pursued by international trade lawyers. In contrast, those who exclusively study IP as well as Brazil's development and its innovation tools are skeptical about how Brazilian IP lawyers and laws have worked in favor of Brazil's development.

The argument is not that international trade lawyers are better professionals than those who handle IP cases. Instead, it is being discussed how civil society, alongside the Brazilian government, has built legal capacity for international trade lawyers that has not been similarly offered to IP lawyers. This problem in the preparation of IP lawyers has not been addressed when academics have looked at the strategies concerning international IP in Brazil. This investigation has added another layer to that discussion, showing the neglect of IP in the Brazilian law school curriculum. Brazilian legal professionals, in general, have fared well in spite of the deficiencies in the legal curriculum. Yet, they still have a long way ahead of them to integrate their knowledge in both IP and international trade, produce synergies, and enhance Brazil's developmental path.

#### APPENDIX A

With respect to the process of gathering data, some problems have been faced in the fourth section. There were some obstacles in collecting precise data on elite IP lawyers in Brazil. For that reason, a methodological caveat regarding this section is necessary.

There are three well-respected publications that make it possible to refine the search of law firms per expertise: “Chambers & Partners,”<sup>318</sup> “The Legal 500,”<sup>319</sup> and “Who is Who Legal.”<sup>320</sup> The website of each of the recommended firms by those periodicals was carefully researched. However, the degree of public information on the educational background of lawyers varied. That is, some firms disclosed only information on partners and, as a result, the total number of IP lawyers working at these firms as well as where they were educated is not known for certain. Data was only collected on the lawyers who had their profiles available.

The barriers to accessing full information shall not change the conclusions drawn from the available data. In general, the educational background of partners was public and might indicate the general portrayal of legal professionals hierarchically beneath them. To be sure, the legal profession in countries such as Brazil is deemed to be stratified.<sup>321</sup> Accordingly, the degree of exposure to foreign education of law firms’ partners tends to be a reliable source to identify to what extent a firm is open to globalization of legal education. Therefore, although it is not possible to generalize, in precise terms, what has been found in this non-random sample to all IP lawyers in Brazil, it is likely that the general profile of the elite of the profession in IP is similar to IP lawyers who have been left out of this sample.

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318. See Chambers and Partners, Intellectual Property Lawyers & Law Firms Guide: Brazil, <http://www.chambersandpartners.com/41/34/editorial/9/1>.

319. See The Legal 500, Intellectual Property: Brazil, <http://www.legal500.com/c/brazil/intellectual-property>.

320. See Who’s Who Legal, Special Reports: Brazil, <http://whoswholegal.com/specials/186/brazil/>.

321. See Maria da Gloria Bonelli, *Lawyers' Associations and the Brazilian State, 1843-1997*, 28 LAW & SOC. INQUIRY 1045 (2003).