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

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

Vitor Martins Dias

Submitted to the faculty of Indiana University Maurer School of Law

in partial fulfillment of the requirements

for the degree

Master of Laws – Thesis

August 2015

Accepted by the faculty, Indiana University Maurer School of Law, in partial fulfillment of the requirements for the degree of Master of Laws – Thesis.

Thesis Committee

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August 11<sup>th</sup> 2015

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## ABSTRACT

This work analyzes a distinctive characteristic of the globalizing Brazilian legal profession. Namely, intellectual property (IP) lawyers who once were leaders in opening the Brazilian economy and were key players in cross-border transactions are now losing ground to their peers with an expertise in international trade. The thesis of this article is that the manner in which Brazilian lawyers are being educated is in shambles. Generally speaking, Brazilian legal education has, overall, 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, Brazilian law, but laws from different jurisdictions. That international trade lawyers in Brazil are now ‘global lawyers,’ 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.

## TABLE OF CONTENTS

INTRODUCTION .....	6
METHODOLOGY .....	13
Chapter 1. Legal Education in Brazil: An Overview .....	16
1.1. Shedding Light on the Law School Curriculum .....	19
1.2. Understanding the Problems of Legal Education in Brazil: Who Are the Law Professors and What are Their Limitations to Teach?.....	22
1.3. Legal Education Reforms, the Role of Law Professors, and the Performance of Private and Public Law Schools .....	27
1.4. Intellectual Property at Elite Brazilian Law Schools.....	30
Chapter 2. Intellectual Property: A Survey of the Brazilian Legislation.....	34
2.1. Intellectual Property Norms in Brazil.....	34
2.1.1. Patents .....	36
2.1.2. Trademarks .....	41
2.1.3. Copyrights.....	45
Chapter 3. When International Trade and IP Overlap: Brazil as an International IP-Rights Disputant .....	48
3.1. The TRIPs Agreement and the Brazilian Response to International IP-Trade Litigation.....	49
Chapter 4. The Globalizing Legal Profession in Brazil: The Practice of Law in International IP.....	56
4.1. Comparing Two Globalizing Fields Of The Legal Profession in Brazil: lessons from international trade lawyers to their IP-colleagues.....	58
4.2. Barriers to Having a Global and Effective IP-Practice in Brazil .....	61
CONCLUDING REMARKS.....	70

## INTRODUCTION

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 and the question of how legal education and legal reforms can be used to promote 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 update and innovative teaching techniques brought by foreign scholars should have trained the “third world”<sup>7</sup> countries’ legal elites, who would carry out

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<sup>1</sup> See David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 Wis. L. Rev. 1062 (1974).

<sup>2</sup> 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) [hereinafter Trubek, *Law and Development*].

<sup>3</sup> 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*]; 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*].

<sup>4</sup> See Trubek & Galanter *supra* note 1.

<sup>5</sup> *Id.* at 1067.

<sup>6</sup> *Id.* at 1068.

<sup>7</sup> *Id.* at 1083-1088.

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> Those organizations provided the necessary resources to put these projects into practice.<sup>10</sup> Such reforms, however, were short-lived. Economic and political instability emerged in countries like Brazil and India for different reasons, but these crises shared 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 policy-making initiatives.<sup>12</sup>

Yet, 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 those interested in this new “moment”<sup>14</sup> of law and

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<sup>8</sup> *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 [hereinafter Trubek, *Reforming Legal Education in Brazil*]. (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).

<sup>9</sup> See generally, Trubek, *Reforming Legal Education in Brazil*, *supra* note 8; Krishnan, *Professor Kingsfield goes to Delhi*, *supra* note 3; and Krishnan, *Academic SAILERS*, *supra* note 3.

<sup>10</sup> See generally, Trubek & Galanter, *supra* note 1; Trubek, *Reforming Legal Education in Brazil*, *supra* note 8; Krishnan, *Professor Kingsfield goes to Delhi*, *supra* note 3; and Krishnan, *Academic SAILERS*, *supra* note 3.

<sup>11</sup> See Trubek & Galanter, *supra* note 1. See generally DAVID M. TRUBEK & ALVARO SANTOS (eds.), *THE NEW LAW AND ECONOMIC DEVELOPMENT* (2006).

<sup>12</sup> See generally TRUBEK & SANTOS, *supra* note 11.

<sup>13</sup> *Id.*

<sup>14</sup> See David Trubek & Alvaro Santos, *The Third Moment in Law and Development Theory and the Emergence of a New Critical Paradigm*, 1-18, in DAVID M. TRUBEK & ALVARO SANTOS (eds.), *THE NEW LAW AND ECONOMIC DEVELOPMENT* (2006), at 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).



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 under a law and development perspective, highlighting how IP law is important to a country’s developmental path,<sup>17</sup> they have not analyzed how problematic legal education may be for IP-lawyers in a country as Brazil. Other studies, though, have thoroughly assessed how Brazilian international trade lawyers have been extensively trained.<sup>18</sup> This thesis, therefore, aims to fill that gap in this literature, bringing legal education and legal training in IP to the center of this debate and discussing the differences between the legal practice in international trade and IP in Brazil as well as the preparation received by lawyers in their respective fields.

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. Patent, trademark, and copyright laws serve as important tools to attract foreign investment and develop a country’s domestic industry and its network

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<sup>15</sup> See generally TRUBEK & SANTOS, *supra* note 11; DAVID M. TRUBEK et al. (eds.), *LAW AND THE NEW DEVELOPMENTAL STATE: THE BRAZILIAN EXPERIENCE IN LATIN AMERICAN CONTEXT* (2013); and DAVID M. TRUBEK & MARIO G. SCHAPIRO, *DIREITO E DESENVOLVIMENTO: DIÁLOGO ENTRE OS BRICS* (2012).

<sup>16</sup> 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.

<sup>17</sup> 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 (2011-2012); Monica Steffen Guise Rosina, Fabrício Polido, and P. Guimarães, *Propriedade Intelectual: Potencialidades e Fragilidades do Ambiente Jurídico-institucional Brasileiro para a Inovação*, 135-180, in DAVID M. TRUBEK & MARIO G. SCHAPIRO, *DIREITO E DESENVOLVIMENTO: DIÁLOGO ENTRE OS BRICS* (2012); and Michelle Rattón Sanchez Badin, *Developmental Responses to the International Trade Legal Game*, 246-300, in DAVID M. TRUBEK et al. (eds.), *LAW AND THE NEW DEVELOPMENTAL STATE: THE BRAZILIAN EXPERIENCE IN LATIN AMERICAN CONTEXT* (2013)..

<sup>18</sup> See generally Gregory Shaffer, Michelle Rattón Sanchez, and Barbara Rosenberg, *The Trials of Winning at the WTO: What Lies behind Brazil’s Success*, 41 Cornell Int’l L.J. 383 (2008); Rubens E. Glezer et al. *Transforming the Trade Law Profession: from WTO Experts to Trade Remedy Litigators and Foreign Trade Consultants*. In: DAVID TRUBEK, DAVID WILKINS & LUCIANA CUNHA (eds.), *TITLE TO BE DECIDED BY THE EDITORS*, forthcoming (on file with the author).

of services.<sup>19</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>20</sup> Accordingly, international trade and IP have worked relatedly for centuries. But, in Brazil, this relationship has been recently marked by an interesting characteristic: international trade lawyers have ably handled and succeeded in IP-trade-disputes derived from the TRIPs Agreement, whereas Brazil's domestic regulation of IP-rights that has resulted from this treaty has failed to foster Brazil's development.

Indeed, there are two groups of scholars who analyze that situation. There are authors whose works focus on international trade and the positive ramifications of Brazil's trade policies and lawyering in transnational disputes over IP-rights.<sup>21</sup> In parallel, academics specifically concerned with IP have discussed how Brazil has wrongly harmonized its domestic IP-laws to international treaties, and whether Brazil needs to strengthen its national research agenda in order to prepare IP-professionals in a better manner.<sup>22</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 described how these professionals have received both legal education and practical training at elite organizations outside of Brazil. Also, a recent research highlighted how this capacity building has

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<sup>19</sup> See PAUL GOLDSTEIN & MARKETA TRIMBLE, INTERNATIONAL INTELLECTUAL PROPERTY LAW, CASES AND MATERIALS (2012).

<sup>20</sup> *Id.*

<sup>21</sup> See Santos, *supra* note 17, and Badin, *supra* note 17.

<sup>22</sup> See Julia Paranhos & Lia Hasenclever, *A Proteção Patentária e a Interação Empresa-Ict no Sistema Farmacêutico de Inovação Brasileiro*, 29 RADAR – TECNOLOGIA 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).

successfully worked for Brazilian legal professionals. While these inquiries on international trade and the legal profession in Brazil exist, similar studies on international IP and IP-lawyers are still missing.

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>23</sup> For that reason, this thesis will analyze this “boundary-blurring”<sup>24</sup> aspect of international IP and how it relates to the Brazilian legal profession.

To be sure, the legal profession is known for its liberal values.<sup>25</sup> Lawyers have been active players in advocating for economic liberalization and the rule of law in several countries.<sup>26</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 that is internationalized, it will look at legal education in IP at Brazilian elite law schools. In sum, whether Brazilian IP-lawyers have been properly educated in IP is a question that needs scrutiny.

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<sup>23</sup> See Jayanth K. Krishnan, Vitor M. Dias, and John E. Pence, *Legal Elites and The Shaping of Corporate Law Practice in Brazil: A Historical Study*, forthcoming in LAW & SOC. INQUIRY.

<sup>24</sup> See Sida Liu, *The Legal Profession as a Social Process: A Theory on Lawyers and Globalization*, 38 Law & Soc. Inquiry 670, at 676.

<sup>25</sup> See TERENCE C. HALLIDAY & LUCIEN KARPIK (eds.), *LAWYERS AND THE RISE OF WESTERN POLITICAL LIBERALISM: EUROPE AND NORTH AMERICA FROM THE EIGHTEENTH TO TWENTIETH CENTURIES* (1997); and TERENCE C. HALLIDAY, LUCIEN KARPIK, AND MALCOLM FEELEY (eds.), *FIGHTING FOR POLITICAL FREEDOM: COMPARATIVE STUDIES OF THE LEGAL COMPLEX AND POLITICAL LIBERALISM* (2007).

<sup>26</sup> See Halliday & Karpik, *supra* note 24; Halliday, Karpik, and Feeley, *supra* note 24; and Krishnan, Dias, and Pence, *supra* note 22.

That claim is relevant to Brazil's development, because Brazil has been politically engaged in IP-matters, both domestically and globally.<sup>27</sup> The Brazilian government has historically signed international treaties,<sup>28</sup> attempted to modernize its patents and trademarks office (INPI in Portuguese),<sup>29</sup> and reformed its domestic norms to foster R&D and innovation within the country.<sup>30</sup> Moreover, with respect to IP-disputes, Brazil has litigated and has been demanded in international forums, such as the WTO.<sup>31</sup> This thesis' argument will add another layer to this specific point, that is, the intersection of IP and international trade, by comparing the different training that IP- and trade-lawyers have received.

Both IP and international trade are deemed to be complex practices that need specialized legal professionals.<sup>32</sup> 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>33</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>34</sup> Brazil has been championed for its success in handling transnational disputes over IP-rights and the TRIPs Agreement.<sup>35</sup> On the other, the harmonization of domestic norms to 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>36</sup> Inasmuch as there exist a market for

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<sup>27</sup> See Badin, *supra* note 17.

<sup>28</sup> See Krishnan, Dias, and Pence, *supra* note 22.

<sup>29</sup> See LEANDRO MALAVOTA, *A CONSTRUÇÃO DO SISTEMA DE PATENTES NO BRASIL: UM OLHAR HISTÓRICO* (2011).

<sup>30</sup> *Id.*

<sup>31</sup> See Badin, *supra* note 17.

<sup>32</sup> See Fabiana Luci de Oliveira and 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); and Shaffer, Sanchez, and Rosenberg, *supra* note 18.

<sup>33</sup> See Badin, *supra* note 17.

<sup>34</sup> See Shaffer, Sanchez, and Rosenberg, *supra* note 18.

<sup>35</sup> See Badin, *supra* note 17; Santos, *supra* note 17.

<sup>36</sup> See Paranhos & Hasenclever, *supra* note 21; and Lana, *supra* note 21.

international legal services in IP, lawyers should be prepared to provide these services accordingly. However, it is unclear 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>37</sup> Namely, the vast majority of Brazil's international trade legal professionals have pursued advanced law degrees at universities outside of Brazil.<sup>38</sup> Also, they have worked at respected multilateral organizations and global law firms abroad.<sup>39</sup> These legal practitioners have described, in different moments, how Brazil's strategy of capacity building has been effective, and how it has been instrumental to Brazil's triumph in international trade disputes.<sup>40</sup> This work will assess whether or not similar initiatives that have targeted on 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 selected elite Brazilian law schools. The existing literature on legal education states that very few 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>41</sup> Initiatives outside the law schools' boundaries will be similarly assessed. Therefore, this thesis will examine whether global forces that have guided Brazil's new development "moment" have also demanded more legal knowledge and hence a better legal education on international IP in Brazil, and whether or not law schools have followed this process.

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<sup>37</sup> See Shaffer, Sanchez, and Rosenberg, *supra* note 18; Glezer et al., *supra* note 18.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> See Trubek, *Reforming Legal Education in Brazil*, *supra* note 8.

## METHODOLOGY

After having stated this research's objective, claim, and argument, its methodology is outlined here. This thesis will draw upon a theoretical framework of law and development, IP, and legal education. An empirical analysis of primary and secondary sources on elite law schools and prestigious IP law firms in Brazil will be conducted. In terms of the former, prominent law schools' curriculum will be assessed in order to identify whether the most regarded Brazilian law schools offer IP courses to their students. Regarding the latter, the websites of highly-ranked Brazilian law firms specialized in IP will be thoroughly investigated in order to observe where Brazil's elite IP-lawyers are being educated, that is, whether in Brazil, abroad, or in both places.

It is important to note that the practice of law in IP in Brazil is stratified and specialized.<sup>42</sup> Few firms repeatedly appear in rankings with focus on the legal profession, and they are constantly demanded by in-house general counsels who do not handle IP-matters internally in their companies.<sup>43</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>44</sup> Consequently, in addition to being well educated at elite law schools, IP lawyers also need to be global lawyers.<sup>45</sup>

This thesis will assess two complementary fields, namely legal education and IP as well as how their relationship impacts the Brazilian legal profession. For that

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<sup>42</sup> See Oliveira and Ramos, *supra* note 31; Glezer et al., *supra* note 36; 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: a J. Int'l. Perspectives 47 (2006).

<sup>43</sup> *Id.*

<sup>44</sup> See Gomulkiewicz, *supra* note 41, and Hicks, *supra* note 41.

<sup>45</sup> *Id.*

reason, these matters need specific attention. This work will thus be organized in five chapters, besides the introduction and this methodological section.

The first chapter will discuss the structure of legal education and the situation of IP within the law school curriculum in Brazil. Secondly, a descriptive analysis of Brazil's copyrights, trademarks, and patent laws will be conducted. After having described the pertinent IP-laws in Brazil that have been majorly affected by globalization, the third and fourth chapters 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.

Namely, the fourth chapter will examine where the elite of IP-lawyers has been educated, what consequences to Brazil's development arise from the problems of legal education in IP, and what international IP-lawyers can learn from the experience of international trade lawyers. Regarding the latter, it will be explained how international trade lawyers have been trained despite the lack of legal education in international trade provided by Brazilian law schools. Thus, capacity building programs that have been created to enhance Brazilian international trade lawyers' skills will be summarized, and a comparison with IP-lawyers will be made in the third chapter. With respect to the process of gathering data, some problems have been faced. There were some obstacles to collect precise data on elite IP-lawyers in Brazil while this research was being done. For that reason, a methodological caveat regarding the third chapter is necessary.

There are three well-respected publications that make it possible to refine the search of law firms per expertise: "Chambers & Partners,"<sup>46</sup> "The Legal 500,"<sup>47</sup> and

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<sup>46</sup> See Chambers & Partners – Brazil – Intellectual Property Lawyers & Law Firms, <http://www.chambersandpartners.com/41/34/editorial/9/1>.

<sup>47</sup> See The Legal 500, <http://www.legal500.com/c/brazil/intellectual-property>.

“Who is Who Legal.”<sup>48</sup> The website of each of the recommended firms by those periodicals has been carefully researched. However, the degree of public information on the educational background of lawyers varied. That is, some firms disclose only information on partners and hence the total number of IP-lawyers working at these firms as well as where they have been educated is not known for certain.

Notwithstanding, when those details were lacking, data on the lawyers who had their profiles available have been collected.

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>49</sup> Accordingly, the degree of exposure to foreign education of law firms’ partners tends to be a reliable source to identify to which 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.

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.

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<sup>48</sup> See Who is Who Legal, <http://whoswholegal.com/specials/186/brazil/>.

<sup>49</sup> See Maria da Gloria Bonelli, *Lawyers' Associations and the Brazilian State, 1843-1997*, 28 *Law & Soc. Inquiry* 1045 (2003); and Frederico de Almeida, *A Nobreza Togada: as Elites Jurídicas e a Política da Justiça no Brasil*, Ph.D. Diss. (2010) (on file with the author).



## Chapter 1. Legal Education in Brazil: An Overview

Access to education at all levels has been a longstanding problem in Brazil.<sup>50</sup> The complications begin before admissions to college. Namely, the needy struggle to register their children in public schools.<sup>51</sup> Even when they succeed in doing that, 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>52</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 necessitous students seek admissions into a public university, because public higher education is the main (or only) option for those who come from public schools. Therefore, the entranceway to higher education for poor people in Brazil is extremely challenging, which is worsened when one seeks elite degrees such as law.

Law schools are considered the elite of higher education in Brazil since the Portuguese empire (1500-1822).<sup>53</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>54</sup> In addition, higher education was not a priority for the crown, and the education of the elites living in Brazil was concentrated in

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<sup>50</sup> See THOMAS E. SKIDMORE, *BRAZIL: FIVE CENTURIES OF CHANGE* (1999).

<sup>51</sup> See Marcelo Cortês Neri (coord.), *Tempo de Permanência na Escola*, FGV/IBRE, CPS (2009); Marcelo Cortês Neri (coord.), *O Tempo de Permanência na Escola e as Motivações dos Sem-Escola* FGV/IBRE, CPS (2009).

<sup>52</sup> *Id.*

<sup>53</sup> See Joaquim Falcão, *Lawyers in Brazil*, pp. 400-434, in: RICHARD L. ABEL & PHILLIP S. C. LEWIS, *LAWYERS IN SOCIETY: THE CIVIL LAW WORLD* (1988).

<sup>54</sup> *Id.*

Europe for several years.<sup>55</sup> To be sure, the first Brazilian law schools were founded only in 1827, when Brazil was an independent country already<sup>56</sup> – two schools were established in that same year, one in São Paulo and another one in Recife (on the Brazilian Southeast and Northeast, respectively).<sup>57</sup>

Since that period, many aspects have changed. Specifically, there has been an increase in the number of law schools in the country.<sup>58</sup> Notwithstanding, holding a law degree remains a symbol of status, and those who earn it are usually in the upper social classes.<sup>59</sup> Therefore, the growth in the number of law schools has been followed by the maintenance of the stratification of the legal careers, which has been worsened by the low quality of the majority of law schools in Brazil.<sup>60</sup>

With that said, the data on legal education in contemporary Brazil are impressive. 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 Brazil. According to FGV Direito SP, there were 1,157 law schools and 40,863 law faculty in Brazil in 2012.<sup>61</sup> Although Brazil has traditionally promoted its public universities, this has not been the case of legal education. Looking at 1,157 law schools that were operating in 2012, 84% were

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<sup>55</sup> See Almeida, *supra* note 48.

<sup>56</sup> *Id* at 97.

<sup>57</sup> *Id.*

<sup>58</sup> *Id* at 90-91. See also Falcão, *supra* note 52.

<sup>59</sup> See Falcão, *supra* note 52.

<sup>60</sup> *Id.*

<sup>61</sup> See José Garcez Ghirardi et al., OBSERVATORIO DO ENSINO DE DIREITO, at 18, 28 (2013). Notwithstanding, 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 and 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, at 90 (2015): “It should be noted that a Brazilian law school based in one city may have a campus in another, from which a student can earn a law degree. Brazilian legal educators would see this situation as there being two separate law schools”. One law school may have campuses in more than one city. For censuses purposes, these are considered different law schools.”

private and only 16% were public.<sup>62</sup> Those numbers denote that private universities have been the main players in expanding the number of law schools in Brazil.

Yet 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>63</sup> Two main aspects stand for that perception. First, there are the grades issued by the Ministry of Education (MEC) for all universities in Brazil – 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>64</sup> (ENADE). Second, the law schools’ passing rates in the bar exam are also taken into consideration.<sup>65</sup> In the end, public universities have usually fared better in both assessments.<sup>66</sup>

More recently, MEC and *Ordem dos Advogados do Brasil* (the Brazilian Bar Association) (OAB) have heatedly debated on the quality of legal education in Brazil. Those two organizations do not always agree on what good legal education means. Yet it is undeniable that one who intends to attend law school in Brazil observes what both MEC and OAB have to say about one or another university. For that reason, it is important to describe how the law curriculum is organized in Brazil and the role that organizations like MEC and OAB play in the Brazilian legal education in order to assess the elite of law schools in Brazil.

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<sup>62</sup> *Id.* at 18.

<sup>63</sup> See Falcão, *supra* note 52. 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).

<sup>64</sup> Translated by the author.

<sup>65</sup> 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.

<sup>66</sup> See CONSULTOR JURÍDICO, *supra* note 62, and FUNDAÇÃO GETULIO 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).

### 1.1. Shedding Light on the Law School Curriculum

In Brazil, education is a constitutional right that shall be provided by public and private organizations.<sup>67</sup> The Guidelines for Education Act (*Lei de Diretrizes e Bases da Educação*, in Portuguese) (LDB), enacted in 1996, is the main norm that establishes the parameters that universities shall follow.<sup>68</sup> LDB states, in sum, that 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>69</sup> In addition to LDB, there are other rules that regulate specific boundaries for universities' degrees, including curriculum.

Historically, Acts 4,024/1961 and 5,540/1968 were the norms that regulated the higher education curriculum.<sup>70</sup> According to these norms, universities and their law schools should follow a strict curriculum model. Namely, which courses should be taught and how many credit-hours they should count toward the curriculum depended upon regulatory permission. The law school curriculum was, under this model, “frozen,”<sup>71</sup> which left law schools with no choice on the emphasis they wanted to put on one or another course, program, and research agenda.<sup>72</sup> Thus, there was virtually no difference between attending one or another law school with respect to curriculum, yet students who attended prestigious universities tended to improve their

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<sup>67</sup> See Brazilian Constitution, 1988, Arts. 205-204 (Braz.).

<sup>68</sup> See Brazilian Lei de Diretrizes e Bases da Educação (Act No. 9,394/1996) (Braz.).

<sup>69</sup> *Id.* at Art. 43, I-VII.

<sup>70</sup> See Carolina Ramazzina Van Moorsel, *O Ensino do Direito e o curso de Direito no Brasil: um panorama literário e regulatório*, Trabalho de Conclusão de Curso, at 44 (on file with the author).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

social networks beyond the classroom. This educational policy resulted in professional opportunities related much more to personal influence than merits.<sup>73</sup>

After the Constitution of 1988 and LDB established the general framework under which universities should be organized, specific regulation of law schools has been implemented. Starting in 1996 with LDB, there has been a movement to make the law school curriculum more flexible, intending that universities started to adjust 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, and foreign investment. The law school curriculum would start to be organized under a less strict framework, needing to follow guidelines, not mandatory courses imposed by the government anymore.<sup>74</sup>

The debate on the flexibility of the law school curriculum has garnered the attention of different players, in particular, MEC and OAB.<sup>75</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>76</sup> On the one hand, there were advocates of the model by which the law school curriculum needed to be exhaustively defined by the regulators,<sup>77</sup> which would establish required courses and give less discretion for law schools on what disciplines should be offered.<sup>78</sup> On the other hand, there were those who urged for more innovation in the curriculum and

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<sup>73</sup> See Falcão, *supra* note 52; and Trubek, *Reforming Legal Education in Brazil*, *supra* note 8.

<sup>74</sup> See Van Moorsel, *supra* note 69.

<sup>75</sup> *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*, Paper Presented at the Third East Asian Law & Society Conference (2013).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

teaching methods in order to update the Brazilian legal education to regional and international changes.<sup>79</sup> After persisting for a long time, the regulatory framework in favor of more flexibility of the law school curriculum won, and it is important to understand the changes that have been introduced since then.

Although the debate on changes to universities' curricula dates back to the 1990s, it was only in 2004 that law schools were specifically regulated, when MEC passed the *Resolução MEC 9/2004*. This *Resolução* confirmed the government's intent to induce law schools 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 point of views existed.

In sum, regulations on this matter have been directed toward more flexibility of the law school curriculum. Different from the "frozen"<sup>80</sup> program of study, law schools shall now inform the regulators the courses they offer, and whether there are elective classes or the entire curriculum is mandatory. As a result, "it does not exist a mandatory curriculum [anymore], but law schools shall justify and detail which program of study will be offered [to the students]."<sup>81</sup>

According to Brazil's current regulatory framework, law schools shall educate law students under a 'tri-tier' system. The first is the 'core program'; the "professional axis" is the second; and the third is the 'traineeship.' The core 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. With respect to the professional part of the curriculum, it follows the Brazilian civil law tradition, thus, a law school shall offer disciplines associated with the codes that exist in Brazil, namely civil law, civil procedure, criminal law, criminal procedure,

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<sup>79</sup> *Id.*

<sup>80</sup> *See* Van Moorsel, *supra* note 69.

<sup>81</sup> *Id.* at 50.

tax law, constitutional law, among others. Lastly, the ‘traineeship’ focuses on preparing students to their everyday practice, and its hours are usually used for internships for those interested in practicing law and complementary activities, such as direct reading and advanced research for those intending to pursue an academic career. Since this ‘tri-tier’ model establishes guidelines, law schools may now choose upon which tier they will put more emphasis, being able to imprint their mark on educating either future lawyers, law professors, or judges.

Although reforms have been pursued, some scholars have debated problems of the Brazilian legal education that persist.<sup>82</sup> One might ask whether the 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 scholarly opinion to date is that little progress has been achieved.<sup>83</sup> Brazilian law schools continue to educate students as they always have done, regardless of the improvements to the curriculum from which they could be benefiting.<sup>84</sup> Once the law professor is the responsible for applying the curriculum in the classroom, it is equally important to understand their situation in this context.

## 1.2. Understanding the Problems of Legal Education in Brazil: Who Are the Law Professors and What are Their Limitations to Teach?

It has been noted that, in Brazil, there were 40,828 law faculty and the vast majority of law schools were private in 2012.<sup>85</sup> Despite the recent developments in the law school curriculum, little attention has been given to law professors, who are

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<sup>82</sup> See generally JOSÉ EDUARDO FARIA (org.), DIREITOS HUMANOS, DIREITOS SOCIAIS E JUSTIÇA (2000).

<sup>83</sup> *Id.* See also Krishnan and Dias, *supra* note 60; JOSÉ GARCEZ GHIRARDI, O INSTANTE DO ENCONTRO QUESTÕES FUNDAMENTAIS PARA O ENSINO JURÍDICO (2012).

<sup>84</sup> See Faria, *supra* note 81; Krishnan and Dias, *supra* note 60; and Ghirardi, *supra* note 82.

<sup>85</sup> See Ghirardi et al., *supra* note 60 at 28.

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 are outdated for a long time.<sup>86</sup>

Drawing upon the data organized by FGV Direito SP, it is possible to analyze the general profile of the law professor in Brazil and what conclusions can be reached from this. Three aspects are relevant to the argument that is being built here: the types of faculty appointment, the educational level of these professors, and whether they work in public or private universities. Bearing these elements in mind, it is possible to understand, in general, which 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 among the faculty who work in public and private universities.

Because law is an undergraduate degree in Brazil, one intending to pursue an academic career upon graduating from law school tends to attend graduate school. That should prepare a law graduate with distinguished research and teaching techniques as well as with substantial background in a specific field of law that one would be interested in teaching. Law professors may hold an advanced degree in either law or other fields, such as economics, sociology, and political science.

With respect to the graduate program in law, it comprehends master and doctoral degrees and few universities offer these programs.<sup>87</sup> As of 2012, there were, respectively, 58 master and 24 Ph.D. programs in law available in Brazil.<sup>88</sup> The amount of programs may seem small, but the cohort of admitted students at each

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<sup>86</sup> See generally Krishnan and Dias, *supra* note 60; Trubek, *Reforming Legal Education in Brazil*, *supra* note 8; and FARIA (org.), *supra* note 81.

<sup>87</sup> 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 to lawyers seeking to become legal practitioners.

<sup>88</sup> See Garcez et al., *supra* note 60 at 26.



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 that hold master and doctoral degrees in Brazil. Namely, 18,489 professors held Master's degrees and 9,989 held Ph.D. degrees in 2012.<sup>89</sup> In sum, from the sample of 40,828 law professors, approximately 70% of them attended graduate school, 45% attained the master level, and 25% concluded the doctoral degree.<sup>90</sup>

These numbers may seem a good signal, but what they do 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>91</sup> whereas only 22% of the professors teaching in private schools are doctors.<sup>92</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 hence 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, some inferences can be made from the data. According to the Brazilian Census on Higher Education,<sup>93</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. Similarly to the higher education system in the United States, full

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<sup>89</sup> *Id.* at 34.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 35.

<sup>93</sup> *Id.*

professors affiliated with one specific department (or school) tend to become engaged more deeply to this appointment than professors that have multiple appointments within and outside the university's activities.

Although some improvement in the life standard for academics has been achieved, the overall situation of university professors remains difficult in Brazil.<sup>94</sup> The salaries paid to tenured, full professors, is not as high as compared to other professions, not to say the wages earned by adjunct professors and the rates applied to hourly-hired professors.<sup>95</sup> The infrastructure for research is poor and faculty lack of funding to attend conferences and do fieldwork.<sup>96</sup> For those 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 usual types of faculty appointment that exist in Brazil.<sup>97</sup> Namely, 66% of all law professors are hired as adjunct and hourly-paid faculty,<sup>98</sup> whereas only 6% are full professors with appointments at only one university. Furthermore, 28% of the faculty who are full professors has appointments at other universities.<sup>99</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 professors' commitment to thinking on new methods, updating syllabus, and researching is at least compromised due to their multiple tasks beyond teaching.<sup>100</sup>

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<sup>94</sup> See Rogério Rissato, *Baixa Remuneração de Professor Prejudica Ensino*, CONSULTOR JURÍDICO, Apr. 2 2011, <http://www.conjur.com.br/2011-abr-02/baixo-salario-professor-contribui-decadencia-curso-direito> (last visited Jul. 25).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> See Garcez et al., *supra* note 60 at 79-90.

<sup>98</sup> *Id.* at 79.

<sup>99</sup> *Id.*

<sup>100</sup> See generally FARIA (org.), *supra* note 81.

The situation is even worse when private law schools are analyzed. Whereas public universities rely on 30% of full professors with exclusive appointments,<sup>101</sup> private law schools count on only 2%.<sup>102</sup> Furthermore, adjunct and hourly-paid professors represent 71% of all law professors working for private universities,<sup>103</sup> whereas they are 38% of all the scholars working at public law schools.<sup>104</sup> There is an important caveat regarding these numbers nonetheless. 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 background, such as it has been noted by David Trubek when he analyzes FGV law schools.<sup>105</sup> There is thus a difference between the hiring parameters of private and public law schools in Brazil, where the priority for the majority of, but not all, universities is not toward having more faculty concerned with research and teaching solely.

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>106</sup> Indeed, 83% of legal academic positions exist at private universities.<sup>107</sup> This percentage raises some concerns regarding what these professors need to face while teaching at private universities. These schools hold the bargaining power and the patterns to hire legal scholars are similar among them, which leaves law faculty without options to negotiate their salaries and conditions for research. Consequently, universities tend to recruit adjunct and hourly-paid professors that have not completed their graduate studies.

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<sup>101</sup> See Garcez et al., *supra* note 60 at 79.

<sup>102</sup> *Id.* at 80.

<sup>103</sup> *Id.* at 80.

<sup>104</sup> *Id.* at 79.

<sup>105</sup> Trubek, *Reforming Legal Education in Brazil*, *supra* note 8.

<sup>106</sup> See Garcez et al., *supra* note 60 at 24.

<sup>107</sup> *Id.*

If some progress has been achieved regarding curriculum, this does not seem to be the case with respect to law faculty's working conditions. Whether that influences the performance of their students and the universities where they work is a relevant question that will be discussed below.

### 1.3. 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 worsened the problem of legal education in Brazil.<sup>108</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 its courses are assessed and graded:<sup>109</sup> teaching; research; agreements among universities; students' performance (in national exams); infrastructure and management; and faculty.<sup>110</sup> All these criteria shall be observed holistically.<sup>111</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 in the bar exam.

Indeed, in Brazil, MEC and OAB are relevant in determining whether a law school is reputable as being good or not. Moreover, conventional wisdom and perception toward which schools are considered elite or poor organizations also plays an important role in the assessment of Brazilian law schools by the population. Furthermore, the passing rates in the bar exam are relevant in people's analysis of law schools. Bearing that in mind, in spite of the big debate that exists in Brazil that only

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<sup>108</sup> See generally Falcão, *supra* note 52; and FARIA (org.), *supra* note 81.

<sup>109</sup> See Brazilian Lei do Sistema Nacional de Avaliação da Educação Superior (Act No. 10,861/2004) (Braz.).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

MEC is responsible for grading and regulating higher education, there are practical issues related to how OAB sees one or another law school.<sup>112</sup> This evaluation is even more important when private law schools' students usually attain lower grades in the government's national exam (ENADE) and fail to pass the bar exam.<sup>113</sup>

Currently, the passing rate in the bar exam is below twenty percent.<sup>114</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 will look at the latter question, specifically on whether Brazil has been able to educate IP-lawyers. Thus, one particular type of assessment of law schools will be used to refine this thesis' 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 MEC and OAB – as it will be explained below.

*OAB Recomenda* exists since 2001. However, it was since 2010 that its methodology was adapted to follow MEC's standards of evaluation of higher education. In 2010, OAB's Federal Council passed *Portaria* nº 52/2010-CFOAB (Portaria 52/2010), which is a regulation that aims to complement ENADE on the evaluation of law schools.<sup>115</sup> According to the Bar, *OAB Recomenda* "is a symbolic program (...), and works as a diagnosis, not a ranking, (...) that entrusts credibility to law schools."<sup>116</sup> Thus, as it has been argued above about people's perception of

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<sup>112</sup> 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.

<sup>113</sup> See CONSULTOR JURÍDICO, *Alunos de Públicas Têm Melhores Notas no Exame da OAB*, *supra* note 62.

<sup>114</sup> See Giselle Souza, *Pesquisa da FGV Mostra Perfil dos Candidatos do Exame de Ordem*, CONSULTOR JURÍDICO, <http://www.conjur.com.br/2015-mai-29/pesquisa-fgv-mostra-perfil-candidatos-exame-ordem> (last visited Aug. 1 2015).

<sup>115</sup> See Brazilian Bar Association (Portaria No. 52/2010-CFOAB) (Braz.).

<sup>116</sup> See OAB, *OAB RECOMENDA: INDICADOR DE EDUCAÇÃO JURÍDICA DE QUALIDADE* (2012), at 11. 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

Brazilian law schools, OAB attempted to add an empirical component upon which one can look at a law school and think about it as being elite or not.

With respect to *OAB Recomenda*'s methodology, it is a triennial report that is built upon statistical analysis of two main variables. Namely, *OAB Recomenda* takes into consideration both the law schools' grades attained in ENADE as well as the passing rate in the Bar Exam. Its sample comprehends the last law schools' results in the ENADE exam(s) and the last three bar exams applied before the report is released. Regarding the bar exam variable, OAB selects only the law schools that had at least twenty students that had sat for each of the three last bar exams. By using this methodology, OAB analyzed 790 law schools in the last edition of the *OAB Recomenda* report.<sup>117</sup> From 790 observations, only 89 received the *Selo OAB Recomenda*, which represents 7.4% of OAB's sample.<sup>118</sup> According to the Bar, these are the elite of legal education in Brazil considering the results of students' grades in ENADE and the passing rates in the bar exam.

Because this thesis is focused on elite law schools and their education in IP, this study will now analyze the curriculum of the 89 law schools recommended by OAB. This data is relevant to understand whether and where IP-lawyers are being educated in Brazil. Although quantitative data for all law schools in Brazil is absent, it is presumable 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 even worse situation.

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

<sup>117</sup> See OAB, *supra* note 115 at 36.

<sup>118</sup> *Id.* at 20.

#### 1.4. 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 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, *Selo OAB Recomenda* reveals an interesting situation regarding the law schools that are reputable as having law students that are faring well in both ENADE and Bar Exam. These schools should be at the forefront of the Brazilian legal education. For that reason, the 89 law schools that received the seal should be fostering innovation to 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 development.<sup>119</sup> Experienced lawyers have declared intellectual property as being an extremely complex field; thus, high skilled lawyers would be necessary to work on this area.<sup>120</sup> Indeed, the general counsel offices of multinational companies in Brazil have reinforced this perception.<sup>121</sup> Researchers have noted that: “[i]n general, legal departments outsource mass demands to law firms, involving labor and consumer litigation, tax litigation, very specific and at the same time complex issues, which require a lot of time from the team, such as mergers and acquisitions (M&A), and

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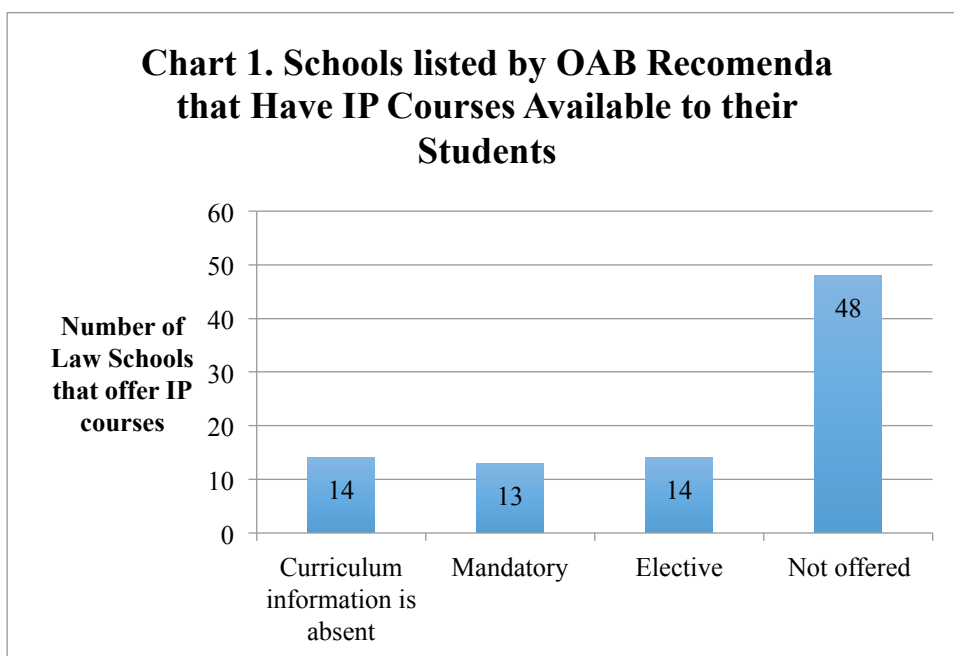
<sup>119</sup> See generally GLAUCO ARBIX, *INOVAR OU INOVAR A INDUSTRIA BRASILEIRA* (2007); and GOLDSTEIN & TRIMBLE, *supra* note 18.

<sup>120</sup> See Oliveira and Ramos, *supra* note 31.

<sup>121</sup> *Id.*

specific and specialized matters (criminal and intellectual property).”<sup>122</sup> Therefore, since IP is considered a complex field, elite lawyers should be receiving an appropriate education while attending law school, so they could be more competitive in the legal market.

In order to understand if lawyers have been trained in IP by the elite of law schools in Brazil, the curricula of all 89 organizations listed in the last *OAB Recomenda* report were researched. Although IP is not part of everyday lawyering, it is certainly important for relevant law schools to educate lawyers in this area, because they tend to supply the future elite lawyers in Brazil. With that said, 14 law schools listed by *OAB Recomenda* do not provide information on their curriculum. Regarding the other 75 law schools, their curricula were thoroughly researched to find whether IP was a course offered by these schools. When law schools had IP in their curricula, this has been divided into which schools make IP a mandatory or an elective course. The results are summarized in the bar chart below.



Source: the website of each of the 89 law schools listed in *OAB Recomenda*.

<sup>122</sup> *Id.* at 31.



The findings are impressive. Forty-eight schools, in a sample of 89 elite law schools, do not have IP courses, not even specific IP-related matters such as copyrights, trademarks, patents, just to name a few. Thus, from 89 law schools that are respected and receive a seal from the Brazilian Bar, 54% of them 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 but 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 leave to the student the choice of whether or not pursue studies on IP. 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>123</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 coming students. However, it is problematic to see that IP has been neglected by 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 in the global market, 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 impacts of globalization in Brazil and from the flexibility to structure their curriculum seem to be leaving IP outside of their scope. That is, IP has been a relevant field to Brazil's industrialization and development and hence most of elite law schools in the country

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<sup>123</sup> See Santos, *supra* note 17; Badin, *supra* note 17.

should be interested in it, but this has not been the case. As a result, Brazilian lawyers may be receiving training in IP, but not necessarily while attending law school in Brazil.

Due to the economic situation in Brazil and its recent booming, IP is an important matter to Brazil's globalizing legal profession that is looking for new demands in the country. In spite of all the limitations of the Brazilian legal education, relevant reforms have been addressed to Brazil's IP-laws over the 1990s and 2000s, and Brazilian lawyers have fared relatively well in 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 chapters.

## Chapter 2. Intellectual Property: A Survey of the Brazilian Legislation

Brazil has held the tradition of being an active country in protecting IP rights from imitation, domestically and globally. That is, 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>124</sup> As an independent country, Brazil has maintained that custom. Under the national perspective, significant changes have been addressed to the protection of IP-rights in Brazil, in particular, after the Constitution of 1988. Regarding the international standpoint, Brazil has signed international treaties on these matters and engaged in transnational disputes at the WTO.<sup>125</sup>

For the reasons mentioned above, this chapter will focus on a contemporary analysis of Brazil’s IP-norms. Specifically, the Constitution of 1988 and 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 WIPO regimes and their effects on Brazil’s IP-practice.

### 2.1. Intellectual Property Norms in Brazil

Similarly to what exists in the United States, intellectual property rights are described in the Brazilian Constitution. Copyrights,<sup>126</sup> patents, and trademarks are expressly written in the Constitution. To be sure, authors and their heirs are granted

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<sup>124</sup> See Krishnan, Dias, and Pence, *supra* note 22 at 14. See also DENIS BORGES BARBOSA, *UMA INTRODUÇÃO À PROPRIEDADE INTELECTUAL* (2010) [hereinafter Barbosa, Introdução].

<sup>125</sup> 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. Regarding this situation, see generally GOLDSTREIN & TRIMBLE, *supra* note 18.

<sup>126</sup> This thesis 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.

the rights of ownership over their work, which can be publicized or reproduced in accordance with specific legislation<sup>127</sup>. Furthermore, inventors and trademark's owners hold similar rights over their inventions and marks, respectively.<sup>128</sup> The 1988 Constitution, therefore, reinforced Brazil's tradition of having IP-rights among the country's highest 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>129</sup> Namely, the establishment of the WTO in 1995 and the signature of the TRIPS Agreement in 1994 strengthened the movement of legal reforms in Brazil, which resulted in legal changes to the main IP-norms in Brazil.<sup>130</sup> Issues like duration, rights of ownership, and transfer of immaterial rights, among others, have been changed as means to foster Brazil's technological, socioeconomic, and cultural development.<sup>131</sup> Brazil that had once been a closed market for foreign investment, companies, and goods was now an open economy.<sup>132</sup> Reforming IP-rights was, consequently, instrumental in ensuring the functioning of a free market economy in Brazil.<sup>133</sup>

With respect to specific norms that regulate IP practice in Brazil, there are copyrights, patents and trademarks, industrial secret, and software acts. There are several different manners to assess those matters. Bearing that in mind, this chapter will draw upon Paul Goldstein and Marketa Trimble's famous textbook,

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<sup>127</sup> See Brazilian Constitution, Art. 5º, XVII and XVIII, a, b (Braz.).

<sup>128</sup> See. Brazilian Constitution, art. 5º, XXIX (Braz.).

<sup>129</sup> See generally Barbosa, Introdução, *supra* note 123; DENIS BORGES BARBOSA, 2002, A *Legislação De Propriedade Intelectual em Vigor*, <http://egov.ufsc.br/portal/sites/default/files/anexos/27580-27590-1-PB.pdf> (last visited Aug. 1) [hereinafter Barbosa, *Legislação*].

<sup>130</sup> See Barbosa, Introdução, *supra* note 123; and Barbosa, *Legislação*, *supra* note 128 at 3-6.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* See also Santos, *supra* note 17; and HELOISA CONCEIÇÃO MACHADO DA SILVA, DA SUBSTITUIÇÃO DE IMPORTAÇÕES À SUBSTITUIÇÃO DE EXPORTAÇÕES (2004).

<sup>133</sup> See Santos, *supra* note 17; Badin, *supra* note 17.

“International Intellectual Property Law: Cases and Materials.” Specifically, Brazilian IP-law’s requirements for protection, duration, remedies and prosecution, and rights of ownership will be summarized. Those characteristics will provide important background for the understanding of Brazil’s engagement in international IP-issues.

### 2.1.1. 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>134</sup> Furthermore, that same norm establishes the first-to-file system as the valid registration proceeding in Brazil.<sup>135</sup> Starting from the date of the filing with *Instituto Nacional de Marcas e Patentes* (INPI) (the Brazilian PTO), patents shall remain valid for twenty years and utility models for fifteen years. The inventor shall register the invention either in Brazil or in any other country that has treaties with Brazil to receive patent protection.<sup>136</sup>

Brazil’s legislation describes what shall not be patented. Specifically, Act 9,279/96 states that the following items shall 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>137</sup> In addition, an innovation shall not be part of the state of the art of ongoing scientific or industrial processes. Under Brazilian law, an invention shall be an innovation resulted from human creation and improvement in order to be patented.

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<sup>134</sup> See Lei de Propriedade Intelectual (Act No. 9,279/1996), art. 8 (Braz.).

<sup>135</sup> *Id.* at arts. 16 and 17.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at art. 10, I et seq.

Once a patent has been granted, a patent holder shall license the right of use for a third party interested in “producing, using, offering for sale, selling or importing”<sup>138</sup> a product or a process derived from the patent. There are two types of license 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 voluntarily seek INPI with the license contract ready for registration, or the licensee may request INPI to offer the patent publically as means of finding a potential licensor interested in exploiting the patented product or process.<sup>139</sup> In both cases, the license contract shall be registered with INPI to become lawful.<sup>140</sup>

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 that occurs, the patent holder is required by INPI to license the product or process. INPI is entitled to grant a compulsory license in specific cases, which shall 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>141</sup> Furthermore, the request for a compulsory license shall describe the license fees and payment methods as well

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<sup>138</sup> *Id.* at art. 42, I, II.

<sup>139</sup> *Id.* at arts. 61-67.

<sup>140</sup> *Id.* at art. 62. and art. 62, I.

<sup>141</sup> *Id.* at art. 68 et seq.

as its duration. And, most important, the petitioner shall prove why the compulsory license shall be granted.

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

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

Regarding the territorial aspects of IP enforcement, both INPI and Brazilian courts need to apply IP-rights from abroad within the Brazilian territory. Those rights are granted whenever the patent holder, or the licensor, exploit 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.

With that said, in numbers, the number of patent and utility model applications registered with INPI has increased over the past years. However, it is undeniable the gap between applications submitted by resident and non-resident applicants in Brazil.<sup>142</sup> According to the existing literature on IP in Brazil, the lack of research in IP in Brazil is one factor that leads to this situation.<sup>143</sup>

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<sup>142</sup> According to the WIPO, the difference between resident and non-resident is: “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,

Table 1 summarizes 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, this has not necessarily resulted in the improvement of research conditions in Brazil. 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 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.

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

[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).

<sup>143</sup> See Eduardo da Motta e Albuquerque and Paulo Brígido Rocha Macedo, *Concessão de Patentes a Residentes no Brasil: 1990/95*, 26(3) PESQ. PLAN. ECON. 483 (1996).



research environment in Brazil can explain, again, 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>144</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. Brazilian patent attorneys who should be qualified to advise and litigate on these matters, in accordance with Brazilian and international laws, lack the proper preparation while in law school. Moreover, the environment for research that should prepare engineers, physicians, and other types of inventors is similarly deficient. 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 the

<sup>144</sup> *Id.*

development of inventions in general. Indeed, trademarks, which do not need extensive research conditions as patents, have thrived in Brazil while the country experienced significant growth over the 2000s.

### 2.1.2. Trademarks

Act 9,279/96 also regulates marks in Brazil. Similarly to the American model of trademarks protection, the rights of ownership of marks shall be gained by its use. However, marks' owners shall register a mark with the trademarks authority – INPI in Brazil – as 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 will have priority over the rights of ownership.

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>145</sup> Furthermore, Act 9,279/96 states that there are services and products, certification, collective, well-known, and famous marks. INPI is entitled to declare whether a mark is well-known, famous, or shall be entitled 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

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<sup>145</sup> See Act No. 9,279/1996 (Braz.), *supra* note 133 art. 122.

be registered in any country that has signed the treaty, whereas well-known marks shall be registered in Brazil.

Different from the lack of details on what is a mark that shall be registered with INPI, Act 9,279/96 extensively describes what shall not be registered as a mark. The scope of the norm is vague to foster creativity, innovation, and development. In sum, a mark shall not be entitled protection in cases that: a mark is already owned by a third party; are considered immoral and unethical signs; signs that may disguise the consumer; and other signals that are already protected under Brazilian law.<sup>146</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. Consequently, the distinctive signals of the registered mark shall not be copied. 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. While a mark is protected, its owner shall use her rights to exploit the mark or license it for third party use. These are, therefore, the main rights of ownership derived from the registration.

Invalid registration and disrespect of rights of ownership may be challenged in either INPI or courts. Petitioners who intend to commence administrative proceedings that claim for the nullity of a trademark registration shall file the request within 180 days from the registration date. As for lawsuits, they shall be brought to courts within five years of the date of the registration. Once a court reaches a decision on whether the mark is valid or null, INPI shall be notified to enforce the legal proceedings with respect to voiding the registration, ceasing the rights of ownership, or transferring the

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<sup>146</sup> *Id.* at art. 124, I et seq.

title to whomever is entrusted the ownership in accordance with what has been decided in courts.

Regarding the development of trademarks in Brazil after the reforms of 1996 and the recent economic booming observed in the country, trademarks applications have increased significantly. To be sure, Brazil was the third country with the highest number of trademarks applications by residents in 2007, according to WIPO's data. Different from patents, however, economic performance has more impact on the development of trademarks than the environment of adequate legal services and R&D.<sup>147</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 good economic moment 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.

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 WIPO statistics database. Prepared by the author.

<sup>147</sup> See William O. Hennessey, *The Role of Trademarks in Economic Development and Competitiveness*, [http://ipmall.info/hosted\\_resources/Hennessey\\_Content/RoleofTrademarksinEconomicDevelopmentandCompetitiveness.pdf](http://ipmall.info/hosted_resources/Hennessey_Content/RoleofTrademarksinEconomicDevelopmentandCompetitiveness.pdf) (last visited Aug. 3 2015) (n.d.).

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 within the country and abroad. That context has led to a significant increase in the number of trademarks applications in Brazil, and Brazilian nationals have been responsible for 74% of the total applications on average.

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. The difference between these two IP-rights regulated under the same norm is likely to be 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. On the other, patent lawyering demands skillful professionals alongside patent experts that understand specific characteristics of an invention. 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 drawn regarding the enforcement of trademarks protection. Thus, Brazilian lawyers shall not be aware of 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.

### 2.1.3. Copyrights

Although trademarks, patents, and industrial design 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 starts describing the international scope of protection in Brazil. The first articles of this norm state that copyrights registered in countries with which 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.

Indeed, the definition of works under the Brazilian copyright legislation is comparable to what is found in the U.S.: “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>148</sup> Likewise, the roll of works that shall receive protection is similar, such as: 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>149</sup> These are some examples of intellectual creation that shall receive protection under Act 9,610/98.

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<sup>148</sup> See Lei de Direitos Autorais (Act No. 9,610/1998), Art. 7 (Braz.).

<sup>149</sup> For a complete list of works described in Act No. 9,610/98, see *Id.* Art. 7, I et seq.

If a creation falls within the categories mentioned above, an author has the right to register her work. However, similarly to what happens with trademarks, the register is not required as means to protect the work, and it is usually recommended to prove anteriority when a conflict over ownership emerges. Accordingly, an author who had registered her work first has the presumption of ownership. Finally, authors have several options as to where they shall register their works, which vary according to the nature of the work.

With respect to the rights of ownership, they shall be exercised by the author solely, a corporate entity duly entitled for that, or more than one author in case of collective works. Authors have moral and economic rights 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 authorizing, expressly, 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.

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. Because there exist 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 aspects related to copyright laws,

the cases of infringement, and what, in general, the Brazilian laws have adopted to protect domestic and international copyrighted works. 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 with some flaws as well. Yet, those are some of the steps to secure IP protection to Brazilian companies and multinational corporations based in Brazil. Another relevant aspect is how Brazil has used the international norms and global forums for dispute settlement on IP rights.



### Chapter 3. When International Trade and IP Overlap: Brazil as an International IP-Rights Disputant

Brazil has been at the forefront of international protection of IP -ights, in particular, because it has signed several international treaties and settled disputes using bodies as the WTO. This tradition dates back to the Berne Convention, which regulates copyrights over artistic and literary works – Brazil is one of the original signatory countries of this treaty. Similarly, Brazil has also signed the Paris and Rome Conventions, respectively on patents and trademarks. Finally and more recently, Brazil agreed to the terms of the TRIPS Agreement, which governs the international trade of IP-related products and services.<sup>150</sup>

Moreover, Brazil has worked closely with international IP organizations, mainly the WIPO and the WTO (since the latter's predecessor GATT). Namely, Brazil joined the WIPO in 1975,<sup>151</sup> has been a WTO member since 1995 (the year of its foundation),<sup>152</sup> and was part of GATT since 1948.<sup>153</sup> As a member of the most relevant international IP bodies, an original signatory to important international IP treaties, and an active reformer of its national IP-laws to adhere to international proceedings, Brazil has been a key global player with respect to the development of international IP.

In addition to the Brazilian proactivity in IP global regulation, international litigation involving IP issues have also been part of Brazil's agenda. The Brazilian government and companies have diligently used international forums of dispute settlement in IP. However, most of the data involving private entities are not

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<sup>150</sup> See *WIPO-Administered Treaties: Brazil*, WIPO, n.d., [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).

<sup>151</sup> See *Information by Country: Brazil*, WIPO, n.d., [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).

<sup>152</sup> See *Understanding the WTO – Members*, WTO, n.d., [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).

<sup>153</sup> *Id.*

disclosed, for example, international arbitration. Nevertheless, the WTO makes available all the 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.

The matters disputed at 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. If not, who else is providing legal services in international IP-trade involving the Brazilian government and companies instead of Brazilian IP-lawyers? These are relevant aspects of the elite legal practice in IP.

### 3.1. The TRIPs Agreement and the Brazilian Response to International IP-Trade Litigation

The establishment of the TRIPs Agreement and the WTO regime with its new dispute settlement system posed several challenges to countries and lawyers, especially those from the developing world. 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 would need 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 would become even more evident in this context.<sup>154</sup>

Yet 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. That is, while using international forums of dispute settlement, namely the WTO, lawyers based in the developing world have designed interesting litigation strategies and achieved effective results for their countries. For example, this has been the case in Brazil and India usage of the compulsory license mechanism for having access to medicines against HIV.<sup>155</sup>

Regarding the Brazilian experience, scholars have analyzed the litigation strategies that have led to the country's favorable outcomes at using the WTO dispute settlement system, including some comprehensive case studies of IP-rights cases brought to the WTO. Brazilian international trade lawyers have been noted as skilled professionals who have succeeded in conflicts against other countries where legal education is significantly better and proper training on WTO disputes is provided.

Notwithstanding, scholars who have observed the aforementioned situation have put much of their attention in international trade lawyers, leaving international IP lawyers outside their scope, namely because it seems that they have not assumed the leadership of this process. Although the WTO legal proceedings are extremely

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<sup>154</sup> See generally Rochelle C. Dreyfuss, *The Role of India, China, Brazil and Other Emerging Economies in Establishing Access Norms for Intellectual Property and Intellectual Property Lawmaking*, N.Y.U. PUB. L. RESEARCH PAPER No. 09 (2009); Graeme B. Dinwoodie and Rochelle C. Dreyfuss, *Designing a Global Intellectual Property System Responsive to Change: The WTO, WIPO, and beyond*, 46 HOUS. L. REV. 1187 (2009-2010); GUSTAVO GHIDINI, RUDOLPH J. R. PERITZ & MARCO RICOLFI, *TRIPS AND DEVELOPING COUNTRIES: Towards a New IP World Order?* (2014); CARLOS CORREA, *INTELLECTUAL PROPERTY RIGHTS, THE WTO AND DEVELOPING COUNTRIES: THE TRIPS AGREEMENT AND POLICY OPTIONS* (2000); Carlos Alberto Primo Braga, *The Developing Country Case for and against Intellectual Property Protection*, 112 World Bank Discussion Papers 69 (1990).

<sup>155</sup> See Dreyfuss, *supra* note 153.

complex and need specialized litigators to handle cases filed there, IP has been the central issue that has been discussed in some relevant cases in which Brazil has been a party – specifically, a country can litigate at the WTO in three different ways: being a complainant, a respondent, or a third party. Accordingly, in addition to the legal procedure of the WTO regime, the substantive matter of the cases is equally or even more important to build a strong legal argument and 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. However, this market seems to be occupied by international trade lawyers only. International IP lawyers, if they had any participation, were not highlighted in comprehensive studies on these disputes. For example, Shaffer, Badin, and Rosenberg<sup>156</sup> assessed all the cases (until 2008) brought by and against Brazil at the WTO, as well as the cases in which Brazil was a third party. They organize their analysis by listing the parties, file date and stage of the proceeding, matter in dispute, and more important for the present thesis, the private consultants hired.

Drawing upon Shaffer, Badin, and Rosenberg's work, and using the WTO database of disputes, the search for cases has been refined here. Only disputes over IP-rights and the TRIPs Agreement have been analyzed. After having researched all the 135 cases that Brazil has participated at the WTO, it has been possible to select a sample of 13 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

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<sup>156</sup> See Shaffer, Sanchez, and Rosenberg, *supra* note 18.

complainant,<sup>157</sup> was the respondent in one case,<sup>158</sup> and participated as a third party in ten cases.<sup>159</sup>

Likewise, a similar research on cases that Brazilian disputants have brought to the WIPO Mediation and Arbitration Center has been attempted. Surprisingly, according to WIPO, a case involving a party (complainant or defendant) from Brazil has never been filed with this WIPO's Center. In order to promote ADR on IP-matters in Brazil, a Memorandum of Understanding between WIPO and INPI was signed in 2012 to become effective in 2013.<sup>160</sup> The movement towards bringing in disputes to Brazil is relevant, because it complies with and draws upon WIPO's guidelines and successful experience in solving disputes outside the courts. In Brazil, where conflicts commonly reach the courts, it is important to think about and work on practices to reduce litigiousness. The internationalization of IP in Brazil, thus, has led to this initiative.

With respect to the thirteen disputes within the WTO 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 amount to the majority of cases at 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

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<sup>157</sup> 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).

<sup>158</sup> See *United States v. Brazil*, DS No. 199 (WTO, May 30 2000).

<sup>159</sup> 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).

<sup>160</sup> The information described here has been provided by WIPO's and INPI's officials, which are on file with the author.

international trade agenda, none has garnered as much attention from scholars as patent disputes.

Prominent academics such as Alvaro Santos,<sup>161</sup> Michelle Badin,<sup>162</sup> and Rochelle Dreyfuss<sup>163</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 to trump the access to medicines in the Global South after the implementation of the TRIPs Agreement. 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>164</sup>

In response to that process that stemmed from the TRIPS Agreement, Brazil alongside 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. These countries thus sought to litigate in international bodies as well as draw policies to ameliorate the asymmetric powers between developed and developing countries. 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>165</sup>

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<sup>161</sup> See Santos, *supra* note 17.

<sup>162</sup> See Badin, *supra* note 17.

<sup>163</sup> See Dreyfuss, *supra* note 153; Dinwoodie and Dreyfuss, *supra* note 153.

<sup>164</sup> See Dreyfuss, *supra* note 153 at 8.

<sup>165</sup> *Id.* at 3.

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 problems to 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 defending legislation, it could also be proactive: it could insist on renegotiating the Agreement to deal with its development problems.”<sup>166</sup>

However, previous research indicates that the championed result mentioned above stems from the work of skillful international trade lawyers, not legal professionals experts in IP.<sup>167</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. Therefore, Brazilian professionals with expertise in international trade have capitalized on several opportunities they had available to thrive in this niche, which has not necessarily been followed by their peers who work in IP.

Conversely, IP-lawyers in Brazil face severe problems in being properly educated in their field, and their international opportunities do not seem to be too as

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<sup>166</sup> *Id.* at 8.

<sup>167</sup> See Santos, *supra* note 17; Badin, *supra* note 17.

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 chapter 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, once they do not find this guidance and mentorship at most of the elite law schools in Brazil.



## Chapter 4. The Globalizing Legal Profession in Brazil: The Practice of Law in International IP

As it has been described in the previous chapters, this thesis is focused on the elite of IP-lawyers in Brazil. Accordingly, a thorough research of publications on lawyers and law firms has been made as means to compiling a group of highly-regarded IP law firms in Brazil. After having selected IP as the area of expertise in that selected references, it has been possible to find 30 law firms that are based in Brazil and are globally known for their IP-practice.

An important characteristic of IP-firms in Brazil is that they have been historically seen as global law firms,<sup>168</sup> which have been founded by “pioneer-globalizer[s].”<sup>169</sup> To be sure, previous research described how some of these firms were leaders in implementing advanced and democratic management strategies to run a legal business in Brazil,<sup>170</sup> for example, by establishing organizational models based on efficiency and meritocracy at law firms.<sup>171</sup> As it will be discussed below, IP-lawyers have not engaged in transnational initiatives as they 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 that result. Thus, a comparison between these two groups of legal practitioners may explain this situation.

Bearing that in mind, the data reveal a context in which less than twenty-five percent of all IP-lawyers of this sample have received legal education abroad. By being educated abroad, it has been taken into account lawyers who have graduated from master and doctoral programs at universities outside of Brazil. In contrast, a

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<sup>168</sup> See Krishnan, Dias, and Pence, *supra* note 22.

<sup>169</sup> *Id.* at 10. Note also the case of Dannemann Siemsen Bigler & Ipanema Moreira, an IP-firms that has foreigners among its founding partners.

<sup>170</sup> See Krishnan, Dias, and Pence, *supra* note 22.

<sup>171</sup> *Id.*

recent study on Brazilian trade-professionals found 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>172</sup>

Moreover, the data show that the size of the cohort of IP-lawyers working at elite Brazilian firms is not small, especially if it is considered that IP is seen as a complex area and hence needs specialized professionals. In a universe of thirty firms, it has been possible to count four 517 lawyers who work exclusively in IP. That 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>173</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>174</sup> On the other, the recent economic development in Brazil has also increased the workload related to domestic IP-matters.<sup>175</sup> For example, there are accounts of the growth in the number of administrative proceedings filed with and conducted by INPI.<sup>176</sup> To be sure, at least one important law firm specialized in IP has doubled its size during the 1990s.<sup>177</sup> As a result, law firms with focus on IP have expanded in order to meet an increasing

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<sup>172</sup> See Glezer et al., *supra* note 36 at 9.

<sup>173</sup> *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.)

<sup>174</sup> See Dreyfuss, *supra* note 153.

<sup>175</sup> See Lilian Matsuura, *Especialista em Propriedade Intelectual Brilha na Advocacia*, CONSULTOR JURÍDICO, Oct. 31 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).

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

demand. Yet this advancement has not 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 rather an alarming signal than a positive one. Since an important part of law schools in Brazil is not offering education in IP, when law students start practicing law, their training needs to be provided by either their hiring-firms or law schools outside Brazil. The data presented above suggests 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 different sort of problems, which will be outlined below.

#### 4.1. Comparing Two Globalizing Fields Of The Legal Profession in Brazil: 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>178</sup> Accordingly, legal practitioners specialized in IP should not be different, especially when they should fight for a global environment of fair trade of IP-rights. However, when lawyers are trained within the workplace, it is expected that they attend demands brought by clients, leaving behind policy-making issues as well as matters outside their firms' and clients' scopes. The TRIPs Agreement and its aftermath in Brazil suggest that international trade lawyers have ably brought together

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<sup>178</sup> See Halliday & Karpik, *supra* note 24; Halliday, Karpik, and Feeley, *supra* note 24; and Krishnan, Dias, and Pence, *supra* note 22; YVES DEZALAY & BRYANT GARTH, *THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES* (2002).

private interests and policy-making concerns with respect to the cross-border commerce of IP-rights, whereas IP-lawyers have stood aside of this process.

Specifically, the chapter above described how the TRIPs Agreement has deepened the asymmetry of powers between developed and developing nations, and yet Brazil has achieved a relevant position in the international lawmaking in IP.<sup>179</sup> Surprisingly, IP-lawyers have not taken the lead in this process.<sup>180</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 has been conducted by international trade lawyers, not IP-lawyers.<sup>181</sup>

Although previous research on international trade lawyers in Brazil has discussed the flaws in the legal education that these professionals receive in Brazil,<sup>182</sup> specific programs to build legal capacity for trade lawyers have been organized.<sup>183</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>184</sup> In addition to receiving incentives to pursuing advanced degrees at respected European and American universities, these trade-professionals have also worked at the Brazilian embassy in places such as Washington, D.C., and Geneva, which have been considered “‘unique in the realm of trade diplomacy.’”<sup>185</sup> In sum, the “‘three pillar’” worked in accordance with the following framework:

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<sup>179</sup> See Dreyfuss, *supra* note 153.

<sup>180</sup> See Santos, *supra* note 17; Badin, *supra* note 17 (discussing the success of the Brazilian 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).

<sup>181</sup> *Id.* See also Shaffer, Sanchez, and Rosenberg, *supra* note 18.

<sup>182</sup> See Glezer et al., *supra* note 18.

<sup>183</sup> See, Shaffer, Sanchez, and Rosenberg, *supra* note 18.

<sup>184</sup> *Id.* at 423.

<sup>185</sup> *Id.* at 435.

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>186</sup>

Likewise, several trade lawyers have worked at global firms and other prestigious organizations in the U.S. and Europe, apart from the internships at the Brazilian embassies.<sup>187</sup> But again the main places where these professionals have sought training were Washington and Geneva. Thus, Brazil has successfully exposed its legal practitioners to educational opportunities in international trade and practical experience at elite organizations.<sup>188</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>189</sup>

As the initiatives above-mentioned succeeded, it has been noted that the vast majority of Brazilian legal professionals working in international trade law have been extensively trained abroad.<sup>190</sup> There is thus a cohort of lawyers with exceptional sets of skills in international trade, with significant social capital, and who are ready to engage in disputes and policy-making in this field, which comprehends the TRIPs Agreement.<sup>191</sup> Conversely, IP-lawyers have not achieved the same results as their

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<sup>186</sup>

*Id.*

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

<sup>188</sup>

*Id.*

<sup>189</sup>

*Id.* at 33.

<sup>190</sup>

*Id.*

<sup>191</sup>

*See* Shaffer, Sanchez, and Rosenberg, *supra* note 18.

peers in international trade, despite WIPO's and INPI's agreements to make opportunities available to Brazil's IP-lawyers.<sup>192</sup>

#### 4.2. 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>193</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>194</sup> That is, in Brazil, civil society organizations and governmental bodies that have focus on IP-rights are not as structured to train IP-lawyers as those engaged in educating international trade professionals.

Regarding the dichotomy between public and private participation in IP-initiatives, scholars argue that most of the investments in IP in Brazil derive from public funding, in particular, public universities.<sup>195</sup> Namely, R&D is commonly funded by the government and the money is usually managed by public universities and foundations.<sup>196</sup> Civil society is still becoming a relevant player in promoting IP-training and hence foster innovation in Brazil.<sup>197</sup>

In addition, the fact that Brazil's institutional arrangements for innovation heavily rely upon public organizations poses (at least) two related problems. First, funding for research is scarce and the process of accessing these resources is

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<sup>192</sup> See Maria Beatriz Amorim-Borher et al., *Ensino e Pesquisa em Propriedade Intelectual no Brasil*, 6(2) REVISTA BRASILEIRA DE INOVAÇÃO 281 (2007).

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> 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*, Master Thesis, FGV (2011).

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

extremely bureaucratic.<sup>198</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>199</sup> And second, a foundation or university that structures institutional bypasses to spend the money more efficiently may incur in under-reported consultancy fees accusations, and their respective leaders may face criminal charges for mishandling public money.<sup>200</sup>

The obstacles mentioned above, along with the weak infrastructure that exists at Brazilian universities hinder the formation of a strong research environment in Brazil.<sup>201</sup> This bottleneck in Brazil's capacity to stimulate R&D, innovation, and IP-protection raises serious questions about Brazil's chances of being competitive. Given that situation, lawyers have attempted to create legal tools to reduce the bureaucratic steps that universities face in fundraising for research. Namely, legal professionals alongside the academic community have worked to approve Brazil's Innovation Act (*Lei de Inovação* in Portuguese), and they have also put efforts to legalize efficient means of receiving and spending money for highly-innovative projects.<sup>202</sup> Apart from a few successful initiatives, however, Brazilian lawyers and scholars still have a long path 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>203</sup> The authors found that few initiatives had been structured, for example, graduate programs in IP. However, most of the steps that have been created

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*Id.*

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*Id.*

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*Id.*

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*Id.*

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*Id.*

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Amorim-Borher et al., *supra* note 190.

are seminars, workshops, and conferences.<sup>204</sup> Yet these short-term programs have been a tradition in IP in Brazil. To be sure, the National Conference on Intellectual Property was in its twentieth-six edition in 2006, when the aforementioned investigation was conducted.<sup>205</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 WIPO's participation.<sup>206</sup> In 2006, 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 have focus on the commercialization of intellectual property."<sup>207</sup> It is not clear, however, whether, and to what extent, legal professionals have been targeted by this initiative.<sup>208</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 as well as a professional development program. 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.

With that said, although it has not been possible to infer from the article mentioned above that the attendees of such programs were already working, it has not

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<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 295.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*



been mentioned any possibility for lawyers to work temporarily at the WIPO and 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 Brazil. As a result, it is expected that IP-professionals needed 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 it has happened in other emerging economies.<sup>209</sup> Specifically, this thesis will add another layer to this discussion: Brazilian international trade lawyers have thrived in the global IP-market that has once been dominated by IP-lawyers, in particular, when trade-professionals have litigated over rights stemmed from the TRIPs Agreement.

Namely, that scenario is likely to be found because Brazilian IP-lawyers have long experienced a lack of education and training at either 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 even greater advantages resulted from the TRIPS Agreement than what has been observed in Brazil.<sup>210</sup> Article 6 of the TRIPs Agreement was a serious point of contention during the negotiations of this treaty, with strong opposition from the U.S.<sup>211</sup> Namely, the

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<sup>209</sup> See Paranhos & Hasenclever, *supra* note 21; and Lana, *supra* note 21.

<sup>210</sup> *Id.*

<sup>211</sup> J. 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).

TRIPs Agreement established that developing and least developed countries might wait for five up until ten years to harmonize their domestic norms to the treaty. In the meantime, those 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>212</sup>

Scholars argue that the underlying reason for that interlude and the parallel import provision was giving developing countries the possibility of preparing their economic and legal environments to compete with developed nations under an equitable, or at least fairer, terms.<sup>213</sup> Those conditions, along with the compulsory license mechanism, should provide emerging markets tools to build and strengthen their own patent industries, so they could capitalize on the entrance of foreign inventions by emulating and enhancing them, and to enjoy greater chances of being more competitive.<sup>214</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>215</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>216</sup> Conversely, India introduced its new patent legislation only in 2005, almost ten years after the TRIPs Agreement has originally been signed.<sup>217</sup>

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<sup>212</sup> See V. Di Cataldo, *Parallel importations. New perspectives*, 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), at 1.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* See also Paranhos & Hasenclever, *supra* note 21; and Lana, *supra* note 21.

<sup>215</sup> See Paranhos & Hasenclever, *supra* note 21; and Lana, *supra* note 21.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

Consequently, India has enjoyed the transitional period to do parallel importations and hence boost its patent industry.<sup>218</sup> Therefore, in comparison with Brazil, India has ably handled 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>219</sup>

However, as it has been described above, the TRIPs Agreement's effects on the Brazilian IP-practice have not been so favorable. Brazilian residents have always designed and registered utility models, whereas non-residents have majorly registered patents, a situation that could have been changed following the TRIPs Agreement. These unsatisfactory statistics are likely to be a result of the problems in IP-training at Brazilian law schools in particular and 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 literatures that have been discussed in this thesis. There are, at least, two ways of interpreting what is being said about Brazil's participation in the international IP arena. On the one hand, Brazil has been championed as a prominent player in using international trade tools related to IP-rights, in particular, the TRIPs Agreement litigation at the WTO.<sup>220</sup> On the other, Brazil has not fostered innovation and has not strengthened IP-rights as other developing countries had done after the TRIPs Agreement, for example, when it enacted its legislation without using the transitional period set forth by the TRIPs Agreement.<sup>221</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,

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<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> See Santos, *supra* note 17; Badin, *supra* note 17.

<sup>221</sup> See Paranhos & Hasenclever, *supra* note 21; and Lana, *supra* note 21.

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 built a legal and corporate framework capable of enhancing Brazil’s capacity to innovate.

This “boundary-blurring”<sup>222</sup> aspect of international IP is a relevant characteristic of the globalization of the legal profession in Brazil. That is, IP has its nuances as well as international trade, but they 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>223</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>224</sup> Why this has happened is a question yet to be answered by further research, but the response 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 fields.<sup>225</sup> International trade is deemed to be a small niche, whereas IP has several demands that lawyers can exploit, and upon which specialized IP-firms have expanded.<sup>226</sup> Furthermore, both areas of law share deficiencies with respect to the legal education that legal professionals have received

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<sup>222</sup> See Liu, *supra* note 23.

<sup>223</sup> *Id.* at 676.

<sup>224</sup> See Santos, *supra* note 17; and Badin, *supra* note 17.

<sup>225</sup> See Glezer et al., *supra* note 18; and Oliveira and Ramos, *supra* note 31.

<sup>226</sup> See Glezer et al., *supra* note 18; and Matsuura, *supra* note 173.

at Brazilian law schools, where lawyers do not find proper training. Thus, similarities exist between IP and international trade law, albeit striking differences are also found. To be sure, recurrent studies on international trade lawyers and international trade strategies designed by Brazilian professionals have noted that civil society organizations alongside the Brazilian government have efficiently coordinated ways to fill the gaps in legal education and hence build legal capacity for Brazilian trade-lawyers. 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 have lost their space, which has been colonized 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 that conclusion. There is not a specific training-program that reaches the majority of the legal professionals working in IP in Brazil. Conversely, although international trade is a field that relies on a small group of professionals, almost all of them have received training abroad at elite educational, market, multilateral, and governmental organizations.<sup>227</sup>

It is a fact that Brazil has fared relatively well in its recent development process over the 1990s and 2000s, and IP protection has been crucial to that result. However, when one considers Brazil's performance in comparative perspective, this context changes. The part of IP-practice in Brazil that is unrelated to international trade disputes over IP-rights shows that Brazil has lacked efficient IP-policies, which

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<sup>227</sup> See Glezer et al., *supra* note 18.

may stem from the difficulties in finding efficient legal advice. Both INPI officials and IP-lawyers are highly-regarded for their deep knowledge of IP, and yet Brazil has not benefited from IP-mechanisms derived from the TRIPs Agreement as other emerging markets.<sup>228</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.

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<sup>228</sup> See Paranhos & Hasenclever, *supra* note 21; and Lana, *supra* note 21.

## CONCLUDING REMARKS

This thesis 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 for this assessment: international intellectual property. Several academics have discussed how IP is important for a country's development.<sup>229</sup> Similarly, there are authors who have long studied law and development.<sup>230</sup> After an interlude in the scholarly works on law and development, several investigations have been pursued to understand the different "moments"<sup>231</sup> of law and development in the developing world.<sup>232</sup> Although few investigations on IP exist, legal education in IP has not been the central topic of analysis for these authors. 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 towards 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 chapter of this work shed light on Brazil's elite law schools, and whether or not 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, it is expected that Brazilian lawyers have attempted to find training elsewhere, whether by pursuing an advanced law degree in foreign countries or receiving training at their law firms.

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<sup>229</sup> See generally GOLDSTEIN & TRIMBLE, *supra* note 18; Dinwoodie and Dreyfuss, *supra* note 153.

<sup>230</sup> See Trubek and Galanter, *supra* note 1.

<sup>231</sup> See TRUBEK & SANTOS, *supra* note 11.

<sup>232</sup> *Id.*

Bearing that in mind, the second and third chapters assessed how globalization has affected important IP-laws and IP-lawyering in Brazil. 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 disputes over international IP, in particular, during the negotiations and after the implementation of the TRIPs Agreement. Patent, trademark, and copyright laws have been updated in order to harmonize to 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 WTO's dispute settlement body. Therefore, Brazilian international trade lawyers have been at the forefront of international trade law, in particular, 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 chapter 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 that the latter have faced. That is, it has been analyzed whether Brazilian IP-lawyers were going abroad to receive education in IP. It has been found that, roughly, almost only twenty-three percent of Brazilian IP-lawyers have received education abroad. Conversely, previous research on international trade lawyers revealed that almost all the sample of elite legal professionals researched had experienced excellent training and have been educated at highly-regarded law schools in Europe and the U.S.

Looking at this thesis 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 voice to Brazil's IP-lawyers and hear their perceptions. Furthermore, globalization has pushed 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 received by their IP peers, international trade lawyers have coped with international trade law concerning IP-rights. On 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 has not been seen so positively.

Indeed, in comparison with other emerging economies, as India, Brazil has lost important window of opportunities to capitalize on the TRIPs Agreement. Regarding the Indian case, it is another important point for further research. Namely, legal education in India is in crisis, such as it has been noted in Brazil. Notwithstanding, Indian 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 is a relevant question yet to be addressed, and scholars might be interested in understanding the Indian context.

With respect to Brazil's problems in benefiting from the TRIPs Agreement in a more efficient manner, Brazil has enacted new IP legislations shortly after the TRIPs Agreement had been signed. For that reason, Brazil did not enjoy the transitional period set forth by the TRIPs Agreement and hence it did not use, at least not extensively, 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 and worked quite well. In contrast, those who exclusively study IP as well as Brazil's development and its

innovation tools are skeptical about how ably Brazilian IP-lawyers and -laws have worked in favor of Brazil's development.

In sum, it is not being argued here that international trade lawyers are better than those professionals 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 noted when academics have looked at the strategies concerning international IP that have been pursued in Brazil. This thesis has added another layer to that discussion, raising awareness to how the law school curriculum is neglectful about IP-courses. Therefore, Brazilian legal professionals, in general, have fared well in spite of all the hurdles faced in their legal education. 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.

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