



TRIPs from a Brazilian perspective

May 30, 2008

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- This presentation...
- <http://denisbarbosa.addr.com/georgiastate.pdf>



Topics

- Brazilian History on PI
- The birth of Developmental concerns
- When Brown v. Board of Education toured abroad
- Sir Francis Drake 's time
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Brazilian History on PI



The emperor who read Jefferson



- "Thought can not be a matter of property rights, as the corporeal things can.

Issuing from the mind, it shares the same nature, as an attribute of personality under the guarantee of free expression.

Once it is expressed, it flows into the intellectual communion of mankind, and is not liable to private property.

- . . . I call to the attention of this Commission to the need to harmonize the rights of the authors and the rights of the Society as a whole..." Emperor Pedro II (1889)

- (to the Civil Code Drafting Commission)



IP as a political choice



•Thomas Jefferson -Inventions then cannot, in nature, be a subject of property. Society may give an exclusive right to the profits arising from them, as an encouragement to men to pursue ideas which may produce utility, but this may or may not be done, according to the will and convenience of the society, without claim or complaint from anybody.



But was Pedro II's grandfather
who started the game



- The King João VI of Portugal, fleeing from Napoleon, established the capital of the worldwide Portuguese Empire in Rio.
- On April 23, 1809, he issued a Royal decree establishing just for Brazil a Patent Law
- It is the 4th oldest Patent Law in the world



But was Pedro II's grandfather
who started the game



- Patents were issued for 14 years for new industries producing in Brazil.
- Cash grants were provided instead of patents for foreign applicants.



And his father made it Constitutional



- The 1824 Brazilian Constitution, granted by Emperor Pedro I is the second in the World to provide for the protection of Intellectual Property Rights
- In 1830 a new law was issued, under which Edison got a number of patents



First copyright law in 1827



- The law protected the scholarship of the 1st. Brazilian Law School, starting 1827.
- Founded in 1817, in 1827, the Harvard law school was down to only one faculty member and one student.



Brazil was a member of Paris Convention before US



- The Viscount de Villeneuve, Brazilian Ambassador to the Paris Convention Conference, authored its Art. 6 wording (Trademarks)
- First Trademark Law (1875) equates the first US Trademark Federal Law (which was revoked in 1879 by US Supreme Court)



No copyright to foreign authors

- Brazil only started to grant copyrights to foreign authors in 1912.
- Entered Berna Convention in 1922
- USA only started to grant copyrights to foreign authors by the Platt-Simmonds Act (1891) (but... works must be typeset in U.S., no commercial importation)
- USA entered Bern Convention in 1989



No copyright to foreign authors

- Carey, from Letters on International Copyright, 1853, 1868:
- “What is called free trade looks to the maintenance of the foreign monopoly for supplying us with cloth and iron; and international copyright looks to continuing the monopoly which Britain has so long enjoyed of furnishing us with books; and both tend towards centralization.”
- Brazil had the very same problem with Portuguese books.....



The birth of Developmental concerns



Madrid Agreement on International registration of trademarks

- Brazil was a member since 1891
- In 1908, the 1st. Federal Circuit Court: “That Agreement is detrimental to the interests of Brazilian business”
- In 1934, by request of Rio and São Paulo trade associations, Brazil withdrew from the Agreement
- The **Madrid Protocol** went into effect in the United States only on November 2, 2003, when the country was quite developed



Updating the Paris Convention

- Brazil decided to cease updating the Paris Convention, holding to the 1925 version, deemed to be the last pro-developmental one.
- It just adopted the most recent version on 1990, when TRIPs was in the verge of reaching its 1995 wording.



When Brown v. Board of Education toured abroad



The Bandung Era

- Gathering in 1955 in Bandung, the non-aligned countries



- The Conference declared its full support of the principle of self-determination of peoples and nations as set forth in the Charter of the United Nations and took note of the United Nations resolutions on the rights of peoples and nations to self-determination, which is a pre-requisite of the full enjoyment of all fundamental Human Rights.
- Le Figaro.....Although politically divided, the states represented in Bandung are, however, much closer in their desire to put an end to the domination of the white man.



Substantive equality

- *The U.S. Supreme Court's decision in Brown v. Board of Education has influenced civil rights and antidiscrimination laws beyond the borders of the United States.*
(http://home.law.uiuc.edu/lrev/publications/2000s/2006/2006_3/Heppele.pdf)
- Over time, however, the connection between legal equality and substantive equality—these two threads in the *Brown* decision that were wrapped up in the broad concept of equity—began to merge. Legal equality was increasingly viewed as the means by which to reach the end
- of substantive equality. KERMIT L. HALL,
<http://law.marquette.edu/lawreview/Fall%202005/Hall.pdf>



The Brazilian denunciation of the Patent system

- UN General Assembly 1961, Professor Guerreiro Ramos, Brazilian delegate asks:
Does the Patent System has any purpose to the development countries?





Guerreiro Ramos Legacy



1713 (XVI). The role of patents in the transfer of technology to under-developed countries

The General Assembly,

Requests the Secretary-General, in consultation with appropriate international and national institutions and with the concurrence of the Governments concerned, to prepare for the Committee for Industrial Development, the Economic and Social Council, and the General Assembly at its eighteenth session, taking into consideration any pertinent discussions which might take place in the United Nations Conference on the Application of Science and Technology for the Benefit of the Less Developed Areas, a report containing:

(a) A study of the effects of patents on the economy of under-developed countries;

(b) A survey of patent legislation in selected developed and under-developed countries, with primary emphasis on the treatment given to foreign patents;

(c) An analysis of the characteristics of the patent legislation of under-developed countries in the light of economic development objectives, taking into account the need for the rapid absorption of new products and technology, and the rise in the productivity level of their economies;

(d) A recommendation on the advisability of holding an international conference in order to examine the problems regarding the granting, protection and use of patents, taking into consideration the provisions of existing international conventions and the special needs of developing countries, and utilizing the existing machinery of the International Union for the Protection of Industrial Property.

*1084th plenary meeting,
19 December 1961.*



The group of 77'

- The Group of 77 (G-77) was established on 15 June 1964 by seventy-seven developing countries signatories of the “Joint Declaration of the Seventy-Seven Countries” issued at the end of the first session of the United Nations Conference on Trade and Development (UNCTAD) in Geneva.



The new economic Order

- Group of 77 sought what could be defined as a substantive equality international order
- “The WTO envisions a world in which every country competes equally against each other irrespective of economic disparities and capabilities”.

<http://fletcher.tufts.edu/news/2005/03/davis.shtml>



What was achieved (?)



- The Change in GATT to provide a General System of Preferences (for third world countries) (Used as a means to obtain good behavior)
- The Copyright Compulsory License in Berne Convention (for third world countries) (So complex that was not used)
- UNCTAD 's Code of Conduct for Transfer of Technology (1974-never ended)
- The Change of the Paris Convention to achieve substantive equality (1980- ended abruptly in 1981, never to be restarted)



Sir Francis Drake's time

Lord Denning's in obiter
dicta.....we also had our Drake
in our own times



Following the shipwrecking of the “new” Paris Convention

- The 1947 GATT included provisions on custom action on some counterfeit goods.
- On basis of that, conversations started in 1982 on the **trade-related** aspects of intellectual property rights.
- Forum-shopping (no G77 in GATT)



sweet inducements

- “these sweet inducements and pleasing persuasions” C. Plinius Secundus *The Historie of the World*. Book VII. (1601)
- In 1987, Brazil suffered a suspension of GSP benefits on footwear and orange juice, through Section 301, on account of lack of pharmaceutical patents.
- In 1987, there were some European countries that also lacked pharmaceutical patents.



Subsidies to the Brazilian Delegation to TRIPs negotiations

- “Thus, the problem for the Brazilian technological development is not the notoriety of being “pirates” who we might have gained in recent times. The risk is that we could not be longer be pirates the same way Sir Francis Drake and his American, Japanese and Swiss followers were at their time. The question is of time”.
- Why we are pirates, Revista Brasileira de Comércio Exterior, Setembro de 1988, found at <http://denisbarbosa.addr.com/43.doc>



More royalist than the
king



A new President, a new policy

- The new Industrial Property Code of 1996
- As sent to the Congress in April 1991

7. Atento aos objetivos governamentais de se compatibilizar a legislação doméstica com a prática internacional, o anteprojeto passa a admitir a patenteabilidade de produtos químicos, alimentícios, químico-farmacêuticos e medicamentos. No entanto, em razão da necessidade de adaptação da indústria nacional ao sistema patentário que se propõe, só se expedirá patente aos mencionados produtos a partir de 01.01.93, quando se tratar de invenção de processo e, a partir de 01.01.94, no caso de invenção de produto.



A new President, a new policy

- The new Industrial Property Code of 1996
- Renunciation of the 2005 term for introducing pharmaceutical patents
- The pipeline provision: retroactive protection for already published patents
 - Proposed by USA to TRIPs, rejected by consensus
- Many TRIPs plus provisions not required by TRIPs
- A complete set of new laws covering all IP rights



But an unrequited promise

- The fact that in some limited areas, especially in the public health sector, TRIPs has actually been used to achieve balance and poise do not change the overall issue. The unilateral thrust which TRIPs was meant to end just increased. It is reasonable to guess whether, in absence of TRIPs, the situation would be the same.

A very important aspect of this post-TRIPs era, by the way, is the denial of the multilateral promise. We were assured that unilateralism was over. All of us were members of the club, after paying the steep entrance fee. It was not so. Members or non-members, the bullying continued and grew. Fact is, however, that the world contemporaneous to the Uruguay Round discussions has severally changed. It was changing fast during the negotiations, and TRIPs when came to force was a gift from a former Christmas. And such changes were particularly felt within the scope of this study.

- Borges Barbosa, Denis , "Counting Ten for TRIPs: Author Rights and Access to Information - A Cockroach's View of Encroachment" (November 4, 2005). Available at SSRN: <http://ssrn.com/abstract=842564>



The FTAA



- Brazilian position in IP: everything we had to bargain, was bargained in TRIPs.
- Let 's stick to TRIPs
 - However, a considerable number of US and European FTAs advance further than TRIPs
- Borges Barbosa, Denis , "TRIPs art. 7 and 8, FTAs and Trademarks" (March 9, 2006). Available at SSRN:
<http://ssrn.com/abstract=889107>



A new “equal” environment

Dispute Settlement Body 1 September 2006

US blocks Brazil's first-time request for compliance panel in “Cotton” case

At its meeting on 1 September 2006, the DSB deferred Brazil's first-time request for a compliance panel to examine US implementation in the “Cotton” case (DS267) following an objection by the US.



A new “equal” environment

Ecuador’s tactics in challenging the EU banana import regime from 1996 to 2001 provide a useful case study for developing countries considering legal action as complainants under the Dispute Settlement Understanding (DSU) and preparing for the settlement negotiations that often accompany these cases. Negotiators from Ecuador pursued an aggressive distributive strategy that enabled it to play an influential role throughout the process and improve its outcome, despite overwhelming asymmetries (in market size, political clout, and legal resources) between itself and the principal disputants on either side of the Atlantic.



A new “equal” environment

The WTO enforcement system relies on decentralized sanctions, a remedy intrinsically more attractive to larger, less trade dependent economies than to small developing countries. Aware of these obstacles, Ecuador adopted an unprecedented strategy in its request for sanctions. Instead of relying on the goods sector, Ecuador proposed to suspend the application of intellectual property rights to EU firms under the TRIPS Agreement. A coalition of developed countries, led by the U.S., had insisted on adding this rule permitting cross retaliation during the Uruguay Round, but Ecuador reversed the arrow, threatening retaliation under TRIPS to ensure EU compliance with GATT.



Seeking for Full TRIPs benefits

- **TWN REPORT ON THE WTO DISCUSSION ON TRIPS AND PUBLIC HEALTH, 20 JUNE 2001.**
- **On 20 June 2001 the WTO's TRIPS Council held a special one-day discussion on**
- **TRIPS and public health. The meeting was in response to public concerns worldwide on how patents were causing monopoly situations enabling exorbitant prices of medicines for treating AIDS and other diseases, making them unaffordable especially in developing countries.**
- **Developing countries led by the Africa Group requested the TRIPS Council to hold a special discussion. At the meeting, 47 developing countries submitted a Joint Paper, asking for action in the WTO to affirm that nothing in TRIPS prevents countries from taking measures to protect public health.**



Seeking for Full TRIPs benefits

- **Disturbing examples of the effects of patents on the price of medicines include:**
- • **In countries where alternative or generic medicines are available, the price of a branded product usually falls as a result of the competition it faces from low-priced alternatives.**
- **When the Brazilian government began producing AIDS drugs generically, for example, the prices of equivalent branded products dropped by 79 per cent. The same brand is sold at a higher price in countries where there is no competition from generic producers.**



Doha sounds its bugle





Par. 6 da Declaração

- **TRIPS and public health. In the declaration, ministers stress that it is important to implement and interpret the TRIPS Agreement in a way that supports public health – by promoting both access to existing medicines and the creation of new medicines.**
- **This separate declaration on TRIPS and public health is designed to respond to concerns about the possible implications of the TRIPS Agreement for access to medicines.**
- **It emphasizes that the TRIPS Agreement does not and should not prevent member governments from acting to protect public health. It affirms governments' right to use the agreement's flexibilities in order to avoid any reticence the governments may feel.**
- **It states that the agreement should be interpreted in a way that supports governments' right to protect public health. This provides guidance to individual members and to dispute settlement rulings.**
- **The separate declaration clarifies some of the forms of flexibility available, in particular compulsory licensing and parallel importing.**



Decisão do par. 6

- **DOHA WTO MINISTERIAL 2001: TRIPS**
WT/MIN(01)/DEC/2
20 November 2001
Declaration on the TRIPS agreement and public health
- Adopted on 14 November 2001
 1. We recognize the gravity of the public health problems afflicting many developing and least-developed countries, especially those resulting from HIV/AIDS, tuberculosis, malaria and other epidemics.
 - 2. We stress the need for the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) to be part of the wider national and international action to address these problems.
 - 3. We recognize that intellectual property protection is important for the development of new medicines. We also recognize the concerns about its effects on prices.



Decisão do par. 6

- 4. We agree that the TRIPS Agreement does not and should not prevent members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO members' right to protect public health and, in particular, to promote access to medicines for all.
- In this connection, we reaffirm the right of WTO members to use, to the full, the provisions in the TRIPS Agreement, which provide flexibility for this purpose.



Decisão do par. 6

- **5. Accordingly and in the light of paragraph 4 above, while maintaining our commitments in the TRIPS Agreement, we recognize that these flexibilities include:**
 - **In applying the customary rules of interpretation of public international law, each provision of the TRIPS Agreement shall be read in the light of the object and purpose of the Agreement as expressed, in particular, in its objectives and principles.**
 - **Each member has the right to grant compulsory licences and the freedom to determine the grounds upon which such licences are granted.**
 - **Each member has the right to determine what constitutes a national emergency or other circumstances of extreme urgency, it being understood that public health crises, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency or other circumstances of extreme urgency.**
 - **The effect of the provisions in the TRIPS Agreement that are relevant to the exhaustion of intellectual property rights is to leave each member free to establish its own regime for such exhaustion without challenge, subject to the MFN and national treatment provisions of Articles 3 and 4.**



Decisão do par. 6

- 6. We recognize that WTO members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPS Agreement. We instruct the Council for TRIPS to find an expeditious solution to this problem and to report to the General Council before the end of 2002.



Development Agenda



Argentina & Brazil

- Proposed the inclusion of developmental concerns at the WIPO 's ambiance
- No prior rule or exercise to such purpose since the 1981 shipwrecking
- Gerreiro Ramos revival



The development agenda

- Bearing in mind the internationally agreed development goals, including those in the United Nations Millennium Declaration, the Programme of Action for the Least Developed Countries for the Decade 2001-2010, the Monterey Consensus, the Johannesburg Declaration on Sustainable Development, the Declaration of Principles and the Plan of Action of the first phase of the World Summit on the Information Society and the Sao Paulo Consensus adopted at UNCTAD XI;
- (1) The General Assembly welcomes the initiative for a development agenda and notes the proposals contained in document WO/GA/31/11.



Our View



Our view



- First, we consider the rapidly evolving relationship of development and trade to intellectual property, and conclude that current approaches to all three of these areas emphasize balanced rules, which means assessments of costs and benefits, preservation of flexibility, and transparency of development impact.
- To increase this pro-development balance within the current international intellectual property regime, each of us offers a specific proposal.



Our view

- Barbosa proposes three principles of treaty interpretation to maximize the potential of TRIPS articles 7 and 8 as balancing mechanisms within WTO jurisprudence. These include:
 - the principles of integration,
 - evolutive interpretation and
 - vectorial interpretation all of which are consistent with a teleological approach to TRIPS as an instrument of development.



Our view

- Chon posits "development" as a key legal term of art throughout the international intellectual property regime via a substantive equality principle; this principle is applied here to the current Development Agenda within WIPO, to link intellectual property and innovation to human development priorities such as education.



Our view

- Moncayo von Hase advocates for the recognition of emerging rules of customary international law, such as the emerging human right to health, in the context of interpreting related intellectual property obligations; in addition, he argues in favor of maximizing international law principles of non-derogation and freedom of implementation, to maintain national policy space and flexibility for social welfare objectives in the context of post-TRIPS bilateral and regional treaties .