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**INTERNATIONAL TRADEMARK ASSOCIATION
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TABLE OF CONTENTS

MONDAY, MAY 5, 1997

Personal Jurisdiction and Domain Names On the Internet David M. Kelly	1
The Perils Of Global Trademark Protection Helmut Pastor and Melvyn Silver	11
Parallel Imports—Trademark and Copyright Considerations In Worldwide Imports and Exports: The United States Mary L. Kevlin	15
Parallel Imports—Trademark and Copyright Considerations In Worldwide Imports and Exports: European Issues Anna Carboni	23
Civility In Litigation—A Professional Responsibility Honorable Marvin E. Aspen	35
Comparison Of the Madrid Agreement and the Madrid Protocol Alan Cox	41
Comparison Between the Community Trade Mark System and the National Registration System—A Multi-National Perspective Michelle M. Michel	49
Madrid Arrangement, Madrid Protocol, Community Trademarks and National Registrations: A View From the Middle Or, Why Do I Feel Like I'm Being Squashed Stanley J. Silverberg	61
Claiming and Defending Against Monetary Awards For Trademark Infringement: Computational Issues Scott D. Phillips	65

Advanced Topics In Monetary Recovery In Trademark Infringement Actions	
James M. Koelemay, Jr.	83
Proof Of Monetary Recovery Under the Lanham Act	
Gary M. Ropski	99
Trips Implementation In Europe	
Dr. Heinz Goddar	117
International Treaties and Their Effect On National Trade Mark Legislation the Implementation Of the Gatt Trips Agreement In Australia and New Zealand	
Stephen Stern	121
The Development Of the Brazilian Ipr Regime and Its Future	
Gustavo Starling Leonardos	131
Update On Latin American Practice: Andean Pact Countries	
Jose Antonio Lloreda	149
Andean Pact and New Peruvian Law	
Francisco Espinosa Bellido	159
Enforcement of Trademark Rights At the Border and Protection Of Well-Known Trademarks—Recent Developments In Mexico	
Dr. Horacio Rangel-Ortiz	171
Update On Latin American Practice	
Juan Pablo Silva	187
 TUESDAY, MAY 6, 1997	
The Use Of Copyright To Combat Gray Market Imports Into the United States	
Charles E. Buffon	197

**THE DEVELOPMENT OF
THE BRAZILIAN IPR REGIME
AND ITS FUTURE**

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THE DEVELOPMENT OF THE BRAZILIAN IPR REGIME AND ITS FUTURE

By Gustavo Starling Leonardos**

I. INTRODUCTION

The recent developments on the Brazilian Intellectual Property Regime (IPR) actually started with the election of former President Fernando Collor de Mello, the first democratic election for the presidency of Brazil since the Brazilian military seized power on April 1, 1964.

One may say, therefore, that there is a direct link between the Brazilian democratic process and the country's move toward a sustained market economy, with the consequent demand for an improved intellectual property system.

On June 28, 1990, President Collor's New Industrial and Foreign Trade Policy, published in the Official Bulletin (pages 12370/71) stated:

The Industrial Property Code, Law n° 5772/71, will also be revised in view of the new Governmental orientations, set forth in this Directive. The Government will be sending to the National Congress a Bill containing the proposals.

In the proposals that will be submitted to the National Congress to ameliorate the mechanisms of acquisition, protection and transfer of technology, in the revision of the Industrial Property Code, the extension of patent protection for the pharmaceutical processes and products is foreseen.

This paper will briefly indicate the major developments which have occurred in intellectual property and related areas since June 28, 1990 and the developments expected in the near future.

* Paper first prepared for presentation during the George Washington University Three day program held in Washington D.C. to mark the passage of Brazil's new Industrial Property Code (CPI): September 19 to 21st, 1996 and updated and adapted for presentation during INTA's 1997 Annual Meeting, May 3 to 7, 1997.

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II. PAST DEVELOPMENT: THE 90'S

At the time of President Collor's New Trade Policy, the Brazilian IPR regime contained strong antitrust and consumer protection provisions. The new concept that the IPR regime should exclusively stimulate investments, protecting the entrepreneurs, resulted in the enactment of specific legislation for the protection of the consumers and of the competition.

II.1. LAW N° 8.078 OF SEPTEMBER 11, 1990

ESTABLISHED THE CONSUMER PROTECTION CODE.

Among other provisions, The Consumer Protection Code considered as a basic consumer right the protection against misleading and abusive advertisements and unfair business methods (Art. 6, IV), including unfair competition and the undue use of industrial creations and inventions, of trademarks, commercial names and distinctive signs that might cause losses to consumers (Article 4, VI).

The consumers are favored in civil proceedings with the reversal of the burden of proof at the court's discretion (Article 6, VIII), and in all misleading or abusive advertisement cases (Articles 37 and 38).

The Law further established the strict liability of the manufacturer (Article 12) and supplier of products (Articles 13 and 18) for defects of these products and of the supplier of services for defects relating to the rendering of services (Article 14). The contractual waiver of eventual liabilities is prohibited (Articles 24 and 25) and therefore, it may not be provided for in the licensing of industrial property rights, technology transfer, franchising or any other contract.

A draft MERCOSUL Consumer Protection Code has already been prepared and was further discussed during the recent MERCOSUL meeting in Fortaleza, Brazil, last December.

II.2. ASUNCIÓN TREATY OF MARCH 26, 1991

CREATED THE MERCOSUL, THE SOUTHERN COMMON MARKET BETWEEN BRAZIL, ARGENTINA, URUGUAY AND PARAGUAY .

The treaty provides not only for a common external tariff and for the future free transit of goods and services between the Member States, both as from January 1, 1995, but also for a broad harmonization of their laws. Presently, the common external tariff covers 85 % of MERCOSUL trade while more than 90% of the intra-MERCOSUL trade is already duty free.

The future admission of other Latin American countries is contemplated (Article 20). If, however, a Latin American country is already a member of another regional agreement its admission will only be considered after January 1, 2000.

II.3. LAW N° 8.383 OF DECEMBER 30, 1991

AMENDED THE INCOME TAX LAW ON PAYMENT OF ROYALTIES FOR PATENT AND TRADEMARK LICENSES AND FOR TECHNICAL, SCIENTIFIC AND ADMINISTRATIVE ASSISTANCE.

This law allowed the deductibility of royalties paid between a subsidiary and a parent company (Article 50) up to the limit of Ordinance 436/58 (from 1 to 5%)

An amount higher than the one deductible can be agreed upon and remitted but the exceeding portion shall be treated and taxed as profit.

A 15% withholding income tax shall always be paid at the time of the remittance.

As far as patents and trademarks are concerned, however, only what is deductible is remissible to the parent company abroad (sole paragraph of Article 50).

II.4. DECREE 635 OF AUGUST 21, 1992

PROMULGATED THE STOCKHOLM TEXT OF THE PARIS CONVENTION (ARTICLE 1 TO 12).

Before the Decree, the Hague text of the Paris Convention was in force in relation to articles 1 to 12 and the Stockholm text only in relation to articles 13 to 30.

II.5. INPI NORMATIVE ACTS 116 OF OCTOBER 27, 1993 AND 120 OF DECEMBER 17, 1993

ESTABLISHED RULES FOR THE RECORDAL OF COST SHARING AND TECHNOLOGY TRANSFER AGREEMENTS.

N.A. 116 allowed Brazilian companies to pay a fixed or percentage amount of royalties for a share of the costs of a research & development (R&D) technology center.

N.A. 120 declared the freedom of contracting in regard to the license of industrial property, transfer of technology, cost sharing, franchise, technical and scientific assistance and similar agreements.

It expressly states that INPI cannot refuse the recordation with basis on an alleged violation of the unfair competition law, antitrust law, consumer law and others (Article 4, second paragraph).

INPI is given 30 days to effect the recordal or the contract will be considered as automatically registered.

II.6. LAW 8.884 OF JUNE 11, 1994

CHANGED THE EXISTING ANTITRUST REGULATIONS AND THE ADMINISTRATIVE ECONOMIC PROTECTION COUNCIL - CADE INTO AN INDEPENDENT AGENCY.

Among the acts which may be deemed a violation of the economic order are:

- To bar access of competitors to technology sources (Article 21, VI);
- To regulate markets of a certain product or service by way of agreements devised to limit or control technological research and development (Article 21, X);
- To take possession of or bar the use of industrial or intellectual property rights or technology (Article 21, XVI).

II.7. DECREE 1.175 OF JUNE 21, 1994

EXEMPTS ROYALTIES REMITTANCES ABROAD FROM THE 25% TAX LEVIED ON FINANCIAL TRANSACTIONS (I.O.F.).

II.8. LAW 8.955 OF DECEMBER 15, 1994

SETS SPECIFIC PROVISIONS FOR FRANCHISE AGREEMENTS.

This Law tried to provide greater protection to the Franchisees especially by requiring the Franchisor to provide the Franchisee with a "Franchise Offer Brochure" containing detailed information on the franchise system.

The Brazilian Patent and Trademark Office (INPI) handles the Franchise Agreements as a complex agreement subject to a special regime, recording agreements providing for a much higher royalties rate than that of patent or trademark licenses or technology transfer agreements where INPI usually includes a disclaimer indicating the existing ruling for tax deductibility (Ordinance 436/58) with the scope of ascertaining the Income Tax and the remissibility of the payments.

The royalties paid by the Franchisee are being fully deducted and remitted and the Brazilian I.R.S. (Receita Federal) and the Brazilian Central Bank have not challenged these tax deductions and remittances.

II.9. DECREE 1.355 OF DECEMBER 30, 1994

PROMULGATED THE TRIPS AGREEMENT.

A question which is still under discussion in Brazil and will probably end up before courts is the exact date on which the TRIPS Agreement became applicable in Brazil.

Below is the answer given by the Brazilian Intellectual Property Association to a Questionnaire on the subject. Another question which is already being raised is whether Article 70.2 of TRIPS extended the term of validity of all Brazilian patents from 15 to 20 years.

- In Brazil treaties which have been ratified must be approved by Congress through a Legislative Decree and then promulgated through an Executive Decree in order to be applicable internally. Some have argued that the Executive Decree is not necessary as the publication of the Legislative Decree should be considered as the promulgation.

Nevertheless, Brazil, without making any disclaimer, approved the Final Record Incorporating the Results of the Uruguay Round through the Legislative Decree number 30 of December 15, 1994 and promulgated it through Decree number 1355 of December 30, 1994, determining its application and enforcement.

The legal consequences of the Decrees from the Legislative and Executive powers have already been analyzed by the Supreme Court. Justice Leito de Abreu in the extraordinary appeal number 80.004 (Full Court) stated: "... it does not seem to me that it should be abandoned the principle established in the leading case, of which Minister Osvaldo Trigueiro was the Reporter. In expressing the **unanimous opinion of this Court regarding the immediate applicability of Treaty-Laws, approved and duly promulgated**, he justified with his customary accuracy and sobriety of language, the terms in which **these norms of international law mandatorily apply to domestic law**. *With regard to Brazilian law* - stated the eminent jurist—*it does not seem reasonable to me that the validity of treaties shall be conditional on a double manifestation by Congress, a requirement which no Brazilian Constitution has ever stipulated*" (R.T.J. 58/74).

From the absence of a provision specifically directed to delaying the domestic applicability of TRIPS, the Brazilian Association of Intellectual Property - ABPI, after extensive discussions and studies on this subject, concluded that the text of the Agreement known as TRIPS was incorporated to the Brazilian legal system on January 1, 1995,

revoking the provisions of the Brazilian Law which did not conform thereto, according to the principle *lex posterior derogat priori*.

- The arguments against the applicability of TRIPS in Brazil have derived from the fact that the Legislative and Executive Decrees which respectively approved and promulgated the TRIPS Agreement were silent as to whether the transitional provisions contained in article 65 of the Agreement would apply internally.

At the international level the transitional provisions of article 65 would certainly exempt developing countries as Brazil from applying the Agreement. Therefore, it has been argued that the Agreement would have a programmatic nature as the countries would have the faculty of applying or not the provisions of the Agreement within the limits of article 65. Considering that a faculty should be actively exercised and the above referred decrees were silent in regard to the provisions of article 65, some, including the Brazilian Patent and Trademark Office, have said that in view of the inertia of the country on this point, the international exemption provided for in article 65 would remain applicable internally.

However, the position of the Brazilian group was that Brazil actively exercised its faculty of determining the application of the Agreement when approved it through the Legislative Decree and then promulgated it with the Executive Decree, the legal consequences of which are explained by the Supreme Court decision in the extraordinary appeal no. 80.004 (see above).

Besides, it has also been argued that if the Agreement is applicable internally, article 65 of the Agreement would also be one of the provisions which would be applicable internally. The Brazilian group, however, believes that the provision contained in the first paragraph of article 65 of TRIPS "...no Member shall be obliged to apply the provisions of this Agreement before the expiring of a general period of one year following the date of entry into force of the Agreement Establishing the WTO" (January 1st., 1995) brings to the Brazilian legal system the obligation of not requiring the application of the Agreement by another Member country before the deadline it provides for. Expressly directed to the strict application between the Member countries, it is a legal provision of the International Law which, internally, neither obliges nor exempts Brazil from applying the Agreement, consonant to the freedom of implementation provided for in article 1 of TRIPS.

This freedom was sovereignly exercised by Brazil which, without making any disclaimer, approved the Final Record Incorporating the Results of the Uruguay Round through the Legislative Decree number 30

of December 15, 1994 and promulgated it through Decree number 1355 of December 30, 1994, determining its application and enforcement.

Finally, as the period provided for in paragraph 2 of article 65 entitles the Member States to further delay the date of application as from the end of the first period which was provided for in paragraph 1 of article 65, of which Brazil did not make any use, it would not be possible, now that the agreement is already in force in Brazil to claim the benefits of paragraph 2 of article 65 of TRIPS. Indeed, the wording of paragraph 2 of article 65 also creates a faculty which should be actively exercised to be applicable.

The non applicability of the second paragraph of article 65 will further be confirmed if by the end of the first period which was provided for in paragraph 1 of article 65 (December 1995) the Government does not publish a law claiming the benefits of the second paragraph of article 65. Then, the Agreement should be considered in force **and fully effective** even by those who believed that the first paragraph of article 65 would have the consequence of internally suspending the application of the Agreement after the whole text of the Agreement entered into force in Brazil, following the publication of the Legislative and Executive Decrees.

II.10. MERCOSUL PROTOCOL ON TRADEMARKS, INDICATIONS OF SOURCE AND DENOMINATIONS OF ORIGIN OF SEPTEMBER 1995

This Protocol contains detailed provisions (twenty articles) on trademarks and geographical indications. One of the interesting provisions refers to the protection of well-known marks:

The Mercosul Protocol extended the protection of Article 6bis of the Paris Convention to services, keeping the notion of similar goods/services. But, in paragraph 4 of Article 9, the Mercosul Protocol innovated, shifting, considerably, the enforcement test from the degree of knowledge of the mark to emphasize the unfairness of the unauthorized use and/or application for registration of a mark which was or should have been known to the unauthorized user/applicant as belonging to somebody else. Article 9, paragraph 4, of the Mercosul Protocol states:

9.4 - The Member States shall particularly forbid registration of a sign which imitates or reproduces, totally or partially, a mark which the Applicant evidently could not misknow as belonging to an owner established or domiciled in any of the Member States and capable of causing confusion or association.

In this regard, the agreement implemented more extensive protection than is required by TRIPS.¹

In the final provisions, the Protocol refers to the commitment of the Member States to enter into future agreements on the remaining subjects of the intellectual property area. The Protocol must still be promulgated by each Member State to enter into force in each country.

II.11. LAW 9.249, OF DECEMBER 26, 1995

REDUCED THE INCOME TAX ON THE REMITTANCE OF ROYALTIES FROM 25% TO 15%.

II.12. AGREEMENT BETWEEN THE MERCOSUL AND THE EUROPEAN UNION OF DECEMBER 1995

PROVIDES FOR THE CREATION OF A FREE TRADE AREA BETWEEN THE TWO ECONOMIC BLOCS WITHIN THE NEXT TEN YEARS.

II.13. LAW Nº 9.279, OF MAY 14, 1996

REGULATES RIGHTS AND OBLIGATIONS RELATING TO INDUSTRIAL PROPERTY.

After 5 years being examined in Congress, Law 9279 ruling on rights and obligations related to industrial property has been promulgated by the President on May 14, 1996, and published on the following day. Except as regards the "pipeline" provisions in connection with patents for pharmaceutical, chemical and food products and processes, which are immediately applicable, the new Law will only be in force one year after its publication, that is, as from May 15, 1997. No amendment of the law is expected until then.

I. TRADEMARKS

From the original text submitted to Congress by the Government and object of HR 824, very little was left in the new Law as consequence of the innumerable amendments, most of which originating from the Brazilian Intellectual Property Association

1. "TRIPS - Trademark and Geographical Indication a Latin American Perspective" by GUSTAVO LEONARDOS, in, ECTA Newsletter nº 29, of May 1996, págs. 67 to 90).

(ABPI). As the discussions and debates were mostly centered on the introduction of pharmaceutical products and biotechnology patents, the part of the law referring to trade and service marks (hereinafter, generally "trademarks"), is almost totally derived from the amendments prepared by ABPI.

Four groups of provisions contain important innovations relating to trademarks as compared to the former Law 5772/71: first, the widening of the definition and registrability of marks; second, a broader protection against piracy and dilution; third, the simplification of bureaucracy; and fourth, stronger enforcement. It is to be noted that the trademark provisions of the new Law fully comply with the agreement on Trade Related Aspects of Intellectual Property (TRIPS) which has been promulgated in Brazil by Decree No. 1355, of December 30, 1994.

1) DEFINITION AND REGISTRABILITY OF MARKS.

According to article 122 of Law 9279, all visually perceptible signs which are not excluded may be registered, a) as a trade or service mark, that which is used to distinguish a product or service from an identical, similar or related one of a different origin; b) as a certification mark, that which is used to certify the conformity of a product or a service with certain technical specifications, notably as to quality, nature, used materials, and methods of production; and c) as a collective mark, that which is used to identify the products or services originating from members of a certain (collective) entity. The shape of products and packaging may be registered, except when it is common or vulgar or cannot be dissociated from its technical effect (art. 124, XXI) or when it is the object of a third party's registered design (art. 124, XXII). Also civil names, company names, artistic works, such as characters, as well as their titles protected under copyright may be registered with the authorization of the owner thereof (art. 124, XV, XVI and XVII).

2) PROTECTION AGAINST PIRACY AND DILUTION.

Besides the usual exclusions of registrability referring to descriptive, generic and common names or to the reproduction or imitation of previously registered marks for identical, similar or related products (art. 124, VI and XIX), a mark cannot also be registered if it may cause the

association with another mark, that is, if it may be identified as having any relationship with the origin of a previously registered mark (art. 124, XIX). A more important provision, however, may be found in article 124, XXIII, according to which a mark may not be registered when it is the reproduction or imitation of a mark which the applicant, by reason of his activity, evidently could not misknow, for identical, similar or related products or services, susceptible of causing confusion or association with such mark. This is an important provision as it discards any consideration as to the high reputation or notoriousness of the copied mark going thus much further than art. 6.bis of the Paris Convention and, to a certain extent, also of TRIPS art. 16.3 which, although broadening the scope of protection of well-known marks requires that it is registered for meriting such wide protection. The broad wording of art. 124, XXIII, also embraces applications maliciously filed by a distributor or representative of the trademark owner without his authorization. It is to be noted that the MERCOSUL Protocol on trademarks (not yet in force) widens even more this provision by not requiring that the copied mark covers identical or similar products.

2.1) Trademarks of a high reputation, according to art. 125 of the Law, when registered in Brazil shall have a special protection irrespective of fields of activities, and

2.2) Well known marks as foreseen in art. 6.bis of the Paris Convention are protected independently of registration (art. 126). Such protection is extended to service marks. However, both in the cases of arts. 124, XXII, and 126, the owner of the copied mark must file its own application within 60 days of objecting to the infringing mark (art. 158, § 2).

2.3) Also with the scope of fighting against trademark piracy it is required from trademark applicants to have an effective activity in the field covered by the mark (art. 128, § 1st). Such activity may be either directly or indirectly (holding

companies) exercised, however, it is not necessary to provide any documentation to this effect, a declaration by the applicant, made in the application itself, being enough. This is a much softer requirement, for instance, than that of U.S. Law requiring evidence of actual use of the mark before a registration is issued.

2.4) A strong protection is also afforded to geographical indications such as indications and appellations of origin (arts. 177/182).

3) LESS BUREAUCRACY.

For filing a trademark application and obtaining a registration it is enough to submit the application together with a power of attorney simply signed on behalf of the applicant, no notarization or legalization being required. As mentioned above, also no documents attesting to the applicant's field of activities is necessary as it suffices to declare the field of activities in the application itself.

3.1) The application is published immediately after filing for opposition purposes which may be presented within 60 days from publication (art. 158). A full examination as to registrability is made (art. 159) and in case the application is granted no administrative appeal is allowed (art. 213, § 2nd) but after issuance of the registration any interested party may apply within 180 days for the cancellation of the registration (art. 169). If the application is rejected, however, the applicant may appeal to the President of the Patent and Trademark Office (PTO).

A trademark registration may also be the object of invalidation proceedings before Federal Courts within 5 years as from registration (arts. 173/175).

4) ENFORCEMENT.

A trademark registration is valid for ten years, being indefinitely renewable for subsequent ten year periods (art. 133) and it may be subject to forfeiture if the mark is not used for more than five years (art. 143). If, however, the use of the mark has been licensed, it is not

necessary to have a license agreement recorded in order that the use of the mark made by the licensee may inure to the benefit of the trademark owner (art. 140, § 2nd).

4.1) Trademark infringement is both a criminal and a civil tort and anyone who, without authorization, reproduces or imitates a registered mark so as to cause confusion or alters a mark already put on the market, is liable for imprisonment of three months up to one year or to a fine. In case the crime is committed, however, by importing, exporting, sale, offer for sale, hiding or having in stock the product covered by the infringing mark, the penalty is reduced to imprisonment from one to three months. In view of the rather lenient penalties in criminal proceedings, only in exceptional cases they would be worthwhile. Criminal proceedings start by a preliminary seizure of the products bearing the infringing mark and the infringement action must start within 30 days after conclusion of the seizure proceedings.

4.2) Civil proceedings, consequently, are by far more important than criminal ones and it is possible to obtain through civil courts all kinds of seizures, injunctions, preliminary relieves, etc., as foreseen in the Code of Civil Procedure. Actual damages should be calculated on the basis of the actual losses suffered and lost profits (art. 210 of Law 9279) should be calculated according to the criteria most favorable to the aggrieved party among the following:

- I the benefits he would have obtained were it not for the infringement,
- II the benefits obtained by the infringer, or
- III a reasonable royalty.

4.3) Products bearing counterfeited or infringing marks may be seized at customs (art. 198) either *ex-officio* or at the request of the interested party.

4.4) Exhaustion of rights is limited to the internal market (art. 132, III). Therefore, it is likely that parallel importation will be repressed except for goods coming from the other MERCOSUL countries.

The trend followed in the last few years both at the PTO and at Courts has led to a better trademark protection which is already reflected in the current reduced number of pirate trademark applications. It is expected that, with the new Law, still better protection will be afforded to trademarks, stimulating trade and investment.

II. PATENTS

1) DESIGNS WILL NO LONGER BE TREATED AS PATENTS

Designs (in Brazil presently known as Industrial models (MI) and industrial designs (DI)) will no longer be prosecuted as patents, but rather, will be object of a registration procedure more like trademarks. Furthermore, these two categories (MI and DI) will be grouped as industrial designs (DI).

III. TECHNOLOGY TRANSFER

Technology transfer agreements, including patents, trademarks and know-how licensing, as well as franchising agreements, should still be recorded before the PTO in order for:

- (a) the agreement to be enforceable against third parties (including to enable the licensee to sue in its own name infringers of the patent or the trademark);
- (b) payments by the Brazilian party to be remissible abroad; and
- (c) such payments to be tax-deductible for the Brazilian party for corporate income tax purposes.

Art. 240 of the new Law withdrew the discretionary powers of the PTO to scrutinize technology transfer agreements during the recordation procedure and —although it is still not clear whether the PTO will obey the new Law and refrain to make demands of

amendments in technology transfer agreements in order to record them—, it may be expected that the trend towards liberalization of the governmental controls in the area of licensing will continue.

Arts. 61-63, for patents, and 139-141, for trademarks *did not repeat* the conditions imposed by the former Law for the payment of licensing royalties for patents and trademarks, namely that the applications should have been filed in Brazil with the priority claim based on the Paris Convention or the Patent Cooperation Treaty and, for trademarks, that the registration should still be in its first ten-year-period of validity. As a consequence thereof, it may also be expected that licensing of patents and trademarks should increase significantly following the entry into force of the new Law.²

II.14. CADE RESOLUTION OF AUGUST 28, 1996

THIS NEW RESOLUTION OF THE ADMINISTRATIVE ECONOMIC PROTECTION COUNCIL—CADE AIMS AT REDUCING FROM 10 TO 2 MONTHS THE PROCEDURES ON ACQUISITIONS AND MERGERS.

(O Globo Newspaper of August 29, 1996).

Cade's Resolution comes after much criticism on its delay to examine the acquisition of American Home Products' Kolynos division by Colgate Palmolive Co. The complaint filed by Procter & Gamble states that Colgate's control of almost 80% of the toothpaste market would prevent new entries in that market. CADE's decision was that the only or primary anticompetitive effect of the merger was the joint ownership of the two consumer preferred trademarks: KOLYNOS and COLGATE. Therefore, the acquisition was approved conditioned to COLGATE choosing between:

- A. The temporary interruption (4 years) of the use of the mark KOLYNOS;
- B. The exclusive license of the mark KOLYNOS for third parties for 20 years;
- C. The assignment of the mark KOLYNOS

II.15. ECONOMIC DEVELOPMENTS

Between 1990 and 1995 American foreign sales to Brazil grew more than 100% in value, from US\$4.4 billions to US\$10.4 billions.

2. (MOMSEN, LEONARDOS & CIA. - Newsletter nº 137 of July 1996).

During the same period, Brazil's exports to the U.S. increased from US\$7.6 billions to only US\$8.7 billions and the country's gross domestic product increased from US\$412 billions to US\$560 billions.

Since 1990, intra-MERCOSUL trade increased from US\$4 billions a year to US\$14.4 billions. MERCOSUL has 200 million consumers with a gross domestic product of US\$800 billions and US\$63 billions in total exports.

Two-way trade between the United States and the MERCOSUL was approximately US\$ 27 billions in 1995. (See the graphics attached).

III. FUTURE DEVELOPMENTS

There are several bills presently before the Brazilian congress either directly or indirectly related to intellectual property matters, the latter referring more specifically to commercial matters or enforcement of rights in general.

Among these bills, it should be noted that there are several bills on copyright, also several bills on plant varieties, and bills on: biodiversity, software, crimes through the internet, integrated circuits, rights of the indigenous population. There is also a new law no. 9.307/96 on arbitration, providing for the judicial enforcement of the arbitration award (Brazil is not a member of the New York Convention).

Besides, Article 241 of Law 9.279/96 authorizes the Judiciary power to create special courts to settle intellectual property disputes and the Brazilian Association for Intellectual Property—ABPI created a committee to discuss this possibility with the judiciary. Administrative Regulations on this new industrial property law should be ready before the law enters into force on May 15, 1997. ABPI was invited by the Minister of Industry and Commerce to prepare draft regulations and the work should start still in September, 1996.

It is also worth mentioning that a new "Law of Foreign Commerce", which would replace nearly 150 existing laws and decrees, is being proposed by the Brazilian Foreign Trade Association—AEB in order to provide a new legal framework for the Brazilian Foreign Trade. A first draft has already been prepared but many amendments are being suggested.

One should not forget that the final provisions of the Mercosul Protocol on Trademarks, Indication of Source and Denominations of Origin refers to the commitment of the Member States to celebrate future agreements on intellectual property. A draft Protocol on copyrights had been prepared but it seems that the Member States have not achieved consensus on a final text yet.

The expansion of the MERCOSUL is a reality pointing to multiple possibilities. Chile and Bolivia have signed economic agreements with the Mercosul and Venezuela is expected to sign an agreement similar to the Chilean one next December. Some

already talk about a South American Free Trade Area (SAFTA). In fact, the MERCOSUL and the ANDEAN PACT (Colombia, Venezuela, Ecuador, Peru and Bolivia) might sign still this year an agreement aiming at creating a free trade area between the two economic blocs.

The 1991 trade and investment framework between the United States and the MERCOSUL under the Enterprise for the Americas Initiative may evolve with the process for the creation of the Free Trade Area of the Americas (FTAA). In 1995, however, the FTAA developments were not substantial. That may be the reason of Henry Kissinger's recent critics to President Clinton's lack of attention toward Latin America and more specifically toward the Mercosul. President Clinton's insistence to discuss labor and environmental standards in the context of the FTAA is seen by the MERCOSUL Member States as a protectionist measure which hinders the progress of the discussions. Nevertheless, the next meeting in May 1997 in Belo Horizonte, Brazil, is expected to establish a working time-table for the creation of the FTAA.

The European Union seems, on the other hand, to be moving ahead quite faster than the United States in the establishment of its economic and political agreements with the MERCOSUL. On October 15, 1996, representatives of the European Union met with the representatives of the Mercosul Member States in Ouro Preto, Brazil, to start the studies for the creation of the free trade area between the two economic blocs. These studies should be completed within two years.

IV. CONCLUSION

As the previous State intervention in the Brazilian economy continues to diminish, Brazil is trying to find a satisfactory balance between its laws affecting trade. In the intellectual property area, the many laws and regulations recently approved and pending before the Brazilian Congress demonstrate the strategic importance which the Brazilian Government attaches to intellectual property in its "course toward sustained market based growth and openness".

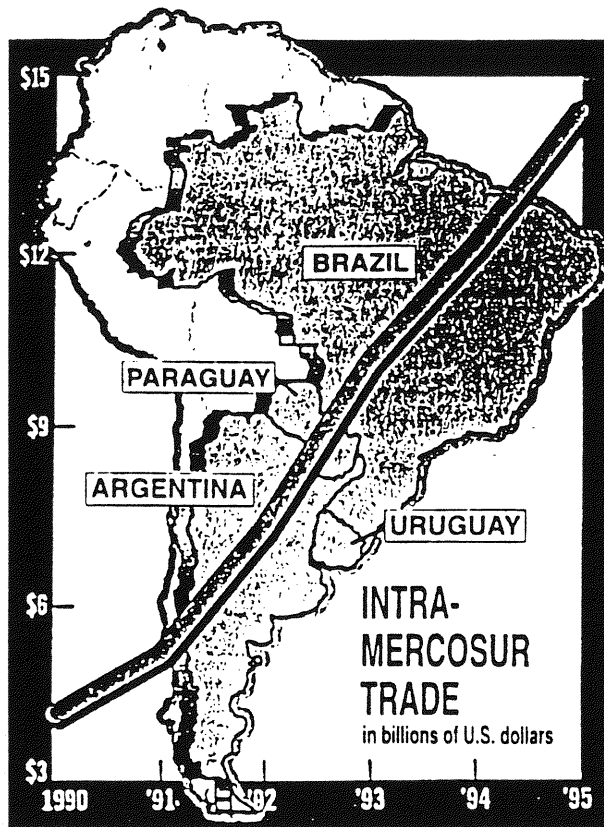
The economic and political success of the MERCOSUL indicates that a deeper insertion of its Member States in the global economy is planned. In this context, the intellectual property legislation in the region will at least conform to the international standards and should be further harmonized.

Commerce between the United States and Brazil should continue to flourish in the coming years. However, the exceptional increase of U. S. exports to Brazil from 6,787 US\$ millions in 1994 to 10,444 US\$ millions in 1995 should not be seen as a long lasting trend if Brazilian exports are not to receive some reciprocity. In this regard, Brazil was pleased with the approval of the General System of Preferences by President Clinton in August of 1996.

Brazil would also welcome the bilateral agreement to avoid double taxation which is finally to be negotiated between Brazil and the United States. However, further bilateral agreements, outside the FTAA forum should not be neglected as they might improve the U.S.-MERCOSUL relationship while trade between the Latin American countries intensifies and the European and Asian presence in the MERCOSUL economy is vigorously pursued.

The United States of America is naturally positioned to play a prominent role in the unification of the American economies. But the international success of its free market economic policies has been of such magnitude that now the U.S. may not coherently expect the MERCOSUL to take less than the best partnership offers in the market.

APPENDIX



TRADE BALANCE - BRAZIL X USA

US\$ MILLIONS FOB

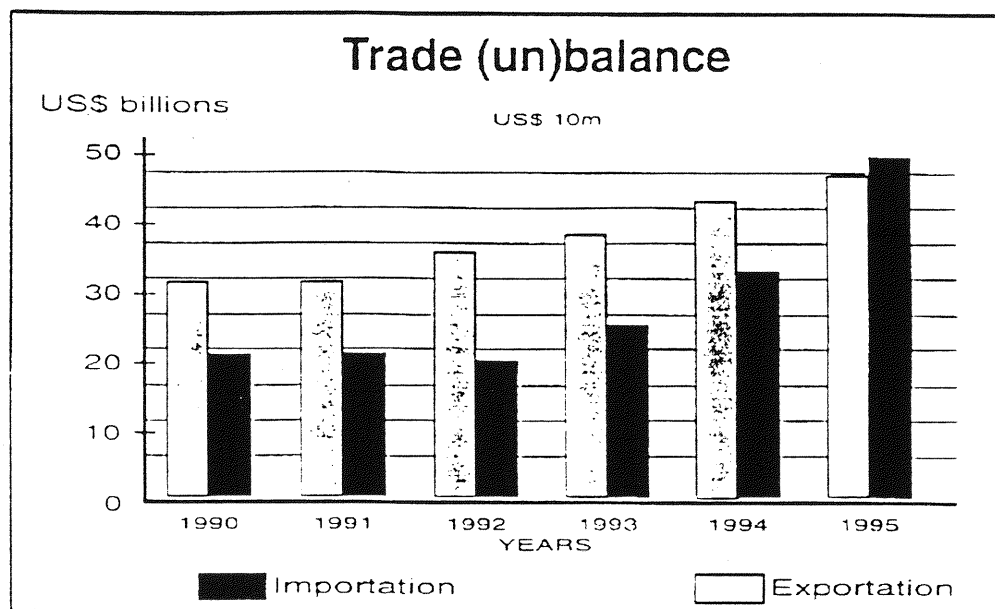
YEAR	EXPORTS	IMPORTS	BALANCE
1982	4,034	2,861	1,173
1983	5,063	2,409	2,654
1984	7,710	2,297	5,413
1985	6,956	2,602	4,345
1986	6,174	3,187	2,987
1987	7,192	3,143	4,049
1988	8,715	3,121	5,594
1989	8,370	3,822	4,548
1990	7,675	4,412	3,263
1991	6,361	4,974	1,387
1992	7,120	4,949	2,171
1993	8,023	6,030	1,993
1994	8,951	6,787	2,164
1995	8,798	10,444	(1,646)
1996*	2,922	3,299	(377)

(*) Jan/April

Source: SECEX/DPPC

Prepared by: AEB (Brazilian Foreign Trade Association)

Source: Time, August 26, 1996, pg 29.



Source: News & Views, April 1996 (A publication of the British Chamber of Commerce & Industry in Brazil).