



Role of Trade Secret Protection Laws in the Development of Indo-Brazilian Bilateral Trade & Investment

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Abstract

Trade secret is vital information for the commercial enterprise for the extra traditional IP rights with copyrights, patents or trademarks. The trade secret protection offers companies a better course to avoid patent discoveries and critical patenting procedures for inventiveness. The trade secret laws, policies and judicial attitude provide an array of interesting protection canopy, infringement scenario and equitable remedies in Indo-Brazil jurisdictions. Both emerged major contributor to industrial development and competitive benefits in BRICS regions. The foundational values of two legal systems are different however there great commonalities and congruence in trade secret protection regime. Both countries' trade secret laws are insightful as they offer a cluster of civil, criminal and equitable remedies. Under this backdrop, the significance of trade secret protection in India and Brazil is discussed in terms of bilateral trade and development. It also offers a deep insight into the comparative IP jurisprudence of Indo-Brazilian law as a potential instrument of innovation and competitiveness.

Keywords: trade secret protection, undisclosed information, comparative IP jurisprudence, bilateral trade, equitable remedies misappropriation, BRICS

1. Introduction

Protection of trade secrets is a component of the general concept of protection against unfair competition under equity, contract and intellectual property. This is confidential information for a competitive edge for a business which includes mechanized, industrial and commercial secrets. It may assume as manufacturing processes, distribution methods, advertising strategies, sales methods, consumer profiles, and lists of suppliers and client relationships. Trade secret protection is instantaneously effectual as compared to patents which may take years to materialize (Rowe & Sandee, 2015) ^[1]. Article 39 of the *Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement*, 1995 has defined it as information which is not generally known among, or readily accessible to, circles that normally deal with the kind of information in question. It must have commercial value and subject to reasonable steps by the rightful holder of the information to keep it secret through confidentiality agreements (Melvin, 2014) ^[2].

Unlike patents, trade secrets provide protection without registration or other procedural formalities for an indefinite time. It additionally provides a whole photo of the various ways of protecting the change consisting of the felony gadget, sui generis device, and international agreement bearing trade secret protection (Nomani, 2018) ^[3].

Though India's diplomatic relations with Brazil dates back to 1948, it opened the industrial and commercial hub of Brazil in 1996 (Nomani & Rahman, 2011) ^[4]. since then India-Brazil bilateral relations are in a state of clearly discernible upswing trend. The two countries share common democratic values and developmental aspirations. Both are large developing countries, each an important player in its

BRICS region, both stable, secular, multi-cultural, multi-ethnic, large democracies as well as trillion-dollar economies (Nomani & Raj, 2016) ^[5]. The trade secret laws, policies and judicial attitude provide an array of interesting protection canopy, infringement scenario and equitable remedies available to an aggrieved person with respect to Indo-Brazil scenarios. The cluster of remedies available for the protection trade secret laws is insightful of civil, criminal and equitable remedies across two jurisdictions. The foundational values of two legal systems are different however there great commonalities and congruence in trade secret protection regime. Thus it emerged major contributor to industrial development and competitive benefits to both nations in the last two decades.

2. Material and Methods

This comparative jurisprudential study attempts to deepen understanding of the international legal protection, Indian and Brazilian trade secret laws in the broader objectives of the *Paris Agreement*, 1967 and *TRIPS Agreement*, 1995. It appraises the pragmatic discourse of Indian and Brazilian trade secret laws to draw distinctive features for a vibrant IP regime. These two countries' juridical mooring stand apart but in terms of bilateral trade and investment shares a cohesiveness and competitiveness, therefore the methodology partakes the comparative law method tilted to qualitative and quantitative research in the doctrinal and semi-empirical framework. The Indian common law method of study along with the statutory legal interpretation is followed with a judicial analysis of doctrines. Where as in Brazilian context the promulgating ordinances and judicial pronouncements and prosecutorial system of justice have been studied in the context of *Brazilian Industrial Property*

Law No. 9.279, of May 14, 1996 as amended by *Brazilian Industrial Property Law No. 10.196* of February 14, 2001, *Civil Code*, 2002 *Code of Civil Procedure*, 1973 and *Brazilian Consolidation of Labour Laws*, 1943. This study has analyzed relevant international and national legal materials on international IP laws in the framework of Maxwell's qualitative research design (Maxwell, J.A., 2005) [6].

3. Results

3.1 international trade secret Laws

The international trade secret laws consist of the *Paris Convention for the Protection of Industrial Property*, 1967 and *Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement*, 1995. Article 10 bis of the *Paris Convention*, 1967 administered by the *World Intellectual Property Organization (WIPO)* highlights the nature of trade secret protection against unfair competition. Article 1 defines the scope of industrial property originally covered, which the *TRIPS Agreement*, 1995 extends by explicitly providing for the protection of undisclosed information. Article 39 of the *TRIPS Agreement*, 1995 protects undisclosed information including agricultural and pharmaceutical test data. In practical terms trade secret is usually shared by the owner with a limited group of employees and business partners (Maskus, K.E.2012) [7]. Thus The nature of international trade secret laws might be obscure but the TRIPS Agreement requires that WTO members put in place national systems to protect trade secrets against acts of unfair competition (Sandeen, 2011) [8].

3.2 Trade secret laws in India

There is no specific legislation that regulates the protection of trade secrets and confidential information in India (Nomani, 2013) [9]. Indian courts have upheld trade secret protection on basis of principles of equity, common law principles, breach of contractual obligation and restraint of trade provided under Section 27 of the *Indian Contract Act*, 1872 (Nomani, 2011) [10]. There are not any unique legal guidelines in India to shield trade secrets except the *Law Commission of India* in 1958 suggestion for the expansion of the accompanying in the principle segment '... with the exception of in so far as the limitation is sensible having respect to the enthusiasm of the gatherings to the understandings and of people in general (LCI, 1958) [11]. The judicial pronouncement mostly relied on the principle of equity and advanced civil remedies include damages, injunctions, and the return of the confidential information (Nomani, 2011). Be that as it may, the Indian government has clarified its position in 1989 in response to *General Agreement on Tariffs and Trade (GATT)*, 1947 that: Trade secrets cannot be considered to be intellectual property rights, because while the fundamental basis of intellectual property right rests in its *disclosure, publication, and registration*, trade secrets are premised upon secrecy and confidentiality (WIPO, 2017) [12].

Trade secrets protection has been also provided under Section 72 of the *Information Technology Act*, 2000 but it is limited only with reference to electronic records. The importance of trade secrets protection fresh impetus under exports and commercialization in the context of *Make in India Policy* (Nomani & Raj, 2016) [13]. The *United States Trade Representatives Special 301 Report*, 2016 also

indicated that the United States has problems with respect to IPR protection, enforcement, or market access in the absence of legislative protection to Trade Secrets. The *Special 301 Report*, 2016 also indicated that the United States has problems with respect to IPR protection, enforcement, or market access in the absence of legislative protection to Trade Secrets (USTR,2016) [14].

3.3 Trade secret laws in Brazil

Article 5(XIV) of the *Brazilian Constitution*, 2004 states that 'access to information is assured to everyone and the confidentiality of the source is protected when necessary for the performance of professional activity (Ligue, 2016) [15]. Articles 195(XI) and 195(XII) of *Brazilian Industrial Property Law No. 9.279*, of May 14, 1996 as amended by *Brazilian Industrial Property Law No. 10.196* of February 14, 2001 regulates generic reference to "confidential business information" and "confidential industrial information" to include "confidential knowledge, information or data, usable in industry, commerce or the provision of services". According to Article 195(XI):

whoever reveals, exploits, or uses, without authorization, knowledge, information, or confidential data used in industry, commerce, or services to which the person has had access through a contractual or employment relationship, even after the termination of the contract or relationship, commits the crime of unfair competition, unless the information is public knowledge or obvious to someone with the required technical skills.

The provision considered unfair competition to reveal, exploit, or use knowledge or information without authorization as a crime. Besides these two express prohibitions of the law, the *Brazilian Industrial Property Law No. 9.279*, 1996 also grants that:

The injured party shall be assured the right to receive loss and damages in compensation for the loss caused by acts of infringement of industrial property rights and by acts of unfair competition not provided by this Law, which tend to prejudice one's reputation or business, or to create confusion between commercial, industrial or service providing establishments, or between products and services offered in the course of trade (I P Law 9279, 1996) [16].

Articles 186 and 187 of the *Civil Code of Brazil*, 2002 determines that a person, who, by a voluntary act or omission, negligence, or imprudence, violates the rights of and causes damage to another, even though the damage is exclusively moral, and commits an illicit act. It further states that: A person who practices an illicit act and causes damage to other persons is obligated to repair the damage. The employer or principal is also responsible for the civil damages caused by his employees, servants, and agents in the performance of their work or because of it. The amount of compensation is measured by the extent of the damage (Law No.10.406, 2002).

Article 482 of *Brazilian Consolidation of Labour Laws*, 1943 considers a violation of trade secrets norms as a just cause for termination of employment by the employer [17].

4. Discussion

India and Brazil enjoy multifaceted bilateral relationship such as BRICS, BASIC, G-20, G-4, IBSA, International Solar Alliance, Biofuture Platform in multilateral bodies such as the UN, WTO, UNESCO and WIPO (Nomani & Raj, 2016) [18]. It heralded a new phase for India-Brazil

relations, is based on a common global vision, shared democratic values, and a commitment to foster economic growth with social inclusion for the welfare of the people of both countries.

4.1 Indo Brazil Commercial Relations

Brazil is one of the most important trading partners of India in the entire LAC (Latin America and the Caribbean) region. India-Brazil bilateral trade has increased

substantially in the last two decades. Brazil is one of the most important trading partners of India in the entire LAC (Latin America and the Caribbean) region. India-Brazil bilateral trade has increased substantially in the last two decades.

The bilateral trade between India and Brazil rose to USD 7.6 Billion with the growth of 34.71%, the highest growth among the top 10 trading partners of Brazil(MEA,2017).¹⁹

India-Brazil Bilateral Trade 2008-2014 (USD million)

Table 1

Year	India's Export	India's Import	Balance of Trade for India	Total Trade	Growth %
2008	3564	1102	2461	4666	49.23
2009	2191	3415	-1224	5605	20.12
2010	4242	3492	750	7734	37.97
2011	6081	3201	2880	9282	20.00
2012	5043	5577	-544	10620	14.41
2013	6357	3130	3227	9487	-10.67
2014	2260	1141	1119	3401	

Source: Ministry of External Affairs, India- Brazil Relations, https://www.mea.gov.in/Portal/ForeignRelation/Brazil_May_2014.pdf

The impetus to trade relation resulted in India's gaining a spot to rise to 10th position among the top trading partners of Brazil. The Brazilian companies have invested in automobiles, IT, mining, energy, biofuels, and footwear sectors in India. In turn, the Indian companies have invested in such sectors as IT, Pharmaceutical, Energy, agri-business,

mining, engineering, and automobiles. On 21 February 2018, an important business event organized in the Embassy brought together prominent businesses from both sides for a B2B interaction exploring the opportunities of enhancing bilateral investments.

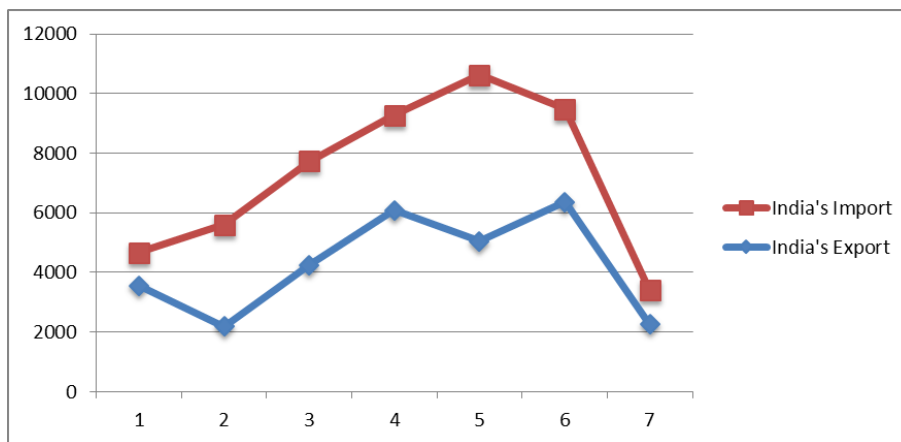


Fig 1

India's diplomatic relation from 1948 to 2018 is in a state of a clearly discernible upswing. Although the two countries are divided by geography and distance, they share common democratic values and developmental aspirations. Both are large developing countries, each an important player in its region, both stable, secular, multi-cultural, multi-ethnic, large democracies as well as trillion-dollar economies.

4.2 Nature of Trade Secret in India

The trade secrets law in India is a judiciary made law based on the principle of equity and on common law action for a contractual obligation to the restraint of trade. In view of foreign investor's reluctance in sharing technical know-how with their Indian counterparts in the absence of statutory law, the *Satwant Reddy Committee Report, 2007* prescribed three years of information restrictiveness on account of agrochemicals and proposing of two option models to be

Followed on account of pharmaceuticals sectors. The recommendation of *Satwant Reddy Committee Report, 2007* was put in abeyance because of indigenous resistance. To overcome this impasse, an analogous law on *National Innovation Act, 2008* facilitated public, private or public-private partnership initiatives for building innovation support to encourage innovation and to codify and consolidate the law of confidentiality in aid of protecting Confidential information, trade secrets and Innovation (Nomani & Rahman,2015)^[20]. However, the current status of statutory trade secret protection is still unclear as there is no law similar to the *Uniform Trade Secret Act, 1979* and *Economic Espionage Act, 1996* of U.S.A. Thus the Indian position is similar Article 39.3 of the *TRIPS Agreement, 1995* which leaves significant space for the Member nations to execute the commitment to secure test information on

trade secret protection (Nomani, 2012) ^[21].

4.3 Nature of trade secret in Brazil

The nature of trade secret in Brazil is governed by a mixture of intellectual property, trade secret, civil code, criminal code, and labour laws. It enunciates civil, tort and criminal remedies in trade secret infringements. The disclosure, either by lawful or unlawful means, implies that the information becomes public. Thus once a third party discloses your confidential information the information will no longer be protected as a trade secret. The misappropriation of trade secrets violation invoke suspension of confidential information, claim for loss and damage and monetary caution or fiduciary guarantee. The trade secrets are governed by criminal provisions covering unfair competition and unauthorized use, exploitation or disclosure of trade secrets invoke criminal actions against an employee, ex-employee, or a person having or who have had a contractual relationship with the trade secret owner. Even a third party may be convicted of this crime if they obtained the trade secret by fraud or other illicit means. The Brazilian Courts tend to be restrictive regarding the award of potential, theoretical and moral damages due to an exacting standard of proof(LOC,2016) ^[22].

5. Conclusion

The comparative jurisprudence of trade secret in India and Brazil reveals that trade secrets are becoming important in the intellectual property regime and play a very expanding role in the economy of both countries. While the trade secret regime as thought out under the *TRIPS Agreement*, 1995 was for protection against unfair competition, it is now increasingly being seen as an alternative to patent protection. This is evident from the US where a substantial part of inventions does not translate into patents but are kept as secrets (Almeling, 2010) ^[23]. The companies generally feel that disclosure can lead to imitation, companies will have incentives to keep inventions or certain crucial parts of that invention secret (Anton & Yao, 2004) ^[24]. The traditional economies of India and Brazil are based on physical assets of natural resources and capital goods but the knowledge economy relies extensively on intellectual property for their value. It is under this context, Paragraph 3.8.4 of the *National IPR Policy*, 2016 ensured an effective legal and legislative framework for the protection of IPRs including trade secret (Nomani, 2017) ^[25]. The legal regime has been dynamic to keep pace with the technological changes evident from the promulgation of the Information Technology Act, 2000 and its subsequent amendments that covers theft of confidential information through the electronic route and mandates stiff penalties, damages, and imprisonment. Thus a stronger the trade secret law in India and Brazil is need of time for a rising international trade and in turn, will spawn into inventiveness and competitiveness in India and Brazil for economic development and prosperity in BRICS region.

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