

The Brazilian Experience in Dispute Settlement

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Abstract

Since the end of the Uruguay Round, Brazil has become a protagonist in the multilateral trade system and in its dispute resolution mechanism. This work analyzes the Brazilian experience, and explains how a greater participation in trade disputes was provoked by institutional and political changes that took effect in the country during the last two decades. These changes include an active participation from the private sector and the political relevance that trade disputes have acquired.

I. Introduction

Any scholar visiting Brazil these days may be interested in the local newspapers and magazines. The visitor will certainly be stunned by the low number of pages dedicated by the local media to international issues. Even when compared to the press in neighboring countries, the Brazilian press is mostly dedicated to national problems and local news. This tendency probably reflects the main interests of their readers, inhabitants of a gigantic territory who will hardly have the opportunity to visit foreign lands along their lives, or to foresee how distant events may affect their interests in some way.

Nevertheless, one exception to this inward-looking tendency of Brazilians may be discovered, where international issues are concerned. International trade usually raises interest and international trade topics prevail in the few pages that daily newspapers dedicate to international issues.

This is a remarkable change if one considers the timid Brazilian participation in the Uruguay Round. Actually, Brazil and India are probably the best examples of renewed interest in international trade, after many years of being subjugated by other defense and regional concerns. Leaders among developing countries and active players in the current multilateral trade negotiations, Brazil and India represent the rising protagonism of previously modest players.

Brazilian activism in the world trading system may be also identified in the dispute settlement arena. Since 1995, Brazil has been an assiduous claimant at the World Trade Organization (WTO) and at the South American Common Market (MERCOSUR) dispute mechanism. The latter case is not surprising: Brazil represents 79,35% of MERCOSUR's GNP, and the number of cases is less than proportional to this economic prevalence. However, explaining Brazilian pre-eminent participation at the WTO Dispute Settlement Body (DSB) requires a more sophisticated explanation.

This paper asserts that the recent evolution of Brazil's participation in international disputes derives mainly from domestic pressures. Hence, one must understand the institutional and political changes that took effect in the country during the last two decades. These changes

not only make trade a central topic for the local industry, but also make trade (and trade disputes) a relevant electoral topic.¹

In order to reach this conclusion, the next section describes the radical evolution of trade policy in Brazil after the 1990s, when international trade was opened. The following sections will describe Brazilian experiences with both regional and multilateral dispute resolution. Next, the questions proposed by the Economic Commission for Latin America and the Caribbean (ECLAC) will be considered, based on available data regarding the Brazilian experience. The final section consolidates these answers and the main ideas proposed in the paper.

¹ An example of the electoral relevance of trade disputes may be identified in the last electoral campaign. The two main candidates argued tirelessly about which parties (Workers' Party or Social Democratic Party, respectively) won more claims at the WTO. See "Política externa gera embate acalorado entre Lula e Alckmin". Oct 9th., 2006. BBCBrasil.com, http://www.bbc.co.uk/portuguese/reporterbbc/story/2006/10/061009_debatepoliticaexternacg.shtml.

II. Trade Policy in Brazil (1990-2007)

Before the 1990s, a central word related to Brazilian trade policy was import-substitution. Just as in other Latin American countries, Brazilian policy-makers were heavily influenced by the 20th century view that foreign goods represented a threat to the national infant industry, and that trade policy was dependant on industrial policies for regional development. High tariffs, generous subsidies, and a high level of state intervention were natural consequences.

Another consequence was that Brazil's participation in multilateral arrangements liberalizing trade was not, after World War II, a priority for its foreign policy. Although the country was an original contracting party to the General Agreement on Tariffs and Trade (GATT), and an important advocate for the creation of the United Nations Conference on Trade and Development (UNCTAD), trade was still a secondary topic in the Brazilian foreign agenda.²

Trade policy in Brazil radically changed in the 1990s, after Fernando Collor de Mello took the Brazilian presidency. In many ways, Collor de Mello represented the national icon of liberal reformists elected in other Latin American countries during that period. His aggressive discourse for modernization and market efficiency led to sudden openness in international trade, radically reducing tariffs even before the end of the Uruguay Round. Thus, tariffs were graciously cut at the beginning of his term. The average tariff rate, which had already been reduced from more than 50% in 1987 to 32.2% in 1990, was scheduled to be further reduced unilaterally to 14.2% by the beginning of 1994. Non-tariff trade barriers and special import prohibitions were abolished. "The removal of bilateral sources of friction with the United States became a priority in a situation marked by a comprehensive effort to regain credibility which included also efforts on deregulation, privatization and price stabilization."³

² "Brazil was a GATT founding father but its involvement up to the Tokyo Round was really marginal. Brazilian stance in the UNCTAD in the 1960's underlined the importance of statements of principle in Brazilian foreign economic policy and also the considerable autonomy of Itamaraty in the definition of such a policy. The reversal of the timid trade liberalization of 1967 in the late 1960's and the concentration of interest in GSP preferences made it natural that Brazil continued aligned to the G-77 grand coalition of developing countries which had taken shape in New Delhi in the first UNCTAD conference in 1964". Cf. Abreu, 1998, p. 23.

³ Abreu, 1998, p. 26.

Opening international trade, which was initiated in the early 1990s, saw some steps back, mainly in industrial and automobile sectors, once the low competitiveness of local industries became apparent. Nevertheless, most tariffs were kept at a lower level than in previous years, and data related to trade witnessed increasing flows.

The participation of international trade in the Brazilian GNP increased during the next presidential term, after 1994. In fact, economic policy during these years was marked by the attempt to control inflation, and openness to competitive imports was a key element in this policy. Moreover, to stabilize prices, the “Real Plan,” was anchored in the U.S. dollar. Although the program was successful in controlling inertial inflation, it also kept an over-valuated exchange for the domestic currency, promoting more imports and reducing the competitiveness of local firms.

In this context, the reaction from local industries was predictable. Domestic industries openly lobbied for protection against foreign goods, while more organized sectors lobbied for temporary relief. Trade remedies, especially anti-dumping measures, were increasingly imposed, whereas subsidies for the automobile industry attracted new investments for the country. In fact, the first claims against Brazil before the WTO were brought by the Philippines (against countervailing measures imposed by Brazilian authorities on the imports of coconuts),⁴ and by a group of countries against the Brazilian policy of attracting investments in the automobile sector.⁵

Related to the relevance of multilateral trade arrangements, Brazil became deeply involved with attempts to regionally integrate within MERCOSUR. In fact, initiatives for regional integration in South America may be identified since the 1960s, MERCOSUR was the success story, at least in its initial years. From 1991, when the Treaty of Asuncion was signed, to 1998, when the Brazilian currency crisis began, regional trade quadrupled.⁶ After 1998, the relevance of regional trade for MERCOSUR partners was diminished due to complex factors: the devaluation of the Brazilian Real, which contaminated the neighbor economies; the resulting and unprecedented economic crisis in Argentina; long-lasting resentment from minor partners (Paraguay and Uruguay); the reduction of MERCOSUR’s political relevance after democracy was consolidated and military moves in the regional were no more a threat; personal characteristics of national leaders, who gave less importance to regional trade (at least in practice) than previous presidents.

The number and features of disputes within MERCOSUR are closely related to these complex factors. Generally speaking, most cases derive from protectionist measures or barriers to market access. As discussed in the following section, the majority of disputes were solved by direct negotiation between the parties involved, and this flexibility is regularly praised as one of MERCOSUR’s positive characteristics. The weak dispute resolution mechanism, likewise, has allowed for many negotiated outcomes, and, in spite of systemic incertitude, most (if not all) judgments were fully complied with by MERCOSUR partners.

⁴ Brazil-Measures Affecting Desiccated Coconuts (WT/DS22). The Philippines requested consultations with Brazil (November 27th 1995) regarding a countervailing duty imposed by Brazil on the Philippine’s exports of desiccated coconut. The Philippines claimed that this duty was inconsistent with WTO and GATT rules. Panel established on March 5th 1996, with Canada, the EC, Indonesia, Malaysia, Sri Lanka and the U.S. as third-parties. The Panel Report (October 17th 1996) concluded that the provisions of the agreements relied on by the claimant were inapplicable to the dispute. Philippines appealed. The AB Report (February 21st 1997) upheld the Panel’s decision..

⁵ Brazil – Certain Automotive Investment Measures: WT/DS51 (Japan as complainant); WT/DS52 and WT/DS65 (US as complainant); WT/DS81 (EU as complainant). Although an official settlement was never reached, claimants did not request a panel, since Brazilian regulations on the matter expired in 1999.

⁶ On the evolution of trade within MERCOSUR, and its economic cycles, see Machinea (2003).

This brief history of Brazilian trade policy during the last two decades indicates that trade has been acquiring importance in the national economy. In spite of oscillating government orientation, and after decades of import substitution, a more liberal trade regime, widely accepted by economic agents, seems to have fused in the country. Occasional upheavals from affected industries have been transformed to sector pressures, rather than on generic challenges to the openness of trade flows.

III. A Primer on Trade Disputes in Brazil

If the economic mood can be described as a positive view towards more liberal trade, the Brazilian behavior towards trade disputes was highly affected by institutional evolution in recent years. Such evolution was clearly marked by the increasing relevance of these disputes in a domestic political scenario where democracy was being affirmed. After three decades of authoritarian rule, greater transparency in public administration after 1988 allowed more information to flow to business associations, civil society, and academic researchers. Concurrently, democracy allowed organized groups to lobby for trade measures, either as protectionist devices against imports or as claims against barriers to Brazilian exports.

In terms of trade policy, business associations became increasingly aware of the relevance of trade liberalization for their plans. During the 1990s, these associations created institutional links with decisional instances of the governmental bureaucratic structure. Associations such as the Brazilian Confederation of Industries or the powerful Sao Paulo Industrial Federation created specific departments to follow the negotiations, and aligned within the Brazilian Business Coalition, an organization that presented the views from the business community to the official negotiators.⁷

A concrete example of this proactive behavior towards trade issues in recent years comes from the Brazilian agricultural industry. Until the 1990s, the highly subsidized Brazilian agriculture lobbied mainly for generous loans from official banks. An unprecedented crisis followed in the 1990s, when foreign competition was combined with inefficient techniques and poor infrastructure. After this painful period (and its terrible social consequences), the Brazilian agriculture reemerged as a highly-skilled and productive sector, with a high level of investment. Next, Brazil's concerns shifted to custom barriers and distorting subsidies in developed countries. The agricultural sector achieved an impressive level of organization, lobbying continuously for new cases to be taken to the WTO Dispute Settlement Body (DSB), while their representatives are frequently present at the Brazilian Business Coalition.

⁷ See Shaffer et al., 2006, p. 38 [noting that “[t]he Summit of the Americas with its parallel meeting of the Business Forum in Belo Horizonte, Brazil, in 1997, was the turning point, triggering the creation of an official partnership between Brazil’s industrial and agricultural sectors under the Brazilian Business Coalition (Coalizão Empresarial Brasileira, or CEB). CEB brought together 166 Brazilian business associations and enterprises under a single umbrella”].

The Ministry of Foreign Affairs (Itamaraty) itself is an example of how the evolution in trade relations promoted institutional openness. Traditionally the most hermetic bureaucratic organization in the Brazilian government, Itamaraty was progressively opened to inputs from civil society and business community in the 1990s, mainly through specialized meetings. At the same time, specialized bodies were created, detached from the traditional vision of the generalist diplomatic career. An illustration related to dispute settlement was the creation of the General Coordination of Disputes (CGC) within the Ministry's structure.⁸ The CGC's performance in WTO disputes became apparent, earning it a higher reputation among the trade community in Brazil.⁹

An interesting experience demonstrating the Brazilian attitude in this area was an event, in December 2006, involving two representatives from each South American country that dealt with dispute settlement in the WTO. The one-week meeting was sponsored by Itamaraty and organized by CGC in Sao Paulo. The meeting was based on case studies involving the countries present, and on presentations regarding the evolution of procedural practices before panels and the Appellate Body.¹⁰

CGC's good reputation attracted interest from other ministries in the Brazilian government in regards to international trade disputes. The General Attorney Office expressed its interest in following the cases, for instance.¹¹ Furthermore, the economic impact of trade disputes provoked attentiveness from the Ministry of Development and Trade, the Ministry of the Environment, the Ministry of Finance, and other specialized agencies. The different, and sometimes conflicting, points of views are occasionally identifiable during the meeting of the Chamber of Foreign Trade (Camex), the inter-ministerial body responsible for proposing policies related to trade.¹²

Not surprisingly, the interest in trade has not been limited solely to the government spheres. An increasing number of cases is routinely reported, and these news are appealing to public opinion. In fact, a general knowledge about trade disputes involving Brazil was particularly visible after the Brazil-Aircraft case or, rather, after the Canadian reaction.¹³

In 1996, Canada and Brazil began a time-consuming dispute at the WTO, with reciprocal accusations of directing prohibited subsidies to their national aircraft industry.¹⁴ The case triggered Brazilian pride in their most technologically advanced industry, and the case caught popular attention. Later, when Canada was authorized to retaliate due to Brazil's inaction on

⁸ CGC was created by Decree N. 3.959/2001. Currently, Itamaraty's staff organization is regulated by Decree 5.979/2006.

⁹ CGC first coordinator was Counselor Roberto Azevedo, a seasoned diplomat in Geneva and a former panelist at the WTO. His successor, Counselor Flavio Marega, a bright diplomat with longtime experience in Washington, leads the group of five specialists in trade disputes in Brasilia, and others at the Brazilian embassy in Geneva. See "O Brasil aprendeu a brigar na OMC". Folha de São Paulo. Feb 21st 2002. <http://www1.folha.uol.com.br/fsp/brasil/fc2102200222.htm>.

¹⁰ "Ciclo de palestras para funcionários governamentais sobre o sistema de solução de controvérsias da OMC". http://www.mre.gov.br/portugues/imprensa/nota_detalhe.asp?ID_RELEASE=4120.

¹¹ The Attorney General recently revealed that he wants, as one of his aims, "to enlarge the Brazilian international defense, in a partnership with the Ministry of Foreign Affairs". Cf. *Advocacia-Geral da União* (2007).

¹² Camex is regulated by Decree 4.732/2003.

¹³ See WT/DS46. Shaffer notes that "Brazil became one of the most active users of the WTO disputes settlement system following the Embraer case, adopting an approach based on public and private networks for capacity building and strategic litigation". Shaffer et al., 2006, p. 18.

¹⁴ WT/DS46, WT/DS70, WT/DS71, WT/DS222. These cases are mentioned more extensively below, in Section 3.3.

reforming the challenged domestic rules, Canada instead banned imports of Brazilian beef, alleging an inexistent bovine spongiform encephalopathy (mad cow) outbreak in Brazil.¹⁵

Popular reaction was immediate: from a consumer boycott on Canadian imports to a barbecue before the Canadian embassy, the case boosted national belligerence in a way uncommon to a country unused to international conflicts. Moreover, the dispute contributed to educate the public about ongoing events at the WTO and MERCOSUR.

Another case with perceptible impact over the Brazilian public opinion was the dispute between Brazil and the United States regarding compulsory licenses for pharmaceuticals. A longtime nightmare for trade negotiators on both sides, the provision in the Brazilian patent law allowing compulsory license in case of public health was considered a central aspect for the policy of donating medicines for HIV patients.¹⁶ Pressured by its laboratories, the U.S. government presented a complaint to the WTO, alleging the breach of TRIPS provisions in May 1999.¹⁷

The repercussions in Brazil were immediate. The government led a well orchestrated campaign with different NGOs, while the national and international press censured the U.S. move.¹⁸ When the ministerial conference began in Doha, the issue of compulsory license was a point of honor for the Brazilian public and the minister of health, who was by then a candidate for presidency.¹⁹ The Declaration on the Trips Agreement and Public Health was seen as another victory for Brazil in the world trading system, although a panel was never, in fact, established.

Trade disputes became a fashionable topic not only among the public. In the Brazilian academy, trade regulation became the central subject in International Law, with dozens of publications blossoming around the country.²⁰ Simultaneously, graduate programs dedicated to international trade were created in schools of law, management, and economics. Another novelty is the organization of think tanks providing specific studies for industries that awoke to the relevance of trade negotiations for their business strategies.²¹

Law firms' contribution to Brazil's national interest in trade deserves a paragraph. In some cases, foreign law firms represented Brazilian companies interested in the outcome of an international trade dispute. For Brazilian law firms, this represented lost opportunities in a promising market. Thus, while the main law firms being created, with Itamaraty, a successful internship program that drove dozens of young lawyers to Geneva and Washington, for a three-

¹⁵ Rich (2001), for example, wrote that “The Brazilian government threatened to abandon talks over a hemispheric free-trade zone and to impose trade sanctions on Canadian products if the ban was not lifted [while] port workers union has called on stevedores in Brazil's main ports not to unload Canadian cargo”.

¹⁶ Cf. Federal Law n. 9,279 of May 14th 1996, article 68.

¹⁷ WT/DS199. Mutually agreed solution notified to the WTO in July 19th, 2001

¹⁸ See “The Urgency of Cheaper Drugs”. New York Times. Oct 31st 2001. <<http://select.nytimes.com/gst/abstract.html?res=F30715F93E540C728FDDA90994D9404482>>; “US action at WTO threatens Brazil' successful AIDS programme”. Médecins sans frontières. <<http://www.accessmed-msf.org/prod/publications.asp?scntid=2182001228232&contenttype=PARA&>>

¹⁹ Mr. José Serra heralded the Doha Declaration on Public Health as one of his achievements, during the presidential campaign. See “Eleição faz escala no Qatar, com guerra de patentes”. Folha de São Paulo. Nov. 4th, 2001. <<http://www1.folha.uol.com.br/fsp/dinheiro/fi0411200111.htm>>.

²⁰ A quick research in a known online bookstore indicates that 30 books on the WTO and a dozen books on international dispute resolution were published in Brazil in the last ten years. Cf. <http://www.livcultura.com.br>.

²¹ A well-known example of think tank is ICONE, an institute based in Sao Paulo and funded by the Brazilian agricultural associations. Cf. <http://www.iconebrasil.org.br>.

month internship at each firm's expense. Besides training lawyers on the intricacies of trade regulation, the internship program provoked a collateral effect: once they are back to Brazil, these young lawyers are under pressure from the firm partners to develop clients and cases related to trade. Nevertheless, after recognizing that a case at the WTO is not a daily event, these practitioners specialize in trade remedies and non-tariff barriers, bringing a new dynamic to trade disputes before Brazilian courts.²²

Since 2004, the training program for lawyers was extended to the trade department at the Brazilian Embassy in Washington, with the same features. The Brazilian Embassy also sponsors the Brazilian International Trade Scholars (ABCI), an Institute that regularly gathers academics and practitioners in the U.S. capital. ABCI has become an important source for networking, academic research, and an exchange of ideas on trade disputes involving Brazilian interests.²³

Considering this evolution, Brazil's activism in international trade disputes is not completely unexpected. Actually, the country participated in 9.92% of all 363 cases before the WTO Dispute Settlement Body, a remarkable number for a developing country that currently represents 1% of world trade. In most cases (22 or 6.06% of total cases) Brazil was the claimant, whereas 14 (or 3.87% of the total) claims were presented against Brazilian measures. Roughly, Brazil has brought twice as many claims than it has defended claims at the WTO.

Evidently, these statistics must be adjusted to the realities of disputes before the WTO, where the participation of developing countries is relatively small. Faced with administrative and financial constraints, the majority of developing countries have never presented a claim either at the WTO or before other international fora.²⁴ Indeed, Shaffer et al. (2006) noted that developing countries confront three important challenges: (i) the capacity to organize information concerning trade barriers and opportunities to challenge them, and a relative lack of legal expertise in WTO law; (ii) constrained financial resources, including for the hiring of outside legal counsel; and (iii) fear of political and economic pressure from the United States and EC, undermining their ability to bring WTO claims.²⁵

In this context, Brazil has a privileged position vis-à-vis other developing countries. Even when its governmental structure faced cyclical scarcity of human and financial resources, the private sector has been a recurrent partner, by financing lawyers and other costs related to the dispute. Actually, the hiring of specialized lawyers to support the Brazilian position by interested companies has been relatively common, although the final strategy is dictated by CGC.²⁶ The

²² One example of the increasing number of trade remedies: between 1988 and 1994, Brazil imposed 21 final measures related to trade remedies, whereas between 1995 and 2005 the country imposed 101 final measures. Cf. Departamento de Defesa Comercial (2006).

²³ Publications sponsored by ABCI include Lima-Campos (2005) and Lima-Campos (2006). ABCI has also organized annual trade symposiums in Washington. See <http://www.wilsoncenter.org>.

²⁴ On the constraints faced by developing countries when involved in disputes before the DSU, see Gusman and Simmons (2005)[concluding that poor states behave differently than their rich counterparts because they lack the financial, human, and institutional capital to participate fully in the dispute resolution system]; Nordstrom (2003)[stating that “the activity level is highly uneven and closely correlated with size and income levels”], and Abbott (2007) [concluding that “it is rather problems of internal governance and organization in many capitals that may be responsible for the relative absence of many members from the WTO dispute scene”]. One interesting analysis of the participation of Latin American countries is in Biggs (2005).

²⁵ Shaffer et al., 2006, p. 26.

²⁶ In *Canadá-Aircraft*, the Brazilian manufacturer (Embraer) assumed costs of foreign lawyers involved in the case. In *United States-Cotton* and *EC-Sugar*, the Association of Brazilian Cotton Industry and the Association of Brazilian Sugar Industry hired the same U.S. firm to prepare the case. Goldhaber, 2006. On this sense, the CGC Coordinator recently asserted that “the partnership with the private sector has

Brazilian government itself has promoted an international bid to hire a law firm in complaints against its domestic measures, a path probably unavailable to many developing countries.

Moreover, Brazilian presence in various trade disputes may be also understood by the country's diversified export interests. From aircraft to cotton, from gasoline to sugar, different pressure groups are incited in Brazil whenever a protectionist measure is adopted in importing markets. Evidently, these groups have different levels of organization and political relevance, and their capacity to convince the Brazilian government to bring a claim before the WTO may vary enormously.

Another explanation for the Brazilian private sector's eagerness to bring cases to the WTO could be a high rate of compliance. Data on this topic is far from conclusive, however. In most cases won by Brazil, as commented below, an immediate implementation with material advantages for the exporting industry could not be identified. Even in landmark cases (such as US-Cotton), in which the participation of the private sector was fundamental, implementation was diffuse and time-consuming, without clear evidence that the Brazilian private sector raised profits out of such implementation.

In spite of the uncertain results and high costs, Brazilian business associations still seem convinced that international trade disputes are a valuable tool for their export strategies. As mentioned in this section, such a belief is probably motivated by domestic political factors, including the incentive for business leaders to show that all resources are being used to defend their constituencies, rather than by effective results from litigating in international courts.

If this assumption is correct, Brazil will continue to be a frequent claimant in trade disputes. Firstly, because an indefinite number of complaints from the domestic industry are being contained pending the outcome of the current multilateral negotiation process. If these complaints are not resolved within the negotiations, they will certainly turn into new claims before the WTO. Secondly, because the continuing coordination among trade associations, inflamed by lawyers and consultants, will bring claims to the WTO as a legitimate means to enlarge access to foreign markets. Thirdly, because the greater number of claims in defense of the domestic industry is a political discourse that new presidents will not want to lose.

After this general presentation about the evolution and prospects for trade disputes in Brazil, the following sections are dedicated to the cases in which the country was involved since the GATT years.

A. Disputes in the GATT

According to Abreu (1998), Brazil's most interesting initiative in the GATT in the 1960s was a joint effort with Uruguay, regarding the nullification and impairment of obligations (Article XXIII). The two countries proposed that the GATT adopted new sanctions for legal violations, including both money compensation and collective retaliation by the contracting parties. Developed countries refused to include any of these proposals in Part IV, and the initiative resulted in only minor changes to the dispute settlement rules.²⁷

been an essential element in the Brazilian strategy before the DSB [and that] the involvement of extra-governmental actors, well managed, may contribute decisively to disseminate highly technical information among government officials and the involved industries, increasing [the Brazilian] ability before the DSB". Cf. Marega (2006).

²⁷ Abreu, 1998, p. 5.

Brazilian participation in trade disputes, during the GATT years, varied in scope and number. The most important issues were:

- (a) A claim from France related to the domestic tax on liquors that discriminated against French exports, in violation of the national treatment obligation of Article III. A working party report ruled that the measure was a violation of GATT, and the discrimination was eliminated a decade later.²⁸
- (b) In 1953, Brazil filed a claim against the United States for failing to implement concessions promised in a previous negotiation. The concessions were implemented the following year.²⁹
- (c) In 1962, Brazil charged the United Kingdom with proposing to increase the margin of preference in its tariff on bananas, in violation of the terms of a waiver permitting such increases. A panel ruled in favor of Brazil, and the proposed increase was abandoned.³⁰
- (d) In the 1970s, Brazil joined Australia in its claim that the EC system of payments to sugar importers violated Article XVI, causing the EC share of the world market to increase and seriously injure other exporters. EC legislation was modified after the panel found a violation.³¹
- (e) In 1980, Brazil proposed a claim against Spain, related to a higher domestic tax applicable on Arabic coffee, mostly exported by Brazil. The panel report recognized a de facto discrimination, favoring the Brazilian claim.³²
- (f) In 1982, Brazil requested consultations with other contracting parties (Argentina, Colombia, Cuba, Dominican Republic, India, Nicaragua, Peru, Philippines and Australia) on EC sugar export subsidies.³³
- (g) In 1986, Brazil requested consultations with the United States on ethyl alcohol. Due to the shortage in the product, Brazil did not pursue the case.³⁴
- (h) In 1988, Brazil requested consultations with the United States on the unfavorable impact of the U.S. Export Enhancement Program on Brazilian exports, particularly “regarding the damage being done to Brazilian exporters of soya-bean oil by U.S. Government funding of similar exports to the international market.”³⁵
- (i) Brazil became more active in the 1990s, becoming the claimant in seven cases, all of them against the United States and the EC, and mostly related to pending disputes that were not being solved during the Uruguay Round: a complaint against EC anti-dumping measures involving cotton yarn;³⁶ a

²⁸ Working Party Report, Brazilian Internal Taxes, GATT/CP.3/42 (First Report, 1949), BISD II/181; GATT/CP.5/37 (Second Report, 1950), BISD II/186.

²⁹ Brazilian Compensatory Concessions. GATT Document SR.9/27 (1954).

³⁰ GATT Document L/1749 (1962).

³¹ European Economic Community Export Refunds on Sugar. BISD, 27th, Supplement (1981), p. 69.

³² Spain – Tariff treatment of unroasted coffee. BISD 28th Supplement (1981), p. 102.

³³ European Economic Community Sugar Regime (Export Subsidies). GATT Documents L/5309 (1982) and C/M/166 (1983).

³⁴ GATT Document L/5993 (1986).

³⁵ GATT Document SCM/89 (1988).

³⁶ European Economic Community – Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil, ADP/137 (1995). The panel did not find the violation claimed by Brazil.

complaint concerning United States' quantitative restrictions on wool suits; a complaint against anti-dumping measures imposed by the United States on steel products; a complaint against the EC in respect to the compensation provided to the United States in the oilseeds case; and a challenge brought with ten other countries against U.S. internal measures favoring U.S. tobacco.

In 1992, a GATT panel determined that the U.S. policy of providing different procedural treatment to parties to the Subsidies Code, compared to non-parties, violated Article I of the GATT.³⁷

In 1993, Brazil presented claims before the Anti-dumping Committee on the treatment by Mexico of Brazilian exports of electric power transformers.³⁸

Likewise, Brazil requested consultations on a case related to exports of wool suits to the United States. In both cases solutions were found without use of conventional dispute settlement.³⁹

In 1993, Brazil, along with Chile, Colombia, El Salvador, Guatemala, Thailand, and Zimbabwe, complained against the United States on the enactment of a new law containing measures which favored American tobacco. Later on, Canada and Argentina also submitted claims, and a panel was established to examine all of the complaints. The panel found that some of the measures were inconsistent with Articles III.5 and III.2 of the GATT.⁴⁰

Complaints against Brazil in the 1980s were mainly from the United States: the dispute in 1983 regarding poultry exports was solved by a market sharing agreement also involving the EC.

In 1989, the United States complained about the Brazilian import licensing system,⁴¹ but the matter was solved with Brazil's trade regime reform, post-March of 1990.

There was a complaint against Brazil in 1992 by the EC due to Brazil's imposition of subsidy countervailing duty on imports of milk powder and other milk types. In 1994 the panel findings were against Brazil and the duties were withdrawn.⁴²

Along the 1980s, other harsh disputes between Brazil and the United States were motivated by intellectual property issues, but not taken to the GATT. In 1987, the United States threatened retaliation against Brazilian exports, responding to the legislation on information technology. The threat was suspended after legal changes were proposed that would guarantee intellectual property rights on software.⁴³

The second dispute involved the imposition of surtaxes by the United States on Brazilian exports, as retaliation for poor protection of pharmaceutical patents. Brazil requested a panel, but

³⁷ United States—Denial of Most-Favoured-Nation Treatment as to Non-Rubber Footwear from Brazil. DS18/R-39S/128 (1992). Brazil had previously lost a panel on this issue, before the Subsidies Committee.

³⁸ GATT Document ADP/91 (1993).

³⁹ GATT Document DS37/1 (1993).

⁴⁰ United States – Measures Affecting the Importation, Internal Sale and Use of Tobacco, DS44/R.

⁴¹ GATT documents DS8/1 (1989); DS8/2 (1990).

⁴² Imposition of Provisional and Definitive Countervailing Duties on Milk Powder and Certain Types of Milk from the European Economic Community, SCM/179, BISD 41S/467 (1994).

⁴³ GATT Document L/6274, request for consultation; L/6274/Add. 1, request for Good Offices of the Director-General). Shaffer et al. assert that the case was solved “after Brazil agreed to a number of legislative and administrative changes”. (Shaffer et al., 2006, p. 11).

the issue was solved bilaterally after the Brazilian government proposed new legislation recognizing intellectual property rights on pharmaceuticals.⁴⁴

This history of Brazilian participation in the GATT dispute settlement system demonstrates an increasing activism along the years, and especially during the Uruguay Round negotiations. This could be explained, probably, by the increasing relevance of trade for Brazil in those years. Also, trade disputes seemed an alternative to emphasizing some topics during the negotiation process. This strategy would be repeated later, during the Doha negotiations.

B. Brazilian Disputes in MERCOSUR

MERCOSUR had its origins in Brazil and Argentina's drive for closer relations and political-legal approximation, after the military regimes collapsed in these countries. In spite of the failure of prior ambitious experiences with integration, the Treaty of Asuncion (1991) created an even more ambitious Southern Common Market.

That creation, then, has been most appropriately evaluated more as a hortatory document than an acute description of the objectives to be accomplished by the four countries in a short period of time.⁴⁵

These ambitious objectives proved unfeasible, for pragmatic reasons grounded in the contemporary history of the states political parties: political instability and cyclical economic crisis, the lack of coordination with subnational institutions, a time-consuming process for ratifying and incorporating MERCOSUR law into domestic law, inconsistent domestic political priorities, and insufficient time to coordinate efforts among government officials.

From an economic viewpoint, MERCOSUR's initial impulse was grounded in the increasing regional trade among the partners between 1991 and 1998. Trade, however, was frozen in 1998 as a result of Brazil's currency crisis, which led to extreme financial instability in Argentina. In the domestic political debate, the Argentine criticism of its "Brazil-dependency" justified measures to protect its national industry. Several of these measures triggered the dispute settlement mechanism of MERCOSUR.⁴⁶

Notwithstanding the loss of political and economic relevance in recent years, MERCOSUR is still a mandatory topic of regional discourse, and the presidents of the four countries reinforce, from time to time, their commitment to the development of regional integration. The last concrete attempt to revamp MERCOSUR occurred in 2000, when the

⁴⁴ GATT Document L/6386 (1988); L/6386/Add. 1 (1988); C/169 (1989); C/169/Add. 1 (1990).

⁴⁵ Treaty of Asunción, art. 1. All official documents related to MERCOSUR are available at <http://www.mercosur.org.uy>. The disputes discussed here reached a final decision in the dispute settlement mechanism. There are dozens of other issues that were solved by bilateral negotiations among MERCOSUR members (or are still pending before the MERCOSUR Trade Commission). These latter disputes, and their resolution, are not well documented, as normally treated as restricted information by the negotiators.

⁴⁶ According to O'Keefe (2003, p. 9)"[w]ith the maxi-devaluation of the Brazilian real in January of 1999, however, the shortcomings of MERCOSUR's minimalist institutional framework became apparent. National governments attempted to impose unilateral trade barriers to thwart alleged import surges that were illegal under MERCOSUR, while private parties that had been detrimentally affected found there were no institutional bodies within MERCOSUR that could quickly redress their grievances

“MERCOSUR’s Relaunching Agenda” was approved. This agenda encompassed legal measures aimed at bringing greater stability to the process of regional integration.⁴⁷

Among the more important items on the “Relaunching Agenda” was the improvement of the dispute settlement system. The hope was to bring a higher legal density to the process, as well as solutions to procedural problems that occurred when the first cases were adjudicated in accordance with the procedures outlined in the Protocol of Brasilia. This norm was also a source for reviving the debate among academics about a stable and efficient structure for MERCOSUR’s dispute settlement system.

In fact, since its very beginning, MERCOSUR faced a lively debate about the most effective structure for its dispute settlement system. The initial aspiration was to create a permanent system, to be adopted as soon as the transition to a common market was completed.⁴⁸ According to the original provision in the Treaty of Asuncion, the transition period would extend from 1991 to 1994. During the transition period, the Protocol of Brasilia would be applicable, until the permanent system could be in force.⁴⁹

A permanent supranational court is still missing, but the states’ parties signed, in 2002, the Protocol of Olivos, which reformed the dispute settlement system.⁵⁰ According to the Protocol of Olivos, the dispute settlement system has jurisdiction over all the claims related to “the interpretation, application, and non-fulfillment” of MERCOSUR provisions.⁵¹ MERCOSUR provisions subjected to this process of dispute settlement included the Decisions of Council of the Common Market, the Resolutions of the Common Market Group, and the Directives of the MERCOSUR Trade Commission. The settlement process of the Protocol of Olivos developed the following steps for dispute resolution: (a) direct negotiations between the States Parties; (b) intervention of the Common Market Group, such intervention being non-mandatory and conditioned upon the request from a State Party; (c) ad hoc arbitration, with three arbitrators; (d) non-mandatory appeal to the Permanent Court of Review; (e) request for clarification, regarding any obscure meaning in the award; (f) compliance with the award by the State Party; (g) review of the compliance, if requested by the State favored by the award; (h) adoption of retaliatory measures by the favored State, in case of non-compliance; and (i) review of the retaliatory measures, if requested by the obliged State.

The creation of the Permanent Court of Review was the main innovation brought by the Protocol of Olivos, if compared with the procedure existing when the Protocol of Brasilia was in force. This innovation attempts expressly to bring greater coherence to the judgments by ad hoc tribunals, because divergent interpretations were adopted by past decisions.

A provision inserted in the Protocol of Olivos brings the possibility of choosing between the MERCOSUR dispute settlement system and another system eventually competent to solve the dispute. The rule stipulates that the complaining state may choose the forum, but once the

⁴⁷ MERCOSUR CMC/Dec 25/2000.

⁴⁸ Treaty of Asuncion, Annex III, par. 3.

⁴⁹ Protocol of Brasilia (MERCOSUR Decision CMC 1/91), art. 34. Since the Protocol of Brasilia, many academics have advocated for a permanent court. See Ventura (1995) and Basso (1997). On the opposite side, government officials continue to advance pragmatic arguments: the cost of keeping a permanent court, the necessity of changing the constitutional structure of states’ parties, a reduced number of cases, the material impossibility of hearing claims from private parties, and the unfamiliarity of national judiciaries with the topic. For a presentation of this debate, see Barral (2001).

⁵⁰ The Protocol of Olivos for the Settlement of Disputes in MERCOSUR. An English version is available at 42 I.L.M. 2 (2003). The Protocol entered into force at the beginning of 2005.

⁵¹ Protocol of Olivos, art. 1.

proceedings are initiated, that state may not re-litigate before the other forum.⁵² This rule becomes relevant if we notice that the MERCOSUR states parties participate, in an individual status, in other multilateral trade agreements with their own dispute settlement mechanisms.⁵³

Next, summaries of all the cases decided so far are presented:⁵⁴

(a) Case between Argentina and Brazil concerning Brazil's application of restrictive measures to reciprocal trade with Argentina (1999)

The first case brought to MERCOSUR involved a complaint by Argentina against Brazilian license requirements on imported lactate products. In a unanimous decision issued on April 28, 1999, the arbitral panel gave Brazil approximately seven months to eliminate all non-automatic import license requirements not based on very limited exceptions.

(b) Case concerning Brazil's Subsidies on the Production and Export of Pork to Argentina (1999)

Argentina lodged a complaint against Brazil, alleging that Brasilia was unfairly subsidizing exports of pork meat within MERCOSUR. The ad hoc arbitration panel, in an award made on December 27, 1999, found that the alleged Brazilian subsidized corn feed program that was at the root of Argentina's complaint was not specifically directed at pork producers and, therefore, was not a type of subsidy expressly prohibited by either MERCOSUR or the WTO. Thus, by a unanimous vote, the panel rejected Argentina's complaint relating to the financial mechanisms of advances on exchange contracts and export contracts applied by Brazil.

(c) Case between Brazil and Argentina concerning safeguards measures for Brazil's textiles (2000)

This time, Brazil complained about an Argentinean safeguard measure that imposed annual quotas on Brazilian-made cotton textiles. On March 10, 2000, the arbitral panel dismissed Argentina's argument that the panel did not have jurisdiction over the dispute and found that Argentina had imposed a safeguard measure that at the time was no longer permissible under MERCOSUR rules in the context of bilateral Argentine-Brazilian trade. The panel gave the Argentinean government fifteen days to abrogate its safeguard measure on Brazilian cotton textiles.

(d) Case on the application of Argentina's anti-dumping measures against Brazilian exports of poultry (2001)

The action was brought by Brazil, alleging that Argentina's imposition of an anti-dumping duty on Brazilian whole chickens violated MERCOSUR rules concerning the investigation of unfair trade practices between member states and the subsequent imposition of anti-dumping measures. Although the ad hoc arbitration panel rejected the Argentine contention that it lacked jurisdiction over the dispute, it did find in favor of Argentina, alleging the absence of MERCOSUR norms that directly addressed the issues invoked in the case.

The superficial analysis given by the arbitral panel was highly criticized. Later, Brazil brought the case before the DSB, and prevailed. This case was a landmark because it favored the

⁵² Protocol of Olivos, art. 1.

⁵³ The rule attempts to eliminate the possibility that the same dispute be examined by different dispute settlement mechanisms. This risk is not only theoretical: in two important disputes in MERCOSUR—Argentina–textiles (complaint by Brazil) and Argentina–Poultry (complaint by Brazil)—the cases were also brought to the WTO.

⁵⁴ The arbitral awards and related documents are available at MERCOSUR official website (<http://www.mercosur.org.uy>).

creation of a review body within MERCOSUR (consolidated in the Protocol of Olivos) and created the rule of choice of one exclusive international forum, mentioned above.

(e) Case between Uruguay and Argentina on Argentina's restrictions of access to the market of bicycles imported from Uruguay (2001)

Uruguay complained that Argentinean customs authorities' determination of the value of imported bicycles implied a violation of the regime of dispatch and valuation of goods adopted by MERCOSUR. The arbitral panel issued a unanimous decision in favor of Uruguay, declaring that Argentina's blanket treatment of Uruguayan bicycles made by one company as non-MERCOSUR in origin and therefore subject to the common external tariff or CET, violated Argentina's MERCOSUR obligations.

(f) Case between Uruguay and Brazil on the import of remolded tires from Uruguay (2002)

A sixth arbitral award was issued on January 9, 2002, in a matter brought by Uruguay, alleging that a Brazilian law enacted in September of 2000, which prohibited the issuance of import licenses for remolded tires, violated a July of 2000 MERCOSUR standstill prohibition on new restrictions to intraregional trade flows. In reaching its decision, the arbitration panel reasoned that Brazil was stopped from claiming that an earlier 1991 law was intended to include remolded tires as "used" tires, whose importation into Brazil from that date forward was prohibited. Thus, the panel ruled in favor of Uruguay, and Brazil was ordered to issue domestic legislation lifting the ban on imported remolded tires within 60 days.

(g) Case between Argentina and Brazil on barriers to entrance of Argentinean phytosanitary products in Brazil (2002)

The case was brought by Argentina against Brazil for failure to incorporate into its domestic legal framework five Common Market Group Resolutions that are intended to create a streamlined phytosanitary system for evaluating and registering foodstuffs and facilitating their commerce among the four MERCOSUR countries. Although the arbitral panel recognized that the five Common Market Group Resolutions in question did not contain explicit time limits for incorporating them into domestic law, relevant international law principles obligated Brazil to incorporate them within "a reasonable period of time." Given that six years had elapsed since the first of these resolutions were issued (and that all three other MERCOSUR countries had already incorporated them), Brazil's inaction was found to be unreasonable, and the Brazilians were ordered to implement the resolutions within 120 days.

(h) Case between Paraguay and Uruguay on the application of a specific Uruguayan internal tax on the sale of Paraguayan cigarettes (2002)

For the first time, a complaint was brought by Paraguay, over Uruguay's discriminatory imposition of its specific internal tax (impuesto específico interno — IMESI) on imported cigarettes versus domestic cigarettes, further distinguished, depending upon whether the cigarettes came from countries that directly bordered Uruguay (Argentina and Brazil). The Paraguayan government claimed that the different methodologies for calculating the IMESI created an impermissible nontariff barrier. The arbitral panel found the entire Uruguayan scheme discriminatory and in violation of the principle of national treatment found not only in MERCOSUR, but also in Latin American Integration Association (ALADI) and the WTO. The Uruguayan government was given six months to calculate the value of cigarettes from within MERCOSUR for purposes of imposing the IMESI, using the same methodology for calculating the value of domestic cigarettes.

(i) Case between Argentina and Uruguay concerning wool export incentives (2003)

In April of 2002, Argentina presented a complaint against the Uruguayan regime of incentives for the industrial treatment of wool products. The panel decided that the Uruguayan regulation was incompatible with MERCOSUR regulations, and should be revoked in fifteen days.

(j) Case between Uruguay and Brazil concerning discriminatory measures against Uruguay's tobacco and tobacco-related products (2005)

Uruguay complained that a Brazilian decree would raise to 150% the tariff applicable to all imports of tobacco and related products. Later, Brazil informed the panel that the decree had been unilaterally revoked. With the Uruguayan approval, the panel extinguished the dispute.

(k) Case concerning the Argentinean prohibition of remolded tires from Uruguay (2005)

In the first case brought within the Protocol of Olivios, Uruguay presented a claim against the Argentinean prohibition of imported remolded tires. Initially, the case was decided by an arbitral panel, which sustained the Argentinean regulations, based on the reasoning that estoppel was not identifiable in the situation. The Permanent Court of Review, however, found that the panel had incurred "evident and serious legal errors," because the Argentinean regulations were incompatible with MERCOSUR principles.⁵⁵

(l) Case concerning the Uruguayan complaint against the blockage of international bridges (2006)

This case is actually a consequence of the dispute between Argentina and Uruguay regarding the building of two industrial paper mills on the left margin of the Uruguay River. A related case, based on the Treaty of the Uruguay River, had been filed by Argentina before the International Court of Justice.⁵⁶

In the case before MERCOSUR, Uruguay complained that Argentinean authorities had neglected its responsibilities to guarantee free access to the bridges over the Uruguay River, an essential path for Uruguayan exports. The arbitral panel, in the first instance, concluded that the Argentinean authorities did not adopt the "due behavior" in order to guarantee free access for Uruguayan transporters (without, however, making Argentina pay damages or reparation).

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(m) Permanent Court of Review: Opinion 01/2007

For the first time, the member states petitioned the Court to issue an opinion on the applicability of MERCOSUR law (in this case, the Buenos Aires Protocol on the Jurisdiction over International Contracts). The original case, before a Paraguayan domestic court, involved a

⁵⁵ Laudo TPR 1/2005, p. 12: "Por mayoría, determinar que la Ley argentina 25.626 promulgada en fecha 8 de agosto del 2002 y publicada en el Boletín Oficial en fecha 9 de agosto de 2002 es incompatible con la normativa MERCOSUR, en base a una correcta interpretación y aplicación jurídica de las excepciones previstas en el Art. 50 del Tratado de Montevideo de 1980, las cuales están entroncadas en el Anexo I del Tratado de Asunción, específicamente en su Art. 2b, y en consecuencia la República Argentina deberá derogarla o modificarla con el alcance precedentemente expuesto, por la vía institucional apropiada, dentro del plazo de ciento veinte días corridos".

⁵⁶ International Court of Justice. Pulp Mills on the River Uruguay (Argentina v. Uruguay). Case documents available at <http://www.icj-cij.org>.

contractual dispute between an Argentinean and Paraguayan companies. In a grandiose opinion, the Court decided that MERCOSUR law should prevail over domestic regulations, besides clarifying its interpretation of how to apply the regional agreements.

After this overview of the MERCOSUR dispute settlement system, some inferences may be extracted thus far. Firstly, the relatively low number of cases solved by litigation should not imply that the number of disputes is proportionally low. In fact, most disputes were solved by negotiation between MERCOSUR partners, especially before the MERCOSUR Trade Commission. Hence, the low number of arbitrated decisions has been praised as a feature of “flexible character” of the system.

Secondly, the level of compliance has been remarkable. According to Bertoni (2006), all decisions have been complied with, which is a sign that MERCOSUR member states respect to the judgments. This cooperation grants credibility and legal certainty to the process.⁵⁷

Yet, Brazil was involved in seven of the cases. This is not surprising, once one considers the prevalence of the Brazilian economy in regional trade flows. Nevertheless, the cases involving Brazil have been conducted, and decided, according to the Protocol of Brasilia. Its performance at the Permanent Court of Review has yet to be seen.

C. Brazilian Disputes at the WTO

The WTO dispute settlement system has been regularly praised as the jewel in the Uruguay Round crown. Especially in the first years after Marrakesh, there was a deep enthusiasm about the higher dose of legalism in the resolution of trade disputes. Innovations such as the appellate review, strict time frames, and the practical extinction of the blockade of panel decisions, were seen as important steps towards more predictability in the trade jungle.⁵⁸

A decade of experience chilled some of these aspirations, once procedural issues and the practical hindrances for developing countries became more apparent. Thus, an improvement of the system was recognized as necessary by the Doha Development Agenda,⁵⁹ in 2002. Nevertheless, the WTO dispute settlement system has become the most used mechanism in the history of public international adjudication. The explanation, according to Palmeter (2006), may be found in “the confidence in the integrity of the system and the competence of those who administer it; the limited subject matter jurisdiction (trade and commerce, not war and peace); and a remedy that, historically, has been justified simply as an attempt to rebalance concessions and restore the status quo”.⁶⁰

As noted before, Brazil has been actively involved in the disputes, being a claimant in 22 cases and a respondent in 14 of them. As seen in the charts below, Brazilian participation has been constant since 1995, with remarkable activism between 2000 and 2002. In fact, in 2000, a quarter of the complaints were presented by Brazil. Two hypotheses may explain the emphasis on these years. On one hand, the devaluation of Brazilian currency in 1998 prompted many industrial

⁵⁷ Bertoni (2006).

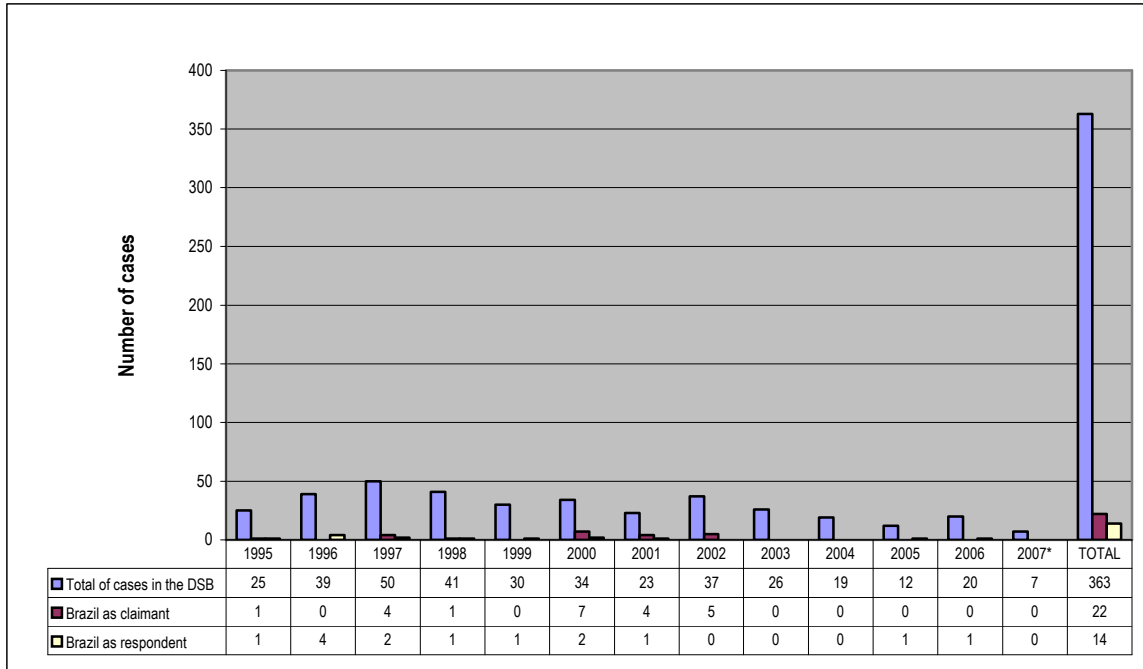
⁵⁸ Jackson, 1996.

⁵⁹ Doha Ministerial Declaration (WT/MIN(01)/DEC/1, 2001): “30. We agree to negotiations on improvements and clarifications of the Dispute Settlement Understanding. The negotiations should be based on the work done thus far as well as any additional proposals by Members, and aim to agree on improvements and clarifications not later than May 2003, at which time we will take steps to ensure that the results enter into force as soon as possible thereafter”.

⁶⁰ Palmeter, 2006, p. 13.

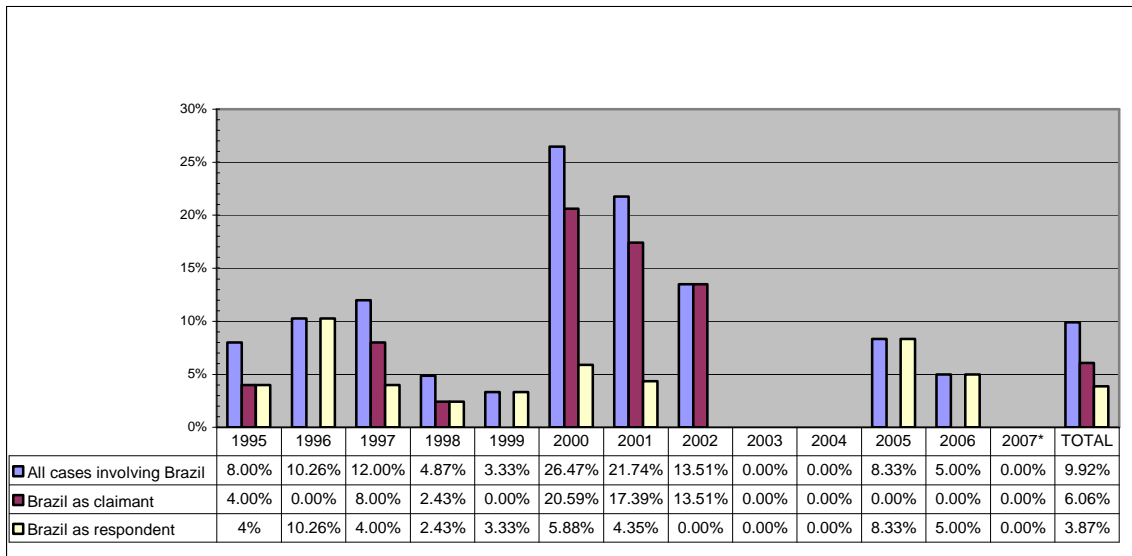
sectors to complain with the government on increasing barriers in exporting markets. On the other hand, at the beginning of the decade the institutional elements identified above were present, including the capacity of government officials dedicated to trade disputes and the organized pressure from industrial lobbies.

**GRAPH 1
TOTAL BRAZILIAN PARTICIPATION IN THE DSB**



Source: WTO (data until May 2007).

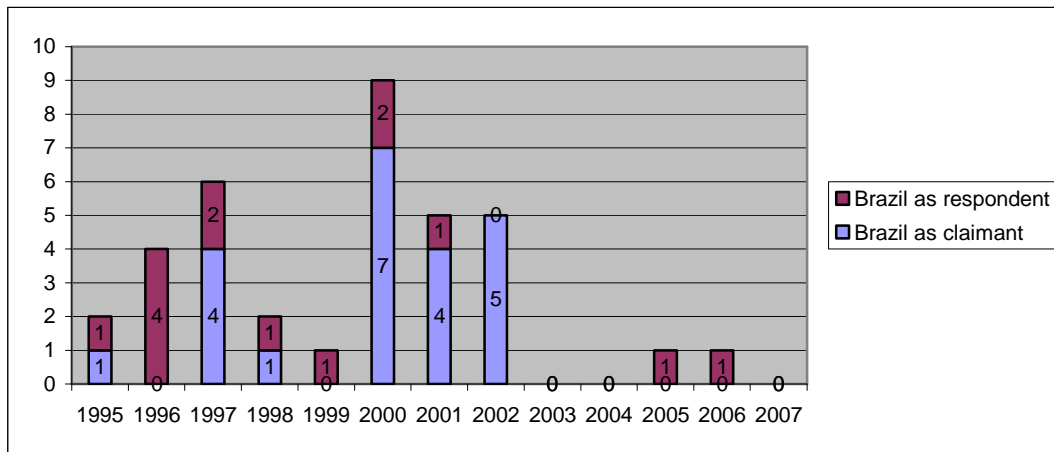
**GRAPH 2
BRAZIL PARTICIPATION IN THE DSB
(% of total DSB cases)**



Source: WTO (data until May 2007).

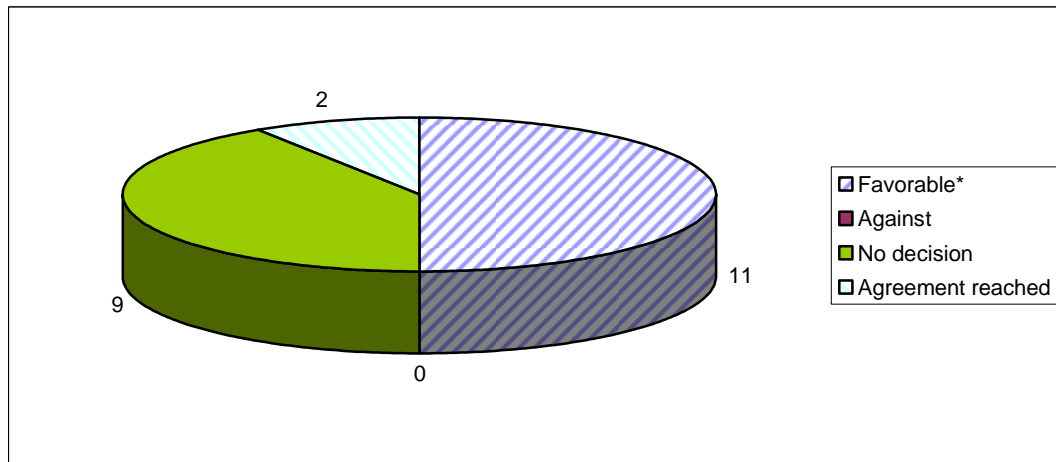
A related question, regarding the level of Brazilian participation at the DSB, concerns the rate of success as the claimant. Arguably, one could say that the rate of success may serve as an incentive for presenting new cases, either because government officials learn positively from the experience, or because the victory has a demonstration effect for other national industries affected by similar trade barriers. If this assumption is correct, the positive results obtained by Brazil can also be mentioned as a factor for more audacity in new cases. The data so far shows that Brazil obtained full or partial victories in 11 cases, whereas in two of them an agreement was reached with the respondent. Nine cases did not reach a decision, mostly because parties agreed to suspend the procedure.

GRAPH 3
BRAZIL: NUMBER OF CASES IN THE DSB PER YEAR



Source: WTO (data until May 2007).

GRAPH 4
RESULTS OF CASES FROM BRAZIL'S PERSPECTIVE
(Brazil as claimant)

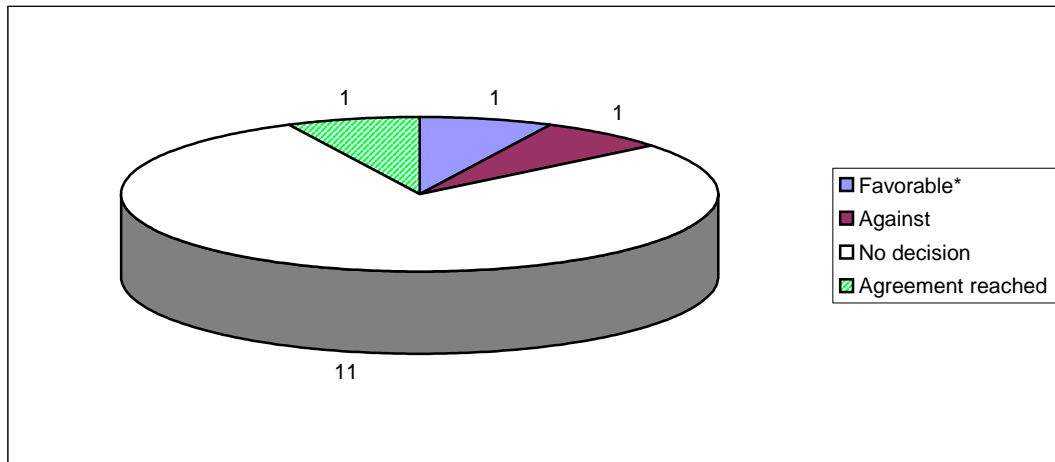


Source: WTO (data until May 2007).

*Favorable includes fully and partially favorable.

Even when Brazil was on the other side of the bench, the WTO dispute settlement system has not brought any catastrophic result. In fact, most cases against Brazil did not reach a panel decision. That can be explained by the fact that some measures challenged before the WTO were temporary, such as the transitional subsidies for the automobile sector in the late 1990s. Thus, complainants lacked incentives for engaging in complex litigation at the DSB only for a matter of principle. Following the previous reasoning, these results lead to a perception within the Brazilian trade community that the system is fair and equitable, as opposed to the recurring accusations of judicial activism that are found in the United States.

GRAPH 5
RESULTS OF CASES FROM BRAZIL'S PERSPECTIVES
(Brazil as respondent)

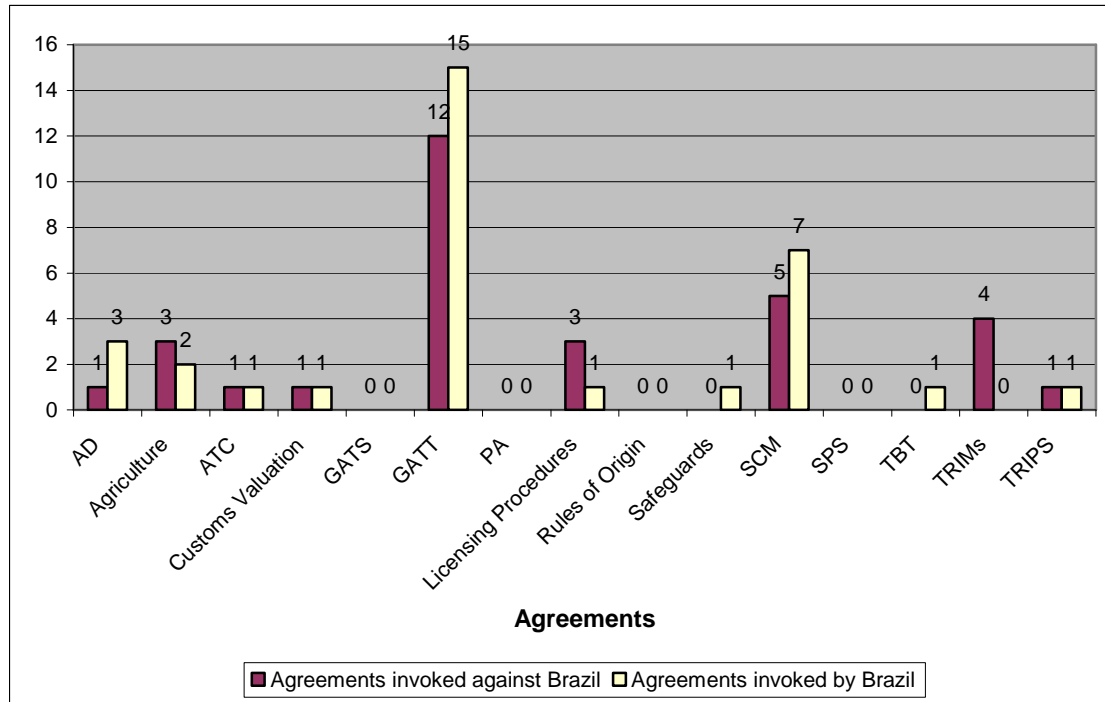


Source: WTO (data until May 2007)

*Favorable includes fully and partially favorable

Not surprisingly, many complaints against Brazil invoked the Agreement on Subsidies and Countervailing Duties (SCM) and the Trade Related Investment Measures Agreement (TRIMS). Two reasons may be presented for these claims. On one hand, they were international reactions against the reappearance of industrial policies based on subsidies to attract new plants. On the other, some of the challenged measures were related to pre-WTO legislation that had not been put in conformity with the multilateral obligations.

GRAPH 6
INVOKED AGREEMENTS
(Brazil's perspective, until May 2007)



Source: WTO (data until May 2007).

Considering the Brazilian activism at the DSB, a legitimate question is whether the complaints do not prompt the respondents to reciprocate with claims against Brazil, in a natural “*tu quoque*” reaction. The analysis of the cases, however, does not provide any indication that could support this correlation. The filing and the issues presented against Brazil seem disconnected with previous claims presented to the DSB.

On exception could be the EC-Sugar case, commented below. After Brazil presented the claim, the OECD (impelled by France) began a long study on the Brazilian agricultural markets, looking with detailed attention for subsidies granted to local producers. Nevertheless, the conclusion of this study only confirmed the outstanding efficiency of Brazilian farmers and the low level of subsidies when compared to the OECD members.⁶¹ Without a case in the agricultural sector, rumor has it that the EC looked for any case against Brazil, and filed the controversial claim against the ban on the importation of retreaded tires.⁶² Whether the motivation for the latter claim was to counteract Brazilian activism will most probably be an unanswered speculative question. For the proposals of this paper, it is adequate to say that a definite correlation between claims and respondents’ reciprocal claims could not be found.

⁶¹ “Government support represents 3% of farm receipts in Brazil, compared with 2% in New Zealand, 4% in Australia, 17% in the US, 34% in the European Union and an average of 30% in OECD countries”. Cf. OECD, 2005.

⁶² Brazil – Measures Affecting Imports of Retreaded Tyres /WT/DS332).

Once the general features of Brazilian participation were presented, the cases are summarized in the next pages.

1. Cases as respondent

DS22: Brazil — Measures Affecting Desiccated Coconut (Brazil – Desiccated Coconuts)

The Philippines requested consultations with Brazil (on November 27th, 1995) regarding a countervailing duty imposed by Brazil on the Philippine's exports of desiccated coconut. The Philippines claimed that this duty was inconsistent with WTO and GATT rules. A panel was established in March of 1996 with Canada, the EC, Indonesia, Malaysia, Sri Lanka, and the United States as third-parties. The Panel Report (dated October 17th, 1996) concluded that the provisions of the agreements relied on by the claimant were not applicable to the dispute. The Philippines appealed, but the AB Report upheld the Panel's decision.

DS30: Brazil — Countervailing Duties on Imports of Desiccated Coconut and Coconut Milk Powder from Sri Lanka

Sri Lanka requested consultations with Brazil (on February 23rd, 1996) concerning the Brazil's imposition of countervailing duties on Sri Lanka's export of desiccated coconut and coconut milk powder. Sri Lanka alleged that those measures were inconsistent with GATT Articles I, II and VI and Article 13(a) of the Agriculture Agreement (the so-called peace clause). No panel was established, nor was a settlement announced.

DS46: Brazil — Export Financing Programme for Aircraft (Brazil – Aircraft)

Canada requested consultations with Brazil (on June 19th, 1996) based on Article 4 of the Subsidies Agreement, which provides for special procedures for export subsidies. Canada claimed that export subsidies granted under the Brazilian Programa de Financiamento às Exportações (PROEX) to foreign purchasers of Brazil's Embraer aircraft were inconsistent with the Subsidies Agreement Articles 3, 27.4 and 27.5. A Panel was established on July 23rd, 1998. The Panel Report (April 14th, 1999) found that the Brazilian measures were inconsistent with Articles 3.1(a) and 27.4 of the Subsidies Agreement. Brazil appealed. The AB Report (August 2nd, 1999) upheld all the findings of the Panel.

On November 23rd, 1999, Canada requested the establishment of a panel under Article 21.5 of the DSU, arguing that Brazil had not taken measures to comply fully with the rulings and recommendations of the DSB. The compliance panel report (May 9th, 2000) decided that the Brazilian measures were not consistent with the Subsidies Agreement. In reaching this conclusion, the panel notably rejected Brazil's defense that PROEX payments were allowed under item (k) of Annex I of the Subsidies Agreement. Brazil appealed. The AB Report (July 21st, 2000) maintained the panel's conclusion that Brazil had failed to implement the recommendation of the DSB and that payments made under the revised PROEX are prohibited by Article 3 of the Subsidies Agreement and are not justified under item (k) of the Illustrative List of the same Agreement. The Appellate Body therefore upheld the review panel's conclusion that Brazil has failed to implement the recommendations of the DSB. A new panel reported (on July 26th 2001) that PROEX III was not inconsistent with Article 3.1(a) of the SCM Agreement, that PROEX III as such is justified under the second paragraph of item (k) of the Illustrative List of Export Subsidies of Annex I of the SCM Agreement, and that PROEX III cannot be justified under paragraph 1 of this item.

DS51: Brazil — Certain Automotive Investment Measures

Japan requested consultations with Brazil (July 30th, 1996) concerning certain automotive investment measures taken by the Brazilian government, arguing that they violated TRIMs

Agreement Article 2, GATT Articles I:1, III:4 and XI:1, as well as the Subsidies Agreement Articles 3, 27.2 and 27.4. Also, Japan made a non-violation complaint under GATT Article XXIII:1(b). No Panel was established and no settlement was announced.

DS52: Brazil — Certain Measures Affecting Trade and Investment in the Automotive Sector

The United States requested consultations with Brazil (August 9th, 1996) concerning the same measures as identified in Japan's request in WT/DS51. Moreover, the United States also made a non-violation claim under GATT Article XXIII:1(b). No panel was established and no settlement was announced.

DS65: Brazil — Certain Measures Affecting Trade and Investment in the Automotive Sector

The United States requested consultations with Brazil (January 10th, 1997) concerning roughly the same measures as in WT/DS52, although they also included, in this request, measures adopted by Brazil subsequent to consultations held with the United States pursuant to the request under WT/DS52, which included measures conferring benefits to certain companies located in Japan, the Republic of Korea, and the EC. The United States alleged violations under Articles I:1 and III:4 of GATT 1994, Article 2 of the TRIMs Agreement, and Articles 3 and 27.4 of the SCM Agreement. The United States also made a nullification and impairment of benefits claim under Article XXIII:1(b) of GATT 1994. No panel was established and no settlement was announced.

DS81: Brazil — Measures Affecting Trade and Investment in the Automotive Sector

The EC requested consultations with Brazil (May 7th, 1997) concerning certain measures in the trade and investment in the automotive sector implemented by Brazil, including in particular, Law No. 9440/1997, Law No. 9449/1997, and Decree No. 1987/1996. The EC argued that these measures violate Articles I:1 and III:4 of GATT 1994, Articles 3, 5 and 27.4 of the Subsidies Agreement, and Article 2 of the TRIMs Agreement. In addition, the EC claimed for nullification and impairment of benefits under both GATT 1994 and the Subsidies Agreement. No panel was established and no settlement was announced.

DS116: Brazil — Measures Affecting Payment Terms for Imports

The EC requested consultations with Brazil (January 9th 1998) in respect to measures affecting payment terms for imports allegedly introduced by the Central Bank of Brazil. EC contended that these measures violated Articles 3 and 5 of the Agreement on Import Licensing Procedures. No panel was established and no settlement was announced.

DS183: Brazil — Measures on Import Licensing and Minimum Import Prices

The EC requested consultations (October 14th, 1999) regarding a number of Brazilian measures, especially Brazil's non-automatic licensing system and the minimum pricing practice, which allegedly restricted EC exports — notably of textile products, Sorbitol and Carboxymethylcellulose (CMC). EC claimed that those measures violated Articles II, VIII, X and XI of the GATT 1994; Article 4.2 of the Agreement on Agriculture; Articles 1, 3, 5 and 8 of the Agreement on Import Licensing Procedures; and Articles 1 through 7 of the Agreement on Implementation of Article VII of the GATT 1994. No panel was established and no settlement was announced.

DS197: Brazil — Measures on Minimum Import Prices

The United States requested consultations with Brazil (May 30th, 2000) concerning the practice of minimum import prices for customs valuation purposes, established by Decree No. 2.498/98 and other statutes and regulations. The United States contended that Brazil used this

verification system, along with non-automatic import licensing procedures, to prohibit or restrict the import of products with declared values below arbitrarily determined minimum prices. The United States considered that Brazil's measures were inconsistent with its obligations under Articles 1 through 7, and 12 of the Customs Valuation Agreement; general notes 1, 2 and 4 of Annex 1 of the Customs Valuation Agreement; Articles II and XI of the GATT 1994; Articles 1 and 3 of the Agreement on Import Licensing Procedures; Articles 2 and 7 of the Agreement on Textiles and Clothing; and Article 4.2 of the Agreement on Agriculture. No panel was established and no settlement was announced.

DS199: Brazil — Measures Affecting Patent Protection (Brazil – Patent Protection)

The United States requested consultations with Brazil (May 30th, 2000) in respect to certain provisions of Brazilian Industrial Property Law (Law N. 9.279/1996) and other related measures, which established a “local element” requirement for the protection of exclusive patent rights. The United States argued that the “local element” requirement could only be satisfied with local production of the patented subject matter. The United States also added that Brazil's “local element” requirement stipulated that a patent should be subject to compulsory licensing if the subject matter of the patent is not assembled in Brazilian territory. The United States further noted that Brazil explicitly defines “failure to be assembled” as “failure to manufacture or incomplete manufacture of the product” or “failure to make full use of the patented process.” The United States considered such a requirement to be inconsistent with Brazil's obligations under Articles 27 and 28 of the TRIPS Agreement, and Article III of the GATT 1994. A Panel was established on February 1st, 2001, with Cuba, the Dominican Republic, Honduras, India, and Japan as third-parties. An agreement was reached by the parties on July 5th, 2001.

DS229: Brazil — Anti-Dumping Duties on Jute Bags from India

India requested consultations with Brazil (April 9th 2001) concerning: the determination by Brazil to continue imposing anti-dumping duties on jute bags and bags made of jute yarn from India; Brazil's refusal to reconsider the decision to continue anti-dumping duties on Indian jute products; the non-consideration of the fresh evidence regarding cost of production, domestic sales prices, and export prices of Indian jute manufacturers, and refusal to initiate review of the decision to impose anti-dumping duties; the Brazilian general anti-dumping practice. According to India, the Brazilian anti-dumping rules are inconsistent with Articles VI and X of GATT 1994; Articles 1, 2, 3, 5, 6 (especially 6.6, 6.7, 6.8 and Annex II, 6.9, 6.10), 11, 12, 17.6(i), 18.3, 18.4; and Article XVI of the WTO Agreement. No panel was established and no settlement was announced.

DS332: Brazil — Measures Affecting Imports of Retreaded Tires (Brazil – Retreaded Tires)

The EC requested consultations (June 20th, 2005) with Brazil on the imposition of measures that adversely affect exports of retreaded tires from the EC to the Brazilian market. The EC considers that these measures were inconsistent with Brazil's obligations under Articles I:1, III:4, XI:1 and XIII:1 of the GATT 1994. Panel established on January 20th 2006, with Argentina, Australia, Japan, Korea and the United States originally as third-parties (China, Cuba, Guatemala, Mexico, Paraguay, Chinese Taipei, and Thailand later joined as third-parties). The Panel completed its work in June 2007, allowing the Brazilian measure, but recommending adaptations to put it in conformity with the WTO provisions.

DS355: Brazil — Anti-dumping Measures on Imports of Certain Resins from Argentina

Argentina requested consultations (December 26th, 2006) with Brazil concerning anti-dumping measures applied by Brazil to imports of certain polyethylene terephthalate (PET) resins from Argentina. Argentina considers that the anti-dumping investigation, the determination made, and the duties imposed by Brazil were inconsistent with at least Article VI of GATT 1994 and

Articles 2.2.1, 2.2.1.1, 2.2.2, 2.4, 3.1, 3.2, 3.4, 3.5, 6, 8, 10, and 12 and Annex II of the Anti-Dumping Agreement. Also, the request for consultations concerns Articles 2 (XV) and 5 §3 of Decree 4.732/2003, which Argentina considers inconsistent with Article XVI:4 of the WTO Agreement, with Article X of GATT 1994 and Articles 6.14, 10, and 18.4 of the Anti-Dumping Agreement. Finally, the request for consultations concerned Article 58 of Decree 1.602/1995, which Argentina claims to be inconsistent with Article XVI:4 of the WTO Agreement, Article X of GATT 1994, and Articles 9 and 18.4 of the Anti-Dumping Agreement. In May of 2007, Argentina formally requested a panel, after a negotiated solution was not reached during the consultations.

2. Cases as complainant

DS 4: United States — Standards for Reformulated and Conventional Gasoline

Venezuela requested consultations on January 24th, 1995 and Brazil on April 10th, 1995, alleging that a U.S. gasoline regulation discriminated against its gasoline exports, in violation of GATT Articles I and III and Article 2 of the Agreement on Technical Barriers to Trade (TBT). Two panels were established (April 10th, 1995 for Venezuela and June 19th, 1995 for Brazil). On May 31st, 1995, according to Article 9 of the DSU, the two complaints were merged into a single panel. The panel report (January 29th, 1996) found the regulation to be inconsistent with GATT Article III:4 and not to benefit from an Article XX exception. The United States appealed on February 21st, 1996. The Appellate Body report (April 22nd, 1996) modified the panel report on the interpretation of GATT Article XX(g), but concluded that the U.S. regulation was not compatible with the WTO principles. The United States announced the implementation of the DSB recommendations on August 19th, 1997.

DS 69: European Communities — Measures Affecting Importation of Certain Poultry Products (EC- Poultry)

Brazil requested consultations with the EC (February 24th, 1997) in respect to the EC regime for the importation of certain poultry products and the implementation by the EC of the Tariff Rate Quota for these products. Brazil argued that the EC measures were inconsistent with Articles X and XXVII of GATT 1994 and Articles 1 and 3 of the Agreement on Import Licensing Procedure. Also, Brazil contended that the measures nullified or impaired benefits accruing to it directly or indirectly under GATT 1994. A panel was established on August 11th, 1997. Thailand and the United States. participated as third-parties. The Panel report (March 12th, 1998) found that Brazil had not demonstrated that the EC had failed to implement and administer the tariff rate quota for poultry in line with its obligations under the cited agreements. Brazil appealed. The report of the Appellate Body (July 13th, 1998) upheld most of the Panel's findings and conclusions, but reversed the Panel's finding that the EC had acted inconsistently with Article 5.1(b) of the Agreement on Agriculture. The Appellate Body, however, concluded that the EC had acted inconsistently with Article 5.5 of the Agreement on Agriculture. Afterwards, the EC and Brazil announced (October 21st, 1998) that they had reached an agreement on a reasonable period of time for implementation, until March 1999.

DS70: Canada — Measures Affecting the Export of Civilian Aircraft (Canada – Aircraft)

Brazil requested consultations with Canada (March 10th, 1997) regarding certain subsidies granted by the Government of Canada or its provinces intended to support the export of civilian aircraft. Brazil argued that these measures were inconsistent with Article 3 of the Subsidies Agreement. Panel established on July 23rd, 1998. The United States participated as third-party. The panel report (April of 1999) found that certain of Canada's measures were inconsistent with Articles 3.1(a) and 3.2 of the Subsidies Agreement, but rejected Brazil's claim

that EDC assistance to the Canadian regional aircraft industry constitutes export subsidies. Canada appealed. The Appellate Body upheld the findings of the panel (August of 1999).

On November 23rd, 1999, Brazil requested the establishment of a panel under Article 21.5 arguing that Canada had not taken measures to comply fully with the rulings and recommendations of the DSB. Australia, the EC and the United States participated as third-parties. The panel compliance report (May of 2000) found that Canada had implemented the recommendation of the DSB, once Canada had withdrawn the Technology Partnership Canada (TPC) assistance to the Canadian regional aircraft industry within 90 days, but that Canada had failed to implement the recommendation to withdraw the Canada Account Assistance to the Canadian regional aircraft industry. Brazil appealed (May of 2000) certain issues of law and legal interpretations developed by the compliance panel. The Appellate Body (July of 2000) found that the review panel erred in declining to examine one of Brazil's arguments to the effect that the revised TPC program was inconsistent with Article 3.1(a) of the Subsidies Agreement, and also found that Brazil had failed to establish that the revised TPC program was inconsistent with Article 3.1(a) of the Subsidies Agreement. Accordingly, the AB found that Brazil had failed to establish that Canada has not implemented the recommendations of the DSB. Canada agreed to implement the recommendations of the DSB in respect to the Canada Account Program.

DS71: Canada — Measures Affecting the Export of Civilian Aircraft

Brazil requested consultations with Canada (March 10th, 1997) concerning the same measures complained of DS70, but this time in reference to Article 7 of the Subsidies Agreement. It argued that the Canadian measures were actionable subsidies within the meaning of Part III of the Subsidies Agreement, and caused adverse effects within the meaning of Article 5 of the Agreement. No panel was established and no settlement was announced.

DS112: Peru — Countervailing Duty Investigation against Imports of Buses from Brazil

Brazil requested consultations with Peru (December 23rd, 1997) regarding a countervailing duty investigation against imports of buses from Brazil. Brazil argued that the procedures followed by the Peruvian authorities to initiate this investigation were against Articles 11 and 13.1 of the Subsidies Agreement. No panel was established and no settlement was announced.

DS154: European Communities — Measures Affecting Differential and Favorable Treatment of Coffee

Brazil requested consultations with the EC (December 7th, 1998) in respect of the special preferential treatment under the EC Generalized System of Preferences (GSP). Brazil asserted that the EC GSP scheme favored products originating in the Andean countries and Central America that were conducting programs to combat drug production and trafficking. Brazil argued that this special treatment adversely affects the importation into the EC market of soluble coffee originating in Brazil and contended that this special treatment was inconsistent with the Enabling Clause, as well as with Article I of GATT 1994. Brazil further alleged that this special treatment nullifies or impairs benefits accruing to Brazil directly or indirectly under the cited provisions. No panel was established and no settlement was announced.

DS190: Argentina — Transitional Safeguard Measures on Certain Imports of Woven Fabric Products of Cotton and Cotton Mixtures Originating in Brazil (Argentina – Cotton)

Brazil requested a panel (February 11th, 2000) regarding restrictions imposed by Argentina on certain imports of woven fabrics of cotton and cotton mixtures originating in Brazil. Brazil argued that the transitional safeguards applied by Argentina were inconsistent with the country's obligations under Articles 2.4, 6.1, 6.2, 6.3, 6.4, 6.7, 6.8, 6.11, 8.9, and 8.10 of the

Agreement on Textiles and Clothing (ATC) and should, therefore, be revoked. Following Article 6.11 of the Agreement on Textiles and Clothing, Brazil had referred the matter to the Textiles Monitoring Body (TMB) for review and recommendations, which conducted a review of the measures implemented by Argentina, and recommended that Argentina rescind the safeguard measures applied against imports from Brazil. Nevertheless, the matter remained unresolved. The DSB established a panel in March of 2000. The EC, Pakistan, Paraguay, and the United States joined as third-parties. In a communication in June of 2000, Brazil and Argentina notified a mutually agreed solution to this dispute.

DS208: Turkey — Anti-Dumping Duty on Steel and Iron Pipe Fittings

Brazil requested consultations with Turkey (October 9th, 2000) in respect to the anti-dumping duty on steel and iron pipe fittings from Brazil. Brazil believed that Turkey authorities failed to ensure proper notifications in this case, that its establishment of the facts was not proper, and that its evaluation of the facts was not unbiased nor objective. Thus, Brazil argued that Turkey has acted inconsistently with Article VI of the GATT 1994 and Articles 2, 3, 5, 6, 12, and 15 of the Anti-Dumping Agreement. No panel was established and no settlement was announced.

DS209: European Communities — Measures Affecting Soluble Coffee

In October of 2000, Brazil requested consultations with the EC regarding measures applied under the EC Generalized System of Preferences scheme (GSP) that affect imports of soluble coffee originating in Brazil. These measures included the “graduation mechanism,” which progressively and selectively reduces or eliminates preferences granted to specific products and/or beneficiary countries under the GSP scheme, and the “drugs regime,” which confers preferential treatment for products originating in the Andean and Central American countries that are conducting a campaign to combat drugs. Brazil argued that the EC legislation that established the special treatment adversely affected the importation of soluble coffee originating in Brazil. Brazil alleged that these measures were inconsistent with the obligations of the EC under the Enabling Clause and under Article I of GATT 1994. No panel was established and no settlement was announced.

DS216: Mexico — Provisional Anti-Dumping Measure on Electric Transformers

Brazil requested consultations with Mexico (December 20th, 2000) regarding a provisional anti-dumping measure on electronic transformers from Brazil. Brazil considered that the above determination and the resulting provisional measures were inconsistent with Mexican obligations under the Anti-dumping Agreement (AD) and the GATT 1994, in particular, with Articles 5.2, 5.3, 5.8, 6.8, 7.1(i), 7.1(ii) and Annex II of the AD Agreement. No panel was established and no settlement was announced.

DS217: United States — Continued Dumping and Subsidy Offset Act of 2000 (US – Offset Act, Byrd Amendment)

The complainants (Australia, Brazil, Chile, European Communities, India, Indonesia, Japan, Korea, and Thailand) requested consultations on December 21st, 2000 with the United States concerning the amendment to the Tariff Act of 1930. Complainants argued that the amendment was inconsistent with the obligations of the United States under several provisions of the GATT, the AD Agreement, the SCM Agreement, and the WTO Agreement. A panel was established in July of 2001, with Argentina, Canada, Costa Rica, Hong Kong, China, Israel, Norway, and Mexico as third-parties. The Panel concluded (September of 2002) that the Byrd Amendment was inconsistent with Articles 5.4, 18.1, and 18.4 of the Anti-Dumping Agreement, Articles 11.4, 32.1, and 32.5 of the Subsidies Agreement, Articles VI:2 and VI:3 of the GATT 1994, and Article XVI:4 of the WTO Agreement. The United States appealed. The Appellate

Body, in January of 2003, upheld some of the Panel's findings and rejected others, but generally found the Byrd Amendment inconsistent with the SCM and the GATT 1994 agreements.

Later, complainants requested arbitration, under article 21.3 of the DSU, to determine a reasonable period of time for the implementation of the DSB recommendations. Following the non-compliance, the countries, including Brazil, asked for authorization to suspend concessions, which was granted. In February of 2006, the United States enacted a new Deficit Reduction Act, to be in force in 2007, and stated that it complied with the WTO ruling.

DS218: United States — Countervailing Duties on Certain Carbon Steel Products from Brazil

Brazil requested consultations with the United States in December of 2000, concerning certain aspects of United States countervailing duty practice and the imposition of countervailing duties on certain carbon steel products originating in Brazil. More specifically, Brazil is concerned with the United States' practice of applying its countervailing duty laws by finding that privatized companies benefited from pre-privatization subsidies, and the unwillingness of the United States to bring its practice into conformity with the SCM Agreement. Brazil believed that the findings, that three companies were benefiting from subsidies conceded prior to their privatization, were a breach of Articles 1.1(b), 10, 14, 19, and 21 of the SCM Agreement. Also, Brazil believed that the decision not to terminate the investigation was in breach of Article 11.9 of the SCM Agreement. No panel was established and no settlement was announced.

DS219: European Communities — Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil (EC – Tube or Pipe Fittings)

Brazil requested consultations on December 21st, 2000, with the EC concerning definitive anti-dumping duties imposed by Council Regulation (EC) No. 1784/2000 concerning imports of malleable cast iron tube or pipe fittings originating, inter alia, in Brazil. Brazil argued that the establishment of the facts was not proper and that EC's evaluation of these facts was not unbiased and objective. Brazil considered that the EC had violated Article VI of GATT 1994 and Articles 1, 2, 3, 4, 5, 6, 7, 9, 11, 12 and 15 of the Anti-dumping Agreement. A panel was established in July of 2001, when Chile, Japan, Mexico and the United States joined as third-parties. The panel report (March, 2003) concluded that the EC had acted inconsistently in Articles 2.4.2, 12.2, and 12.2.2 of the AD, but also ruled against other claims presented by Brazil. Brazil appealed. The AB Report (July, 2003) rejected six of the seven Brazilian claims and found that the EC acted inconsistently with Articles 6.2 and 6.4 of the AD. In March of 2004, the EC informed that it had fully complied with the DSB recommendations. Brazil contested this claim. EC urged Brazil to prove that it had not fully complied with the DSB recommendations.

DS222: Canada — Export Credits and Loan Guarantees for Regional Aircraft (Canada – Aircraft Credits and Guarantees)

Brazil requested consultations with Canada (January 22nd, 2001) regarding subsidies which are allegedly being granted to Canada's regional aircraft industry. Brazil argued that Canada was providing export credits and loan guarantees to its aircraft industry, which it understood were subsidies within the meaning of Article 1 of the SCM Agreement. The panel was established on March 12th, 2001 with Australia, the EC, India, and the United States as third-parties. The Panel report (January 28th, 2002) rejected most of Brazil's claims, but indeed found some Canadian conducts to be characterized as subsidies. Thus, the Panel recommended that Canada should withdraw the subsidies within 90 days. Canada did not fulfill its obligation; Brazil requested authorization to suspend concessions. Canada and Brazil reached an agreement. Canada breached the agreement and, afterwards, Brazil requested authorization to suspend concessions, which was granted by the DSB (although at a lower value than that requested by Brazil).

DS224: United States — U.S. Patents Code

Brazil requested consultations with the United States (January 31st, 2001) in respect to some provisions of the U.S. Patents Code, in particular those of Chapter 18 [38] — “Patent Rights in Inventions Made with Federal Assistance,” which, as alleged by Brazil, contained several discriminatory elements. Brazil argued that those elements infringed provisions from the TRIPS Agreement, especially Articles 27 and 28, as well as provisions from the TRIMs Agreement (especially Article 2) and Articles III and XI of GATT 1994. No panel was established and no settlement was announced.

DS239: United States — Anti-Dumping Duties on Silicon Metal from Brazil

Brazil requested consultations with the United States (September 17th, 2001) and, on November 1st, 2001, requested that the original request for consultations be cancelled and replaced with a new request. In this new request, Brazil requested consultations with the United States regarding Anti-dumping duties imposed by the United States on imports of silicon metal from Brazil, arguing that the methodology used was inconsistent with Articles 2.4.2, 5.8, 9.3, 11.1, 11.2, and 18.3 of the AD Agreement. Thailand joined consultations on September 28th, 2001, and the EC also requested, on November 19th, 2001, to join the consultations. No panel was established and no settlement was announced.

**DS 241: Argentina — Definitive Anti-Dumping Duties on Poultry from Brazil
(Argentina – Poultry Anti-Dumping Duties)**

Brazil requested consultations with Argentina (November 7th, 2001) concerning definitive anti-dumping duties imposed by Argentina on imports of poultry from Brazil, classified under MERCOSUR tariff line 0207.11.00 and 0207.12.00. These measures were adopted by Argentina’s Ministry of Economy in Resolution 574/2000. Brazil considered that the duties, as well as the investigation conducted by Argentina, might have been flawed and were inconsistent with Argentina’s obligations under Articles 1, 2, 3, 4, 5, 6, 9, 12, and Annex II of the Anti-Dumping Agreement, Article VI of the GATT 1994, and Articles 1 and 7 of the Customs Valuation Agreement. The EC also requested to join the consultations (November 19th 2001). A panel was established (April 17th 2002), with Canada, Chile, the EC, Guatemala, Paraguay and the United States as third-parties. The Panel report (April 22nd, 2003) found that Argentina had acted inconsistently with its obligations under Articles 2.4, 2.4.2, 3.1, 3.2, 3.3, 3.4, 3.5, 5.1, 5.8, 6.1.1, 6.1.3, 6.8 and Annex II, 6.10, and 12.1 of the Anti-Dumping Agreement. The Panel concluded that Argentina had not acted inconsistently with a number of Articles from the same Agreement and declined to rule on a number of claims for judicial economy.

DS250: United States — Equalizing Excise Tax Imposed by Florida on Processed Orange and Grapefruit Products (US – Florida Excise Tax)

On March 20th, 2002, Brazil requested consultations with the United States (March 20th, 2002) regarding the “Equalizing Excise Tax” imposed by the State of Florida on processed orange and grapefruit products produced from citrus fruit grown outside the United States (Section 601.155 Florida Statutes). In Brazil’s view, the incidence of this tax on imported processed citrus products and not on domestic products on its face constituted a violation of Articles II:1(a), III.1, and III:2 of GATT 1994. A panel was established on October 1st, 2002, with the EC, Mexico, Paraguay, and Chile (joined on October 11th, 2002) as third-parties. Afterwards, the United States and Brazil reached a mutually agreed solution under Article 3.6 of the DSU (May 28th, 2004).

DS259 United States — Definitive Safeguard Measures on Imports of Certain Steel Products (US – Steel Safeguards).

Brazil requested consultations with the United States (May 21st, 2002) concerning the same definitive safeguard measures imposed by the United States on imports of certain steel products. The EC, Japan, Korea, Norway, China, and later Mexico, also petitioned to join the consultations. Brazil claimed that the United States measures violated Articles 2.1, 2.2, 3.1, 4, and 5 of the Agreement on Safeguards and Articles I:1, X:3, and XIX:1 of GATT 1994. A single Panel was established, with Canada, Chinese Taipei, Cuba, Malaysia, Mexico, Thailand, Turkey, and Venezuela as third-parties (Malaysia withdrew on October 23rd 2002). The Panel concluded (July 11th, 2003) that all the United States' safeguard measures at issue were inconsistent with at least one of the following WTO prerequisites for the imposition of a safeguard measure: lack of demonstration of (i) unforeseen developments; (ii) increased imports; (iii) causation; and (iv) parallelism. On these grounds, the Panel requested that the United States bring the relevant safeguard measures into conformity with its obligations under the Agreement on Safeguards and GATT 1994. The United States appealed. The AB Report (November 10th, 2003) upheld the Panel's conclusions, although it reversed the Panel's findings that the United States failed to provide a reasoned and adequate explanation on "increased imports" and on the existence of a "causal link" between increased imports and serious injury for two of the ten safeguard measures. However, even these measures were found to be inconsistent with the WTO Agreement on other grounds.

DS266: European Communities — Export Subsidies on Sugar (EU – Export subsidies on sugar)

On September 27th, 2002, Australia and Brazil requested consultations with the European Communities concerning the export subsidies provided by the EC in the framework of its regulations for the sugar sector. Brazil argued that the EC provided, under Council Regulation (EC) No. 1260/2001, export subsidies for sugar and sugar containing products above its reduction commitment levels specified in Section II of Part IV of its Schedule of Concessions. Brazil also believed that the EC sugar regime violated Article III:4 of the GATT 1994. Finally, Brazil claimed that the EC was acting inconsistently with at least the requirements of: Articles 3.3, 8, 9.1(a) and (c), and 10.1 of the Agreement on Agriculture; Articles 3.1(a) and 3.2 of the SCM Agreement; and Articles III:4 and XVI of GATT 1994. A single panel comprising the claims of Brazil, Australia, and Thailand was established on August 29th 2003, with Barbados, Canada, China, Colombia, Jamaica, Mauritius, New Zealand, Trinidad and Tobago, and the United States as third-parties (later, Belize, Cuba, Fiji, Guyana, Paraguay, and Swaziland, India, Madagascar, Malawi, Tanzania, Thailand, Kenya, and Côte d'Ivoire also joined as third-parties). The Panel report (October 15th, 2004) found, inter alia, that the EC had acted inconsistently with its obligations under Articles 3.3 and 8 of the Agreement on Agriculture. The EC appealed. The AB report (April 28th, 2005) maintained the Panel's decision, but argued that it erred in not ruling on the Complaining Parties' claims under the SCM Agreement, because the Panel's ruling under the Agreement on Agriculture was insufficient to fully resolve the dispute, especially in relation to implementation of a remedy. The EC informed the DSB of its intention to implement the recommendations and rulings of the DSB, and stated that it would require a reasonable period of time to implement them. On June 8th, 2006, Australia, Brazil and Thailand informed the DSB that they each had reached an agreement under Articles 21, and 22 of the DSU with the EC.

DS267: United States — Subsidies on Upland Cotton (US – Upland Cotton)

Brazil requested consultations with the United States (September 27th, 2002) regarding prohibited and actionable subsidies provided to U.S. producers, users, and/or exporters of upland cotton. Brazil argued that these measures were inconsistent with the obligations of the United States under: the SCM Agreement; the Agreement on Agriculture; and Article III:4 of GATT 1994. The panel was established on March 18th, 2003 with Argentina, Canada, China, Chinese Taipei, the EC, India, Pakistan, and Venezuela reserved as third-parties (later, Benin, Australia,

Paraguay, New Zealand, and Chad also joined as third parties). The Panel report (September 2004) found that three United States export credit guarantee programs were prohibited export subsidies not under the Peace Clause exception, that the United States also granted several other prohibited subsidies in respect to cotton, and that this resulted in serious prejudice to Brazil's interests in the form of price suppression in the world market. The United States appealed. The AB Report (March 3rd, 2005) modified the Panel's interpretation of certain aspects of the dispute, but, nevertheless, recommended that the prohibited subsidies should be withdrawn over a period of six months, and that the subsidies which caused serious prejudice should have their adverse effects removed or should be completely withdrawn.

On August 18th, 2006, Brazil requested the establishment of an Article 21.5 panel, which was established on September 1st, 2006 with Argentina, Australia, Canada, China, the EC, India, Japan, and New Zealand as third-parties. The panel is expected to complete its work in July of 2007.

DS269: European Communities — Customs Classification of Frozen Boneless Chicken Cuts (EC- Chicken Cuts)

On October 11th, 2002, Brazil requested consultations with the European Communities concerning EC Commission Regulation No. 1223/2002, which provided a new description of frozen boneless chicken cuts under the EC Combined Nomenclature ("CN") code 0207.14.10. According to Brazil, this new description included a salt content to the product that did not exist before and subjected the imports of these products to a higher tariff than that applicable to salted meat (CN code 0210) in the EC's Schedules under the GATT 1994. Brazil argued that this change violated Articles II and XXVIII of the GATT 1994. In addition, Brazil claimed that the application of this measure by the EC nullified and impaired, within the meaning of Article XXIII:1, benefits accruing to Brazil directly or indirectly under the GATT 1994. A panel was established on November 7th, 2003. China, Thailand and United States participated as third-parties. The Panel Report (May 30th, 2005) found that the measure was inconsistent with the EC's obligations under Articles II:1(a) and II:1(b) of the GATT 1994. The EC appealed, and so did Brazil (on certain issues of law covered by the Panel Report). The AB Report (September 12th, 2005) upheld the Panel conclusions. On July 26th, 2006, Brazil and the EU informed the DSB of an agreement regarding procedures under Articles 21 and 22 of the DSU.

IV. The Practice so far

After this report on the Brazilian experience at the WTO and MERCOSUR, the questions proposed by ECLAC may be considered.

When does Brazil take a case to the DSB?

As seen in the evolution of the trade community in Brazil, the decision to present a claim to the WTO is a result of complex factors. The final decision is taken at the ministerial level, after administrative review by the Ministry of Foreign Affairs, whose decision is influenced by CGC. The main factors are: (a) level of pressure and support by the affected private sector; (b) economic impact of the foreign measure on Brazilian exports; (c) legal grounds for the case; and (d) the reaction from public opinion and the press over the issue.

How does Brazil choose between WTO or MERCOSUR?

It seems that, until 2001, Brazil would prefer the MERCOSUR dispute settlement mechanism, as a sign of political prestige for the regional agreement. In that year, however, the unsound arbitral decision on Argentina-Anti-dumping on Poultry led Brazil to renew the claim before the WTO (where the Brazilian argument prevailed). Although no case was presented after the clause of jurisdictional choice in the Protocol of Olivos, it is foreseeable that Brazil will look carefully for the forum where rules on the specific issue are clearer.

How does Brazil prepare the case?

As mentioned before, the preparation of the case has involved close connections with the private sector and with national and foreign law firms, usually funded by the national industry. On some occasions, the industry's interests have not coincided with the CGC's perception of the public interest, and the latter has prevailed on deciding the strategy.

Has Brazil participated in coalitions?

Brazil has been noticed as a leading actor among developing countries, especially after the Cancun Ministerial Conference, when the G20 coalition was composed. In terms of dispute resolution, however, the participation in joint claims is smaller. In United States –Gasoline, for instance, Brazil participated with Venezuela in the claims against the U.S. discrimination against imported gasoline, but each country determined their own strategy and presented different

documents to support the claim. The sole occasion in which Brazil joined a common claim was in United States-Byrd Amendment.⁶³

This behavior could probably be explained by the Brazilian perception that claimants' cases may be conflicting at some point; hence individual documents could guarantee a higher level of independence. Nevertheless, Brazil has participated regularly as third party in different cases before the DSB. In contrast with the permanent U.S. interest in systemic issues, Brazil's activity as a third party may be identified especially in cases where the challenged measure affects a product that Brazil also exports.⁶⁴

TABLE 1
BRAZIL PARTICIPATION AS THIRD PARTY IN DSB CASES
(Total of 46, up to May 2007)

Case #	Case title and parties	Other third parties
DS76	Japan — Measures Affecting Agricultural Products (Complainant: US)	EC; Hungary
DS89	United States — Anti-Dumping Duties on Imports of Colour Television Receivers from Korea (Complainant: Korea)	None
DS108	United States — Tax Treatment for “Foreign Sales Corporations” (Complainant: EC)	Australia; Barbados; Canada; China; India; Jamaica; Japan
DS114	Canada — Patent Protection of Pharmaceutical Products (Complainant: EC)	Australia; Colombia; Cuba; India; Israel; Japan; Poland; Switzerland; Thailand; US
DS121	Argentina — Safeguard Measures on Imports of Footwear (Complainant: EC)	Indonesia; Paraguay; Uruguay; US
DS135	European Communities — Measures Affecting Asbestos and Products Containing Asbestos (Complainant: Canada)	Zimbabwe; US
DS138	United States — Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom (Complainant: EC)	Mexico
DS152	United States — Sections 301–310 of the Trade Act 1974 (Complainant: EC)	Canada; Colombia; Costa Rica; Cuba; Dominica;

⁶³ A joint claim was filed by Argentina, Brazil, Canada, Costa Rica, Hong Kong, China, Israel, Mexico, and Norway.

⁶⁴ Yet, Shaffer recommends that developing countries should participate as third parties, for three primary reasons: “First, an important procedural issue could arise affecting all future cases. Second, the interpretation of a point of substantive law could have implications for the country in future cases. Third, and perhaps most importantly, a country needs ‘to stay in touch with panel activity’ in order to know how panels and the Appellate Body are working so that, when it has a complaint, it can tailor legal arguments and litigation strategies accordingly. WTO Appellate Body members and secretariat officials change over time. Just as in domestic litigation, a party needs to know the ‘institutional culture and personalities’ of the judges and the tribunal” (Shaffer, 2005).

		Dominican Republic; Ecuador; Hong Kong; China; India; Israel; Jamaica; Japan; Korea; St. Lucia, Thailand
DS160	United States — Section 110(5) of U.S. Copyright Act (Complainant: EC)	Australia; Canada; Japan; Switzerland
DS174	European Communities — Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs (Complainant: US)	Argentina; Australia; Brazil; Canada; China; Chinese Taipei; Colombia; Guatemala; India; Mexico; New Zealand; Turkey
DS184	United States — Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan (Complainant: Japan)	Canada; Chile; EC; Korea
DS204	Mexico — Measures Affecting Telecommunications Services (Complainant: US)	Australia; Canada; Cuba; EC; Guatemala; Honduras; India; Japan; Nicaragua
DS207	Chile — Price Band System and Safeguard Measures Relating to Certain Agricultural Products (Complainant: Argentina)	Australia; Canada; China; Colombia; Costa Rica; EC; Ecuador; El Salvador; Guatemala; Honduras; Japan; Nicaragua; Paraguay; Peru; Thailand; Venezuela; US
DS212	United States — Countervailing Measures Concerning Certain Products from the European Communities (Complainant: EC)	China; India; Korea; Mexico
DS234	United States — Continued Dumping and Subsidy Offset Act of 2000 (Complainants: Canada and Mexico)	Argentina; Australia; Costa Rica; EC; Hong Kong, China; India; Indonesia; Israel; Japan; Korea; Norway; Thailand
DS244	United States — Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan (Complainant: Japan)	Canada; Chile; EC; India; Korea; Norway
DS245	Japan — Measures Affecting the Importation of Apples (Complainant: US)	Australia; China; Chinese Taipei; EC; New Zealand
DS246	European Communities — Conditions for the Granting of Tariff Preferences to Developing Countries (India)	Bolivia; Colombia; Costa Rica; Cuba; Ecuador; El Salvador; Guatemala; Honduras; Mauritius; Nicaragua; Pakistan; Panama; Paraguay; Peru; Sri Lanka; Venezuela; US
DS248	United States — Definitive Safeguard Measures on Imports of Certain Steel Products	Canada; China; Chinese Taipei; Japan; Korea; New

	(Complainant: EC)	Zealand; Norway; Switzerland; Thailand; Turkey; Venezuela
DS249	United States — Definitive Safeguard Measures on Imports of Certain Steel Products (Complainant: Japan)	Canada; China; Chinese Taipei; EC; Korea; Mexico; New Zealand; Norway; Switzerland; Thailand; Turkey; Venezuela
DS251	United States — Definitive Safeguard Measures on Imports of Certain Steel Products (Complainant: Korea)	Canada; China; Chinese Taipei; EC; Japan; Mexico; New Zealand; Norway; Switzerland; Thailand; Turkey; Venezuela
DS252	United States — Definitive Safeguard Measures on Imports of Certain Steel Products (Complainant: China)	Canada; Chinese Taipei; Cuba; EC; Japan; Korea; Mexico; New Zealand; Norway; Switzerland; Thailand; Turkey; Venezuela
DS253	United States — Definitive Safeguard Measures on Imports of Certain Steel Products (Complainant: Switzerland)	Canada; China; Chinese Taipei; Cuba; EC; Japan; Korea; Mexico; New Zealand; Norway; Thailand; Turkey; Venezuela
DS254	United States — Definitive Safeguard Measures on Imports of Certain Steel Products (Complainant: Norway)	Canada; China; Chinese Taipei; Cuba; EC; Japan; Korea; Mexico; New Zealand; Switzerland; Thailand; Turkey; Venezuela
DS258	United States — Definitive Safeguard Measures on Imports of Certain Steel Products (Complainant: New Zealand)	Canada; China; Chinese Taipei; Cuba; EC; Japan; Korea; Mexico; Norway; Switzerland; Thailand; Turkey; Venezuela
DS265	European Communities — Export Subsidies on Sugar (Complainant: Australia)	Barbados; Belize; Canada; China; Colombia; Côte d'Ivoire; Cuba; Fiji; Guyana; India; Jamaica; Kenya; Madagascar; Malawi; Mauritius; New Zealand; Paraguay; St. Kitts and Nevis; Swaziland; Tanzania; Thailand; Trinidad and Tobago; US;
DS283	European Communities — Export Subsidies on Sugar (Complainant: Thailand)	Barbados; Belize; Canada; China; Colombia; Côte d'Ivoire; Cuba; Fiji; Guyana; India; Jamaica; Kenya;

		Madagascar; Malawi; Mauritius; New Zealand; Paraguay; St. Kitts and Nevis; Swaziland; Tanzania; Thailand; Trinidad and Tobago; US;
DS286	European Communities — Customs Classification of Frozen Boneless Chicken Cuts (Complainant: Thailand)	China; US
DS290	European Communities — Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs (Complainant: Australia)	Argentina; Australia; Canada; China; Chinese Taipei; Colombia; Guatemala; India; Mexico; New Zealand; Turkey; US
DS291	European Communities — Measures Affecting the Approval and Marketing of Biotech Products (Complainant: US)	Argentina; Australia; Canada; Chile; China; Chinese Taipei; Colombia; El Salvador; Honduras; Mexico; New Zealand; Norway; Paraguay; Peru; Thailand; Uruguay
DS292	European Communities — Measures Affecting the Approval and Marketing of Biotech Products (Complainant: Canada)	Argentina; Australia; Chile; China; Chinese Taipei; Colombia; El Salvador; Honduras; Mexico; New Zealand; Norway; Paraguay; Peru; Thailand; Uruguay; US
DS293	European Communities — Measures Affecting the Approval and Marketing of Biotech Products (Complainant: Argentina)	Australia; Canada; Chile; China; Chinese Taipei; Colombia; El Salvador; Honduras; Mexico; New Zealand; Norway; Paraguay; Peru; Thailand; Uruguay; US
DS294	United States — Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing) (Complainant: EC)	Argentina; China; Chinese Taipei; Hong Kong, China; India; Japan; Korea; Mexico; Norway; Turkey
DS315	European Communities — Selected Customs Matters (Complainant: US)	Argentina; Australia; China; Chinese Taipei; Hong Kong, China; India; Japan; Korea
DS316	European Communities — Measures Affecting Trade in Large Civil Aircraft (Complainant: US)	Australia; Canada; China; Japan; Korea
DS317	United States — Measures Affecting Trade in Large Civil Aircraft (Complainant: EC)	Australia; Canada; China; Japan; Korea
DS320	United States — Continued Suspension of Obligations in the EC — Hormones Dispute	Australia; Canada; China; Chinese Taipei; India; Mexico; New Zealand;

	(Complainant: EC)	Norway
DS321	Canada — Continued Suspension of Obligations in the EC — Hormones Dispute (Complainant: EC)	Australia; China; Chinese Taipei; India; Mexico; New Zealand; Norway; US
DS335	United States — Anti-Dumping Measure on Shrimp from Ecuador (Complainant: Ecuador)	Chile; China; EC; India; Japan; Korea; Mexico; Thailand
DS339	China — Measures Affecting Imports of Automobile Parts (Complainant: EC)	Argentina; Australia; Japan; Mexico; Chinese Taipei; Thailand
DS340	China — Measures Affecting Imports of Automobile Parts (Complainant: US)	Argentina; Australia; Japan; Mexico; Chinese Taipei; Thailand
DS342	China — Measures Affecting Imports of Automobile Parts (Complainant: Canada)	Argentina; Australia; Japan; Mexico; Chinese Taipei; Thailand
DS343	United States — Measures Relating to Shrimp from Thailand (Complainant: Thailand)	Chile; China; EC; India; Korea; Japan; Mexico; Viet Nam
DS345	United States — Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties (Complainant: India)	China; EC; Japan; Thailand
DS347	European Communities and Certain Member States — Measures Affecting Trade in Large Civil Aircraft (2 nd Complaint) (Complainant: US)	Australia; Canada; China; Japan; Korea
DS353	United States — Measures Affecting Trade in Large Civil Aircraft (2 nd Complaint) (Complainant: EC)	Australia; Canada; China; Japan; Korea

Although Brazilian participation at the DSB seems primarily defined by its export interests, some systemic issues have prompted the country's reaction. Such reaction is particularly seen at the DSB meetings, leading sometimes to harsh debates between the involved diplomats.⁶⁵

Hence, Brazilian interventions are particularly vocal regarding delays from developed countries in the implementation of DSB decisions. The repeated claims against the U.S. practice of “zeroing” have been mentioned by Brazil.⁶⁶ Brazil has also reacted against forms of

⁶⁵ On January 12th, 2007, for instance, when the United States argued that Brazil has disrespected the confidential aspect of opposing panelists, “[t]he representative of Brazil said that with regard to responsibility and cooperation, Brazil was better equipped than the United States to speak, but he suspected that whatever Brazil referred to now would be treated as a breach of confidentiality by the United States”,. Cf. WT/DSB/M/222.

⁶⁶ United States – Anti-dumping measure on shrimp from Ecuador, cf. WT/DSB/M/226, March 3rd, 2007.

implementation that could lead to new barriers in international trade.⁶⁷ Consistently, Brazil has noted that “the DSB's decision should not be read as a license for indefinite continuation of the non-compliance situation, which had lasted for too long in the present dispute. Brazil urged the parties to the dispute to take advantage of the positive momentum that had led to the bilateral agreement on procedures: i.e., either to reach a mutually satisfactory solution consistent with the multilateral rules and beneficial to all Members or to develop ways towards an expedited withdrawal of the illegal measure”.⁶⁸

How does Brazil act in the negotiation arena?

The Brazilian experience seems to reflect a practice of evaluating the timing for presenting a case. Thus, the filing of claims in EC-Sugar and U.S.-Cotton were calculated to have a decision by the end of the Doha agenda of negotiations. The reports favoring the Brazilian arguments were thought to represent an *acquis* that would not require further concessions during the negotiations.

Still in the negotiation arena, Brazil has managed successfully the participation of NGOs and the private sector, as noted before in this paper. In topics related to either pharmaceuticals or cotton subsidies, Brazil has given attention to the international public opinion and to a well-orchestrated release through the world press.

Nevertheless, Brazil's initial position was critical to *amicus curiae* briefs.⁶⁹ Most probably, the country's initial concern was that NGOs funded by entities in developed countries could undermine the negotiation sphere. Moreover, environmental issues – a common concern for many NGOs – are a sensitive topic in Brazilian politics. This may explain why Brazil (in spite of the fruitful experience with NGOs), has still recently opposed the admission of *amicus curiae* briefs by the panels.⁷⁰

How to change the strategy, according to the phase in the dispute?

The cases analyzed demonstrate that Brazil has pursued the same strategy once a claim is presented. This line of behavior can probably be explained by the long domestic process for a claim to be approved.

⁶⁷ For example, regarding the implementation of EC-Sugar, Brazil noted that “Members should, at a minimum, apply a standstill as to the export subsidies commitments in place. Instead, by taking its decision on declassification on 22 September 2005, the EC had detracted from its commitments in this area. Hardly anyone could find a more deleterious way to express the gap between the words and the deeds.” Cf. WT/DSB/M/198, Oct 26th, 2005.

⁶⁸ WT/DSB/M/199, Nov 11th, 2005 [regarding United States – Section 211 Omnibus Appropriations Act of 1998: Status report by the United States].

⁶⁹ “Brazil, in its third participant's submission, and Mexico, in a letter submitted to us on 23 February 2000, agree with the European Communities that the Appellate Body does not have the authority to accept *amicus curiae* briefs. Brazil and Mexico emphasize that neither the DSU nor the Working Procedures allow the Appellate Body to receive factual information of the type contemplated by Article 13 of the DSU, much less briefs from private entities containing legal arguments on the issues under appeal [...]. Brazil adds that Members of the WTO and, in particular, parties and third parties to a dispute, are uniquely qualified to make legal arguments regarding panel reports and the parameters of WTO obligations.” Cf. US-Lead and Bismuth II (DS138), AB report, par. 37. The same position was reasserted in DS248, DS249, DS251, DS252, DS253, DS254, DS258, and DS259.

⁷⁰ “Again, in the recent and controversial US-Steel Safeguards case, the Appellate Body itself (again) faced a barrage of renewed arguments against the admission of an *amicus curiae* brief submitted by the American Institute for International Steel. Brazil cited (the usual) “legal and systemic concerns” against admitting the brief. Likewise, Mexico, Cuba and Thailand opposed the admission of the brief”. Cf. Lim, 2005, p. 85.

How does Brazil fulfill its obligations?

The low number of cases in which Brazil has been the respondent does not allow a definite tendency to be identified. However, except for Brazil-Aircraft, the other cases were complied with in a relative short period of time, mainly through changes in administrative regulations. This is particularly true in the cases where a negotiated agreement was achieved.

An interesting situation regarding compliance in Brazil will be seen in the near future. Indeed, on June 12th, 2007, the panel on Brazil-Retreated Tires issued its report.⁷¹ Basically, the panel accepted Brazil's arguments that the ban on imports of retreaded tires was justifiable as necessary to protect the environment and public health. However, the panel also considered that imports of used tires, for use as raw material by the domestic industry, made possible by judicial injunctions, jeopardize the objectives of the Brazilian measures and introduce a discriminatory element that is incompatible with the multilateral trading rules. The challenge for Brazil (if this decision is maintained by the Appellate Body) will be to convince its domestic judiciary to follow the same line of reasoning.

⁷¹ Brazil – Measures Affecting Imports of Retreaded Tires, WT/DS/332R.

V. Conclusion

According to a foreign analyst, Brazil is the leading example of a developing country that adapted its strategies to the challenges of the legalized and judicialized WTO regime.⁷² If Shaffer is right, it is also true that the Brazilian example cannot be repeated in every developing country, due to its particular features.

In fact, Brazil has been extremely successful when using coalitions with private entities, who have been supportive of the claims in a variety of ways, including financially. Moreover, the claims have become a source of political prestige within governmental and business spheres, even when compliance with the DSB recommendations is not immediate.

On the other hand, the development of human capacity related to trade matters, either in government and among practitioners, has been an experience that could create enthusiasm for other developing countries. The Brazilian practice of “learning by doing” in Geneva and Washington is different from traditional capacity-building efforts, and it has guaranteed that a new generation of trade specialists will influence this topic in the near future.

⁷² Shaffer et al., 2006, p. 3.

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