

Brazil's Response to the Judicialized WTO Regime: Strengthening the State through Diffusing Expertise

by Gregory Shaffer, Michelle Ratton Sanchez and Barbara Rosenberg¹

(Working draft by Gregory Shaffer, Michelle Ratton Sanchez and Barbara Rosenberg, commissioned by ICTSD as part as part of ICTSD's project on WTO Dispute Settlement and Sustainable Development, forthcoming publication in 2007)

During the 1990s, Latin American countries changed their trade and development policies, although to varying degrees, from the "import substitution industrialization" policies of the 1960s and 1970s to more "export-oriented," trade-liberalizing alternatives. These transformations occurred at a time when liberalized international trade relations were further institutionalized at the international level through the creation of the World Trade Organization (WTO) and its judicialized system for dispute settlement in 1995. The WTO expanded the scope of the 1948 General Agreement on Tariffs and Trade (GATT) to include nineteen agreements under a single framework and a vastly expanded membership, consisting of 149 members today. Most countries have significantly reduced tariff rates,² and the WTO

¹ Gregory Shaffer is Wing Tat-Lee Professor of International Law, Loyola University Chicago School of Law. Until July 1, 2006, he was Professor of Law at the University of Wisconsin Law School, Director of the UW European Union Center, Co-Director of the UW Center on World Affairs and the Global Economy; Michelle Ratton Sanchez is Professor of Law at the Law School of Sao Paulo, Getúlio Vargas Foundation (DireitoGV) and researcher of the Brazilian Center for Planning and Analysis (CEBRAP); Barbara Rosenberg is a lawyer in São Paulo and teaches at GVlaw courses. *Comments welcomed to gshaffe@luc.edu.*

² Since the 1980s, tariff rates have been significantly reduced around the world. Within Brazil, average tariffs dropped from nearly fifty percent in 1985 to twelve percent in 1995, and 10.4 percent by the start of 2005. For 2004 figures, see Peter Hakim, "Two Ways to Go Global," *Foreign Affairs* 148, (Jan.-Feb. 2002). See also Pinelopi Koujianou Goldberg and Nina Pavcnik, "The response of the informal sector to trade liberalization," *72 Journal of Development Economics* 463, 473 (2003) (noting that "the average tariff declined from 58.8% in 1987 to 15.4% in 1998 in Brazilian manufacturing"). In the two largest markets for Brazil's exports, the United States (US) and European Community (EC), average tariff rates declined from 8 percent in the EC and 6.5 percent in the US in 1990 to 6 percent in the EC and 5.8 percent in the U.S. in 1995, and 4.5 percent in the EC and 4.0 percent in the US in 2003. UNCTAD, UNCTAD Handbook of Statistics, Geneva (2004) at 8.4: Average applied import tariff rates on non-agricultural and non-fuel products *available at* (<http://r0.unctad.org/trains/> [Jun. 2005]). Tariff peaks, however, continue to affect products of export interest. For example, Brazil maintained that "discriminatory [US] measures have led to the application of an average tariff of 45.6 percent on the fifteen top Brazilian exports to the U.S."

has legally constrained the use of other barriers to trade. Centrally important for our story, the WTO created a judicialized dispute settlement system with compulsory jurisdiction and an appellate process to enforce these undertakings, unlike under the former GATT regime where a defendant could block the creation of a panel or the adoption of its report, or under the International Court of Justice.³ In this article, by legalized regime, we refer (from a formal perspective) to the relative precision and binding nature of WTO rules, and by judicialized regime, we refer to the use of a third party institution for dispute settlement—in this case, WTO panels whose decisions are subject to appeal before the WTO Appellate Body.⁴

This study examines how Brazil has adapted institutionally to respond to these changes at the international level and defend its interests in international trade disputes. These transformations have occurred within government ministries and in the private sector, including in trade associations, consultancies, think tanks, academia and civil society organizations. Brazil has diffused expertise on international trade matters outside of the traditional Foreign Ministry (Itamaraty) to include broader public-private networks with the aim of enhancing Brazilian capacity to respond to these international institutional challenges. The result, in our view, has not been the weakening of the state (as argued by some scholars),⁵ but the strengthening of Brazil's capacity to play a more active role in response to a new international context, with a focus in our case on the more legalized and judicialized WTO regime. The organization of, and the relationship between, the Brazilian state and private sector, however, has significantly changed in the process.

This article applies two complementary analytic frameworks. First, the study is part of a larger investigation of how changes at the international level affect domestic institutions and government-

market. These fifteen products represent 36.4 percent of the Brazilian total exports.” Monica Hirst, *The United States and Brazil: A Long Road of Unmet Expectations 2005*, at 27, citing “U.S. Barriers on Brazilian Goods and Services,” report prepared by the Brazilian Embassy in Washington D.C., Nov. 2000.

³ See Philippe Sands and Pierre Klein, *Bowett's Law of International Institutions* (5th ed.) 356-361 (2001) (noting the requirement of “consent” of countries to the ICJ’s jurisdiction pursuant to a “*compromis*,” and their use of “reservations” where they have accepted the ICJ’s “compulsory” jurisdiction pursuant to article 36(2), the “optional Clause,” of the ICJ’s Statute).

⁴ On the concept of “judicialization,” or third party dispute resolution, see Alec Stone Sweet, “Judicialisation and the Construction of Governance,” *Comparative Political Studies* 31: 147-84 (1999). Cf. Kenneth Abbott et al, *The Concept of Legalization*, 54:3 *IO* 385-399 (Summer 2000) (defining legalization in terms of a spectrum of three factors: (i) precision of rules; (ii) authority or bindingness of rules; and (iii) delegation to a third party decision-maker; and Martha Finnemore and Stephen Toope... *IO* (taking a more sociological perspective, and critiquing Abbott et al’s formal definition of legalization because it obscures how law and legal norms actually operate in practice).

⁵ See e.g. Susan Strange, *The Retreat of the State, The Diffusion of Power in the World Economy*; and Kenichi Ohmae, *The Borderless World: Power and Strategy in the Interlinked Economy* (1991, 1999 rev ed.).

business-civil society relations around the world.⁶ New governance processes, whether they consist of trans-governmental (public) networks,⁷ transnational (private) commodity chains,⁸ or mixed public-private hybrid networks,⁹ have reflected and responded to the challenges of economic globalization and the transnational institutions and regimes that have arisen to govern it.¹⁰ This study examines how the legalization and judicialization of international trade relations have spurred institutional change within the Brazilian government, reorganization of Brazilian business and the development of new Brazilian public-private partnerships for trade policy and trade litigation.

Second, the study is part of a project on the challenges of the legalized and judicialized WTO regime for developing countries and the strategies that some of them are developing to adapt to it, with Brazil being the leading example.¹¹ Although the WTO's more legalized and judicialized dispute settlement system offers significant promise for developing countries, greater judicialization does not come without costs. The demands on human resources, legal knowledge and experience have multiplied if a WTO member wishes to invoke its international trading rights. The legal procedures and substantive case law are technically complex. The Consultative Board to the WTO Director General reported in December 2004 that the first "81 cases for which reports are adopted, and reports whose adoption is

⁶ See Gregory Shaffer and Damian Chalmers, Transnational Transformations of the State project description at http://www.luc.edu/law/faculty/docs/shaffer/transnatl_transf_state.pdf.

⁷ See e.g. Anne-Marie Slaughter, "The New Global Order" (2003).

⁸ See e.g. Gary Gereffi & Miguel Korzeniewicz, eds., *Commodity Chains and Global Capitalism* (1994).

⁹ See e.g. John Braithwaite and Peter Drahos, *Global Business Regulation* (2000); and Gregory Shaffer, *Defending Interests: Public-Private Partnerships in WTO Litigation* (2003). Such a framework is linked to other studies of networked forms of governance in domestic, regional and global contexts. See e.g. Rhodes...; Pollack and Shaffer, "Who Governs?" in Pollack and Shaffer, eds., *Transatlantic Governance in the Global Economy* (2001). On the increased importance of public-private networks in public interest lawyering domestically within the United States, see Louise Trubek, *Crossing Boundaries: Legal Education and the Challenge of the 'New Public Interest Law,'* 2 *wisc l rev* 455, 461 (2005) (noting a new framework for public interest lawyering, involving new public-private collaborations, more flexible tools, and greater international awareness and engagement. As Trubek states, "This collaboration is in contrast to classic public interest lawyers who took adversarial stances toward all interests other than the 'group' they claimed to represent... Advocates are now joining with businesses, government agencies, and non profit organizations to collaborate in problem-solving efforts").

¹⁰ We refer to globalization as "a process of widening, deepening and speeding up of worldwide connectedness, in particular in the economic sphere." We adapt this definition from David Held, Anthony McGrew, David Goldblatt & Jonathan Perraton, *Global Transformations: Politics, Economics and Culture 2* (1999). Held et al also have a broader, more complex definition which includes cultural as well as economic phenomena: "A process (or set of processes) which embodies a transformation in the spatial organization of social relations and transactions-- assessed in terms of their extensity, intensity, velocity and impact-- generating transcontinental or interregional flows and networks of activity, interaction and the exercise of power" (Held et al. 1999, 16).

¹¹ See e.g. Gregory Shaffer, *How to Make the WTO Dispute Settlement System Work for Developing Countries* (ICTSD 2003), available at http://www.ictsd.org/pubs/ictsd_series/resource_papers/DSU_2003.pdf. Much of the analysis builds from socio-legal studies of how domestic legal frameworks operate where parties have disparate financial resources and legal experience. See e.g. Marc Galanter, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change," 9 *Law & Soc'y Rev.* 95 (1974).

pending, amount to more than 27,000 pages of jurisprudence.”¹²

Brazil is widely touted as one of the most successful users of the WTO dispute settlement system among all countries, developing and developed. Its relative success before the WTO dispute settlement system has received national and international attention and arguably has further motivated the government and private sector to engage actively in the “Doha” round of WTO negotiations. This study examines how Brazil has responded to the challenges of the WTO regime, and in particular, how it has attempted to mobilize legal capacity. Brazil has developed a relatively effective strategy of public-private coordination involving a reorganized Foreign Ministry that now includes a specialized WTO dispute settlement unit, an expanded mission in Geneva including officials dedicated to handling WTO litigation, private Brazilian companies, trade associations, and economic consultancies, private foreign and Brazilian law firms, as well Brazilian and foreign civil society organizations. The study addresses, in particular, Brazil’s use of mechanisms of public-private coordination to gather information and define and advance interests in WTO negotiations and dispute settlement, adapting mechanisms analogous to those that were first developed in the United States and Europe for similar purposes.¹³

This shift toward the use of public-private networks for WTO negotiations and dispute settlement reflects a shift in Brazil’s overall development strategy toward greater reliance on global markets and the private exporting sector to increase economic growth. Just as Brazil’s economic development policy has moved “in the direction of greater support for (and increased reliance on) the private sector,”¹⁴ so here we see a delegation of traditional government functions to collaborative networks of state officials, private trade associations and companies and their lawyers. In the case of Brazil, these networks have linked legal knowledge that was well-developed in the north to southern trading interests, with Brazilian lawyers being trained in the process. Brazil’s trajectory is of great interest to many developing country members of the WTO, as it shows how a developing country can mobilize legal resources to respond to and

¹² See *The Future of the WTO: Addressing institutional challenges in the new millennium*, Report of the Consultative Board to the Director-General Supachai Panitchpakdi 51 (World Trade Organization, 2004).

¹³ See e.g. Gregory Shaffer, *Defending Interests: Public-Private Partnerships in WTO Litigation* (2003); and Gregory Shaffer, “What’s New in EU Dispute Settlement? Judicialization, Public-Private Networks and the WTO Legal Order,” in *The EU and the New Trade Politics*, eds John Peterson & Alasdair Young, *Journal of European Public Policy* (2006).

¹⁴ See Thomas Biersteker, “The ‘triumph’ of liberal economic ideas in the developing world, in Barbara Stallings, ed., *Global Economic Change, Regional Response: The New International Context of Development* (1995), at 178. See also discussion of general shifts in Latin America in Augusto Varas, “Latin America: toward a new reliance on the market,” in Stallings, *Global Change*, supra note..., at 284 (noting, in addition to privatization, deregulation, capital liberalization, “the delegation to the private sector of tasks ranging from education to infrastructure are found in virtually every country”); and Juan de Onis, “Brazil’s New Capitalism,” *Foreign Affairs* 107 (May-June 2000) (“the ‘new model’ reforms created by President Fernando Henrique Cardoso feature a political economy in which

advance its interests through the judicialized WTO regime, including against the most powerful WTO members, the United States and EC,¹⁵ although there are significant limits to the transportability of Brazil's approach, as we examine at the end.¹⁶

Part I provides background on the export-oriented shift in trade policy in Brazil and in Latin American countries generally during the 1990s. Part II presents a brief overview of Brazil's experience with GATT and WTO dispute settlement in the context of the significant challenges posed by the WTO legal system for developing countries. Part III, the core of this article, examines the institutional changes and mobilization strategies that Brazil has developed to enhance legal capacity and better respond to these challenges. Part IV examines how Brazil has deployed these strategies in specific WTO cases as a complainant, respondent and third party. Part V addresses the limitations of the Brazilian model not only for Brazil, but, in particular, for smaller developing countries in light of the challenges of an increasingly demanding WTO dispute settlement system. Part VI concludes.

The study builds from in-depth interviews and discussions with Brazilian officials in Brasilia and Geneva, private lawyers that have worked with Brazil, representatives of Brazilian companies, trade associations and civil society, members of the Brazilian bar, Brazilian academics, leaders of Brazilian think tanks and consultancies, and members of the WTO secretariat, complemented by a review of primary documents relating to Brazil's involvement in the GATT and WTO.

I. Brazil's Change in Trade and Development Policy

The causal explanation for change is always difficult to pinpoint. The best explanation of the change in Brazil toward a more outward-looking, liberalized trade policy during the 1990s, as for Latin America generally, appears to be a combination of internal and external structural and ideological factors involving changed economic and geopolitical contexts and the proliferation of ideas in relation to the debt crises of the 1980s.¹⁷ Brazil's (and Latin America's) import substitution policies of the 1950s through the

private enterprise, including foreign investment, is assigned and expanded responsibility for economic development").

¹⁵ Confirmed in numerous interviews as well as symposia and workshops attended by Shaffer, 2003-2006.

¹⁶ See Part V, *supra* notes... and accompanying text.

¹⁷ See discussion in Barbara Stallings, ed., *Global Change, Regional Response: the New International Context of Development* (1995); Daniel Yergin & Joseph Stanislaw, *The Commanding Heights: The Battle Between Government and the Marketplace that is Remaking the Modern World* (1999); and John Williamson, *The Progress of Policy Reform in Latin America* (1990). Simmons and Elkins test for explanations for the liberalization of capital controls in terms of the impact of economic competition (affecting the demand for liberalization) and social emulation, as through transnational networks (affecting the supply of liberalization). They find evidence for both explanations. See Beth Simmons & Zachary Elkins, "Globalization and Policy Diffusion: Explaining Three Decades of Liberalization," in Miles Kahler & Dave Lake, eds. *Governance in a Global Economy: Political Authority in Transition* (2003). As Cason points out, however, Brazil did adopt "export-promotion policies "as far back as the

1970s were relatively successful, at least as reflected in growth rates. From 1955-1961, Brazil's "economic development was at an average GDP growth rate of 9.4%."¹⁸ For the following period, Brazil's GDP increased from US\$ 17.2 billion in 1961 to around US\$ 42.6 billion in 1970, and US\$ 237.8 billion in 1980.¹⁹ For Latin America as a whole, per capita output increased by "almost 40% through the 1970s and about 20% through the 1960s."²⁰

The oil and interest rate crises of 1979 and the ensuing debt crises of the 1980s and 1990s, however, caused economic stagnation, resulting in what has been called the "lost decade."²¹ Elites in Brazil, as in other Latin American countries, became disaffected with past inward-looking, protectionist policies. The "development economics" that was used to justify import substitution industrialization policies was in retreat.²² Policymakers noted, in particular, the success of the more export-oriented economies of East Asia with which their countries had been favorably compared only two decades before. As Varas notes, in the 1970s, Latin American and East Asian countries were often "linked as successful 'newly industrialized countries (NICs).'"²³ During the 1970s, real per capita GDP grew at relatively similar rates in the two regions—about 6 percent annually in Brazil, about 7 percent annually in Korea and Hong Kong, and between 8 and 8.4 percent annually in Taiwan and Singapore. However, growth rates diverged during the 1980s, during which Brazil's real per capita GDP grew by only about 1 percent annually, while Korea's and Taiwan's real per capita GDP grew by between 6.3 and 6.6 percent annually,

1960s and early 1970s," in conjunction with import substitution industrialization, but they were unsuccessful. See Jeffrey Cason, "The state as naïve entrepreneur: The political economy of export promotion in Brazil and Tunisia," 26:1 *Policy Studies Journal* 46 (Spring 1988). For an analysis of the institutional changes in Latin America, see Andrea Bandeira and Fernando Garcia, "Reforms and growth in Latin America", *CEPAL Review*, 77, 79-95 (August 2002).

¹⁸ Jorg Meyer-Stamer, *Technology, Competitiveness and Radical Policy Change: The Case of Brazil* (1997), at 38.

¹⁹ See data available at the Ministry of Industry, Trade and Development website <<http://www.desenvolvimento.gov.br/arquivo/secex/evocomextbrasil/evolucaocebrasileiro.xls>> (May 2006).

²⁰ John Williamson, *The Progress of Policy Reform in Latin America 1* (Institute for International Economics, Jan. 1990).

²¹ See e.g., Thomas Skidmore & Peter Smith, *Modern Latin America*, 6th ed. (2005), at 443.

²² See e.g. Deepak Lal, *The Poverty of Development Economics* (1983); Albert Hirschman, "The rise and decline of development economics," in *Essays in Trespassing: Economics to Politics and Beyond 1* (1981); Kathryn Sikkink, *Ideas and Institutions: Developmentalism in Brazil and Argentina* (1991) and John Williamson, *The Progress of Policy Reform in Latin America* (1990) (in which the concept of "Washington Consensus" is examined).

²³ Augusto Varas, "Latin America: toward a new reliance on the market," in Stallings, *Global Change*, supra note..., at 273. See also Jorg Meyer-Stamer, *Technology, Competitiveness and Radical Policy Change: The Case of Brazil* 33 (1997) ("Brazil's industrialization long appeared to be a pronounced case of success. A country that at the beginning of the 1950s still had an agrarian character turned, in the course of 30 years, into one of the world's major industrial states. At the end of the 1970s there was hardly any doubt that the country would close the gap separating it from the OECD countries, much in the same way that South Korea and Taiwan in fact did in the 1980s").

and Hong Kong's and Singapore's by between 5 and 5.75 annually, compounding the differences in economic growth over the decade and ever since.²⁴

In 1989, Fernando Collor de Mello won the election and pushed for policies of monetary stability, fiscal restraint, trade and capital liberalization, and privatization. *The Economist* magazine hailed his talk of "opening his country to the outside world and unshackling the economy"²⁵ as he "emphasized deregulation and greater openness to world markets."²⁶ Fernando Henrique Cardoso, a leader of "dependency theory" which had provided the intellectual basis for import substitution industrialization, became Minister of Finance in 1994 and then, in 1995, President of the Republic for two four-year terms. Cardoso privatized more state enterprises and further opened Brazil's economy to global competition, although Brazil has only gradually adhered to more liberal economic policies and it has continued a complementary focus on industrial policy.²⁷ Brazil's shift in policy reflected a "slow move of the opinion of local elites toward deregulation—especially in the sphere of trade and industrial policy," a shift that included not only government leaders, but also business people and academics.²⁸ Although the political left won the election of 2002, the government of President Luiz Inacio Lula da Silva has maintained Brazil's economic policies of greater budgetary discipline and liberalized trade.

External factors complemented internal domestic explanations for Brazil's change in trade and development policies. The World Bank and International Monetary Fund, as well as the US Treasury, strongly advocated Brazilian trade liberalization while Brazil negotiated new and restructured loans. Their leverage arguably increased on account of the debt crises, facilitating their demands for "structural

²⁴ These computations are based on real GDP per capita in constant prices (chain series) figures found in Penn World Table Version 6.1. See Alan Heston, Robert Summers and Bettina Aten, Penn World Table Version 6.1, Center for International Comparisons at the University of Pennsylvania (CICUP), October 2002 available at (http://pwt.econ.upenn.edu/php_site/pwt61_form.php [June 2006]). Vargas goes further, maintaining that World Bank figures show that real per capita GDP grew by about 6% annually in Brazil (and about 3.7% in Latin America), during the 1970s, but actually fell by about .6% annually in Brazil (and about .8 percent in Latin America) during the 1980s. See e.g., Varas, Latin America, *supra* note., Table 9.1, at 296-297. See also <<http://www.brazil.org.uk/economy/gdp.html>> (May 2006) (showing that Brazil had a growth rate of 2.96 during the decade and its per capita incomes actually fell.. *To verify*).

²⁵ See "A Survey of Brazil," *The Economist*, 7 December 1999, 7 ("Since the election campaign, the consequences of this political and ideological change for Brazilian trade policy were not long in coming"). Williamson notes, however, that Brazil was among the last Latin American countries to liberalize. See Progress of Policy Reform, *supra* note 26, at 26.

²⁶ US Library of Congress, *Country Studies – Brazil*, available at <http://countrystudies.us/brazil/80.htm>.

²⁷ Monica Hirst, *The United States and Brazil: A Long Road of Unmet Expectations* 2005, at 20. See also Andrew Hurrell, "The United States and Brazil: Comparative Reflections," in Hirst, *supra* note..., at 74 (Brazil "moved toward economic liberalization,; but the process of economic reform domestically remained more complex and checkered than elsewhere").

adjustment policies” as loan “conditions.”²⁹ Moreover, as other Latin American countries liberalized their economies, Brazil, competing with them for investment and foreign market access, followed suit.³⁰

The United States offered not only carrots in the form of facilitating new loans, but also wielded sticks in the form of trade sanctions. For example, during the 1980s and early 1990s, the Office of the United States Trade Representative (USTR) targeted Brazil’s trade, industrial and intellectual property policies six times under Section 301 of the 1974 US Trade Act.³¹ In 1989, the USTR wielded what was known as “Super 301” against Brazil, designating Brazil’s import licensing regime as a “priority practice,” together with practices of India and Japan.³² The US filed a GATT complaint that it settled when Brazil agreed to relax its import restrictions as part of a general liberalization initiative under the Collor government.³³ The USTR again initiated a section 301 investigation of Brazil’s intellectual property policies in May 1993, which it terminated in February 1994 in light of the creation of the WTO and the new Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPs”), as well as alleged Brazilian assurances.³⁴

²⁸ Winston Fritsch & Gustavo Franco, “Brazil and the World Economy in the 1990s,” in Winston Fritsch, ed. *Latin America’s Integration into the World Economy* (1991), at 9.

²⁹ See e.g. Robert Gilpin, *Global Political Economy: Understanding the International Economic Order* 270 (2002) (noting that “in November [1998] the IMF offered Brazil a large assistance package of over \$40 billion and attached a precondition that the Brazilian economy be significantly revamped”).

³⁰ See Marcelo de Paiva Abreu, “Trade liberalization and the political economy of protection in Brazil since 1987”, *INTAL-ITD Working Paper- SITI – 08*, April 2004, p. 8. Special emphasis given to Brazil’s competition with Argentina, Chile and Mexico.

³¹ Under section 301, the USTR would “investigate” foreign practices to determine if they were in violation of an “international legal right” or “unreasonable” (as defined by the statute), following which the United States could apply (or threaten to apply) a variety of trade sanctions. In 1982, for example, the US footwear trade association and unions filed a petition to the USTR challenging import practices of a number of countries, including Brazil’s import licensing system. In a settlement, Brazil agreed to lift a number of restrictions on footwear, “at least temporarily.” The United States Trade Representative (USTR) found that Brazil had a strong defense at the time on balance of payments grounds on account of the debt crisis and did not pursue the case before GATT, although Brazil nonetheless lifted some restrictions. See Thomas Bayard & Kimberly Ann Elliott, *Reciprocity and Retaliation in US Trade Policy* (1994), at 410-411. In 1985, the USTR self-initiated a Section 301 proceeding to investigate Brazil’s industrial policies to develop an informatics industry, including Brazil’s policy on software copyright protection. On Brazil’s industrial policy toward developing an informatics industry, see Peter Evans, “State, Capital, and the Transformation of Dependence: The Brazilian Computer case,” 14: 7 *World Development* (1986); and Peter Evans, “Declining Hegemony and Assertive Industrialization: U.S.-Brazil Conflicts in the Computer Industry,” 43:2 *International Organization* (1989).

³² The Brazilian system had been used to help allocate scarce foreign reserves. Bayard & Elliot, *supra* note.... at 149-164 (noting that the US action was, once again, to the condemnation of many GATT members).

³³ The Collor government also agreed to renounce use of article 18(B) of the GATT which provided special treatment of developing countries when implementing trade restrictions on alleged balance of payment grounds. *Id.*, at 155.

³⁴ The USTR also targeted other key developing countries in its push for the TRIPs Agreement, including Argentina, India, Korea, Thailand, and India. It applied sanctions against Thailand (in 1989) and India (in 1992), as well as Argentina (in 1997), withdrawing tariff benefits under its “General System of Preferences” program. Bayard & Elliott, *supra* note... at 189 and 195. On US strategies, see generally Peter Drahos, *Information Feudalism: Who*

In sum, there was a general shift in trade and development policy in Brazil and throughout Latin America in the 1990s. Although some South American countries have changed course in the 2000s, such as Venezuela and most recently Bolivia, Brazil's government under President Lula has largely retained its general international trade and macroeconomic orientations. Moreover, the liberalization of transnational trade has now been institutionalized through the WTO and its dispute settlement system, as well as through a growing, complex web of bilateral and regional trade agreements, so that, while policies can change, they must do so within changed international and transnational institutional contexts. We now provide an overview of Brazil's experience in trade litigation before the WTO and its GATT predecessor in the context of the intensifying resource demands of the judicialized WTO system (Part II), before turning to the changes within the Brazilian state that have occurred to mobilize capacity in response to these international institutional developments (Part III).

II. Brazil in GATT and WTO Dispute Settlement: The Challenges Posed

1. Brazil during the GATT Years: An Overview.

Brazil was one of the twenty-three original GATT contracting parties³⁵ Although it was not a frequent user of GATT dispute settlement in the early years, Brazil became more active as the GATT system itself became more judicialized in the 1980s.³⁶ In particular, Brazil was active during the last years of the Uruguay Round negotiations. It filed sixteen complaints during the nearly forty-eight years that it was a member of the GATT, with twelve of them being initiated during the Uruguay Round negotiations (1986-1994). It was a respondent in six cases during these forty-eight years.³⁷ Overall, and in particular on account of its activity during the Uruguay Round negotiations, Brazil was the fifth most active user of the GATT dispute settlement system.³⁸

Owns the Knowledge Economy 86 (2002); Susan Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (2003) and *Power and Ideas: North-South Politics of Intellectual Property and Antitrust* (1998); and Michael Ryan, *Knowledge Diplomacy: Global Competition and the Politics of Intellectual Property* (Brookings Institution Press: 1998).

³⁵ Brazil formally joined the GATT on July 30, 1948.

³⁶ According to a Brazilian government source, Brazil always identified dispute settlement as an important issue, although it placed more attention on negotiations in the early years. Seven rounds of negotiations were completed between 1949 and 1979. Interviews with Brazilian foreign officials of the Brazilian Mission in Geneva, September 20-24, 2006.

³⁷ See Appendix (Brazil in the GATT Dispute Settlement System).

³⁸ From data base of Eric Reinhardt and Marc Busch, provided to us, and confirmed in email from Eric Reinhardt, Nov. 1, 2006. The four most active members during the GATT, were, in order, the United States, EC, Canada and Australia.

During the GATT's early years, Brazil was an infrequent participant in dispute settlement.³⁹ Although it was a respondent in one of the first GATT cases – Brazilian internal taxes – a case brought by France in 1949,⁴⁰ it was not until 1962 that Brazil brought its first complaint, one against the United Kingdom (UK) in response to a proposed tariff that would have increased the margin of preferences on bananas that the UK provided to Commonwealth countries.⁴¹ The UK abandoned its proposed tariff increase a few months after the panel's report. Brazil did not participate again for another fifteen years when it brought a complaint against EC sugar export subsidies in 1978, which resulted in a panel decision against the EC in 1980, but no significant change in EC policy.⁴² Interestingly, these earlier GATT cases refigured cases that were to come before the more judicialized WTO system decades later.⁴³

Brazil significantly increased its use of GATT dispute settlement after the reforms to GATT dispute settlement in 1979 at the end of the "Tokyo round" of trade negotiations, following which the GATT established a specialized legal division within its secretariat, in 1981, to assist the three-member panels that heard GATT complaints.⁴⁴ Brazil initiated seven complaints in the 1980s, four of them between November 1987-August 1988. In 1980, Brazil brought a case against Spain concerning its tariff treatment of unroasted coffee, with the panel finding that Spain's measures were not in conformity with GATT article I, the most-favored-nation clause.⁴⁵ In 1982, Brazil joined eight other sugar producing countries in a second complaint against EC sugar subsidies, with the United States filing separately, which again resulted in no change in EC policy.⁴⁶ In 1986, Brazil brought a complaint against the United

³⁹ See case tables in Robert Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* (1993); and Ernst-Ulrich Petersmann, *The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement* (1997). All cases involving Brazil during the GATT period are listed in Appendix...

⁴⁰ France v Brazil: Internal Taxes, 25 April 1949, GATT/CP.3/SR.9. The working party recommended that Brazil liberalize its discriminatory internal taxes, which Brazil was reported to have done ten years later in 1958.

⁴¹ Brazil v UK: Increase in Margin of Preferences on Bananas, 9 Dec. 1961, SR.19/12.

⁴² Brazil v EC: Refunds on Exports of Sugar, 14 Nov. 1978, L/4722

⁴³ See infra notes... and accompanying texts (re EC-sugar case and EC-bananas arbitration)

⁴⁴ Since the panelists were largely diplomats designated on an ad hoc basis, the GATT secretariat's legal division became a font of knowledge of GATT precedent, working to create a jurisprudence that was more legally rigorous, and less diplomatically-oriented. In this way, the post-1979 reforms were a foretaste of the more intensive judicialization that was to come with the establishment of the WTO and its Appellate Body. See Robert Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* (1993), at 53-57, 137-138 (noting the Agreed Description of Customary Practice, and the Understanding on Dispute Settlement, which respectively "certified that objective third-party adjudication was established GATT practice," and committed to make this practice "more effective in the future," including through "a definition of procedures for creating panels, and some rule-of-thumb time limits for the various phases of the overall procedure"). See Robert Hudec, *Enforcing International Trade Law* (1993), at 42.

⁴⁵ Brazil v Spain: Tariff Treatment of Unroasted Coffee, 29 Feb. 1980, L/4948. Spain then equalized the tariff rates for all coffee. See Hudec, *Enforcing Trade Law*, supra note..., at 484.

⁴⁶ Argentina et al. v EC: Sugar Regime, 8 April 1982, L/5309.

States in response to a tariff increase and production subsidies for non-beverage ethyl alcohol, but did not pursue it, allegedly because of a shortage of relevant Brazilian exports.⁴⁷

Brazil brought two complaints in response to US unilateral trade retaliation pursuant to Section 301 of the US 1974 Trade Act. In 1987, Brazil initiated a GATT complaint in response to US threats “to impose retaliatory tariff increases on \$700 million of Brazilian exports” because of Brazilian restrictions affecting the informatics sector. The case was settled after Brazil agreed to a number of legislative and administrative changes.⁴⁸ In 1988, Brazil filed a complaint in response to US retaliatory tariffs of US\$ 39 million in a Section 301 case concerning pharmaceutical patent protection. It too was settled, this time in the context of the WTO’s creation and Brazil’s agreement to be bound by the TRIPs agreement.⁴⁹

Brazil also brought complaints against the United States for violation of most-favored-nation treatment in US countervailing duty proceedings involving rubber footwear (which it followed with a similar complaint in 1992),⁵⁰ and for an export subsidy program benefiting soybean oil.⁵¹ The panel decided against Brazil in one case, and Brazil did not request the formation of a panel in the other. The United States, in turn, brought two complaints against Brazil during the decade, one in 1983 against Brazilian export subsidies on poultry,⁵² and the other in 1989 against the Brazilian import licensing regime following the Super 301 listing, both of which were settled.⁵³

In the first half of the 1990s (before the WTO’s creation), Brazil brought seven more cases and was a respondent in one, four of them resulting in a panel report. Five of the seven complaints brought by Brazil were again against the United States and EC. They were:

⁴⁷ Brazil v United States: Measures on Imports of Non-Beverage Ethyl Alcohol, 13 My1986, L/5993. See Hudec, *Enforcing International Trade Law*, supra note..., at 530.

⁴⁸ Brazil v United States: Tariff Increase and Import Prohibition on Brazilian Products [Informatics Dispute], 27 Nov. 1987, L/6274. See discussion in Hudec, *Enforcing International Trade Law*, supra note..., at 552-553; and supra note..., [concerning the section 301 investigation].

⁴⁹ Brazil v United States: Import Restrictions on Certain Products from Brazil [“Pharmaceuticals Retaliation”], 31 August 1988, SCM/89. See discussion of the 301 case supra note...

⁵⁰ Brazil v United States: Collection of Countervailing Duty on Non-Rubber Footwear, 31 May 1988, SCM/M/38. See Hudec, *Enforcing*, at 565-566. The panel found against Brazil, but Brazil blocked adoption of the report, and a separate GATT panel in a subsequent 1992 Brazilian case against the same countervailing duty order found against the United States. See Brazil v United States:, DS/18/R (10 Jan. 1992). No settlement, however, appears to have been reached to Brazil’s satisfaction. Hudec, at 566.

⁵¹ Brazil v United States: Export Enhancement Program (EEP) Subsidy, 31 August 1988, SCM/89. Brazil, however, never requested formation of a panel.

⁵² United States v Brazil: Subsidies on the Export and Production of Poultry, 27 Sept. 1983, SCM/Spec/19. The US complaint followed a similar one against the EC. The complaints allegedly were settled after the “major exporters reached an understanding about mutual restraint on export subsidies.” Hudec, *Enforcing International Trade Law*, supra note..., at 514.

⁵³ United States v Brazil: Restrictions on Imports of Certain Agricultural and Manufactured Products, 11 Oct. 1990, DS8/1. It was settled when the Collor government significantly liberalized Brazil’s import policies. See supra note...

- a follow-up to the 1988 US countervailing duty case on rubber footwear;⁵⁴
- a complaint against EC antidumping measures involving cotton yarn;⁵⁵
- a complaint concerning US quantitative restrictions on wool suits;⁵⁶
- a complaint against antidumping measures imposed by the US on steel products;⁵⁷
- a complaint against the EC in respect of the concession compensation provided to the US in the oilseeds case;⁵⁸
- and a challenge brought with ten other countries against US internal measures favoring US tobacco.⁵⁹

Brazil brought its two other complaints against Mexico respectively concerning antidumping measures on textiles and electric power transformers, but neither of them resulted in the formation of a panel.⁶⁰ Appendix I contains a complete list of all GATT cases involving Brazil.⁶¹

Although Brazil was relatively active during the last years of the GATT and the run-up to the WTO in terms of filing complaints, many of them did not result in the formation of a panel or, more importantly, any change in the targeted country's policies. In fact, the final result of Brazil's complaints against the US's strategic use of Section 301 in the context of Uruguay Round negotiations actually resulted in significant changes in Brazilian domestic law and practice, which were further constrained by the new WTO TRIPS Agreement and the Agreement on Import Licensing Procedures. Despite the 1979 reforms, Brazil was operating with less certainty under the GATT system, since the US and EC could block a panel's formation or adoption of a panel's findings or simply ignore the ruling. As a result, the GATT complaints involving Brazil did not receive significant public attention in the country, and involved little to no engagement of the private sector, unlike the WTO cases that would follow. Since international trade dispute settlement involves bargaining in the shadow of a complaint or a panel ruling, and since Brazil is in a relatively weak bargaining position against its most frequent adversaries (the US

⁵⁴ United States - Denial of Most-Favoured-Nation Treatment as to Non-Rubber Footwear from Brazil, 19 June 1992, DS18/R - 39S/128. **to confirm**

⁵⁵ EC - Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil, 4 July 1995.

⁵⁶ Brazil v. US – Quantitative restrictions on wool suits (1992).

⁵⁷ Brazil v. US – Antidumping actions on steel products (1992).

⁵⁸ Brazil v. EC – Oilseed concession compensation (1993). **To confirm**

⁵⁹ United States - Measures Affecting the Importation, Internal Sale and Use of Tobacco, 4 October 1994, DS44/R. They challenged the US measures as a violation of GATT article III.

⁶⁰ Brasil v. Mexico – Antidumping proceeding on Brazilian textiles (1992); Brasil v. Mexico – Antidumping actions on electric power transformer (1991).

⁶¹ The only complaint not listed in the text above was the EC complaint brought in 1992 against Brazil under the Subsidies Code in response to Brazilian countervailing duties on milk powder. See Brazil - Imposition of Provisional and Definitive Countervailing Duties on Milk Powder and Certain Types of Milk From the European Economic Community, 27 January 1994, SCM/179.

and EC), Brazil's situation could be enhanced by the WTO's stronger legal system, provided that Brazil was able to mobilize the legal capacity to use it.⁶² As we will see, WTO dispute settlement has gained a much higher profile in Brazilian government, industry, the private bar, and the major media.

2. Overview of Brazilian Dispute Settlement under the WTO.

During the Uruguay Round and throughout most of the GATT period, Brazil supported a stronger dispute settlement system both to help to defend itself against US unilateralism and to secure better access for its exports generally, including through "a more active, prosecutorial role for the GATT Secretariat."⁶³ In the words of Brazil's delegation in 1988, "the dispute settlement procedures are a very important and integral part of the GATT and ... they play a decisive role in securing reciprocity and a proper balance of rights and obligations between contracting parties."⁶⁴ Brazil, however, has also long maintained that developing countries should receive special and differential treatment in dispute settlement. It has stressed, in particular, that a system of remedies based on retaliation favors large developed countries exercising market power. In the negotiations that led to the 1979 GATT reforms, for example, "[t]he Brazilian delegation tabled proposals [for]... stronger remedies for developing country complaints, such as collective retaliation or money damages."⁶⁵ These issues have again been raised by developing countries (although not Brazil) in new proposals in the current review of the WTO Dispute Settlement Understanding (DSU).⁶⁶

⁶² As a diplomat from a mid-sized developed country mission confirms, it is a common error of trade law academics to view WTO judicial opinions as the end of the process. Cases are rather resolved through diplomatic negotiations (and private party bargaining behind-the-scenes) that take place in the context of the judicial decision. The judicial decision simply serves to help the parties resolve their dispute. In his words, "the end game... ultimately involves negotiation informed by dispute settlement." Interview of Shaffer, Geneva, June 24, 2002.

⁶³ See Robert Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* (1993), at 42 (also citing similar proposals made in 1966).

⁶⁴ BRAZIL, Communication from Brazil at the Negotiating Group on Dispute Settlement, MTN.GNG/NG13/W/24, available at <http://www.worldtradelaw.net/history/urdsu/w24.pdf>.

⁶⁵ In the 1970s, Brazil supported procedural changes that would specifically benefit developing countries. See Robert Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* (1993), at 42 (also citing similar proposals made in 1966).

⁶⁶ See e.g. proposals of- **add references to relevant dsu review proposals**..... The 1994 Morocco Ministerial Decision stated that dispute settlement rules should be reviewed by 1 January 1999. The review started in the Dispute Settlement Body in 1997, the deadline was then extended to 31 July 1999, but even so, no agreement was reached. In November 2001, at the Doha Ministerial Conference, Members agreed to negotiate with the aim to improve and clarify the Dispute Settlement Understanding, and since then those negotiations have been occurring in special sessions of the Dispute Settlement Body (DSB). For detailed information, see http://www.wto.org/english/docs_e/legal_e/53-ddsu.pdf. See also *Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes*, adopted by the Trade Negotiations Committee, December 15, 1993.

Brazil became one of the first users of the WTO dispute settlement system both as a complainant (WT/DS4)⁶⁷ and respondent (WT/DS22).⁶⁸ Although Brazil's litigation approaches in these two cases did not involve significant coordination with the private sector, and were largely similar to those used under the GATT,⁶⁹ Brazil's Foreign Affairs Ministry was nonetheless able to quickly gain experience regarding the procedural changes under the WTO Dispute Settlement Understanding, involving tight timelines and appellate review. In January and April 1995, Venezuela and Brazil brought complaints against the United States regarding its differential requirements for domestic and foreign reformulated and conventional gasoline (WT/DS4), resulting in the adoption of an Appellate Body decision in favor of the complainants in May 1996. The case involved a prototypical national treatment complaint (GATT article III) and an article XX defense on alleged environmental grounds.⁷⁰ Also in the WTO's first year (December 1995), Brazil was a defendant in a case brought by the Philippines concerning measures affecting desiccated coconuts (WT/DS22). The case again went through the appellate process and Brazil emerged victorious, although on the technical grounds that the measure was not covered by the new WTO regime, but rather by the former GATT.⁷¹

While these two early experiences were important, it was in the end of 1996 and start of 1997 that Brazil faced a controversy that was to receive widespread attention in Brazilian internal politics, the private sector and the media and that was to change the government's approach to WTO dispute settlement. The case was brought by Canada concerning Brazil's subsidization of the Brazilian aircraft manufacturer Embraer in response to the petition of Embraer's Canadian rival, Bombardier (WT/DS46). The Brazilian government soon followed suit with its own case against Canada on behalf of Embraer (WT/DS70), resulting in a complex series of decisions in which both Brazil and Canada were found to have violated provisions of the WTO agreement on subsidies.⁷² These parallel cases brought WTO

⁶⁷ United States - Standards for Reformulated and Conventional Gasoline (Complainant: Brazil).

⁶⁸ Brazil — *Measures Affecting Desiccated Coconut* (Complainant: Philippines).

⁶⁹ **Gcs to check with D.P. and others**

⁷⁰ The Appellate Body upheld the panel's result but reversed it on its reasoning, indicating how the article XX exception is to be applied in the future. One single report was issued respectively by the Panel and by the Appellate Body for these complaints, WT/DS4 (Brazil) and WT/DS2 (Venezuela). See Report of the Panel, United States - Standards for Reformulated and Conventional Gasoline - WT/DS2/R, January 29, 1996; and Report of the Appellate Body, United States - Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, April 29, 1996.

⁷¹ WT/DS22/R, Brazil - Measures Affecting Desiccated Coconut - Report of the Panel, October 17, 1996; WT/DS22/AB/R, Brazil - Measures Affecting Desiccated Coconut - Report of the Appellate Body, February 21, 1997.

⁷² The Canada-Brazil, Bombardier-Embraer cases were complex, involving the panoply of WTO procedures, including requests and authorizations for retaliation on account of non-compliance with the ruling. The first complaint was filed in 1996 and the most recent decision was issued in 2003, although the case could flare up again. The main decisions ensuing from the initial complaints (WT/DS46 and WT/DS70) were: WT/DS46, Brazil - Export Financing Programme for Aircraft - Report of the Panel, April 14, 1999; WT/DS46/AB/R, Brazil - Export Financing

proceedings to the broader Brazilian public opinion for the first time.⁷³

The challenge against Brazil's subsidization of Embraer was symbolically important for Brazil's identity as an emerging economic power. Not only is Embraer among the largest companies and largest exporters in Brazil, Embraer's economic success supports Brazil's claim that it can compete in international markets in high tech and high value-added sectors— in this case, jet aircraft for commercial, corporate and military use. Embraer was created as a government owned enterprise in 1969, aiming to become the domestic supplier to the Brazilian Air Force during Brazil's military rule, but it was privatized in December 1994 as part of the liberalization of Brazil's economy after the country's return to democratic government.⁷⁴

Interestingly, it was after being placed on the defensive in an important WTO case that Brazil developed new dispute settlement strategies that we examine in Parts III and IV, which led to its most highly touted successes in WTO litigation. 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. In total, Brazil participated in 75 of the 343 cases

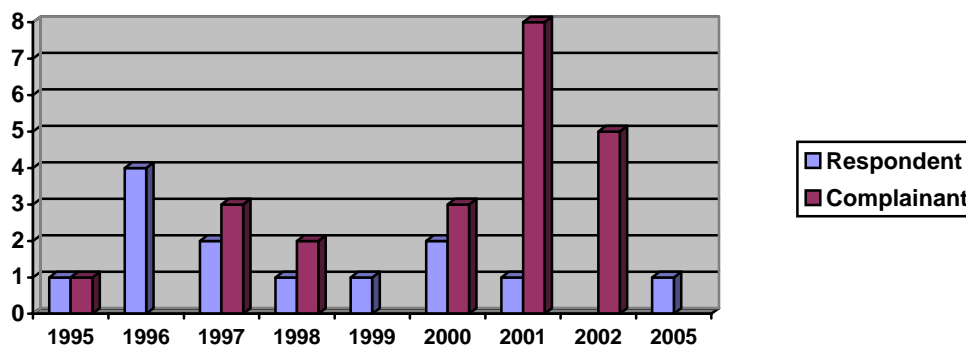
Programme for Aircraft - Report of the Appellate Body, August 2, 1999; WT/DS46/RW, Brazil - Export Financing Programme for Aircraft - Recourse by Canada to Article 21.5 of the DSU - Report of the Panel, May 9, 2000; WT/DS46/ARB, Brazil - Export Financing Programme for Aircraft - Recourse to Arbitration by Brazil under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement - Decision by the Arbitrators, August 28, 2000; WT/DS46/AB/R, Brazil - Export Financing Programme for Aircraft Recourse by Canada to Article 21.5 of the DSU - Report of the Appellate Body, July 21, 2001; WT/DS46/RW/2, Brazil - Export Financing Programme for Aircraft - Second Recourse by Canada to Article 21.5 of the DSU - Report of the Panel, July 26, 2001. WT/DS70/R, Canada - Measures Affecting the Export of Civilian Aircraft - Report of the Panel, April 14, 1999; WT/DS70/AB/R, Canada - Measures Affecting the Export of Civilian Aircraft - AB-1999-2 - Report of the Appellate Body, August 2, 1999; WT/DS70/RW, Canada - Measures Affecting the Export of Civilian Aircraft - Recourse by Brazil to Article 21.5 of the DSU - Report of the Panel, May 9, 2000; WT/DS70/AB/RW, Canada - Measures Affecting the Export of Civilian Aircraft - Recourse by Brazil to Article 21.5 of the DSU - AB-2000-4 - Report of the Appellate Body, July 21, 2000. The following decisions for complaint WT/DS222 are also related to this dispute, WT/DS222/R, Canada - Export Credits and Loan Guarantees for Regional Aircraft - Report of the Panel, January 22, 2002; WT/DS222/ARB, Canada - Export Credits and Loan Guarantees for Regional Aircraft - Recourse by Canada to Article 22.6 of the DSU and Article 4.11 of the SCM Agreement - Decision by the Arbitrator, February 17, 2003.

⁷³ See e.g., EXAME, "OMC autoriza sanções do Brasil contra o Canadá, 24/12/2002, FOLHA DE SÃO PAULO, "Embraer festeja decisão da OMC contra Canadá", 23/12/2002.

⁷⁴ Embraer's shares were first listed in the Sao Paulo stock market in 2000 and are now also quoted on the New York stock exchange. Since its privatization, due to private investment, new managerial strategy and alliances, and with government credit support (which Canada challenged), Embraer became the largest Brazilian exporter in 1999 and 2001, the second largest in 2002 (after Petrobrás) and the third in 2004 (after Petrobrás and Companhia Vale do Rio Doce). See Embraer website, <http://www.embraer.com.br/portugues/content/empresa/profile.asp> (September 2005) and Agência Brasil, "Petrobras é a maior exportadora do país", available at http://www.idbrasil.gov.br/noticias/News_Item.2004-01-27.3216. In the market for 30-120 seat commercial jet aircraft, its share of the global market has risen. Transportation consultant Ray Jawarowski, of Forecast International estimates that over the next decade, Embraer will produce 1,426 regional jets, resulting in a 38.8 percent global share of the regional jet market, while Bombardier will make 1,210, constituting a 32.5 percent share. Raymond Jaworowski, "Regionals Faring Better Than the Majors", press release, Financial Post, September 1, 2004.

filed before the WTO through May 2006, as complainant, respondent or third party, constituting a 22% participation rate.⁷⁵ Similarly, it has been a complainant in eleven, a respondent in two, and a third party in thirty, of the 105 cases that have resulted in an adopted WTO report, again constituting about a 22% participation rate.⁷⁶ Figure A depicts Brazilian participation as a complainant and respondent on an annual basis, based on the date that the complaint was filed.

Figure A: Brazil as a party in WTO cases



Source: Authors, as per the WTO database. This chart notes the date of filing of the case, and not of the adoption of the ruling by the WTO Dispute Settlement Body, which typically occurs about a year or year and a half after filing, depending on the complexity of the case and whether the panel decision was appealed.

After the Embraer case, Brazil filed a flurry of complaints from 2000-2002, and was actually the most active WTO complainant in 2001. Many of these cases were particularly factually and legally complex, such as the US-cotton and the EC-sugar cases. Although the chart suggests that Brazil was less active between 2003-2005, it was in fact litigating the cases that it had filed earlier. In addition, Brazil became increasingly engaged in the Doha round of negotiations, which appears to have caused a decline in overall WTO dispute settlement activity during these years.⁷⁷

⁷⁵ This information was obtained from the WTO website and Itamaraty

⁷⁶ Some of the cases in which Brazil is involved were still in consultations or before a panel in May 2006. See details in Appendix... For the adopted reports, see <http://www.worldtradelaw.net> database (May 2006).

⁷⁷ Figures on data concerning the flow of cases by all WTO Members are available at <http://www.worldtradelaw.net> (May 2006).

Of the twenty-two complaints filed by Brazil, ten were settled during consultations,⁷⁸ and twelve resulted in panel decisions, eight of which were appealed. The foreign affairs ministry, Itamaraty, reports that all panel and Appellate Body decisions ruled, in whole or in part, in Brazil's favor. This statement is generally correct, with the exception that Brazil clearly lost the case brought by Canada against its subsidization of Embraer.⁷⁹ Nineteen of Brazil's complaints involved specific sectors, the most important being agricultural products (8), steel products (5) and vehicles (aircraft and bus, 4).⁸⁰ The remaining two of the twenty-two complaints were of a more systemic character, although the antidumping case against the US (against the Byrd amendment's provision for distributing antidumping duties to the petitioning US industry) directly implicated the steel industry.⁸¹ Brazil was a respondent in thirteen cases, but only three of these resulted in the establishment of a panel.⁸² Most of them (9) concerned Brazilian regulatory measures affecting specific product sectors, as opposed to systemic cases. Appendix ... lists all cases in

⁷⁸ Of the 10 claims concluded during consultations stage, only two had the mutually agreed solution communicated to the DSB, other two were suspended by Brazil (both related to measures against steel products exported by Brazil), four of them lost their issue (most of them had the measures of concern suspended), and, finally, as per Itamaraty's information the remaining two were settled by mutual agreement. See Appendix... in order to identify the cases. Itamaraty's information may be found in the public report available at http://www.mre.gov.br/portugues/ministerio/sitios_secretaria/cgc/contenciosos.doc (May 2006).

⁷⁹ As per Itamaraty's report on Brazil's cases at the WTO/DSS, available at http://www.mre.gov.br/portugues/ministerio/sitios_secretaria/cgc/contenciosos.doc (May 2006). The two Canadian complaints are, however, arguably the only two cases that Brazil has lost, and it won its first reciprocal claim against Canada's subsidization of Bombardier. Thus, in the Embraer-Bombardier aircraft subsidy dispute, Brazil and Canada were each found to have failed to comply with the provisions of the WTO Agreement on Subsidies and Countervailing Measures.

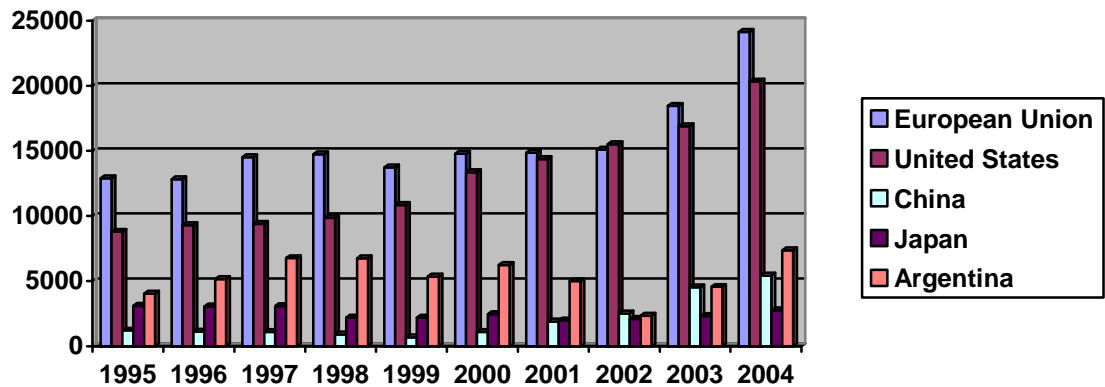
⁸⁰ Agricultural products: WT/DS 269, European Communities - Customs classification of frozen boneless chicken; WT/DS267, United States - Subsidies on upland Cotton; WT/DS266, European Communities - Export subsidies on sugar; WT/DS250, United States - Equalizing excise tax imposed by Florida on processed orange and grapefruit Products; WT/DS241, Argentina - Definitive Anti-Dumping Duties on Poultry from Brazil; WT/DS209, European Communities - Measures affecting soluble coffee; WT/DS154, European Communities - Measures affecting differential and favourable treatment of coffee; WT/DS69, European Communities - Measures affecting importation of certain poultry products. Steel products: WT/DS259, United States - Definitive safeguard measures on imports of certain steel products; WT/DS219, European Communities - Anti-dumping duties on malleable cast iron tube or pipe fittings from Brazil; WT/DS218, United States - Countervailing duties on certain carbon steel products from Brazil; WT/DS208, Turkey - Anti-dumping duty on steel and iron pipe fittings. Vehicles: WT/DS222, Canada - Export credits & loan guarantees for regional aircraft; WT/DS112, Peru - Countervailing duty investigation against imports of buses from Brazil; WT/DS71, Canada - Measures affecting the export of civilian aircraft; WT/DS70, Canada - Measures affecting the export of civilian aircraft. The cases related to other economic sectors are: WT/DS216, Mexico - Provisional anti-dumping measure on electric transformers; WT/DS190, Argentina - Transitional safeguard measures on certain imports of woven fabrics of cotton and cotton mixtures originating in Brazil; WT/DS4, United States - Standards for reformulated and conventional gasoline. For details, see Appendix ...

⁸¹ See WT/DS239, United States - Certain Measures Regarding Anti-Dumping Methodology; WT/DS217, United States - Continued Dumping & Subsidy Offset Act of 2000. The third case, WT/DS224, United States - US Patents Code, was a tit-for-tat maneuver in response to a US challenge to the compulsory licensing provisions in Brazil's pharmaceutical patent law, in which both complaints were dropped as part of a settlement, as discussed below. For details on each case, see Appendix...

which Brazil has participated in the WTO dispute settlement system, indicating the status of the case, the products covered, the industry affected, and any private law firms used.

Brazil’s use of the dispute settlement system roughly reflected its trade flows, and thus primarily involved cases against the WTO most powerful members, the US and EC. Brazil’s main trading partners for imports and exports, during the last ten years, were the following:

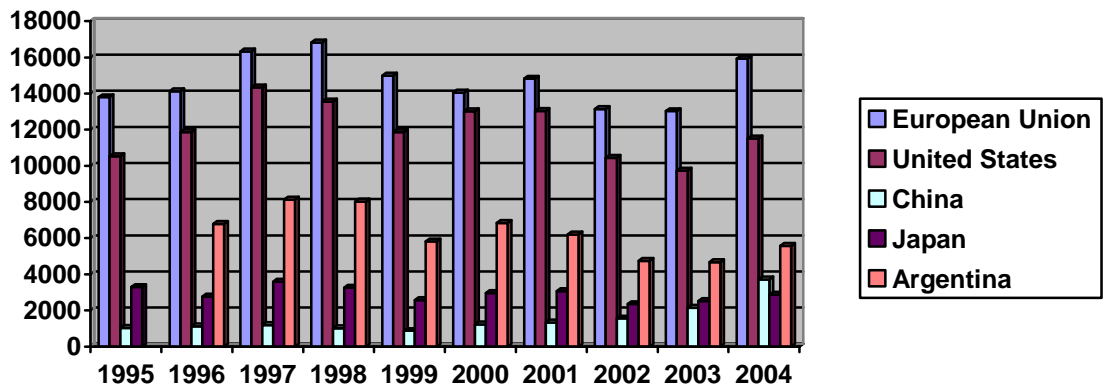
Figure B: Brazil exports to (in US\$ mi)



Sources: Brazilian Central Bank and the Ministry of Development, Industry and Trade. The stark decline in Brazil’s exports to Argentina in 2001 and 2002 is possibly a result of the Argentine financial crisis that swept the country in late 2001, triggering bank runs and rioting.

⁸² Consultations under the cases (WT/DS332- *European Communities – Customs classification of frozen boneless chicken*) started in June 2005.

Figure C: Brazil imports from (in US\$ mi)



Sources: Brazilian Central Bank and the Ministry of Development, Industry and Trade.

Correspondingly, around 36% of Brazil's complaints were against the US, and around 22% against the EC, constituting, in total, 58% of its complaints.

Figure D: Number of claims at WTO/DSS (1995-2005)

| WTO Member | Brazilian complaints (country) | Complaints against Brazil (country) |
|------------|---|--|
| US | 8 | 4 |
| EC | 6 | 4 |
| Canada | 3 | 1 |
| Other | 2 Argentina 1 Mexico 1 Peru 1 Turkey | 1 India 1 Japan 1 Sri Lanka 1 Philippines |

Source: Authors, based on WTO database at <<http://docsonline.wto.org>> (August 2005).

WTO members can also participate as a third party in WTO dispute settlement. They do so primarily where they have only a systemic interest in a case, although some smaller and poorer countries may do so because they lack the resources to bring a case on their own. Brazil has been the 7th most active participant as a third party in WTO cases, filing 38 times, following the EC (69), Japan (69), US (62), Canada (57) and India (46), although China has been proportionally more active as a third party since it

joined in December 2001.⁸³ Most of the cases in which Brazil requested third party rights related to agricultural and steel products (around 19 of the 38 cases). In 13 of these cases, Brazil filed its own separate, parallel complaint (as per Figure E below),⁸⁴ so that it has acted solely as a third party in 25 cases. Only four of these parallel cases gave rise to separate adopted decisions.⁸⁵ Figure E lists the cases in which Brazil was a complainant and participated as a third party in a parallel case. Appendix... sets forth a list of all cases in which Brazil has participated as a third party, including the issues raised, and, where applicable, the specific sector affected and any private law firms used.

Figure E: List of parallel cases in which Brazil was a complainant and third party

| Issue | Brazil as a party | Brazil as a third party |
|------------------|--------------------|--|
| Boneless chicken | DS269 (Brazil/EC) | DS286 (Thailand/EC) |
| Sugar | DS266 (Brazil/EC) | DS283 (Thailand/EC)/ DS265 (Australia/EC) |
| Steel | DS259 (Brazil/US)* | DS248 (EC/US)/ DS249 (Japan/US)/ DS251 (Korea/US)/ DS252 (China/US)/ DS253 (Switzerland/US)/ DS254 (Norway/US)/ DS258 (New Zealand/US)* |
| AD Methodology | DS239 (Brazil/US) | DS244 (Japan/US) |
| CVD | DS218 (Brazil/US) | DS212 (EC/US) |
| Byrd Amendment | DS217 (Brazil/US) | DS234 (Canada/US) |

Source: Authors, based on WTO database at <<http://docsonline.wto.org>> (August 2005).

* One single report was issued for all cases by the Panel and the AB.

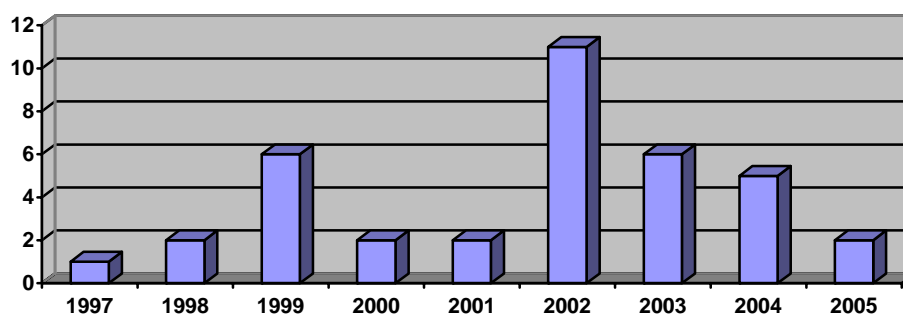
Brazil's participation as a third party also declined in the last three years, in reflection of the general decline in WTO dispute settlement as the Doha Round negotiations intensified, as the following chart shows:

⁸³ These figures are as of.... [Michelle, please add a date]. See each Member's page at WTO website (http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) for details of that Member's involvement in disputes as a third party.

⁸⁴ For additional information on the cross-references and the details of each case, see Appendix ... and

⁸⁵ Members normally participate as a third party in cases filed in parallel to their own in order to obtain information from the other's case, including the legal and factual arguments used. The four cases are: WT/DS286, WT/DS244, WT/DS234, and WT/DS212. Details in Appendix....

Figure F: Brazil as third party in DSS cases⁸⁶



Source: Authors, based on **Appendix xxx**.

Overall, since the WTO's creation (from 1995-2004), Brazil has been a complainant in twenty-two, a respondent in thirteen, and a third party in thirty-eight cases,⁸⁷ making it the fourth most active complainant after the US, European Communities (EC) and Canada.⁸⁸ Brazil has largely prevailed in each of its complaints, and the settlements that it obtained have been largely to its satisfaction.⁸⁹ Brazil's relatively active use and success in WTO dispute settlement is noteworthy in light of the significant challenges posed by the WTO's legalized and judicialized system, and in particular for developing

⁸⁶ See note __ above concerning statistics on Brazil's requests for third party rights. The cases are apportioned in the chart according to the year Brazil filed its request to participate as third party.

⁸⁷ The list of cases is in Appendix ... which reflects information found in documents accessible to the broad public and checked in interviews with Brazilian foreign ministry representatives. The WTO webpage for Brazil (http://www.wto.org/english/thewto_e/countries_e/brazil_e.htm, May 2006) lists 38 cases in which Brazil requested third party rights. This calculation includes participation in the *WT/DS89 - United States- anti-dumping duties on imports of colour television receivers from Korea*, but no evidence of participation in *WT/DS89* was found by the authors. The WTO web site also does not consider Brazil's participation in *WT/DS27/RW/ECU - EC - Regime for the Importation, Sale and Distribution of Bananas*, nor the latest request for consultations in *WT/DS324 - United States - Provisional Anti-Dumping Measures on Shrimp from Thailand*. In contrast, the Brazilian Foreign Ministry lists 17 cases in which Brazil was third party (http://www.mre.gov.br/portugues/ministerio/sitios_secretaria/cgc/contenciosos.doc, May 2006). In this incomplete list, it adds Brazil's participation as third party in the *WT/DS56 - Argentina - measures affecting imports of footwear, textiles, apparel and other items*. However, no evidence of such participation was found. Thus, these two further references are not reflected in the numbers noted above.

⁸⁸ According to the World Trade Law database, available for registered users at <http://www.worldtradelaw.net> (August 2005). It is worth noting that Brazil holds the fourth position following Canada as the third- both being parties in around thirty/forty cases - with a large gap separating them from the two most active members, the US and EC with more than a hundred cases each (US, 169 cases; EC 123).

⁸⁹ In the 22 cases Brazil acted as a complainant, the Dispute Settlement Body approved recommendations in favor of Brazil in the 11 cases that resulted in an adopted ruling. The government maintains that it obtained positive results in 17 of these cases. In the 13 cases where Brazil was a defendant, it was found to be in non-compliance in only one of the cases that resulted in an adopted ruling (the first Canada-Aircraft case).. See the conclusions of the Brazilian Foreign Ministry available at (http://www.mre.gov.br/portugues/ministerio/sitios_secretaria/cgc/contenciosos.doc (May 2006) and further details in Appendix...

countries, to which we now turn.

3. The Challenges Posed by WTO Dispute Settlement: An Overview.⁹⁰

Most trade law academics and economists look at the outcomes of Brazil's experience in WTO litigation in terms of the legal reasoning of the rulings and their implications, with some pointing to Brazil as an example of how the WTO dispute settlement system works for developing countries.⁹¹ Yet no other developing country has experienced Brazil's relative success, and most have not participated at all. In fact, during the first eleven years, 91 of the WTO's 118 non-OECD members have never filed a complaint before the WTO, and 59 of 118 had not even participated as a third party in the first 95 cases that have resulted in adopted reports.⁹² In this section, we provide an overview of the significant challenges that developing countries face in WTO dispute settlement, before we examine the changes that Brazil's public and private sectors have adopted in response to the legalization and judicialization of the WTO regime, which have facilitated its relative success.

Although developing countries vary significantly in terms of the size of their economies and the role of law and legal institutions in their domestic systems, they generally face three primary challenges if they are to participate effectively in the WTO dispute settlement system. These challenges are: (i) the capacity to organize information concerning trade barriers and opportunities to challenge them, and a relative lack of legal expertise in WTO law, with its common law orientation; (ii) constrained financial resources, including for the hiring of outside legal counsel to effectively use the WTO legal system, which has become increasingly costly; and (iii) fear of political and economic pressure from the United States and EC, undermining their ability to bring WTO claims. We can roughly categorize these challenges as constraints of legal knowledge, financial endowment, and political power, or, more simply, of law, money and politics.⁹³

⁹⁰ This sub-section draws significantly from Gregory Shaffer, "The Challenges of WTO Law, Strategies for Developing Country Adaptation," *World Trade Review* (forthcoming 2006). **Gcs:** check it with item 6 about the remaining challenges to Brazil

⁹¹ **Add cites to work by Bill Davey and others.** Similarly, Pascal Lamy, the WTO Director General speaks of "the increased utilization of the system by developing countries confirms that the multilateral approach protects all Members, not just the large, strong, or rich." Quote from P Lamy in speech in Peru, 31 January 2006, cited in Roderick Abbott, Participation of developing countries in the WTO dispute settlement system in the years 1995-2005, for ECIPE (the European Centre for International Political Economy) (draft on file)..

⁹² These figures are as of December 1, 2005. Using World Bank income criteria, 79 of the WTO's 104 developing country members have not filed a complaint before the WTO, and 61 of 104 have not participated as a third party. In these calculations, all countries other than "high income countries" are designated as "developing." See categories of World Bank County Groups, available at <http://www.worldbank.org/data/countryclass/classgroups.htm>.

⁹³ The focus on these issues results from information provided in an ongoing project of Gregory Shaffer involving over one hundred interviews with key participants in, and observers of, the WTO dispute settlement system in

In order for a WTO member to use the WTO system successfully, it must develop cost-effective mechanisms to perceive injuries to its trading prospects, identify who is responsible, and mobilize resources to bring a legal claim or negotiate a favorable settlement. In the domestic socio-legal literature, these stages of dispute resolution are referred to as “naming, blaming and claiming.”⁹⁴ In the WTO context, a member’s participation in the system will be, in part, a function of its ability to process knowledge of trade injuries, their causes, and their relation to WTO rights. Hiring lawyers to defend WTO claims is of little help if countries lack cost-effective mechanisms to identify and prioritize claims in the first place.⁹⁵ Even where countries become aware of actionable injuries, this awareness will not be transformed into legal claims if, based on experience, officials lack confidence that a claim is worth pursuing in light of high litigation costs, relatively weak remedies, and political risks.

Many developing country missions suffer from a lack of national legal expertise in WTO matters, both within government and in the private bar. Diplomatic postings have generally been filled by non-lawyers.⁹⁶ Most developing countries have only one or two lawyers (if any) to address WTO matters, whether in Geneva or in the home capital.⁹⁷ There may, moreover, be few (or no) private lawyers in the country knowledgeable about WTO law. WTO law, as opposed to traditional “public international law,” has not traditionally been taught in developing countries, although this is changing in some (but by no means most) countries.⁹⁸ Many developing countries have, as a result, become dependent on education at

Geneva, Switzerland, as well as in a number of national capitals. Those interviewed include representatives from over forty developed and developing country missions to the WTO, private lawyers and trade association representatives, over a dozen members of the WTO secretariat, six members of the Advisory Centre on WTO Law, and multiple representatives from the United Nations Conference on Trade and Development (UNCTAD) and other Geneva-based organizations.

⁹⁴ See William Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming and Claiming*, 15 LAW & SOC’Y REV. 631 (1980-81).

⁹⁵ As Hoekman and Kostecki write regarding WTO dispute settlement, “The Advisory Centre on WTO Law focuses only on the ‘downstream’ dimension of enforcement, not on the ‘upstream’ collection of information.” Hoekman B. and M. Kostecki, *The Political Economy of the World Trading System: the WTO and Beyond*, (2nd edition), (Oxford University Press: 2001) pp. 94-95 (also noting that “One option to deal with the information problem is for the private sector to cooperate and to create mechanisms through which data on trade... barriers are collected and analyzed”).

⁹⁶ Of course, there are situations where non-lawyers master WTO legal matters to lead an effective litigation team, as was the case with the former head of Brazil’s unit for WTO dispute settlement, Roberto Azevedo (from 2001-2005). However, this situation is likely atypical.

⁹⁷ As a representative from a Southeast Asian member stated, “I am the only lawyer here. I handle all DSU matters, as well as matters before other WTO committees.” DSU refers to the WTO “Dispute Settlement Understanding.” Interview with official, in Geneva, Switzerland. (Sept. 2002).

⁹⁸ To give just one example, a member of the Ministry of Foreign Relations of Paraguay complained that no course in international trade law was offered in the country as of June 2006, and that no professors were prepared to offer such a course. Discussion with Shaffer, June 21, 2006.

law schools in the United States and Europe to develop local talent, provided that they have the funding to attend these schools, and where they do, that they return home.⁹⁹

In addition, most developing country officials must work in a foreign language in WTO judicial proceedings within this “Anglophone organization.”¹⁰⁰ Although English, French and Spanish are the three official languages of the WTO, English predominates. Even French and Spanish-speaking delegates are at a linguistic disadvantage. As an Argentine representative relates: “It is tiring and time consuming to wait for the translation in hearings. But more relevantly, translation of documents may take ten days, so that panelists turn up without time to read them. This is a disadvantage vis-à-vis documents submitted promptly in English by the defendant. Panelists know where their arguments are headed while they have no clue about ours, and this is a great handicap.”¹⁰¹ Delegates speaking non-official languages are even worse off. Moreover, the common law-oriented legal culture of the WTO dispute settlement system poses a greater challenge for lawyers and diplomats raised in a civil law setting, so that adapting to the WTO’s factually and legally complex jurisprudence is more time-consuming, and thus costly, for them.¹⁰²

A second major challenge that developing countries face is that they have fewer resources to spend on legal assistance to defend their WTO rights. Their government budgets are constrained, often compounded by debt obligations, and there are high opportunity costs to investing in WTO litigation as opposed to other social needs. Compared to larger, wealthier members, developing countries face much higher relative and absolute costs in WTO litigation. The *relative* costs of litigation are much higher for them in relation to the size of their economies and government budgets. Investing in WTO legal expertise thus makes less sense for them in relation to other budgetary needs. In addition, developing countries can face higher *absolute* costs to identify and litigate an individual case unless their representation is partially subsidized, as through use of the Advisory Centre on WTO Law.¹⁰³ Since most developing countries participate less frequently in WTO dispute settlement, they do not benefit from economies of scale. The

⁹⁹ Confirmed in interviews of Shaffer with developing country representatives in Geneva, Switz. (Sept. 2002, February and June 2003).

¹⁰⁰ Interview of Shaffer with Esperanza Duran, Director of the Agency for International Trade Information and Cooperation (AITIC), in Geneva, Switz. (June 20, 2002). AITIC works with least developed organizations from Francophone Africa.

¹⁰¹ Interview cited in Tussie and Delich, Diana Tussie and Valentina Delich, “Dispute settlement between developing countries: Argentina and Chile Price Bans,” in *Managing the Challenges of WTO Participation, 45 Case Studies*, eds. Peter Gallagher, Patrick Low & Andrew Stoler 23, 33 (2005)..They also note the value of English at panel hearings: “sessions could technically be held in any official language; but, after the initial presentations in Spanish led to a member of the panel yawning and dozing off, a decision was taken to switch to English.” Id., at 33.

¹⁰² As WTO case law has taken a common law-orientation based on factually contextualized legal decisions that build from past WTO jurisprudence, the demands on WTO complainants and defendants have generally accumulated.

US and EC, for example, have respectively participated as a party or third party in around 99% and 86% of WTO cases that resulted in an adopted decision.¹⁰⁴ Because of their prior and ongoing litigation experience, the US and EC face fewer start-up costs for an individual case. Put in other words, the US and EC can spread the fixed costs of developing internal legal expertise over more cases than developing countries.

The third major challenge is that developing countries face extra-legal pressure from powerful countries, undermining the goal of objective trade dispute resolution through law.¹⁰⁵ The powerful can exploit power imbalances and rhetorically rationalize their actions in non-power-based terms.¹⁰⁶ There may be little that a small developing country can do to counter threats to withdraw preferential tariff benefits or foreign aid – even food aid – were the country to challenge a trade measure. Such political tactics can undermine developing country faith in the efficacy of the legal system.

In light of these considerable challenges, understanding the steps taken by Brazil in response to the legalization and judicialization of the WTO regime is not just of academic interest. As we see in Part III, Brazil's government and private sector have responded to the challenges posed by the WTO legal system through a series of ad hoc, but interrelated initiatives that are of interest to other WTO members, initiatives to which we now turn.

III. The Transformation of Brazil's Institutional Approach to WTO Matters: the Coordination of the Public and Private Sectors

To respond to the challenges and opportunities of WTO dispute settlement, Brazil has developed what it calls a “three pillar” structure for WTO dispute settlement. The structure consists of a specialized WTO dispute settlement division located in its capital Brasilia (the first pillar), coordination between this

¹⁰³ Regarding the ACWL and its role, see Shaffer, *The Challenges of WTO Dispute Settlement*, supra note..., at ...; as well as the ACWL's web site at http://www.acwl.ch/e/index_e.aspx.

¹⁰⁴ This calculation is based on an update of Tables 6.1 and 7.1 of Shaffer, *Defending Interests*, supra note..., at 132 and 157 (noting 97% and 81% participation rates as of January 17, 2003).

¹⁰⁵ Guzman and Simmons find that statistical evidence concerning the selection of defendants suggests that developing country selection is more likely to be explained by capacity factors than power-based ones. See Andrew Guzman & Beth Simmons, “Power Plays and Capacity Constraints: The Selection of Defendants in WTO Disputes,” *Journal of Legal Studies* (forthcoming 2005). Nonetheless, Shaffer's interviews confirmed that smaller developing countries frequently face political constraints in initiating a WTO complaint.

¹⁰⁶ As Macaulay similarly points out regarding domestic contract disputes, “under bargaining, winning and losing is not necessarily related to ‘legal’ right or wrong; it may be related to the power and resources of the bargainers.” Stewart Macaulay, Lawrence Freidman & John Stookey, *The Legal System in Operation: Highlighting the Importance of Discretion, Bargaining, and “the Law,”* in *LAW & SOCIETY: READINGS ON THE SOCIAL STUDY OF LAW* 160 (Macaulay, Friedman and Stookey, eds., 1995).

unit and Brazil's WTO mission in Geneva (the second pillar), and coordination between both of these entities with Brazil's private sector and law firms hired by it (the third pillar). This coordination aims to defend Brazil's immediate interests in individual WTO cases while facilitating the development of local Brazilian capacity that can supplement constrained governmental resources for time-sensitive, costly WTO disputes. The Ministry of Foreign Affairs created the specialized WTO Dispute Settlement Unit in 2001, which consists of around six professionals based in the capital, Brasilia, who coordinate with Brazil's WTO mission in Geneva, which includes three professionals dedicated (in whole or part) to WTO dispute settlement. This unit works closely with the affected private sector and any outside legal counsel hired by it. As an important part of this third pillar, the Brazilian mission started a program in 2003 to facilitate the training in WTO law and dispute settlement of young attorneys from Brazilian law firms by inviting them as interns to the Brazilian mission in Geneva, supported financially by the law firms. There, they can supplement constrained governmental resources and develop expertise for when they return to Brazil and work with the Brazilian private sector.¹⁰⁷ This mission also included as interns individuals from other government agencies (i.e. other than from the Ministry of Foreign Affairs) and from private business associations. As one Brazilian representative notes, through creating internships in Brazil's mission in Geneva, "we are trying to spread knowledge of the system in order to create a critical mass."¹⁰⁸

The remainder of this section is in three parts. The first section provides a brief chronological introduction to the changes in the Brazilian approach to international trade litigation and dispute settlement; the second, the strategies developed by the Ministry of Foreign Affairs to strengthen governmental capacity; and the third the initiatives taken by private persons and entities to develop their own capacity and collaborate with the government where practicable, resulting in the formation of Brazilian public-private networks for WTO matters, and, in particular, dispute settlement.

3.1. Changes in the Brazilian approach to WTO dispute settlement

Brazilian industry did not organize for foreign trade policy and dedicated little lobbying to it until relatively recently, in part because industry primarily targeted the large internal Brazilian market, and in part because of a corporate culture which viewed external economic affairs as predominantly a

¹⁰⁷ The Brazilian mission was headed at the time by Ambassador Felipe Seixas Correa, Interviews with Brazilian officials and private sector representatives in Sao Paulo, Brasilia, and Geneva, April and June 2004, as part of a project on the Brazilian model for WTO dispute settlement. Confirmed in presentation of Mr. Celso de Tarso Pereira, Brazil's legal representative at ICTSD's seminar on WTO dispute settlement, Feb. 7, 2003 (Geneva).

government matter. This focus on Brazil's internal market reflected Brazil's import substitution industrial strategy discussed above.¹⁰⁹ As Brazil's policies shifted to more open-market and export-oriented alternatives, Brazilian industry and government began to devote more attention to international trade law and practice, exploring strategies to increase exports, retain protection for Brazil's market where desired, and overall, increase economic output.

However noteworthy Brazil's WTO dispute settlement model might be, it was developed in response to events, in large part where Brazil was on the defensive, and not a simple top-down, proactive strategy. Brazil's strategy primarily developed as an outgrowth of the demands it experienced in the Embraer case commenced by Canada. It was this case that first sparked the significant attention now given to WTO dispute settlement in the Brazilian government, the business community, academia and the media. This case was followed by an even more controversial one brought against Brazil that rallied civil society organizations in Brazil and around the world, once more generating significant Brazilian media coverage. In 2000, the United States challenged a Brazilian patent law provision permitting for compulsory licensing at a time when civil society organizations were calling for the provision of lower cost drugs (such as through compulsory licensing) to combat the HIV pandemic and other public health concerns. The US complaint rallied domestic and international NGOs behind the Brazilian government.¹¹⁰ Until these cases, the government had been developing ad hoc, case-by-case strategies to handle WTO cases, and Brazilian industry and civil society had not devoted much attention to the substance of WTO rules. Arguably, Canada's and the United States' challenges to Brazilian industrial and public health policies in the Embraer and patent cases spurred the Brazilian government to devote greater resources to making use of the WTO dispute settlement system offensively.

Over time, the media has played an important role in increasing broader Brazilian public awareness of WTO rules and their impacts on the Brazilian economy and society. Before the Embraer dispute, WTO matters were rarely covered in the Brazilian press. Due to the importance of the Embraer case, two leading newspapers in Brazil decided to base full-time journalists to follow WTO issues in

¹⁰⁸ Discussion with Brazil representative, Feb. 1, 2005, Geneva.

¹⁰⁹ See e.g., the comparative study of the foreign trade policy of selected countries, in which Pedro da Motta Veiga explores the public-private partnership in Brazil for negotiations, evidencing that point-of-view (external economic affairs as governmental matter), IDB –INTAL/ITD/STA, *The trade policy-making process: level one of the two level game: country studies in the Western Hemisphere*, Occasional Paper 13, 2002 <http://www.thedialogue.org/publications/program_reports/trade/trade_policy1.pdf>, May 2006).

¹¹⁰ See, e.g., Tina Rosenberg, "Look at Brazil", *The New York Times*, available at <<http://www.nytimes.com/library/magazine/home/20010128mag-aids.html>>, Nova York, January 28th, 2001 (noting the relatively successful Brazilian strategy to fight the AIDS epidemic, compared to what has transpired in other developing countries).

Geneva.¹¹¹ Today, major Brazilian newspapers report on a regular basis. Even though a number of domestic groups seriously criticize Brazil's foreign trade policy, most commentators have taken pride in Brazil's success in WTO dispute settlement, and, in particular, the cotton and sugar cases brought against the United States and Europe. Extensive positive coverage followed Brazil's 2005 victories in the EC-sugar (WT/DS266), US-cotton (WT/DS267) and EC-poultry (WT/DS269) cases, as well as in the arbitration in the EC-bananas case (WT/DS27).¹¹² The Brazilian media also examined how these cases connected to the negotiations on agriculture in the Doha Round, thus highlighting their potential systemic importance, as Brazil pressed for a ban on all agricultural export subsidies (primarily used by the United States and EC), tighter limits on domestic subsidies, and a significant reduction in agricultural tariffs, particularly in Europe. Brazilian journalists have, as a result, sought further training on WTO matters. A "trade for journalists course" was organized by the São Paulo American Chamber of Commerce (AMCHAM) and the agricultural think tank ICONE. Many journalists have also taken part in trade courses organized by academic institutions, such as those organized at the Getulio Vargas Foundation Law School (DireitoGV), in São Paulo.

In addition, the government, private sector and academia have developed specialized newsletters on international trade matters, largely involving WTO disputes and negotiations. Periodically, the Brazilian mission in Geneva publishes the *Carta de Genebra*, which provides an update on WTO developments, including regarding dispute settlement.¹¹³ Since July 2004, under a partnership with the Geneva-based NGO International Centre on Trade and Sustainable Development (ICTSD), DireitoGV publishes *Pontes-entre comércio e desenvolvimento sustentável*, which is a Portuguese version of ICTSD's *Bridges*, that comes out once per month, with original reporting and analysis by Brazilian academics, practitioners, and civil society representatives.¹¹⁴

As knowledge of the WTO dispute settlement system has spread in Brazil, private parties have sought means to make use of it, whether to obtain greater access to foreign markets, or to defend Brazilian

¹¹¹ The newspapers were *Gazeta* at the time and *O Estado de São Paulo*. Interviews with a Brazilian mission official and one of the journalists bases in Geneva in September 2006.

¹¹² See, for example, EXAME, "OMC anuncia decisão inapelável contra subsídio europeu ao açúcar", 28/04/2005; EXAME, "OMC autoriza Brasil e outros países a retaliarem exportações dos EUA", 31.08.2004, FOLHA DE SÃO PAULO, "Brasil é o quarto país que mais vai à OMC", 18/05/2005. In addition, Welber Barral, for example, writes that "During last August [2004], the most commented news item in Brasilia—and certainly by President Lula's Administration—was the Brazilian victory in two international disputes before the World Trade Organization," the US-cotton and EC-sugar disputes. Welber Barral, "Trade Disputes and the Brazilian Character," *Brazil News*, vol. 5:4, at 1 (Oct. 2004) (published by the Brazil Information Center).

¹¹³ See http://site.mre.gov.br/portugues/links/links/omc/carta_genebra.asp.

¹¹⁴ *Carta de Genebra* is available at <<http://www.mre.gov.br>> (May 2006) and the publication *Pontes - entre comércio e desenvolvimento sustentável* at both <<http://www.edesp.edu.br>> and <<http://www.ictsd.org>> (May 2006) (May 2006).

internal policies. These developments have opened a new niche for private legal and consulting work and academic study, as we examine below. Even though one cannot measure the precise effect of the “three pillar” strategy on Brazil’s success in WTO dispute settlement, there is no doubt that Brazil’s accomplishments have changed the private sector’s approach to external commercial matters, not only regarding dispute settlement, but regarding the determination of national negotiation positions and strategies as well.

3.2. *The First Two Pillars: Reorganizing Government to Respond to WTO Challenges*

The first two pillars of Brazil’s coordinated strategy for WTO dispute settlement involve a specialized WTO dispute settlement division located in its capital Brasilia, and affiliated members of this division in Brazil’s WTO mission in Geneva. This section provides an overview of Brazil’s governmental structure for dispute settlement on international trade matters, including changes implemented in response to the challenges of, and opportunities provided by, the judicialized WTO system.

The Ministry of Foreign Affairs (commonly known as Itamaraty after the palace in which the ministry was located in Rio de Janeiro until 1970) is responsible for advising the President of Brazil on the formulation and implementation of Brazilian foreign policy and for maintaining relations with foreign governments and with international organizations.¹¹⁵ During the almost two centuries since the creation of the Ministry of Foreign Affairs, the Ministry, under the direction of the President, has set and implemented Brazil’s foreign policy, including before international and regional bodies, such as the United Nations, the WTO, the Organization of American States (OAS), and Mercosur.¹¹⁶ The Foreign Ministry is divided into secretariats (*sub-secretarias*), which in turn are split into departments (*departamentos*) and units (*coordenações*), together with separate co-coordinating, advisory and support bodies, such as the Rio Branco Institute (*Instituto Rio Branco*) responsible for the selection and training of diplomats. The Foreign Ministry comprises the Department of State, operating within Brazil, and the Overseas Departments, which consist of the Multilateral and Bilateral Diplomatic Missions and the Career Consular Departments. As Brazil’s foreign policy priorities have changed, the Ministry has

¹¹⁵ The formulation and implementation of Brazilian foreign policy is to be done by the President (Article 84.VIII of the Brazilian Federal Constitution dated as of 1988), normally represented by the Foreign Ministry (Decree N. 99.578/90 and the Provisional Measure N. 813/95). The Brazilian Congress has the power only to approve or disapprove, in whole or part, the commitments undertaken by the Executive Branch (Article 49.I of the Brazilian Federal Constitution). In the case of dispute settlement, the Congress does not play any formal role.

¹¹⁶ Mercosur is the Mercado Commun del Cono Sur. In 1991 Brazil signed the Asuncion Treaty for the establishment of Mercosur, and in 1994 the Ouro Preto Protocol for the establishment of Mercosur’s institutional structure, including its secretariat, and the parties’ commitment to pursue a common market for Mercosur’s four

adapted its organizational structure, and diplomatic activities to the challenges posed. Since the Brazilian economy began to liberalize and integrate regionally and globally at the end of the 1980's, Itamaraty restructured itself in order to meet the needs of the new Brazilian foreign policy.¹¹⁷

Since the end of the 1990's, the Ministry has granted increasing importance to WTO issues. In fact, three of Brazil's past ambassadors to the GATT and WTO, Luiz Felipe Lampreia, Celso Lafer and Celso Amorim, became the country's foreign minister immediately following their Geneva posting. As a result, for more than ten years, from 1995 to the present, the foreign minister himself has had considerable expertise in WTO affairs. In August 2005, the UnderSecretary General for Matters of Integration, Economics and Foreign Trade in Brazil, Mr. Clodoaldo Hugueneu Filho, became Brazil's new WTO ambassador, maintaining a high level foreign ministry presence in Geneva to address trade issues. In addition, after Mr. Celso Lafer became Brazil's foreign minister, the ministry sent about half of the Brazilian diplomats that graduated in 2001 (around twenty among the forty graduated) to the Brazilian Mission in Geneva for their three-month foreign internship¹¹⁸ These assignments (especially those at the highest level) have helped to provide Brazil's mission in Geneva with key support in the capital. Compared to other developing countries in particular, the ministry has allocated significant resources for handling WTO-related issues, including for dispute settlement.

Until 2001, however, there was only one unit in the Ministry- named the Investment Goods Department - that handled all trade-related matters at Itamaraty, including all major trade negotiations relating to the WTO, the proposed Free Trade Area of the Americas (FTAA),¹¹⁹ EC-Mercosur Free Trade Agreement (FTA), and the Latin American Integration Association (ALADI).¹²⁰ Although the WTO was increasingly becoming an important issue on Brazil's foreign policy agenda, the institutional structure of the state was not yet adapted to address the demands of these negotiations and the increasing number of

members—Argentina, Brazil, Paraguay and Uruguay. In December 2005, Venezuela was accepted as a new member of Mercosur, , officially joining on July 4, 2006..

¹¹⁷ See, Ministério das Relações Exteriores, available at <http://www.mre.gov.br/portugues/ministerio/estrutura/papel/index.asp>.

¹¹⁸ Telephone interview with member of Brazilian mission, Oct. 2006. However, in 2003, a new person took charge of the Rio Branco Institute (for training new diplomats) and once more, graduates were sent to other Latin American countries, reflecting more of a south-south orientation in trade policy.

¹¹⁹ In 1994, the Clinton administration pushed for the creation and institutionalization of Summits of America, bringing together the heads of state from the region to address a wide array of issues, from democratization and human rights to trade and investment. The first Summit of the Americas was held in Miami in December 1994. There the US pushed for the creation of a Free Trade Area of the Americas. Since November 2002, Brazil has been co-chair of the FTAA negotiations, together with the United States, to help coordinate the work program.

¹²⁰ ALADI was created in 1980, replacing the Latin American Free Trade Association, founded in 1960. ALADI aims to foster economic cooperation among its eleven members-- Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Mexico, Paraguay, Peru, Uruguay, and Venezuela, and is less ambitious than its predecessor which sought to create a common market.

complex dispute settlement cases involving Brazil. The Brazilian mission in Geneva, headed by Ambassador Lafer (1995-1998), felt the need for increased support from the capital.

In 2001, after Mr. Lafer returned to Brasília as foreign minister, Itamaraty split the Investment Goods Department into six specialized departments, and allocated more human and budgetary resources to them. WTO matters are now handled within the General Under-Secretariat for Matters of Integration, Economics and Foreign Trade, from which Brazil's current ambassador to the WTO, Mr Hugueney, came. This Under-Secretariat is responsible for overseeing all WTO issues, as well as all trade negotiations other than those involving only Latin America.¹²¹ The Under-Secretariat for Matters of Integration, Economics and Foreign Trade thus handles FTAA negotiations and negotiations for free trade agreements with the EC and other countries, in addition to all WTO matters.

As part of these institutional changes, the Ministry created a unit for dispute settlement within the Under-Secretariat for Matters of Integration, Economics and Foreign Trade in October 2001, named the General Dispute Settlement Unit (*Coordenação Geral de Contenciosos*).¹²² Through this unit, the Ministry aimed to respond more effectively to the growing demands of WTO dispute settlement, as well as to manage disputes within Mercosur and to negotiate dispute settlement chapters in existing and proposed trade agreements, such as the FTAA, EC-Mercosur, and the review of the WTO Dispute Settlement Understanding. From 1999 until 2001, Mr. Roberto Carvalho de Azevêdo was responsible for handling the dispute settlement cases from the Brazilian mission in Geneva (and, in particular, the Embraer case), from where he moved to head the new unit in Brasília, holding this post from 2001 to December 2005. As of June 2006, the unit consists of five professionals in Brasília, led by Mr. Flavio Marega, and three professionals in Geneva (although only one of these Geneva-based diplomats handles dispute settlement on a full-time basis).

The dispute settlement unit is responsible for analyzing the legal and factual grounds for a complainant before the WTO, defining strategies, preparing and, if applicable, overseeing outside lawyer's preparation of, legal submissions, and participating in hearings before WTO panels and the Appellate Body. The unit has so far worked largely on its own at the pre-panel stage. When Brazil is a complainant before a panel, the unit has usually counted on the assistance of a law firm that works for the government but is funded by the affected private sector. However, in a number of cases, the private sector is unwilling to support the costs of outside legal assistance, whether because the case is of a systemic

¹²¹ Inter-Latin American trade negotiations, such as pursuant to Mercosur, the OAS and ALADI, are the responsibility of the Latin American Under-Secretariat.

nature (with no particular private interests affected), or because of the amount of legal costs. As a result, the ministry issued an international call for bids in 2005 in order to hire an international law firm to assist it with trade disputes, as needed. The Ministry maintained that it needed an international law firm for these purposes since it would need the support of practitioners that are familiar with foreign law regimes, and can pursue discovery abroad. In December 2005 the Ministry hired a US law firm, with offices in Europe, to render these services to it. Brazil first used the firm in the EC-tyres complaint (WT/DS332), in which the Brazilian government raised a defense based on environmental and health concerns.¹²³

The unit works in coordination with other governmental departments and the private sector to gather data and analysis in its identification and assessment of potential cases. These cases may be identified by sectoral ministries (e.g. agriculture or commerce), or by private parties. In the cotton and sugar cases, the Ministry of Agriculture together with the affected sector referred the matters to the Ministry of Foreign Affairs, while Embraer referred a claim against Canada directly to the Ministry following Canada's initial WTO complaint against Brazil.

Brazil has created an inter-ministerial process for the investigation, preparation and approval of the filing of a WTO complaint. The unit identifies potential cases based on preliminary information provided to it by the affected private sector or other government officials. The dispute settlement unit then takes this information to the unit within Itamaraty that handles the substantive issues relating to the claim. This unit then provides the information to the relevant Ministry, such as the Ministry of Development, Industry and Trade (for industrial matters) or the Ministry of Agriculture (for agricultural matters), in order for it to pursue a preliminary investigation and collect data. The collected data and information is then taken to the Inter-Ministerial Foreign Trade Chamber known as CAMEX (*Câmara de Comércio Exterior*), one of Brazil's "Government Counseling Chambers" (*Conselho de Governo*). CAMEX consists of around seven Ministers and is responsible for formulating, adopting, implementing and coordinating policies and activities related to foreign trade of goods and services. As regards WTO disputes, it is CAMEX that decides whether Brazil will formally file a request for consultations before the WTO Dispute Settlement Body, whether a Brazilian regulation or practice should be modified if a complaint has been brought against Brazil, and whether a foreign party has implemented a WTO decision in favor of

¹²² The dispute settlement unit was created pursuant to Decree N. 3.959, dated as of October 10, 2001, which regulates the internal organization of the Ministry of Foreign Affairs. This Decree was replaced by Decree N. 4.749, as of June 21, 2003, and then by Decree N. 5.032, as of April 5, 2004. The latter was in force in May 2006.

¹²³ See *infra* note..., and Appendix...The case WT/DS332, *Brazil — Measures Affecting Imports of Retreaded Tyres*, June 20, 2005, brought by the EC, directly affects, two Brazilian industries-- that producing new tyres and that selling and importing used and/or retreaded tyres. The Ministry maintained that the case was of systemic importance, since it implicated environmental and health concerns, and that the defense should not be supported by partial, commercial points-of-views of specific industries.

Brazil, and, if not, what retaliatory measures, if any, Brazil should impose.¹²⁴

Once CAMEX decides that Brazil should file a request for consultations, then the Dispute Settlement Unit assumes responsibility for pursuing the case, even though other ministries and units may continue to provide information, discuss strategies and generally follow the case. In all cases in which Brazil is a complainant, defendant or third party, the unit's officials prepare, or oversee the preparation of, submissions and participate in the hearings before WTO panels and the Appellate Body in Geneva. However, where Brazil participates only as a third party, it is usually the Ministry of Foreign Affairs alone (and not CAMEX) that decides whether to intervene, possibly because the stakes are less high for Brazil in these cases.

The unit also coordinates bilateral settlement negotiations over WTO complaints, which may occur before, during, and/or after the formal DSU proceeding. The unit, where relevant, may organize meetings over the settlement terms with the affected sector and other governmental ministries and units. For example, in the settlement of the US complaint against Brazil's compulsory licensing provisions (DS199), the unit reviewed and discussed the proposed settlement terms with the intellectual property unit within the Ministry of Foreign Affairs, the Ministry of Development, Industry and Commerce, and the Ministry of Health, all three of whose policy domains were implicated by the dispute.

The second pillar consists of the Brazilian mission in Geneva, and, in particular, the three diplomats assigned to follow and report on dispute settlement developments from Geneva, and formally submit all filings. The lead representative in Geneva for dispute settlement typically is responsible for representing Brazil as a third party in those WTO cases in which Brazil participates in this capacity, drafting the submission (subject to review and amendment in Brasilia) and attending the panel and Appellate Body meetings. This representative also attends the bi-monthly meetings of the Dispute Settlement Body, all meetings on the review of the Dispute Settlement Understanding,¹²⁵ and (where relevant) meetings of other WTO bodies in which matters relating to a dispute may be raised, such as the Agriculture Committee for agricultural disputes. The position of this point person can be extremely demanding in light of the number of cases in which Brazil has been a party or third party. For this reason, Itamaraty has periodically assigned some additional personnel to address dispute settlement issues in Geneva, with currently three persons being available at the Geneva mission on a full- or part-time basis for dispute-related matters.

¹²⁴ CAMEX consists of the Minister of Development, Industry and Trade, who presides over it, and the Ministers of Foreign Affairs, Finance, Agriculture, Planning, Budget and Civil House. *See* Decree No. 4.732/2003.

¹²⁵ [See](#) *supra* note... (re DSU review).

3.3. Business, Academia and Civil Society: Supporting the three-pillar model

Until very recently, most knowledge of WTO-related matters in Brazil, from negotiations to dispute settlement, was limited to government representatives. Few law firms or economic consultants dealt with trade issues, except for a few internal antidumping or countervailing duty cases, which were largely viewed as any other domestic legal procedure. A division of the Brazilian Ministry of Development, Industry and Trade handled the investigations, and it allegedly was not very concerned with their relation to international legal constraints, since Brazil's internal administrations were less aware of international trade law than today.¹²⁶

One of this article's central claims is that the judicialization of the international trade regime has spurred the Brazilian state and private sector to reorganize themselves and work more closely together on international trade matters than they have ever done before. Our claim is that the Brazilian state has strengthened its ability to participate at the international level, including through the use of the international legal system for trade, through diffusing expertise.

In the last five years, Brazil has developed what the government calls a "third pillar" for dispute settlement matters, which enhances its ability to assess and respond to trade-related legal matters. This "third pillar" consists of the private sector, which broadly includes business, academia and civil society. Since the WTO's creation, private sector initiatives have deepened knowledge about international trade issues among a broader array of persons, who can be viewed as forming a Brazilian epistemic network, in turn linked to international ones.¹²⁷ This section traces developments in academia, trade associations, think tanks, consultancies and elite law firms in Brazil since 1995.

3.3.1 The role of legal education

Brazilian university departments and course offerings have changed significantly in the last years in response to the phenomenon of "globalization," the opening of the Brazilian economy and the increased focus of Brazilian policy on trade-related matters. Specialized "international relations" schools were not created until the late 1990's. Brazilian Law Schools were not required to have an International Law course until the mid-1990's, and there were few international trade courses offered at Brazilian universities generally. Until the early 2000's, there were few courses on trade law specifically, and there

¹²⁶ Brazil first adopted an antidumping law in 1986, but did not take its first antidumping measures until 1988. It revised its legislation to implement the Uruguay Round Antidumping Agreement in 1995. See Welber Barral and Gilvan Brogini, section on Brazil, in Sweden National Board of Trade, "The Use of Antidumping in Brazil, China, India and South Africa—Rules, Trends and Causes 2005, at http://www.tralac.org/pdf/Antidumping_in_4_Developing_Countries.pdf.

was little to no academic debate on the subject. This lack of attention in academia was both a consequence and a cause of the lack of interest and awareness of the WTO system in Brazil. Business, law firms and the government had little interest in hiring expertise in this area, so that there was no demand for schools to introduce classes. Law Schools offered a few courses in public and private international law, but they were of general coverage and offered little to no introduction to the complexities of trade law. As a result, knowledge of WTO matters outside of a few officials in Itamaraty was extremely limited. A few private practitioners handled occasional antidumping and customs matters, but they did little else involving trade law. While private attorneys often teach law courses as adjuncts in Brazil, they offered almost nothing in trade law since they had little practical knowledge or incentive to develop it.¹²⁸

Since 2000, the situation has changed. As interest in the impact of WTO rules on Brazil increased, the demand for legal education on the subject did as well. As new courses were offered, there was a greater supply of knowledge of WTO law into which the public and private sectors could tap. For example, the Law School of the University of São Paulo (among the most prestigious in Brazil) offered three trade-related law courses in 2000, all of these being optional, upper level courses (for students during the last two years of the five-year undergraduate program). In 2005, in contrast, the university offered two courses focused on WTO matters alone at this level, in addition to four other courses that were trade-related.¹²⁹ One of these WTO courses was required for graduation. Since 1999, Masters and PhD theses in law increasingly focus on trade-related issues,¹³⁰ and students have increasingly formed study groups in this area. In short, we see an increased interest in international economic law, paralleling the increased importance of economic expertise in the Brazilian state.¹³¹

In 2003, the new Law School of Fundação Getulio Vargas (FGV) in São Paulo launched a post-graduate WTO course which, for the first time, brought together trade law professors and practitioners, many of whom had been instrumental in public and private WTO capacity-building initiatives. They

¹²⁷ On epistemic communities, see Peter Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT'L ORG. 1, 3 (1992).

¹²⁸ One exception was Professor Luiz Olavo Baptista, who is a practicing lawyer and a professor, and who now is a member of the WTO Appellate Body.

¹²⁹ See list of courses at the University of São Paulo Law School website, <http://www.direito.usp.br/departamentos/internacional/disciplinas.htm>.

¹³⁰ According to public data, around 20 PhD and masters theses have been written on trade-related matters at the University of São Paulo Law School since 1999 (See <http://dedalus.usp.br>).

¹³¹ Dezalay and Garth, for example, find that economics became the leading expertise in South American states in the 1990s, replacing to some extent, law, although they also note the rise of business law. See e.g. Yves Dezalay and Bryant Garth, *The Internationalization of Palace Wars: Lawyers, Economists and the Contest to Transform Latin American States* 30, 47-51 (2002). Here we likewise find a rise of interest in business law, but here, for the first time, in terms of international trade law.

included Mr. Celso Lafer (law professor and former foreign minister and WTO ambassador), Mr. Roberto Carvalho Azevêdo (official who headed the dispute settlement unit), Mr. Marcos Yank (agricultural economist at ICONE), Mr. Christian Lohbauer (who headed the department of foreign affairs of the Industry Federation of the State of São Paulo, FIESP), Mr. José Roberto Mendonça de Barros (economist and former government official), as well as private practitioners, who also began to offer classes in trade law. Collectively the instructors specialized in the different areas that the course covered, including the GATT, the Agreement on Agriculture, the DSU, GATS and TRIPS. A team of four young entrepreneurial law professors who had just come from studying abroad in the US and Geneva, coordinated the course, aiming to offer a study of WTO law and jurisprudence at a high level that addressed issues of specific relevance for Brazil and its economic sectors.

FGV Law School initiated other complementary projects in São Paulo to foster legal education in trade law. In 2003, a first collective research project on textiles trade was developed. The researchers chose textile trade because the sector was to be completely integrated into the GATT in 2005, which could have significant effects for the Brazilian market and Brazilian producers. The FGV Law School funded the research, and the group discussed the results with the Brazilian Textile Association (*Associação Brasileira da Indústria Têxtil e de Confecção*, or ABIT).

In 2004, two Brazilians working on WTO matters in Geneva with experience on WTO work in Geneva,¹³² fostered the formation of an informal study group on WTO dispute settlement in Brazil (the *Núcleo de Estudos sobre Solução de Controvérsias*, or NESC), coordinated by a group of people linked to FGV Law School. The majority of NESC participants were either former interns at the Geneva mission or had (or were pursuing) an advanced degree in trade law (a program we discuss below). Parallel initiatives were created in Rio de Janeiro and Brasília, with former interns again taking the lead. In this way, the interns continued to develop and spread the knowledge that they gained after they returned from Geneva to Brazil.

The initial main task of the NESC São Paulo group was to prepare teaching materials on WTO dispute settlement that could be used in trade courses throughout the country. The group eventually wished to create an academic think tank specialized on trade-related issues, based at FGV. It sought to bring together academics and private practitioners, who could also collaborate with the Brazilian

¹³²The two individuals were Ms. Vera Thorstensen and Mr. Victor do Prado, Ms. Thorstensen is one of the coordinators of the program at the Brazilian Mission in Geneva, who since the 1990s is working in the Mission to provide it with technical support on economic issues. Mr. do Prado is a member of the WTO secretariat who previously worked in the Brazilian Foreign Ministry, including regarding dispute settlement cases. At the WTO, Mr. do Prado was part of the rules division until he became Deputy Chef de Cabinet of the Director General Mr. Pascal Lamy in 2005.

government when possible. Later that year, in July 2004, FGV helped UNCTAD organize a short dispute settlement course, UNCTAD having come to it because of the reputation that FGV was building on trade issues.

Unlike the São Paulo project, the NESC groups in Rio de Janeiro and Brasília were not related to any university, but were organized by former interns working in law firms. The study group in Brasília included, in addition to lawyers and academics, officials from the dispute settlement unit of Itamaraty, from the Secretariat of Foreign Trade of the Ministry of Development, Industry and Trade (*Secretaria de Comércio Exterior*, or SECEX), from the Secretariat for International Matters of the Ministry of Agriculture (*Secretaria de Assuntos Internacionais*), and from the Secretariat of Economic Law of the Ministry of Justice. The government officials would suggest specific topics to be discussed, based on their experience, current needs and priorities, which could help Brazil form its strategy for future WTO cases. Similarly, the group in Rio de Janeiro is composed of former interns, some trade specialists from industry (mainly from the Federal Industry Confederation, or *Confederação Nacional da Indústria*), others from government agencies with headquarters in Rio (such as the standards agency INMETRO), the Brazilian Development Bank (BNDES), and the applied economic research agency (IPEA), and some economic consultants.¹³³

Other universities in Brazil followed suit, including *Universidade Estadual de São Paulo* (UNESP), *Universidade de Brasília* (UNB), *Universidade de Campinas* (UNICAMP), and *Universidade Federal de Santa Catarina* (UFSC) which integrated trade-related courses in their curricula, including specific courses on the WTO, on trade and development, and on international economic relations. In parallel, universities increasingly held conferences and special seminars on WTO and international trade law, with the primary locations being São Paulo, Rio de Janeiro, Brasília and the major cities of southern Brazil. The *Universidade Federal de Santa Catarina* (UFSC) in Florianópolis, for example, now holds an annual conference on Current Issues in International Trade (*Temas de Comércio Internacional em Debate*).

From 2002 until 2004, there was a boom of activities in Brazil concerning international trade issues, probably linked to the high profile WTO dispute settlement cases involving Brazil, and the launching of the Doha negotiating round. As demand for professional expertise grew so did requests for trade-related courses. The more that practitioners dealt with trade-related issues, the greater their competence and interest in teaching courses in this area, and in participating in academic and policy-

¹³³ INMETRO is the National Institute of Metrology, Standardization and Industrial Quality, within the Ministry of Development, Industry and Foreign Trade. IPEA is the Instituto de Pesquisa Economica Aplicada of the Ministry of Planning.

oriented seminars and colloquia. Today, universities in Brazil's most important cities commonly accept that a graduating law student should have at least a basic knowledge of public international law and WTO law.

Since 2005, interest in international trade training courses has decreased, perhaps reflecting the reduced ambitions of the Doha round and the FTAA, the decline in Brazil's dispute settlement activity, and the fact that the Brazilian market can only sustain so many trade specialists.¹³⁴ Specialized courses designed for professionals charge higher fees, and the market has not supported them, so that the number of international trade specialists remains relatively low. Yet although the market in Brazil for WTO-related knowledge has its limits, it has developed significantly over the last five years, so that expertise on trade matters, including dispute settlement analysis, is no longer limited to the diplomatic realm. Brazilian academics continue to play an important role for the country in following trade agendas, in mobilizing responses to developments in trade fora, and in offering a contact point for professionals for the organization of courses, meetings and conferences.

3.3.2 Coordination on trade matters through trade associations

That part of the Brazilian private sector affected by international trade gradually reorganized in the 1990's and 2000's to respond to the challenges posed by Brazil's internal market opening and growing focus on global markets in the context of an increasingly legalized and judicialized international trading system. Brazilian business associations began to coordinate to enhance their ability to provide meaningful input to the Brazilian government on trade matters, in particular in relation to Brazil's negotiating positions in the multiple trade fora that had emerged, from the WTO to the proposed FTAA and EC-Mercosur FTA. They aimed to influence the government's determination as to which tariffs and trade barriers could be reduced in exchange for the reciprocal opening of foreign markets. In particular, industrial and agricultural trade associations worked to strengthen their alliances in order to coordinate their demands.

The Summit of the Americas with its parallel meeting of the Business Forum in Belo Horizonte, Brazil, in 1997,¹³⁵ was the turning point, triggering the creation of an official partnership between Brazil's

¹³⁴ In 2006, however, fewer courses and conferences on international trade issues were offered. In addition, the NESC and GNC (described below) were less active in 2006. **Barbara and Michelle, does this work now, with the footnote?**

¹³⁵ This was the third trade ministerial meeting launched by the Summit of the Americas process in Miami in 1994. Paragraph 14 of the Joint Declaration of the meeting provides, "We received with interest the contributions for the Third Business Forum of the Americas relating to the preparatory process for the FTAA negotiations, which we consider may be relevant to our future deliberations. We acknowledge and appreciate the importance of the private sector's role and its participation in the FTAA process." See Joint Declaration, Summit of the Americas Third Trade

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,¹³⁶ including the Brazilian Confederation of Industries (*Confederação Nacional da Indústria*, CNI), the Brazilian National Confederation of Agriculture (*Confederação Nacional da Agricultura*, CNA), the Brazilian National Confederation of Commerce (*Confederação Nacional do Comércio*, CNC), federations of industries of different Brazilian states (mainly the Industry Federation of the State of São Paulo, or FIESP), unions of employers (such as *Força Sindical*) and specialized associations. The CNI has assumed the leadership within CEB since its founding in 1997. Created in 1997 at a time when the industrial sector was wary of the FTAA negotiations while agribusiness wished to push for greater market access abroad, CEB aimed to help coordinate common positions regarding trade negotiating positions and to establish communication channels with the Brazilian government to advance these views. For that purpose, CEB has promoted the exchange of views and information among businesses and trade associations on trade matters, including through formal and informal meetings among sectoral associations and federations, and a trade negotiations web site that it created.¹³⁷ It organized Working Groups on trade topics and prepared position papers regarding negotiations, in general aiming to build private sector capacity on trade matters.

During the last ten years, industry and agricultural trade associations, as well as Brazil's largest companies, have created new departments and personnel positions focused on international trade law and policy. The two main industry associations in the country, CNI and FIESP, both have had departments on foreign trade policy since the 1950's which dealt mainly with tariff and antidumping issues.¹³⁸ By the end of the 1990's, they developed other specialized branches which took a more proactive approach to foreign trade issues, focused in particular on new trade negotiations. FIESP, whose members represent around 80% of the country's industrial capacity, established a department on international trade relations (*Departamento de Relações Internacionais e Comércio Exterior*) and CNI, the association that represents industries at the national level, created a Unit on International Negotiations (*Unidade de Negociações*

Ministerial Meeting, May 16, 1997, available at http://www.ftaa-alca.org/ministerials/Belo/Belo_e.asp. See also, Hirst, *The United States and Brazil*, supra note..., at 35 ("the demands of Brazilian business sectors and labor organizations became part of the FTAA negotiating process").

¹³⁶ See *Confederação Nacional da Indústria, A Alca na visão da Coalizão Empresarial Brasileira*, August 2003, available at http://www.fiec.org.br/palestras/negocios_internacionais/alca190803/alcaCNI_arquivos/frame.htm.

¹³⁷ The frequency of these meetings has varied with the intensity of negotiations. CEB emphasizes the existence of a website that permits on-line consultation and virtual participation in the debates. See http://www.negociacoesinternacionais.cni.org.br/negocia/fp-negi.htm?URL=/negocia.nsf/web_negocia_html?openform.

¹³⁸ Telephone interviews and emails with FIESP and CNI, June 2006.

Comerciais). These departments in CNI and FIESP have hired professionals with international policy backgrounds, primarily economists and those with a political economy background (in international relations), but also a few lawyers. In addition, major companies in Brazil, such as Companhia Vale do Rio Doce and Embraer, created special departments to address international trade issues. In a number of cases, these companies have attracted trade specialists with previous experience working for private trade associations in São Paulo.

Many of these associations and companies have hired former government officials, as individuals have shifted between the public and private sectors in Brazil. For example, since 2005, Mr. Mario Marconini, who worked at the GATT and WTO from 1988-1996, and was International Trade Secretary for the Ministry of Trade and Industry, and Deputy Secretary for International Affairs in the Ministry of Finance in the late 1990s, has been working as a consultant for FIESP. Mr. Marconini is one of the few Brazilians that have worked in both the GATT and WTO secretariats.¹³⁹

Agribusiness associations, in particular, focused greater attention on trade law matters, hiring trade consultants with experience inside the Brazilian government and abroad, and funding an agricultural think tank (ICONE). The São Paulo Agribusiness Union on Sugar Cane (UNICA) hired the economist Elisabeth Serodio who had been the manager of the CAMEX export program for sugar and alcohol in 2000. She joined UNICA as a consultant in 2003, returned to the government in 2005 as the Secretary for International Relations of the Ministry of Agriculture and then re-joined UNICA in 2006. Similarly, both the Brazilian Rural Society (or SRB), and the Brazilian Association of Producers and Exporters of Pork (ABIPEX) hired Pedro de Camargo Neto, who was a former Secretary of the Ministry of Agriculture.¹⁴⁰ Mr. Camargo Neto helped to push and coordinate Brazil's successful WTO complaints against US cotton and EC sugar policies, and he worked, in particular, with Ms Serodio and UNICA to support the sugar case, and the cotton sector in the bringing of the cotton case. The prior experience of Ms. Serodio and Mr. Camargo Neto in government facilitated their ability to work effectively with it in the public-private partnerships that resulted, recalling the role of former US trade officials in private law firms and trade associations in US litigation before the WTO.¹⁴¹

¹³⁹ See Mr Marconini's bio at http://www.csis.org/component/option,com_csis_experts/task,view/id,274/

¹⁴⁰ Camargo Neto was Secretary of Production and Trade in the Ministry of Agriculture of Brazil, where he was responsible for agriculture negotiations at the WTO, the Free Trade Area of the Americas, the MERSOSUR-EC Free Trade Agreement, and other bilateral agreements. Camargo Neto served as president of the Sociedade Rural Brasileira from 1990 to 1993 and founded and was president of Fundo de Desenvolvimento da Pecuaria de São Paulo (FUNDEPEC) from 1991 to 2000.

3.3.3 The emergence of think tanks, consultancies and networks

Paralleling these developments, entrepreneurial individuals have created consultancies and think tanks that have developed technical research capabilities to advise and assist the government and private sector on international trade issues. These entities have been organized on a profit and non-profit basis and generally maintain their offices in São Paulo or Rio de Janeiro, the two most important economic centers of Brazil. They aim to influence and contribute to the positions of the Brazilian government in international trade fora. Some leading examples of consultancies organized on a for-profit basis are the Institute of Studies on Trade and International Negotiations (ICONE), DATAGRO and Prospectiva Consultants. ICONE was founded in 2003 by Professor Marcos Jank, after he taught and conducted research in the US at Georgetown University and the University of Missouri-Columbia, and worked for a year at the Interamerican Development Bank (IDB). Eight Brazilian agricultural trade associations fund the institute, which focuses on international trade negotiations affecting Brazilian agribusiness. ICONE has closely followed and provided significant support for the government in agricultural negotiations in the Doha Round, generating econometric analysis of the impact on Brazil of different methodologies for tariff and subsidy reductions. In this way, it was instrumental in helping to develop and advance the Brazilian position in the group of four (US, EC, Brazil and India), which set a framework for the Doha Round agricultural negotiations.¹⁴²

DATAGRO provides general consultancy for the domestic and foreign sugar and alcohol sectors, and specializes in statistical analysis. It was founded in 1984 and is coordinated by Mr. Plinio Nastari. While ICONE has focused on agricultural trade negotiations, DATAGRO has provided assistance in dispute settlement as well, and most notably in the Brazil-EC sugar dispute before the WTO where Brazil successfully challenged EC subsidies and import restrictions affecting the Brazilian sugar sector.¹⁴³

Prospectiva, created in 2001, has become one of the leading business consultants for trade and investment-related matters. It provides consulting both to Brazilian companies regarding their international strategies, and to foreign companies interested in the Brazilian market. It analyzes market access and market development strategies, provides consultation about trade negotiations and business strategies in response to their likely outcomes, advises on the development of international supply chains,

¹⁴¹ See discussion in Shaffer, *Defending Interests*, at...

¹⁴² For the movement of the G-4 on the July Framework, check: http://www.intracen.org/worldtradenet/docs/whatsnew/newsletters_2005/newslettevol6no9.pdf (June 2006). Access to examples of the work and analysis developed by ICONE is available at <http://www.iconebrasil.org.br> (June 2006).

¹⁴³ See <http://www.datagro.com.br/> (June 2006). Interviews with officials in Itamaraty confirmed that DATAGRO provided important technical analysis in the EC-sugar cases ,WT/DS266 (Brazil as complainant) and WT/DS265, WT/DS283 (Brazil as third party). See details of the cases on Appendix XXX.

evaluates customs matters, and provides economic advice in anti-dumping and safeguard cases.

In addition to private consultancies, many initiatives have been organized on a non-profit basis to conduct research, organize symposia, and advocate on international trade issues, such as over trade in services, intellectual property, and the WTO dispute settlement mechanism. Examples include the Brazilian Center of International Relations (CEBRI), the Institute on International Trade Law and Development (*Instituto de Direito do Comércio Internacional e Desenvolvimento*, or IDCID), the Brazilian Network for People Integration (*Rede Brasileira pela Integração dos Povos*, or REBRIP), and the Trade Negotiations Group (Grupo de Negociações Comerciais, GNC) and the Law Society Study Center (the Centro de Estudos das Sociedades de Advogados, CESA) of the private bar.¹⁴⁴

CEBRI, founded in 1998 in Rio de Janeiro, organizes activities that address international relations from a broad perspective. The center conducts studies and analysis on international issues, including trade, and organizes debates about them. Its leadership includes important Brazilian public figures, such as Mr. Luiz Felipe Lampreia (former Minister of Foreign Affairs) and Mr. José Botafogo Gonçalves (former Minister of Industry and Trade and Ambassador to Mercosur). CEBRI is sponsored by the most important exporting companies in Brazil, such as Companhia Vale do Rio Doce, Embraer, and Petrobrás, as well as by some international foundations working in Brazil, such as the Ford Foundation, and the largest private law firms, such as Veirano Advogados and Pinheiro Neto Advogados. It has commissioned numerous research papers assessing Brazil's foreign relations policies.¹⁴⁵

Academics have created research institutes and centers, such as IDCID (for law) and CAENI (for political science) (the *Centro de Estudos das Negociações Internacionais*), both organized at the University of São Paulo, although individuals from other schools have also joined it lately. IDCID was created in 2002 by professors and researchers at the university's Law School, and it aims to build legal capacity to address trade issues from a development perspective. IDCID has produced research papers and organized conferences on dispute settlement, intellectual property and services, focused particularly on the WTO. In 2005, IDCID held the official conference, WTO at 10 – A Look on the Appellate Body.¹⁴⁶ CAENI is a research center that, since 2005, is officially linked to the university's political science department. It works with NUPRI (*Núcleo de Pesquisas em Relações Internacionais*), a multi-disciplinary research center which has been at the University of São Paulo since 1989, addressing a broad range of international issues, from security to political economy. An important part of CAENI's research

¹⁴⁴ The NESC, listed among the academic initiatives in Section 3.3.1 also constitutes a study group formed by academics and lawyers aiming to examine and analyze WTO dispute settlement cases, could also be considered as a think tank.

¹⁴⁵ See CEBRI, <http://www.cebri.org.br/>.

focuses on South-South cooperation strategies. IPEA, the governmental research institute, and INTAL within the Inter-American Development Bank, help to fund its activities. The Ford Foundation also sponsors some specific projects.¹⁴⁷

REBRIP is a coalition of NGOs, based in Rio de Janeiro, that studies the social impacts of trade negotiations, and in particular in relation to agriculture, trade and environment, intellectual property, services and investment. It has been particularly active in debates over the effects of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) on access to medicines in developing countries. REBRIP has recently aimed to mobilize civil society against the intellectual property chapters in regional trade agreements being negotiated by Brazil, and in particular under the FTAA and the EC-Mercosur FTA.¹⁴⁸

A group of academics and professionals created GNC in 2003 as a research group on international trade law matters. Coordinated by Ms. Thorstensen and Mr. Yank, the team is composed of practitioners, economists, former interns at the Brazilian mission in Geneva, members of academia and of business associations. GNC aims to analyze specific trade issues being negotiated in trade fora by Brazil, including regarding agriculture, services, dispute settlement, trade and environment, antidumping, subsidy and safeguard rules, intellectual property and competition policy. The group met once a month in 2003, and produced a book consisting of thirteen studies in 2005.¹⁴⁹ It has another book about the Doha Round currently under way.

An important means to institutionalize public-private coordination in WTO dispute settlement is to facilitate exchange between Brazilian government officials and the Brazilian law firms that have traditionally worked on transnational (largely inbound) commercial law matters. The Law Society Study Centre (*Centro de Estudos das Sociedades de Advogados*, or CESA) is an association that groups the largest Brazilian law firms, and is based in Sao Paulo. In 2002, it created a new technical group on international trade consisting of a network of trade law practitioners from Brazil's larger commercial law firms. Since 2002, the group has prepared studies on international trade topics, and has coordinated meetings among lawyers and government representatives to discuss trade issues, including the role of the

¹⁴⁶ See IDCID, <http://www.idcid.org.br/>.

¹⁴⁷ For CAENI, see <http://www.caeni.com.br/>; and for NUPRI, see <http://www.usp.br/cartainternacional/modx/> (both visited in June 2006). INTAL is the Institute for the Integration of Latin America and the Caribbean. See <http://www.iadb.org/intal/index.asp?idioma=eng>

¹⁴⁸ The FTAA negotiations have resulted in greater politicization within Brazil of trade policy. See Hirst, *The United States and Brazil*, supra note..., at 30; and Andrew Hurrell, "The United States and Brazil: Comparative Reflections," in Hirst, supra note..., at 103 (noting "there has been considerable grassroots opposition (including within and around the Workers Party)" to the FTAA).

¹⁴⁹ Thorstensen & Jank, "O Brasil e os grandes temas de comércio internacional", São Paulo, Aduaneiras, 2005.

private bar in representing Brazil's commercial interests in international trade disputes.¹⁵⁰ CESA played a central role in what was a turning point in Brazilian private law firm engagement with WTO rules and policy. In August 2002, it organized a conference in Rio de Janeiro on general trade-related issues, which was the first large-scale event in which Brazilian public and private actors examined the possible synergies of working together in WTO dispute settlement.¹⁵¹ At the conference, private lawyers complained that only foreign law firms were being hired to assist the Brazilian government in WTO disputes, with the Embraer case being a clear example. Brazilian officials responded that the government did not select the private firms, since that decision was made by the private parties who paid the firm's legal fees. The government representatives emphasized the importance of developing local capacity within the private bar, which the government would welcome. This interaction eventually led to the creation of the government's internship programs for private lawyers in Geneva and Brasilia which CESA co-sponsors, and which we examine below.

Other similar conferences bringing together government officials and private Brazilian lawyers and business representatives followed. For example, in November 2002, the Brazilian Institute of Studies on Competition and Consumer Affairs (IBRAC, acronym in Portuguese) organized its first conference dedicated to international trade issues, which brought together lawyers, economists, academics and Brazilian officials.¹⁵² The institute has organized this conference annually ever since, which has attracted increasing interest from private practitioners.¹⁵³ In 2003, the institute formally added international trade to its activities, and changed its name to the Brazilian Institute of Studies on Competition, Consumer Affairs and International Trade, reflecting a position that one should no longer think of competition and consumer affairs matters in Brazil without taking account of international trade. The Ministry of Foreign Affairs itself followed up these events by organizing its own meeting in Brasilia in March 2003, aiming to create further incentives for the development of local capacity and the spread of knowledge about dispute settlement issues within Brazil. The meeting again included legal practitioners, economists, government officials and academics. Building from these initiatives, the Ministry established in 2003 its internship

¹⁵⁰ For detailed information about the work developed, See CESA, *Relatório das Atividades 2004*, São Paulo, 2004, available at http://www.cesa.org.br/com_apoio_rel.asp. Since March 2002, a study group formed by 25 lawyers of the largest Brazilian law firms was created to develop studies on trade issues (Valor Econômico, "Cesa realiza estudos sobre comércio", July 28th, 2003).

¹⁵¹ The meeting was organized by CESA at BNDES, Rio de Janeiro, in August 2002. About 200 hundred people attended the event.

¹⁵² IBRAC "is a non-governmental association of about 500 corporations, law firms, and individuals (lawyers, economists, and academicians) interested in the promotion and development of competition law and policy." OECD, *Competition Law and Policy in Brazil: A Peer Review* (2005), at 131, fn. 116. See also IBRAC's website at <http://www.ibrac.org.br/>.

program for private lawyers at the Brazilian mission in Geneva.

Today, these various groups can be viewed as components of a small Brazilian epistemic community specializing in trade matters. Individuals can be members of more than one group, and they can coordinate with each other. A lawyer that has been on an internship to the mission in Geneva (described next), could participate in CESA's meeting (as a representative of a law firm), in GNC and NESCE (on account of an academic interest), as well as in the CEB meetings (to interact with business leaders). As a result, these groups' members may co-sponsor and attend each other's events, facilitating the groups' interaction. These groups, in turn, link with academic developments in Brazil. Professors are leaders of, and active participants in, many of the groups, and practitioners often speak in courses and academic colloquia organized in Sao Paulo and, to a (much) smaller degree, elsewhere in Brazil.¹⁵⁴

These groups and individuals also form part of transnational epistemic and NGO networks. The heads of ICONE and CEBRI have close ties with participants in the international trade field around the world. Members from GNC have worked with the International Centre on Trade and Sustainable Development (ICTSD) and the United Nations Conference for Trade and Development (UNCTAD), based in Geneva, on events and publications concerning WTO dispute settlement, competition policy, intellectual property and other trade-related matters. REBRIP has worked closely with Doctors Without Borders (*Medicins Sans Frontier*, MSF) and Oxfam on intellectual property-related issues, as has IDCID. The Ford Foundation has helped to fund the work of both of these organizations, as well as that of CEBRI and CAENI. In being linked to international networks, these groups are better informed of developments abroad and better able to provide perspectives and analyses grounded in the Brazilian experience to international policy and legal debates.

3.3.4 A Public-Private Partnership: The Internship Program at the Brazilian Mission in Geneva and its Analogues.

Since September 2002, the Brazilian mission in Geneva has organized a four-month internship program in Geneva for young Brazilian professionals who have pursued (or are pursuing) advanced legal studies in WTO law.¹⁵⁵ The interns are all privately funded, typically by Brazilian law firms for whom

¹⁵³ In the first year of the conference, in 2002, there were about 40 participants, while in 2005 that number increased to almost 90.

¹⁵⁴ Initiatives outside of São Paulo are less developed. Study groups on dispute settlement (NESCE) have been formed in Rio de Janeiro and in Brasília. The University of Brasília has a "Trade Negotiation Course" to which it has invited some of the experts from São Paulo as lecturers, with the same occurring in Campinas and in other cities in São Paulo State. Campinas, for example, is located eighty miles northwest of São Paulo.

¹⁵⁵ Ms. Vera Thorstensen has played a key role in supporting and coordinating the internship program and is

they are employed. This program was developed out of a joint effort of public officials and private law firms to increase knowledge of WTO matters in Brazil. Public officials and the private sector found that they had overlapping interests, since the government could benefit from having qualified local lawyers available, and Brazilian practitioners could learn in Geneva about WTO law and dispute settlement in order to better market themselves to Brazilian firms, trade associations and the government to act as consultants, whether involving the identification and analysis of potential claims, the litigation of actual claims, or in settlement negotiations. Until this time, only foreign law firms had assisted the Brazilian government and business before the dispute settlement system, and Brazilian law firms wished to build their own expertise. In short, through the internship, Brazil's mission would be better able to monitor developments in WTO dispute settlement and respond to the demands of WTO filings, while helping to build local Brazilian capacity in international dispute settlement.

The program was established with the support of the Ambassador of the Brazilian Mission in Geneva, Mr. Luiz Felipe de Seixas Corrêa, who coordinated the program together with Ms. Vera Thorstensen. The associations of CESA and IBRAC were responsible for proposing candidates.¹⁵⁶ As a condition for participating in the program, the individual intern (and where applicable, the law firm), signed a confidentiality agreement with the government. During the internship, the private lawyer took a leave of absence from their office in Brazil. The mission's staff organized a training program for the interns in Geneva to prepare them for WTO meetings that they would attend and for disputes on which they would provide assistance.¹⁵⁷

During the program's first three years (as of the end of 2006), about forty lawyers had participated in the Geneva internship program, involving lawyers from more than thirty Brazilian law firms. In the first year, interns came from Brazil's largest law firms located in São Paulo and/or in Rio de Janeiro, but gradually a few firms from other parts of the country, such as from the Northeast and the South, became interested and some participated. Since the beginning, government representatives from other ministries also joined the program (involving around ten government interns through the end of 2006), in order to increase general knowledge of WTO law and dispute settlement throughout the government. As from 2005, industry associations (such as FIESP and CNI) have sent individuals as well

normally seen as the contact point at the mission for the traineeship program. Ms. Thorstensen, previously an academic, is known for pushing the trainees to conduct research on trade issues when they return to Brazil.

¹⁵⁶ See supra notes...

¹⁵⁷ The diplomat in charge of dispute settlement at the time of the first groups, Mr. Celso de Tarso Pereira, taught courses and organized seminars on WTO issues, in order to prepare the interns WTO meetings and regarding current trade disputes.

who have international policy portfolios.¹⁵⁸ Although the diversity of participants has increased, and some expertise is spreading beyond São Paulo, the majority of interns work for law firms based there, probably because only these firms have considered the cost of investment to be worthwhile, as São Paulo is Brazil's financial and industrial capital.

The program in Geneva seemed to work well for the Ministry, which spurred the Dispute Settlement Unit to create its own internship program in Brasília in 2004.¹⁵⁹ Some interns in Geneva have returned to work as interns in Brasilia for an additional four-month period. Other interns continue to work on WTO cases on a pro bono basis. To give a recent example, former Geneva interns helped to research and define Brazil's strategy in response to the EC's request for consultations before the WTO regarding Brazil's ban on the importation of retreaded tyres (WT/DS 332).¹⁶⁰ Since the affected private sector did not hire a law firm to assist the government, the interns' work was particularly valued.¹⁶¹

The internship program in Geneva was a model for an analogous program that the Brazilian Embassy in Washington created in 2003 to develop capacity regarding US antidumping matters. Its aim is to help Brazil ensure US market access for Brazilian products. Since US antidumping law must conform to the requirements of the WTO antidumping agreement, Brazilian officials and interns will be better prepared to litigate these cases before the WTO or attempt to settle them in the shadow of a potential WTO complaint. Statistical evidence reveals that lower income developing countries fare far worse in US antidumping proceedings than do developed country defendants, probably because they are less able to defend themselves in these US proceedings.¹⁶² Around five interns have served the Washington embassy as of the end of 2006.

¹⁵⁸ The program was initially conceived to train lawyers. However, individuals with international policy backgrounds, such as economists and those with a political economy background, expressed interest in participating, and they have been included on an *ad hoc* basis.

¹⁵⁹ The Brasilia program has had six interns as of June 2006.

¹⁶⁰ The EC actually started informal consultations in 2003 in the context of its own internal investigation of the legality of the Brazilian regulations. On 23 June 2005, the European Communities initiated consultations, and, on November 17, 2005, requested the establishment of a WTO panel (DS332), to determine whether various Brazilian measures on imports of retreaded tyres are compatible with Articles I:1 (*most-favoured nation clause*), XIII:1 (*non-discriminatory administration of quantitative restrictions*), XI:1 and III:4 of the *General Agreement on Tariffs and Trade* (GATT) 1994. The investigation was initiated following a complaint by the *Bureau International Permanent des Associations de Vendeurs et Rechapeurs de Pneumatiques* ("BIPAVER"), dated 5 November 2003, on account of allegedly adverse trade effects suffered by Community retreaded tyre sector resulting from a Brazilian import ban on foreign retreaded tyres.

¹⁶¹ Source: diplomat from the Brazilian Dispute Settlement Unit at the Ministry of Foreign Affairs (São Paulo, February 2006).

¹⁶² These countries "are more likely to be targeted, less likely to settle cases, more likely to confront high dumping duties and less likely to bring cases to the WTO." Chad Bown, Bernard Bernard Hoekman & Caglar Ozden, "The Pattern of US Antidumping: The Path from Initial Filing to WTO Dispute." 2:3 *World Trade Review* 349-371 (November 2003).

Brazilian law firms also recommended that the department in charge of applying antidumping and safeguard measures in Brazil (*Departamento de Comércio Exterior*, or DECOM) create an internship program in Rio de Janeiro. They hoped to increase their knowledge in this area, both to develop their domestic practice and (potentially) to work on these cases if they are brought to the WTO. Some Brazilian attorneys have, on their own initiative, explored the possibility of working with US firms in the United States on antidumping matters that involve Brazilian products. US law firms can train Brazilian lawyers in this subject area, as well as in US approaches to law and litigation. Since WTO law in this area tends to reflect US statutory law, and since WTO jurisprudence tends to reflect US common law reasoning (from facts and judicial precedent) more than a Brazilian civil law approach, these lawyers can, in the process, become better prepared to assist Brazil and Brazilian business in WTO-related matters.¹⁶³

Brazil's development of legal capacity can, of course, be used to impede access to Brazil's internal market as well as to pry open foreign markets. To a large extent, the law firms that have been investing in building internal capacity for WTO issues are also those that wish to be involved in antidumping or safeguard proceedings within Brazil.¹⁶⁴ Lawyers can increase their trade work by identifying and pushing domestic antidumping cases, which both allow for training in trade law, and, more importantly, provide a financial incentive to remain involved in trade issues. Antidumping cases can also attract the interest and awareness from the business community to trade issues, especially since they allow for more immediate and effective remedies than a WTO case. Antidumping work is a way for lawyers to be known in the business community for trade-related expertise.

These internship programs are evidently costly for Brazilian law firms, which also permit the interns to continue to work on a pro bono basis for the government on WTO cases after they return.¹⁶⁵ Sometimes these lawyers even fly back to Geneva to observe the panel and Appellate Body hearings after the internship is completed. These firms have taken a longer-term view, hoping that the experience will provide them with business in the future. Local Brazilian capacity in WTO law and dispute settlement has been developed, and Brazilian lawyers are better situated to advise companies and to work with the government on WTO and other trade-related matters, as a consequence. Some Brazilian lawyers have

¹⁶³ See Gregory Shaffer, *The Challenges of WTO Law: Strategies for Developing Country Adaptation*, *World Trade Review*, July 2006.

¹⁶⁴ Economic consultancy firms are an alternative for dealing with antidumping and safeguard cases, but it appears that law firms have become relatively more involved in response to the legalization of trade matters.

¹⁶⁵ Firms and individuals are likely investing in the expertise and status that comes from conducting a WTO-related internship in Geneva. On investing in the "international" as a means to build domestic social capital, see Dezalay & Garth, *Palace Wars*, *supra* note..., at 34 ("use international credentials, expertise and connections to build capital that they can reinvest in domestic public arenas"). Where individual interns come from wealthy families, they can supplement the expense of living in Geneva during the internship.

already been hired to handle issues related to WTO disputes after returning from Geneva, as in the EC-banana arbitration procedure (of 2005) and in the tyres case, in both cases working for the private sector.¹⁶⁶ One Brazilian lawyer from Veirano Advogados, a major São Paulo-based law firm, who studied law in the US and practiced with a large, experienced US law firm, was hired by the poultry industry to help the Brazilian government defend Brazil's interest in the two poultry cases that Brazil brought before the WTO, which we discuss below.¹⁶⁷

Overall, international trade law-related work has developed in Brazil. Brazilian lawyers can now work for industry to identify trade barriers, evaluate potential WTO complaints, initiate them, and prepare defenses to foreign challenges against Brazilian regulations that protect industry. For Brazil, even if these lawyers do not work on actual WTO cases, they retain knowledge about the system which can be of use. They can help to advise clients when they have a potential WTO case, and bring the case to the government's attention. Moreover, since most trade disputes are settled, the perception by other WTO members of greater Brazilian capacity in WTO law can be of use in settlement negotiations conducted in the shadow of a potential WTO proceeding.

IV. The Brazilian Approach in Practice: Brazil's handling of WTO Disputes

Although Brazil's relatively active use of the WTO dispute settlement system has led to some institutionalization of its handling of cases, the strategy pursued in each case has varied, including in terms of whether Brazil is a complainant or respondent, which in turn reflects whether the private sector is able (or willing) to fund a foreign or Brazilian law firm to assist the Dispute Settlement Unit at Itamaraty in its preparation of Brazil's positions and legal submissions. When Brazil is a complainant, the government has been typically able to rely on private sector-funded legal assistance. This section examines the Brazilian experience with public-private coordination in dispute settlement over time.

4.1 Brazil as complainant

Especially following its complaints against the US-cotton and EC-sugar regimes, commentators have often highlighted how Brazil, a developing country, can make effective use of the WTO legal

¹⁶⁶ In the bananas arbitration case, the law firm represented the Brazilian banana sector. In the EC-tyres case, the law firm represented the EC retreaded tyre sector.

¹⁶⁷ Ana Teresa de S. L. Caetano practiced with O'Melveny & Myers from 1998 to 2001, and worked with Mr. Gary Horlick, a highly respected expert in international trade law. See COMEXNET, "OMC distante das bancas brasileiras", 9 August, 2002.

system.¹⁶⁸ Yet it took awhile for Brazil, one of the largest developing countries, to build the confidence and capacity to bring these cases. Brazil approached its first cases before the more judicialized WTO dispute settlement system much as it had approached GATT cases, changing neither the structure of its Mission in Geneva nor of its Ministry of Foreign Affairs.¹⁶⁹ It had no specialized bureaucratic unit to work on dispute settlement issues, and had no reflex to seek complementary assistance from the private sector to fund private law firm support. Its first case as a complainant, the US-Reformulated Gasoline case (WT/DS4) in 1995, was a prototypical one involving different regulatory requirements for foreign and domestic reformulated gasoline (constituting regulatory discrimination under GATT article III.4). The US regulations affected one of Brazil's largest exporters, the state-owned company Petrobras, so its initiation was easy to justify. Petrobras had hired a Washington DC-based law firm (Mudge Rose) to advise it on the US regulations and its WTO options, and to work together with Brazilian diplomats in the economic department of Itamaraty, and the Brazilian mission based in Geneva, in the preparation of written submissions and communications to the panel and Appellate Body, including statements for the oral hearings.¹⁷⁰ Even though Petrobras funded the preparation of the case, it did little when compared to either Embraer or Brazilian trade associations in the subsequent cotton and sugar cases.

Embraer constituted the first case in which Brazil worked closely and more intensively with law firms hired by the private sector, to form a public-private partnership for preparing written submissions and oral pleadings before WTO panels and the Appellate Body (WT/DS70).¹⁷¹ Embraer, with its large international market share for medium-size civil aircraft, represented a crown jewel for Brazil's industrial policy. Its experience in international markets and its close ties with the government favored the formation of a public-private partnership between it and the Brazilian government, both as respondent and complainant in the WTO litigation.¹⁷² Embraer had the financial capacity to hire Washington DC-based legal expertise to respond to Canada's legal challenge against Brazil, including by building a parallel WTO case against Canada.

The public-private partnership included government ministries in Brasilia, with Itamaraty as focal point, and the personnel of the Brazilian mission in Geneva (and in particular, one diplomat – Roberto de Carvalho Azevêdo – who oversaw the WTO dispute settlement procedures, supervised by the

¹⁶⁸ See supra note... **Add cites** to davey article, Jackson, etc

¹⁶⁹ **To confirm**

¹⁷⁰ According to interviews with Brazilian diplomats who worked at the time on the case- add place and time of interview.

¹⁷¹ The law firm assisted Brazil both in its complaint (WT/DS70) against Canada, and in its defense against Canada's complaint against Brazil (WT/DS46).

¹⁷² Embraer was a state-owned company until 1994. Former Brazilian foreign minister and WTO ambassador Lampreia became a member of its Board of Directors of Embraer in... after leaving Itamaraty.

Ambassador, Mr. Celso Lafer). Embraer hired a number of US law firms to help build different components of the case and prepare the legal submissions, whose work was overseen by Mr. Azevêdo. It was arguably this experience that spurred much greater public-private coordination initiatives, including the creation of the internship program at the mission, and some of the dispute settlement research groups and networks, such as GNC and CESA described above.

By the time Brazil brought the cotton and sugar complaints in September 2002, it had developed significant dispute settlement experience, but these two cases were much more factually-intensive than anything it had addressed before. Without the private sector's initiative and support, it is unlikely that Brazil would have brought these cases, which gained it such notoriety and arguably have had a major impact in focusing political and media attention on the larger issue of the effect of US and European agricultural subsidy programs on developing country agricultural producers. They have thus influenced not only the focus of the Doha round negotiations, but conceivably could contribute to the curtailment of European and US agricultural subsidies (especially export subsidies) even if the round is not concluded. Many politicians and constituencies in the US and Europe oppose US and EU agricultural subsidies. The Brazilian case have made their impact on developing country agricultural producers more transparent, providing at least some greater leverage to opponents of such subsidies in US and EU internal political debates. These cases exemplify how a country can work with its private sector and lawyers hired by it to bring, and prevail in, an extremely complex WTO case.

The major obstacle in the cotton case was to obtain the expertise and evidence required for a successful case before the WTO. The difficulty was accentuated by the fact that the Brazilian cotton sector consists of many producers, of varying size, with limited capacity to address international trade issues. Therefore, they had to coordinate and pool their resources through a trade association in order to hire legal and economic consultants. The former secretary of agriculture policy in the Brazilian Ministry of Agriculture, Pedro de Camargo Neto, played an important role in these cases, working as a consultant to affected agricultural sectors after he left government. Spurred by the prospects of successful public-private coordination, the affected sector, working with private attorneys explaining the merits, was able to successfully collect the financial resources in order to provide the government what it needed to bring the case. The government formally hired the US law firm that worked in the Embraer case (Sidley –Austin LLP), but it was funded by the trade association to prepare the legal submissions and to participate and help the government respond to questions at the hearings before the panel and the Appellate Body.¹⁷³ The

¹⁷³ On the funding, see *infra* note... GCS to speak with D.P.

private sector hired the US economist Mr. Daniel Sumner, a professor at the University of California at Davis who had formerly worked for the US Department of Agriculture, to provide the analysis and explanations of the formula that the US government used to subsidize its cotton farmers. His study showed the severe impact of US subsidies on international agricultural trade.¹⁷⁴ Although the case was extremely costly, the three-pillar model largely worked. The bulk of the work was done by the US law firm and Mr Sumner, overseen by the Dispute Settlement Unit in Brasilia. The work of the new interns was also helpful in providing backup support for Brazilian officials in Geneva.¹⁷⁵

In the sugar case, Brazilian economic consultants were used for the first time in a WTO dispute, in addition to external lawyers. The partnership included, on the government side Itamaraty's Dispute Settlement Unit in Brasilia and the Brazilian mission in Geneva, and on the private sector side, a team of US private lawyers (from Sidley Austin) and a team of Brazilian economic consultants (DATAGRO), funded by the sugar cane association UNICA.¹⁷⁶ Because of the four-fold nature of the collaboration, some officials refer to this development as a “squaring” of the model (in contrast to a “three pillar” model).

The Brazilian government has also worked in public-private partnerships with a São Paulo-based law firm (Veirano Advogados), in two cases involving Brazilian exports of poultry, respectively brought against Argentina (WT/DS241) and the EC (WT/DS269).¹⁷⁷ For the first time, a Brazilian private party—in this case the Brazilian Poultry Association (*Associação Brasileira dos Produtores e Exportadores de Frango*, or ABEF)—decided to hire a Brazilian law firm to help the Ministry of Foreign Affairs defend its (and Brazil's) interests. Although Brazilian law firms are relatively less experienced, and as a result the government likely needs to attend to the legal submissions to a greater extent than when a US law firm with greater experience handles a WTO case, their fees are also much less.¹⁷⁸ The panel and Appellate Body ruled in Brazil's favor in both cases in 2003 and 2005 respectively. These cases show that it is already possible to benefit from Brazilian law firms' assistance, permitting private Brazilian parties to

¹⁷⁴ Sumner's study showed that without the subsidies, the US “would have shipped about 41 percent less cotton abroad; [which] would have raised the world price about 12.6 percent.” See Paul Blustein, “In U.S.: Cotton Cries Betrayal,” *Washington Post* E01 (May 12, 2004). Sumner was considered a traitor by US cotton interests. Id. (“He joined forces with the enemy to cut the heart out of our farm program,” said Don Cameron, vice chairman of the California Cotton Growers Association and chairman of the California Tomato Growers Association Inc. He said such an act was ‘unethical’ because Sumner is an employee of California's public university system.’ There are research projects that he's been involved with in the past that we'll direct elsewhere.... ‘If this was governmental or military related, it might be called treason and court martial proceedings would be in order,’ Earl P. Williams, president of the California Cotton Growers Association, was quoted as saying in the *Western Farm Press*.”).

¹⁷⁵ They helped to collect and process data and organize information in Geneva.

¹⁷⁶ Source: Interview with Brazilian diplomats (Brasilia, April 2006).

¹⁷⁷ For details, see Appendix

¹⁷⁸ Interviews of Shaffer, 2006.

obtain legal assistance when they cannot afford, or do not wish to pay, the fees of US or Europe-based law firms.

Of the twenty-two WTO complaints brought by Brazil to date, ten were settled without any litigation. In each of these cases, the Foreign Ministry handled the cases without the assistance of an outside law firm. However, Brazil's success with WTO litigation using a public-private partnership model has enhanced its credibility in WTO circles, which, in turn, has arguably strengthened its hand in settlement negotiations conducted in the shadow of a potential complaint or full litigation.

4.2. *Brazil as a defendant*

As of June 2006, WTO members have filed requests for consultations thirteen times against Brazil, but only two of these complaints have been fully litigated—the early desiccated coconut case and the Embraer aircraft case, with a third now in litigation. Brazil has settled all other complaints except for the current case on retreaded tyres brought by the EC, which is at the panel stage.¹⁷⁹ The Brazilian government has worked with private law firms in each of the three cases in which a panel was formed. The Brazil retreaded tyre case is the first case in which Brazil has been a respondent since the creation of the Dispute Settlement Unit in Itamaraty in 2001, and thus is of particular interest.

Civil society organizations have been helpful for Brazil in its responses to some WTO complaints against it. Brazil's response to the US challenge to its patent law in 2000 (WT/DS199), in particular, highlights both the role that civil society organizations can play in WTO dispute settlement, as well as the link between dispute settlement and broader trade negotiations. The US brought the complaint under the TRIPS Agreement against Paragraph 1 of Article 68 of the Brazilian Intellectual Property Law, which requires the “local working” of a patent—that is, the local production of a patented invention as a condition for the recognition of an exclusive patent right. Itamaraty devised and implemented its strategy without the assistance of any outside law firm. It maintained that Brazil's intellectual property law was TRIPS-compliant. NGO reactions to the case helped the government in its settlement negotiations with the US, as advocacy groups maintained that the US government was placing corporate interests above life-and-death medical concerns.¹⁸⁰ This NGO pressure was complemented by prodding from

¹⁷⁹ Nine of these thirteen cases related to policies targeted at specific sectors (five involving the automobile industry), and four related to broader regulations (three regarding minimum import prices for customs purposes, and one regarding patents).

¹⁸⁰ The point is further developed in Shaffer, *The Challenges of WTO Law: Strategies for Developing Country Adaptation*, *World Trade Review*, July 2006. *See, e.g.*, “U.S., Brazil End WTO Case on Patents, Split on Bilateral Process,” 19 *Inside U.S. Trade* 1, 2 (June 29, 2001) (“Informed sources said the U.S. backpedaling from the WTO panel, which it had requested in February, reflected an unwillingness on the part of U.S. Trade Representative Robert Zoellick to give opponents of trade liberalization a red-hot issue that appeared to give credence to the idea of

international health organizations.¹⁸¹ In June 2001, the Bush administration withdrew the US claim. The international response spurred by this case helped shift the terms of debate over the protection of pharmaceutical patents, strengthening Brazil's and other developing countries' negotiating position that intellectual property rules must be interpreted and applied (and, where necessary, modified) so that they grant developing countries flexibility to address public health issues. These debates ultimately gave rise to a modification of Article 31 of the TRIPS agreement in 2005, just before the WTO Ministerial Meeting in Hong Kong.¹⁸²

Brazil's response to the EC's 2005 complaint against a Brazilian ban on the importation of retreaded tyres (WT/DS332)¹⁸³ is also of particular interest, not just because it is the only time that Brazil has been a respondent since it created its Dispute Settlement Unit in 2001, but also because it is the first time that the government has hired a law firm's assistance without private sector funding. The government coordinated research on Brazil's defense of a potential complaint once the EC started informal consultations in 2003, working in particular with interns in Brasilia and former interns who had returned to law firm practice from the Geneva mission. The government decided not to settle the case and rather to defend the Brazilian regulations, including on environmental and health grounds. Since the private sector did not hire a law firm to assist Itamaraty in the case, and since there was a national public interest to be pursued, it became clear that the litigation work would have to be done at the Ministry of Foreign Affairs. In December 2005, the Ministry hired a US law firm, with offices in the US and Europe, on a fixed cost basis, so that the firm could support Itamaraty with the dispute, as well as others in the

the WTO interfering with poor countries' health policies." Doctors Without Borders declared that Brazil's patent policy was key to the success of the Brazil's strategy to offer universal access to HIV/AIDS medication in Brazil. Brazil's health program includes free distribution of antiretroviral drugs produced in Brazil. This program has allegedly reduced AIDS deaths by 50 percent since it was introduced and saved the government an estimated \$422 million in hospitalization and medical care costs. See Daniel Pruzin, "US Responds to Criticisms of Brazilian Patent Law Complaint," 18 *International Trade Reporter (BNA)* 238 (February 8, 2001). Oxfam, a British NGO, backed Brazil's efforts, maintaining that the U.S. complaint was an assault on public health. See *Drug Companies vs. Brazil: The Threat to Public Health*, available at <http://www.oxfam.org.uk/policy/papers/brazilctc/ctcbraz.htm>. Although it is questionable whether this general article is actually needed to address Brazil's policy on HIV since Brazilian law could provide for the grant of a compulsory license to address health crises or concerns without referring to a general requirement of local working of a patent, the threat of a compulsory license (whether through a local working requirement or otherwise) can be extremely helpful for Brazil to negotiate reduced prices. NGOs, in any case, successfully linked the US challenge to this Brazilian provision to a challenge to Brazil's HIV/AIDS strategy, and developing country policies to combat the AIDS crisis generally.

¹⁸¹ For example, 52 countries of a 53 member United Nations Commission endorsed Brazil's AIDS policy and backed a resolution sponsored by Brazil that called on all states to promote access to AIDS drugs. See *UN Rights Body Backs Brazil on AIDS Drugs*, NEWS24.COM, Apr. 24, 2001, available at http://www.news24.com/contentDisplay/level4Article/0,1113,2-1134_1014970.00.html.

¹⁸² Add cite with explanation of the change

¹⁸³ WT/DS332, Brazil - Measures Affecting Imports of Retreaded Tyres, June 20, 2005. See details on the Appendix...

future, as determined by the government.¹⁸⁴ In addition, the government was supported by Brazilian NGOs who, for the first time, filed an amicus curiae brief before a WTO panel, together with a US NGO.¹⁸⁵ The NGOs have helped to spur media coverage of the case from an environmental and health perspective, in support of the government's position.¹⁸⁶

4.3 *Brazil as a third party*

When Brazil acts as a third party in a WTO case, not only does the government not work with an outside law firm, but the dispute settlement personnel in the Geneva mission typically do most of the work.¹⁸⁷ The mission communicates with and obtains the approval of the Dispute Settlement Unit in Brasilia before filing any third party submission, but it has much more autonomy than when Brazil is a complainant or respondent, largely because the stakes are much lower. The mission in Geneva often uses its interns for research support in third party filings. Since the cases last longer than the four-month internship, former interns have often continued to assist the government with the matter on a pro bono basis after they have returned to legal practice in Brazil. In this way, they can continue to gather experience for marketing in the future.

The government typically does not develop partnerships with the private sector when Brazil participates as a third party, other than with these interns.¹⁸⁸ In most of these cases, Brazil is a third party because the country has more of a systemic interest, than a direct commercial one, in the dispute. The Brazilian private sector is thus less interested in funding the hiring of a law firm. Moreover, third party

¹⁸⁴ See infra note...

¹⁸⁵ See supra note... and accompanying text. The amicus curiae brief was filed by: Associação de Combate aos Poluentes (ACPO), Associação de Proteção ao Meio Ambiente de Cianorte (APROMAC), Center for International Environmental Law (CIEL), Centro de Derechos Humanos y Ambiente (CEDHA), Conectas Direitos Humanos, Justiça Global, Instituto O Direito por Um Planeta Verde Planeta Verde. Another amicus brief was filed by the American NGO Humane Society of the United States. Both briefs supported the defense of environmental and health values and are available at: <http://www.ciel.org> and www.hsus.org/web-files/PDF/Brazil-Retreaded-Tyres-Submission-of-Non-Party-Humane-Society-International.pdf (September 2006).

¹⁸⁶ See e.g. ICTSD Bridges, at...; Folha de São Paulo, Tendências e Debates, August 7 2006 (Juana Kweitel). Other declarations may be found at: <http://www.mma.gov.br/ascom/ultimas/index.cfm?id=2830>, <http://www.justicaambiental.org.br/> and <http://www.ciel.org> (September 2006). Add other cites, perhaps also web sites.

¹⁸⁷ The only exception would be where Brazil files as a third party as well as a complainant in a parallel case. See supra note ... and accompanying text. Brazil's complaint regarding soluble coffee, for example, was implicated by India's complaint on the EC's general preferences system. The public-private coordination developed for the complaint of the soluble coffee case was extended to the drafting process for the third party communications to the panel and Appellate Body (in the GSP case). **ABICS (Associação Brasileira das Indústrias de Café Solúvel)** was the private association coordinating coffee interests with the assistance of the Brazilian law firm Veirano Advogados. See Appendix II for details.

¹⁸⁸ The only exception would be where Brazil has filed a parallel complaint and the two complaints have not been merged into a single case.

participation is not that costly to the government, since a third party is not required to file a formal submission, and when it does, the submission can be short and non-technical in nature. Some of these cases could nonetheless have important implications for portions of the private sector so that they could conceivably collaborate with the government when Brazil is a third party in the future, especially as they become more aware of the system. Moreover, the work of the interns from private law firms at Brazil's mission in Geneva (and after they return home) already is a significant contribution to Brazil's participation as a third party, and, to our knowledge, is unique among WTO members, although China also works with private firms for its third party submissions.¹⁸⁹

V. The Limits of the Brazilian Approach for Brazil and other Developing Countries

Brazil's successful use of the WTO dispute settlement system has deservedly attracted attention. Its Foreign Ministry has dedicated top-level civil servants to WTO affairs, and private law firms funded by Brazil's private sector have been used to help gather, organize and present the necessary data and argumentation to prevail in some of the WTO's most complex disputes, such as the US-cotton and EC-sugar cases. As a result, the Brazilian approach to public-private coordination on WTO matters is of clear interest to other WTO members. Yet one cannot simply tie Brazil's relative success to the specificities of its "model," as the country's experiences in WTO dispute settlement have resulted, in large part, in an *ad hoc* manner, depending on certain entrepreneurial individuals in some cases, and the receptivity of the affected private sector to fund complementary legal support. Although Itamaraty has created a specialized Dispute Settlement Unit, Brazil's "model" of public-private coordination has not been institutionalized, and even if it were, there is no guarantee that it would remain so in the future.

In this section, we identify a number of specific limitations that the Brazilian "three pillar" (or, as some say, "squared") approach faces—and, in particular, the continuity of government personnel in a system based on diplomatic rotation within the Foreign Ministry; the ability of industry to fund private lawyers, especially for complex cases such as the cotton and sugar subsidy cases; the handling of cases of systemic importance that the private sector will not fund; and the management of private law firms funded by the private sector where public and private interests do not fully coincide.

As for most WTO members, a first challenge is to ensure that government officials with appropriate expertise are assigned to handle WTO dispute settlement matters. According to the Foreign

¹⁸⁹ China participates as a third party in most WTO cases. It solicits bids from Chinese law firms in Beijing to provide assistance in the drafting of the legal brief in these cases. Discussion of Gregory Shaffer with member of China's ministry responsible for WTO matters. February 2006.

Ministry's traditions, diplomats are trained to have broad-based knowledge, and move from one post to another every two-to-three years. There is thus a strong chance that once diplomats are trained in WTO dispute settlement, they are moved to other posts and replaced by others with little to no knowledge of the technical complexities of WTO law and dispute settlement. Moreover, officials within the Foreign Ministry are divided as to whether specialization (as in WTO law) is to be preferred to more general knowledge. Individuals who wish to rise within the civil service can face career incentives not to specialize. Although the Foreign Ministry has, to some extent, attempted to keep diplomats interested in trade matters by assigning them to posts with a similar orientation,¹⁹⁰ this is not a rule, and individuals may seek to broaden their experience specifically to enhance their careers within the ministry. No matter how bright new diplomats assigned to WTO dispute settlement, and how fast they learn, WTO dispute settlement dynamically changes and involves considerable technical complexity, so that countries such as Brazil who assign WTO matters to the Foreign Ministry with a system of diplomatic rotation, can be disadvantaged, unless they foster specialization within the ministry.

A second constraint that Brazil, as many other countries, faces, is whether its private sector can afford, or is willing to pay for, a law firm to assist the government in a WTO case. Sectors composed of relatively small producers often face collective action problems to coordinate and pool the necessary resources to fund a private law firm's assistance. Even in the famous cotton case, the cotton trade association (ABRAPA) allegedly almost dropped the case due to budgetary constraints. Once it appeared that the US law firm's legal fees for the case could range from around US\$ 1 million to US\$ 3 million, there was concern that the association would not be able to pay them.¹⁹¹

Third, Brazil may have potential complaints that are of great systemic importance for the Brazilian economy, but it cannot pursue them because the private sector is less interested in funding

¹⁹⁰ For example, Mr. Celso Almeida Pereira, who was in charge of dispute settlement in the Brazilian mission in Geneva for about four years, left the mission in... to work in Brazil's embassy in Ottawa, Canada. Itamaraty replaced him with an individual who had worked in the Dispute Settlement Unit in Brasilia for four years, Mr. Nilo Ditz. Continuity was thus assured. Similarly, Mr. Roberto Azevêdo, who led the Dispute Settlement Unit, was appointed to be the Director of the Economic Affairs Department (Departamento de Assuntos Econômicos) in [December 2005]. Even though Mr. Flávio Marega, who assumed Azevêdo's former post is an experienced diplomat in trade-related issues, and that the dispute settlement unit is within the Economic Affairs Department so that Mr. Azevêdo will oversee its work, at least in the short run, Brazil had lost its most experienced diplomat in dispute settlement.

¹⁹¹ The actual amount of the costs may have exceeded \$2 million. Interview, July 20, 2005 (noting a figure of \$ 2 million). See Elizabeth Becker, "Lawmakers Voice Doom and Gloom on W.T.O. Ruling," *New York Times*, C1, 7 (April 28, 2004) ("the litigation has already cost \$1 million"). One Brazilian newspaper reported, at one point, that funding of the law firm was collected from: (i) the cotton producers, in the amount of R\$300,000 (US\$130,000); (ii) the Export Promotion Agency (Agência de Promoção de Exportações), in the amount of R\$200,000 (US\$86,000); (iii) amounts collected from the selling of a lottery, in the amount of R\$ 1,2 million (US\$522,000) (Estado de São

supplementary law firm assistance, and the government itself does not have sufficient personnel with the requisite legal knowledge. Systemic issues could have larger impacts over time than industry-specific cases, so that the country could be prejudiced if it does not have sufficient internal resources available for them. Brazil's reorganization of its ministry, its internship program and its recent bid for private law firm assistance, all point to ways in which the country is attempting to respond to this challenge.

Fourth, even when the private sector provides financial support for the hiring of an outside law firm, the private sector's interests may not coincide with the government's perception of the public interest. If private lawyers take the lead in a case and the government does not sufficiently monitor the arguments made, some of these arguments could be used against Brazil in a later case. Moreover, there may be divisions within the Brazilian private sector, so that only that portion of the private sector with the means to fund the lawyers is being represented. Although, in our view, it makes sense for Brazil to work with private attorneys to enhance its capacity to address the complexities and demands of WTO dispute settlement, the country needs to ensure that it has technically astute personnel monitoring and, where appropriate, modifying the arguments prepared by the private counsel in the legal submissions.

Similarly, when settling a case, which is the result of most WTO litigation, there is a risk that Brazil could settle in the interests of a specific commercial sector in a manner that constrains the country's ability to defend the interests of other commercial sectors, or of its broader national interest. For example, in a case involving soluble coffee, Brazil initiated a complaint against the EC regarding the EC's provision of enhanced tariff preferences for exporters from thirteen developing countries (including Andean countries) in order "to combat drug production and trafficking" that were over and above the EC's normal preference system for developing countries, the "Generalized System of Preferences" (GSP).¹⁹² In settling the complaint, the EC agreed to increase the import quotas for the Brazilian soluble coffee sector and Brazil agreed to refrain from further challenging this aspect of the EC's GSP program. Such a settlement, however, could conceivably constrain Brazil in defending other sectors that might be affected by the EC's preferences, and it may explain why Brazil was only a third party in India's challenge to these preferences in *EC-Conditions for the Granting of Tariff Preferences to Developing Countries*, which was of great systemic importance for Brazil and developing countries generally.¹⁹³

Paulo, "Produtores de algodão fazem rifa para bancar painel na OMC", September 18, 2003, available at <http://www.comexnet.com.br/noticom.asp?paNumero=4215>).

¹⁹² See WT/DS154, *European Communities - Measures affecting differential and favorable treatment of coffee*, December 7, 1998; WT/DS209, *European Communities - Measures affecting soluble coffee*, October 12, 2000. The relevant EC GSP Regulation, covering GSP schemes from 1 January 2002 to 31 December 2004, was Council Regulation 2501/2001.

¹⁹³ **to check** re settlement in soluble coffee case. See *European Communities - Conditions for the Granting of Tariff Preferences to Developing Countries - Report of the Panel, WT/DS246/R (Panel Report)*; and Appellate Body

Although Brazil faces constraints in mobilizing legal capacity for WTO dispute settlement, the constraints are much greater for smaller and poorer developing countries. Brazil has an internationally-renowned professional bureaucracy which has developed technical expertise on WTO matters. Even within Latin America, Brazil is traditionally known for the relatively “stronger institutional capacity of the Brazilian state.”¹⁹⁴ Brazil’s relatively greater capacity for WTO dispute settlement is a reflection of the relative importance of Brazil’s economy and trading profile, even though Brazil represents less than 1% of global trade.¹⁹⁵ Smaller developing countries face much greater challenges and reduced incentives (on account of their smaller trade volumes) to organize a specialized unit for WTO dispute settlement. For poorer countries, the opportunity costs of investing in capacity building for WTO disputes are relatively greater, because they will have fewer cases to bring, and they face more immediate demands for the funding of basic human needs. Brazil, of course, faces these opportunity costs as well, but it has a larger national budget to allocate.

In addition, because of Brazil’s size, its industries tend to be relatively larger, and thus relatively better able to fund lawyers for WTO dispute settlement. Because of the importance of the Brazilian market for trade and investment, Brazil’s local law firms also tend to be bigger, and thus better able to fund young attorneys for an internship in the mission in Geneva, or the country’s embassy in Washington. Interestingly, when members of the U.S. Congress expressed concern that the successful Brazilian cotton complaint could lead other countries to challenge US agricultural subsidies, some analysts responded that there was little to fear. They concluded that the required legal fees would constitute “a sum that is prohibitive for the poor nations that suffer the most harm from cheap subsidized imports.”¹⁹⁶

WTO dispute settlement continues to require increased specialization. The common law-orientation of WTO jurisprudence, with its factual contextualization and use of precedent, poses a

Report, European Communities - Conditions for the granting of tariff preferences to developing countries, WT/DS246/AB/R, 7 April 2004 (AB Report).

¹⁹⁴ See e.g. Kathryn Sikkink, *Ideas and Institutions: Developmentalism in Brazil and Argentina* (1991), at 21-22.

¹⁹⁵ Brazil’s gross domestic product was over US\$604 billion, in 2004. Brazil has the fourteenth largest economy (in terms of gross domestic product, when counting the EC and all of its member states as a single entity), and it is the fifth largest territory in the world. For the World Bank’s income classification, see <<http://www.worldbank.org/data>>. However, Brazil also ranks as a lower-middle income country under World Bank criteria, having a per capita gross national income of \$3,000 in 2004. See World Development Indicators 2006, <http://siteresources.worldbank.org/DATASTATISTICS/Resources/lac_wdi.pdf>. The country also has high levels of income disparity and poverty. According to the Human Development Report, Brazil ranks in the 63rd position, as per Table 3 (human and income poverty: developing countries). See Human Development Indicators, <http://hdr.undp.org/reports/global/2005/pdf/HDR05_HDI.pdf>. Cf Andrew Hurrell, “The United States and Brazil: Comparative Reflections,” in Hirst, *supra* note . . . , at 73 (Brazil “has the world twelfth largest gross domestic product (GDP), dropping from being the eighth largest in 1998”).

¹⁹⁶ See Elizabeth Becker, “Lawmakers Voice Doom and Gloom on W.T.O. Ruling,” *New York Times*, C1, 7 (April 28, 2004).

challenge to those who practice in a different legal culture, including Brazilians. Over the last years, there has also been an increasing demand for econometric expertise for WTO dispute settlement.¹⁹⁷ The more econometric studies are used, the more that this expertise needs to be built, resulting in yet greater costs for using WTO dispute settlement. This trend explains why Brazil has had to adapt its approach to WTO dispute settlement once again. In the recent EC banana arbitration, for example, an econometric study was prepared by DATARGO for the government, funded by Brazilian banana producers, which was used in Brazil's submissions.¹⁹⁸ Other developing countries, however, are less likely to have trained econometricians locally available for these tasks, just as they are less likely to have local lawyers with the relevant expertise.

In other words, smaller and poorer WTO members are less likely to make institutional adaptations in response to the judicialization of WTO dispute settlement because of structural factors. The costs of such change simply outweigh the benefits for their smaller and less diverse economies. They are thus more likely to be in a traditional bargaining relationship with their major trading partners, such as the US and EC, so that when WTO legal issues are raised, this is most likely to occur in a traditional bilateral bargaining context.

VI. Some Future Considerations

This study has told the story of how Brazil has mobilized legal capacity to advance its interests through the WTO dispute settlement system. In doing so, it has assessed the impact of Brazil's membership in the WTO and participation in the WTO's legal system on Brazilian governmental institutions and business organization, as well as on the relationship between government, business, law firms and economic and business consultants to address trade policy, trade negotiation and trade dispute settlement strategies.

The story shows how the public and private sectors in Brazil have adapted to defend their respective interests through a more legalized and judicialized WTO regime. Brazil has implemented what the government calls a "three-pillar" model for WTO dispute settlement, involving reorganization of its Foreign Ministry, the creation of a specialized Dispute Settlement Unit, the allocation of more resources to its mission in Geneva, and support for capacity building in the private sector among business, law firms and economic consultants, resulting in the use of public-private partnerships for WTO dispute settlement.

¹⁹⁷ See *World Trade Report 2005*, chapter about quantitative methods in WTO dispute settlement. Available at http://www.wto.org/english/news_e/pres05_e/pr411_e.htm (August 2005).

¹⁹⁸ Discussion with Itamaraty's Dispute Settlement Unit, date.... To add name of banana association [checking]

Canada's challenge of Brazil's industrial policy in the Embraer case was a pivotal moment for Brazil, which resulted in much greater media coverage of the WTO in the country, helping to spur the creation of broader-based capacity on WTO-related matters. There have been numerous initiatives in Brazil to build capacity involving academia, consultancies, think tanks and civil society organizations. Only foreign law firms were initially hired by the private sector to provide legal support to the government, but there are now some cases in which local law firms have assumed this role. Overall, the public-private network approach developed in Brazil for WTO dispute settlement during approximately the last five years is an example of what a country does to adapt to the challenges posed by the WTO dispute settlement system.

In the previous section, we addressed some of the inevitable limits of this model for Brazil and other developing countries. In this section, we address a few considerations that have been raised as to how this approach could be further adapted to provide support for Brazil (and other interested countries) in the future. A first challenge for supporters of this approach will be to ensure that successful innovations are not abandoned, such as the specialized Dispute Settlement Unit within Itamaraty, the internship program in the Brazilian Mission in Geneva, as well as the networks of practitioners, consultants, business representatives, academics and government officials that have been created. The last three governments in Brazil have invested significant resources on foreign trade issues, including those for addressing trade disputes. One of the most important initiatives was the creation of the Dispute Settlement Unit so that dispute settlement expertise is developed within the Foreign Ministry. There is currently no reason to suspect that the unit will be eliminated, as both the government and the business community view exports as an important component for Brazil's economic development, and the unit has been successful in a number of important cases that can facilitate market access for Brazilian exports. The ministry's organization has, however, changed in the past, and it will change in the future in response to new political initiatives.

There is undoubtedly some tension between the increasingly technical demands of the WTO and its dispute settlement system and the traditional model of rotation for a Brazilian diplomatic career, which favors general, broad-based knowledge over specialization. All foreign policy, including trade policy, is currently within the Foreign Ministry (Itamaraty), although the Ministry of Development, Industry and Trade also handles important trade policy issues, such as Brazil's import laws.¹⁹⁹ Although some may inquire whether Brazil should further specialize trade policy by creating a separate trade ministry, such as the Office of the United States Trade Representative or the EC's Trade Directorate General, it seems

doubtful whether this would be a good idea, given the important role Itamaraty plays in Brazil, and there is no sense that Itamaraty would want to give up this important portfolio.²⁰⁰

Another alternative that has been raised is for Itamaraty to provide special training programs for diplomats that intend to work on WTO and trade-related issues, including dispute settlement, and create a distinct trade-related track for them within the ministry throughout their career.²⁰¹ Yet another alternative would be for the ministry to hire permanent staff, such as international trade lawyers and economists, to support the work of the diplomats within the ministry, who could continue to rotate among diplomatic posts. The issue of how best to structure Brazil's response to the demands of a legalized and judicialized international trading regime will be an ongoing one.

A further challenge for Brazil will be how to ensure ongoing collaboration with the Brazilian private sector, academia and civil society so that Brazilian capacity remains broader-based, and not dependent on a few government specialists who may leave their positions. The private sector, academia and civil society can be of significant assistance to the government, providing it with valuable information that it otherwise would not have. They can also supplement the government's constrained human and budgetary resources for individual dispute settlement cases.

Yet there will remain tensions regarding the demands of civil society and the private sector for government transparency on WTO matters, the government's desire for private sector input and support for its positions, and the government's preference for WTO matters (including dispute settlement positions) to remain confidential so as to enhance diplomatic flexibility. There have been requests for the government to facilitate academics' and civil society's access to Brazil's positions before the WTO, such as its written submissions before the dispute settlement system and its statements made during oral hearings (other than business confidential information).²⁰² It is argued that, in this way, the private sector would be better enabled to provide input to the government in the future, and the material could be more broadly used as teaching and training materials. Since 2005, Brazil has been making some of its submissions available, but there is no binding rule regarding the information that must be disclosed, nor regarding the time frame in which the government must do so.

In addition, the government could continue to facilitate training programs in the Brazilian mission and in the Dispute Settlement Unit inside Itamaraty, as well as promote the training of Brazilian

¹⁹⁹ Through CAMEX, Brazil has created a coordinating device among government ministries on trade policy matters. See footnote ... above and accompanying text.

²⁰⁰ See also Andrew Hurrell, "The United States and Brazil: Comparative Reflections," in Hirst, *supra* note..., at 86 ("Itamaraty, despite many predictions, has maintained its general position in foreign policy, including in relation to trade negotiations").

²⁰¹ **Add cite-** raised by whom? Where?

professionals within international institutions working on trade-related matters, such as the WTO Secretariat (including within the Appellate Body, legal and rules divisions) and UNCTAD. Some may argue that the government should aim to continue to spread information and knowledge among other sectors to enlarge the trade community in Brazil (and in particular outside of the São Paulo and Rio de Janeiro regions). Yet there are clear challenges here as well, given the cost for firms to develop expertise that may not be worth the investment. Itamaraty, for example, is still largely hiring foreign law firms to defend Brazil's interests before the dispute settlement system because of their experience and expertise. Although their selection is understandable because the private sector and government wish to do all they can to win a case, this practice can discourage Brazilian law firms from investing resources (as through the internship program) to build their own capacity.

The government can also encourage training in the Brazilian educational system for law, economics and international relations. Universities can enter into arrangements with the public and private sectors to assist with specific analyses. Universities can also create incentives for professors to participate in international debates (including through publishing in English) so as to ensure that Brazilian ideas, perspectives and priorities are better represented before international institutions and transnational policy communities.²⁰³

One of the key challenges for making use of the WTO dispute settlement system is to identify cases in the first place. INMETRO, the Brazilian agency responsible for addressing technical barriers to trade, already makes available an easy-to-use electronic system that lists technical barriers affecting Brazilian exports abroad.²⁰⁴ The private sector and its consultants can interact with government officials

²⁰² **Add cite-** by who? Where?

²⁰³ See e.g. Gregory Shaffer and Yvonne Apea, "Institutional Choice in the GSP Case: Who Decides the Conditions for Trade Preferences: The Law and Politics of Rights," *Journal of World Trade*, Vol. 39, No. 5 (December 2005), pp. 977-1008 (noting how, "The discourse regarding the interpretation of the Enabling Clause in the GSP case was dominated by an interpretive community of predominantly North American and European scholars publishing in the major trade law journals that are read by WTO judicial decision-makers. The discourse inevitably reflects and privileges certain backgrounds and normative priorities. To give two examples from the GSP case, one leading North American scholar admirably published three articles on the GSP case before the Appellate Body rendered its decision and at least two additional contributions after the decision. Within a few months of the decision's publication, the *World Trade Review* published a special issue on the case in July 2004. All six of the commentators were either from North America or the United Kingdom, and five of the six taught at US law schools"). **Gcs to add cite re dezalay and garth on international connections/legitimacy/phds- relevance**

²⁰⁴ See <<http://www.inmetro.gov.br/barreirastecnicas/pontofocal/login.asp?url=clientes/index.asp>> (September 2005). INMETRO is the Brazilian national agency in charge of technical regulation issues, dealing with certification of quality, measurement standards and so; it then became the inquiry point for Brazil under the WTO Agreement on Technical Barriers to Trade (as per art 10.10 of TBT agreement). Together with the Brazilian Foreign Ministry and its mission in Geneva, INMETRO through the TBT committee of the WTO, has access to notifications by other WTO members of new technical requirements, making them available through the website for technical barriers (for an easy access by Brazilian exporters), and prepares the Brazilian notes to the Committee. It can thus build on this

through reference to this data base. The data base could be expanded to cover all foreign trade barriers.²⁰⁵ An effort along these lines has been made by the Ministry of Development, Industry and Commerce in Brazil (MDIC, acronym in Portuguese). It prepares reports on non-tariff barriers, with a list of list of barriers divided by category, for Brazil's most important trading partners (such as US, EU, China, India, and South Africa).²⁰⁶ The Lula government also launched a website specifically designed for exporters – named *Portal do Exportador* - that includes not only information on foreign regulations but on the practices of trade for Brazilian exporters (including the weblinks to the portals for technical and non-tariff barriers) in Brazil.²⁰⁷ The challenge will remain, however, as to how to reach not only the larger exporters, but also smaller and less organized sectors to help to identify and conduct foreign trade barriers that they face.

Finally, some may question why Brazil, as a developing country, is not a member of the Advisory Centre on WTO Law (ACWL), established in 2001.²⁰⁸ The ACWL provides developing countries with lower-cost legal support for WTO dispute settlement and legal analysis. The ACWL, however, has limited resources, so that if Brazil were to join it and actively use it, there might be fewer ACWL resources available for other developing countries. Moreover, the ACWL would cost Brazil, as an “upper middle income country,” \$100,000 to join,²⁰⁹ and, as one of the largest developing country, Brazil has been able to defend itself to date, in part thanks to the willingness of the private sector to fund supplementary legal assistance. In addition, Brazil has worked with the ACWL in some cases involving

list for purposes of its data base, and refer matters to the TBT committee, including to reach amicable settlements. See also Joanne Scott, paper on sps committee.

²⁰⁵ The EC for example has developed an interactive data base on trade barriers. See Shaffer, What's New?, supra note..., at...

²⁰⁶ See <http://www.desenvolvimento.gov.br/sitio/secex/negInternacionais/barExtInfComerciais/barComBens.php> (August 2006). A general report was launched in 1999 on foreign trade barriers to Brazilian exports, by the MDIC together with the Foundation of the Center for Studies in Foreign Trade (FUNCEX, acronym in Portuguese): MDIC, FUNCEX (1999), *Barreiras externas às exportações brasileiras- 1999* (available at <http://www.desenvolvimento.gov.br/arquivo/secex/barTecnicas/barNaoTarifadas/BarreirasLegislacao.pdf>, August 2006).

²⁰⁷ See <http://www.portaldoexportador.gov.br/> (August 2006).

²⁰⁸ On the Advisory Centre on WTO Law (ACWL) program, see its web site at http://www.acwl.ch/e/training/training_e.aspx. Under the annexes to the agreement establishing the Centre, developing countries are divided into three categories, A, B and C, with least developed countries (as defined by UN rules) constituting a fourth category. As of 2006, hourly rates for the Centre's members for WTO litigation support were set at \$200 for category A countries, \$150 for category B countries and \$100 for category C countries. Least developed countries hourly rates are set at \$25. Non-member developing country rates are set at \$350 for category A countries, \$300 for category B countries, and \$250 for category C countries. See *The Agreement Establishing the Advisory Centre on WTO Law*, Annex II, Nov. 13, 1999, available at <http://www.acwl.ch/Docs/ACWLAgreementEnglish.htm>.

²⁰⁹ See ACWL, Annex II, “Minimum Contributions of Developing Country Members and Members with an Economy in Transition, at http://www.acwl.ch/e/pdf/annex_2_e.pdf

other developing country complainants, as when Thailand used the ACWL in the EC-sugar case. Nonetheless, the ACWL could be of use to Brazil for cases that are more of a systemic nature where the government does not benefit from private sector-funded legal support.

VII. Conclusions

There is considerable legal and political commentary about the WTO dispute settlement system, on the one hand, and about the impact (or lack of impact) within states of international law and institutions (such as the WTO and WTO law), on the other. There is, however, considerably less empirical work that probes beneath the surface to examine the impact of the WTO legal system within a state and the processes through which that state engages with the WTO, in turn affecting the system in an ongoing manner.

Brazil has been singled out as an example of a developing country's successful use of the WTO legal system. Commentators note that the Brazilian experience indicates how the system can work for developing countries and is not simply a mechanism that serves only the major industrialized countries, and, in particular, the United States and European Union. Yet until this study, there was little knowledge of what Brazil actually did to enable it to use the WTO legal system, reflecting a general lack of empirical work at the micro-level in the international law field.

Similarly, there has been considerable debate about whether the nation state is in "retreat" in the face of global market forces, facilitated by organizations such as the WTO, or whether it is being strengthened, or being transformed in consistent, identifiable ways.²¹⁰ This study contributes to these analyses through its examination of how Brazil has responded to the legalization and judicialization of the WTO dispute settlement system. As the study shows, Brazil has adapted its governmental structure, including through the creation of a new specialized "dispute settlement unit" and a strengthened process for interministerial coordination. Most importantly, the private sector, including trade associations, large companies, law firms, consultancies, the media, non-governmental organizations, think tanks and academia have adapted. They have often challenged the government, but overall, and in the process, provided it with essential resources to enable it to better represent Brazilian perspectives in the WTO legal system.

This study should thus be of great interest to developing countries generally. Although we address the limits of the Brazilian adaptations both for Brazil and, in particular, for smaller developing

²¹⁰ Cite Bremen project, Shaffer & Chalmers project, other studies

countries (Parts V & VI), all countries and constituencies learn through experience and can benefit through evaluating the experiences of others. We hope that this study will be of use to a broad spectrum of WTO member governments and their constituencies, and will be of interest to scholars of law, international and comparative politics, sociology and economics.

Our central finding is that, as regards WTO dispute settlement, Brazil has increasingly worked with the private sector, private lawyers, private consultancies, and now civil society groups on WTO matters. Some might contend that these trends represent a weakening of the state, in that expertise is no longer monopolized within governmental departments, but rather shared and developed through Brazilian public-private policy networks. We, in contrast, find that Brazil has strengthened its ability to represent Brazilian interests through the diffusion of WTO expertise in the private sector and civil society. As a result, the Brazilian government has enhanced its ability to represent Brazilian interests in the international economic field.

Ultimately, since developing countries face different contexts, there is no single strategy that fits all of them. Exporting legal strategies across cultures regardless of context has never worked.²¹¹ Each country can attempt to determine how best to adapt strategies in light of its particular circumstances. This study has provided information about developments in Brazil in response to the challenges of WTO dispute settlement, noting the state and private sector transformations that have occurred. In this way, it can help to provoke reflection over, and debate and experimentation with, strategies that countries at varying levels of development and their constituencies may adopt to better defend themselves in the international trading system.

²¹¹ See e.g., David Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062.