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The American University in Cairo

School of Global Affairs and Public Policy

**BRAZILIAN TRADE POLICY: A SUCCESSFUL MODEL
IMPACTING THE ROLE OF DEVELOPING COUNTRIES
WITHIN THE WORLD TRADE ORGANIZATION**

A Thesis Submitted to the

Department of Law

**in partial fulfillment of the requirements for the LL.M. Degree in
International and Comparative Law**

By

Johanna Santos Navarro

June 2013

The American University in Cairo
School of Global Affairs and Public Policy

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DEDICATION

I would like to dedicate this thesis to my loving family, specially to my grandparents, Otoniel and Anny, for all their love and support; to my dad, Carlos Santos, who reminds me every day that most dreams are attainable but there are not enough people with courage to achieve them; to my mom, Nubia Navarro, who has taught me that the only things one needs in life to be happy are a kind heart and a big smile; to my husband Ram Akers, who supported me through all this process and encouraged me to continue even during the difficult times; to my sister, Paola Santos, the most amazing woman I have known; and finally to my nephew, Sebastian, our little one.

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Johanna Santos Navarro

Supervised by Professor Hani Sayed

ABSTRACT

Our world economy is constantly changing and within the process, new market players have started emerging and transforming international trade relations. Furthermore, multilateral organizations have become more important than ever for developed and developing countries as common forums to discuss international treaties and to resolve trade disputes. Within this context, Brazil in particular has experienced a positive transformation of its economy during the last 40 years, and has now become a new economic power guiding emerging economies in their strategic use of the international trade legal system. This study analyzes three particular issues that are common to developing countries within the World Trade Organization (WTO): agricultural subsidies, anti-dumping, and the TRIPS Agreement, with a particular focus on the negotiation process with developed countries and the various outcomes obtained. The study illustrates Brazil's influence on the role of the developing countries in light of each of the common issues examined, by presenting examples of trade disputes taken before the WTO where Brazil has had direct participation and obtained a positive result. This paper argues that the WTO continues to be an agent for economic development given its platform to provide the third world with the opportunity to both discuss trade agreements at an international level, and to participate in a neutral system for trade dispute settlement. In addition, this paper recognizes that the WTO remains a strategic option to influence global international trade as with the example of Brazil. While this study highlights the fact that Brazil has achieved particular milestones on its own and as a result has helped develop the role of emerging economies within the international trade arena, it also emphasizes the need for each of the developing countries to confront their own specific challenges in order to realize economic development, as Brazil did. Brazil has been and can be a great example for the developing world within the WTO framework, but it certainly is not the only solution to all developing world problems.

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I. Introduction

Currently Brazil is recognized globally as an economic and political leader within the Latin American region, where countries have not yet succeeded in the strengthening of their economies. According to the International Monetary Fund (IMF) Brazil was classified as the seventh biggest economy in the world in 2012 with a GDP of 2.4 trillion U.S. dollars and it has been ranked fourth for GDP growth projections for 2013, with a 3.5% expected increase following China (8.2%), India (5.9%) and Russia (3.7%).¹ Considering that the positive results are mostly due to the country's international trade these statistics raise an important question: How is Brazil's Trading Policy impacting the role of developing countries in the international economic arena and particularly within the scope of the World Trade Organization (WTO)?

Brazil has been able to build up and fortify its economy during the last decade because of its transition over the past forty years from a protectionist model to a trade liberalization platform/program in the international market, and also because of the structural change in the role of the Brazilian State within its economy and its society.²

Two significant milestone periods can be identified in the evolution of Brazilian Trade Policy: Firstly, *National Developmentalism* that started in the 1930s with the Industrialization process, and that established the State as the focal point of the economy and introduced Import Substitution Industrialization (ISI) as a pillar of trade policy at that time.³ Secondly, *New Developmentalism* that started as a consequence of the global financial crisis in 1980, and that resulted in the liberalization of the Brazilian economy in the 1990s. Brazil's international trade was transformed after the liberalization, most notably during the government of

¹ See International Monetary Fund, World Economic Outlook (October 2012, updated January 2013).

² See Glauco Arbix & Scott B. Martin, *Beyond Developmentalism and Market Fundamentalism in Brazil: Inclusionary State Activism without Statism*, paper presented at the workshop on "States, Development, and Global Governance", University of Wisconsin (2010), available at http://www.law.wisc.edu/gls/documents/paper_arbix.pdf

³ See also Celso Furtado, *Una Economia Dependente* (1956); Hans Singer, *Postwar Relations between Under-developed and Industrialized Countries* (1949); Raul Prebisch, *Raul Prebisch on Latin American Development* (1981); Peter Evans, *Embedded Autonomy: States and Industrial Transformation* (1995).

Ignacio Lula da Silva from 2003 to 2011, which reoriented and advanced Brazilian Trade Policies to what they are today.

Through this evolution process, Brazil has taken its place as one of the new key players in today's world economy together with countries such as Russia, India and China, the BRIC countries. Brazil has established itself as one of these newly developed economies that have started influencing markets and playing a central role in multilateral trade negotiations affecting the third world.

Within the framework of WTO multilateral trade negotiations, Brazil has adopted a defensive position of its economic interests reflected in the various cases brought under the Dispute Settlement Understanding (DSU) as complainant.⁴ In fact, it is the pursuing of trade policies and solving common issues affecting developing countries through international instruments that justify the analysis of whether developing countries can apply the Brazilian model in order to use the WTO platform strategically or not.

⁴ See United States – Standards for reformulated and Conventional Gasoline, WT/DS24 (1995); European Communities – Measures affecting Importation of certain poultry products, WT/DS69 (1997); Canada – Measures affecting the export of civilian aircraft, WT/DS70 and WT/DS71 (1997); Peru – Countervailing duty investigation against import of buses from Brazil, WT/DS112 (1997); European Communities – Measures affecting differential and favourable treatment of coffee, WT/DS154 (1998); Argentina – Transitional safeguard measures on certain imports of woven fabric products of cotton and cotton mixtures originating in Brazil, WT/DS190 (2000); Turkey – Anti-dumping duty on steel and iron pipe fittings, WT/DS208 (2000); European Communities – Measures affecting soluble coffee, WT/DS209 (2000); Mexico – Provisional anti-dumping measure on electric transformers, WT/DS216 (2000); United States – Continued dumping and subsidy Offset Act of 2000, WT/DS217 (2000); United States – Countervailing duties on certain carbon steel products from Brazil, WT/DS218 (2000); European Communities – Anti-dumping duties on malleable cast iron tube or pipe fittings from Brazil, WT/DS219 (2000); Canada – Export credits and loan guarantees for regional aircraft, WT/DS222 (2001); United States – US patents code, WT/DS224 (2001); United States – Anti-dumping duties on silicon metal from Brazil, WT/DS239 (2001); Argentina – Definitive Anti-dumping duties on poultry from Brazil, WT/DS241 (2001); United States – Equalizing excise tax imposed by Florida on processed orange and grapefruit products, WT/DS250 (2002); United States – Definitive safeguard measures on import of certain steel products, WT/DS259 (2002); European Communities – Export subsidies on sugar, WT/DS266 (2002); United States – Subsidies on upland cotton, WT/DS267 (2002); European Communities – Customs classification of frozen boneless chicken cuts, WT/DS269 (2002); United States – Domestic support and export credit guarantees for agricultural products, WT/DS365 (2007); United States – Anti-dumping administrative reviews and other measures related to imports of certain orange juice from Brazil, WT/DS382 (2008); European Union and Netherlands – Seizure of generic drugs in transit, WT/DS409 (2010); and, South Africa – Anti-Dumping Duties on frozen meat of fowls from Brazil, WT/DS439 (2012).

This study recognizes the importance of Brazil as a new economic power and analyzes the evolution of Brazilian Trade Policy in the last forty years. It further describes how developing countries have encountered common issues under the international trade legal system, and the way Brazil has promoted and implemented its trade policies relating to those issues through disputes brought to the WTO. However, the effectiveness of the Brazilian model for developing countries is questioned taking into account the limited capacity of Brazil to represent general interests, the particular conditions that led to its current economic development, and the disadvantageous economic situation of the rest of the third world.

This study is divided into five parts. Part I is the Introduction to the study. Part II describes the development of Brazilian Trade Policy since the Industrialization Era up until today, explaining the most important policies and strategies adopted during the identified periods. Part III analyzes particular issues that developing countries have faced within the WTO as well as the discussions and negotiations carried on these particular matters, focusing on the outcome and achievements reached by the third world. Part IV details dispute settlement cases related to common issues concerning developing countries within the WTO, where Brazil has been involved in order to protect economic interests and critical sectors in accordance with its international trade policies. Finally, Part V after considering the role of the WTO as agent for economic development, evaluates the impact that Brazilian Trade Policy has had and has in the role of developing countries within the WTO framework and analyzes whether other developing countries could use the Brazilian model and the WTO to pursue their own trade policies and goals.

II. History of Brazilian Trade Policy

The development of the Brazilian Trade Policy has been attributed to two particular periods: First, a protectionist model that drove Brazil's economy since its Industrialization started in the 1930s, and secondly a trade liberalization model that emerged in the 1980s as a consequence of the global financial crisis.

These two periods are part of the *Developmentalism* model that has been followed by Brazil to strengthen its economy over the last 80 years, even though both periods differ in how the State applied and perceived the concept of development as well as in their characteristics and the trade policies adopted.

This chapter addresses the historical development of Brazilian trade policy until today, reflecting the path that Brazil has taken for its successes. It sets out to analyze both the *National Developmentalism* and the *New Developmentalism* strategies that lead to the growth of the Brazilian economy in the twenty-first century.

A. National Developmentalism

During the Great Depression in the 1930s, developing countries realized the importance of protecting their markets from external economic fluctuations, as well as the need to strengthen their economies by promoting not only the domestic production of primary goods, but also the industrialized products that had been mainly imported until that moment. "From the late 1940s to the mid-1960s, most developing countries conceived of development as driven by industrialization policies relying on import-substitution and growth of domestic 'infant industries' (i.e. newly emerging industries)."⁵

⁵ Patrick A. Messerlin, *Enlarging the Vision for Trade Policy Space: Special and Differentiated Treatment and Infant Industry Issues*, 29 *WORLD ECONOMIC AFFAIRS* 1397 (2006).

Brazil was not an exception and as a consequence, it adopted a Developmentalist model based on “import substitution, protection of national industry, focus on the market and reduction of an economy’s openness coefficient.”⁶

Import Substitution Industrialization was characterized by the central role given to the State in order to create necessary conditions for the economic development of different industries. The principal policy instruments used to promote and intensify ISI were among others: high customs tariffs and/or exchange controls; special preferences for domestic and foreign firms importing capital goods for new industries; preferential import exchange rates for industrial raw materials, fuels and intermediate goods; cheap loans by government development banks for favored industries; and, the direct participation of government in certain industries, especially the heavier industries, such as steel, where neither domestic nor foreign private capital was willing or able to invest.⁷

This model helped bolster Brazil’s industrialization process. However, it created distortions in its economy such as the repression of exports,⁸ the lack of vertical integration of the industrial apparatus, and the persistence of social and economic inequalities.⁹ “At the end of the 1970s, this model based on a closed economy gave clear signs of being eroded and challenged by the debt and oil crisis that ravaged Latin America, and particularly Brazil.”¹⁰

B. New Developmentalism

The transition to a new model started in the 1980s influenced by the debt crisis as well as by the “ideological neoliberal wave coming from the United States”¹¹ promoting

⁶ Luiz Carlos Bresser-Pereira, *Developing Brazil Overcoming the Failure of the Washington Consensus*, 48 (2009).

⁷ Cf. Werner Baer, *Import Substitution and Industrialization in Latin America: Experiences and Interpretations*, 7 *LAT AM RES REV* 95 (1972).

⁸ See Alice Amsden, *Escape from Empire: The Developing World’s Journey Through Heaven and Hell*, 40 (2007).

⁹ See Diana Alarcon & Terry McKinley, *Beyond Import Substitution: The Restructuring Projects of Brazil and Mexico*, 19 *Latin American Perspectives* 72 (1992).

¹⁰ Glauco Arbix & Scott B. Martin, *supra* note 2, at 8 - 9.

¹¹ Luiz Carlos Bresser-Pereira, *supra* note 6, at 50.

openness of global markets and removal of major administrative controls. However, it was only in the 1990s that Brazil as well as the majority of Latin American countries started to put together and apply the New Developmentalist model.

New Developmentalism was developed on the basis of the State's role being transformed and adapted towards economic development, combined with a substantive political reorientation.¹² Luiz Carlos Bresser-Pereira explains the main differences between Old and New Developmentalism:¹³

Old Developmentalism	New Developmentalism
State plays a leading role in terms of forced savings and investment in firms	State has a subsidiary, but important, role in terms of forced savings and investment in firms
Protectionist and pessimistic	Export-led and realistic
A certain complacency toward inflation	No complacency toward inflation

In the international trade arena, *New Developmentalism* was based on a trade liberalization strategy. In the case of Brazil, during the governments of both President Fernando Henrique Cardoso from 1995 to 2002 and particularly President Ignacio Lula da Silva from 2003 to 2011, the Country was given the opportunity to open its economy to the world through the stimulation of competition and international trade.

However, this process was relatively slow due to the protectionist tradition of the country that prevailed during the previous decades, and the different forces converging in the Brazilian scenario.¹⁴ First, between 1994 and 1998 there was a raised concern from sectors threatened by foreign competition, due to the substantial

¹² See Glauco Arbix & Scott B. Martin, *supra* note 2.

¹³ Luiz Carlos Bresser-Pereira, *supra* note 6, at 247.

¹⁴ See Pedro da Motta Veiga, *Brazil's Trade Policy: Moving Away from Old Paradigms*, in Brazil as an Economic Superpower? Understanding Brazil's Changing Role in the Global Economy (Lael Brainard & Leonardo Martinez-Diaz eds., Brookings Institution Press, 2009).

tariff reduction that increased the amount of imports. This situation drove the government to implement administrative measures to restrict imports, such as cash payments requirements for imports financed in less than a year, compliance with phyto-sanitary requirements, the need for a license to import a long list of products and the implementation of safeguards for the import of textiles and toys.¹⁵

Second, there were macroeconomic concerns from policy makers. For example, in 1997 the average nominal tariff protection was 4.5 percentage points above the tariff registered in 1994 and only in 1999, the average levels of tariff returned to those applied in the mid-1990s.¹⁶ These forces led to a moderate inversion of the trade-opening process.

Cardoso had to face these obstacles and worked on substituting the protectionist model through the progressive liberalization of the economy. This strategy was driven by various factors including the international integration that was taking place in the world at that time due to the creation of the WTO, as well as the new role being played by developing countries in international trade. For instance, Brazil became part of the Group of Twenty (G-20) established in 1999 with the mandate to be the premier forum for international economic development promoting open discussion between industrial and emerging-market countries on key issues related to global economic stability.¹⁷

During his presidency, Cardoso also focused on the strength of commercial relations with Brazil's two main economic partners: the United States and the European Union. As a consequence, initiatives such as the negotiation of the Free Trade Area of the Americas (FTAA) became a priority.

At the end of Cardoso's government, Brazil had built an economic foundation that would be successfully developed by Lula. In an interview in the last year of his

¹⁵ Cf. Honorio Kume and Guida Piani, *Antidumping and Safeguard Mechanisms: The Brazilian Experience, 1988-2003* 8 (World Bank, Working Paper No. 3562, 2005), available at <https://openknowledge.worldbank.org/handle/10986/8991>

¹⁶ See Pedro da Motta Veiga, *supra* note 14, at 8.

¹⁷ See G-20, http://www.g20.org/docs/about/about_G20.html (last visited Apr. 8, 2013).

mandate, Cardoso stated: “Our pillars now are: fiscal responsibility, an emphasis on competitiveness and, above all, total transparency as regards the rules of the game. Investors, both domestic and foreign, know that Brazil is now a sound economy, with well-grounded foundations and a potential for growth unparalleled in any nation at a similar stage of development.”¹⁸

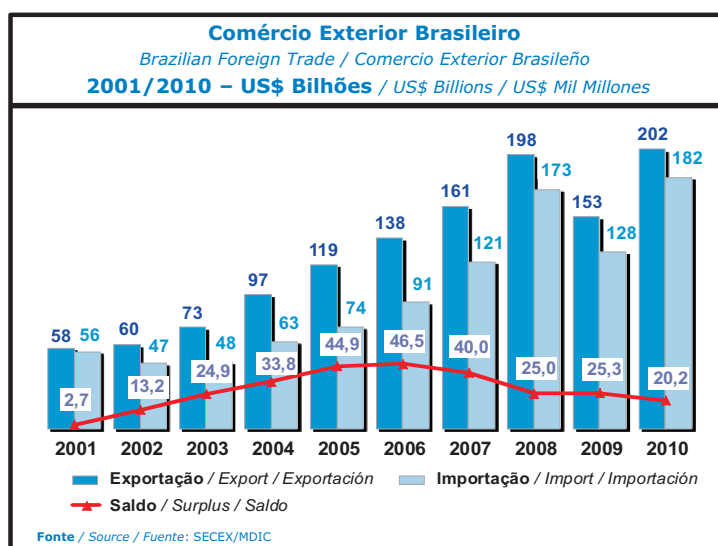
Brazilian trade policy was as a result more dynamic and adapted to the world’s international trade. Subsequently with Lula, Brazil would start a new era that would take it to the top of the global economy.

International trade policy under Lula’s government was focused on four areas: expansion of Brazilian international trade, particularly exports; promotion of foreign direct investment (FDI) inside Brazil and abroad; growth and strengthening of commercial relations with new economic partners; and, active participation in international trade forums in order to protect national interests.

As a consequence of the industrialization process and the liberalization of the economy, Brazil’s foreign trade experienced a significant growth since 2003 during Lula’s government. Exports contributed significantly to this positive change, reaching its maximum point of 202 billion U.S. dollars in 2010 under the export-led model.¹⁹

¹⁸ Interview by Miguel P. Caldas with Fernando Henrique Cardoso, in Miguel P. Caldas, *President Fernando Henrique Cardoso on a Decade of Social and Economic Change in Brazil*, 16 ACAD MANAGE EXEC 8 (2002).

¹⁹ Ministry of Development, Industry and Foreign Trade of Brazil, *Knowing Brazil in Numbers (June 2011)*, available at <http://www.mdic.gov.br/sitio/interna/interna.php?area=5&menu=2701>.



This development “has been closely related to a diversification in the range of exports in terms of sectors, degrees of value added, and types, which include not just simple commodities, but also value-added commodities such as ethanol as well as manufactured goods across an increasingly diverse range.”²⁰ For instance, Brazil is classified as the second producer and first exporter of ethanol in the world, and as the fourth producer and exporter of airplanes worldwide.²¹

In terms of FDI, Brazilian direct investments abroad increased from 2,0 billion U.S. dollars in 2003 to 34,9 billion U.S. dollars in 2010, while FDI in Brazil varied from 10,1 billion U.S. dollars to 48,4 billion U.S. dollars during the same period. The latter in 2010 was distributed in the following sectors: Agriculture, livestock and mineral extraction (34,5%); Industry (36,8%); and, services (28,7%).²² The FDI increment was then the result of Lula’s objective to develop foreign investment for a more dynamic economy.

One difference between Cardoso and Lula’s international trade policy was the approach to trade negotiations in order to decrease dependency on its traditional commercial partners while opening new different economic markets. “The strategic

²⁰ Glauco Arbix & Scott B. Martin, *supra* note 2, at 15-16.

²¹ See Ministry of Development, Industry and Foreign Trade of Brazil, *supra* note 19.

²² *Id.*

shift of the Lula government in the field of trade negotiations has had three characteristics: the downgrading of negotiations with the United States and the EU, resistance to negotiating disciplines from the World Trade Organization (WTO), and a new priority given to South-South negotiations.²³

According to this premise, Brazil focused on the negotiation of trade agreements with other developing countries (see chart below),²⁴ enhancing initiatives such as MERCOSUR, the political and trade agreement between Brazil, Argentina, Uruguay and Paraguay, and opposing proposals such as the FTAA lead by the United States.

Acordos Comerciais em que o Brasil é Parte <i>Trade Agreements / Acuerdos Comerciales</i>	
ALADI (Preferência Tarifária Regional / <i>Regional Tariff Preference</i>)	Mercosul – Peru / <i>Mercosur – Peru</i>
ALADI (Acordo de Sementes / <i>Agreement Seeds</i>)	Mercosul – Colômbia, Equador e Venezuela <i>Mercosur – Colombia, Ecuador and Venezuela</i>
ALADI (Acordo de Bens Culturais / <i>Agreement of Cultural</i>)	Brasil – Guiana / <i>Brazil – Guyana</i>
Brasil – Uruguai / <i>Brazil – Uruguay</i>	Brasil – Suriname / <i>Brazil – Suriname</i>
Brasil – Argentina / <i>Brazil – Argentina</i>	Mercosul – Cuba / <i>Mercosur – Cuba</i>
Mercosul / <i>Mercosur</i>	Mercosul – Índia / <i>Mercosur – India</i>
Mercosul – Chile / <i>Mercosur – Chile</i>	Mercosul – Israel / <i>Mercosur – Israel</i>
Mercosul – Bolívia / <i>Mercosur – Bolivia</i>	Mercosul – SACU (<i>ainda sem vigência</i>) <i>Mercosur – SACU (yet without force)</i>
Brasil – México / <i>Brazil – Mexico</i>	Mercosul – Egito (<i>ainda sem vigência</i>) <i>Mercosur – Egypt (yet without force)</i>
Mercosul – México / <i>Mercosur – Mexico</i>	Mercosul – Jordânia (<i>em negociação</i>) <i>Mercosur – Jordan (under negotiation)</i>
Mercosul – México (Automotivo) <i>Mercosur – Mexico (Automotive)</i>	Mercosul – União Europeia (<i>em negociação</i>) <i>Mercosur – European Union (under negotiation)</i>

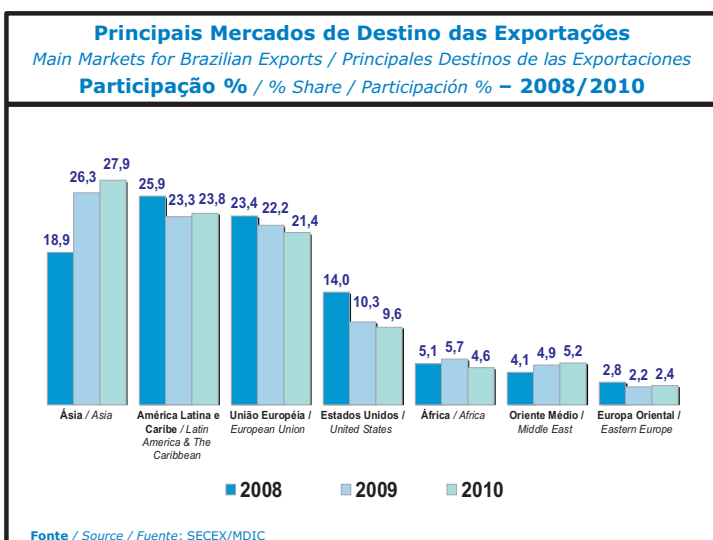
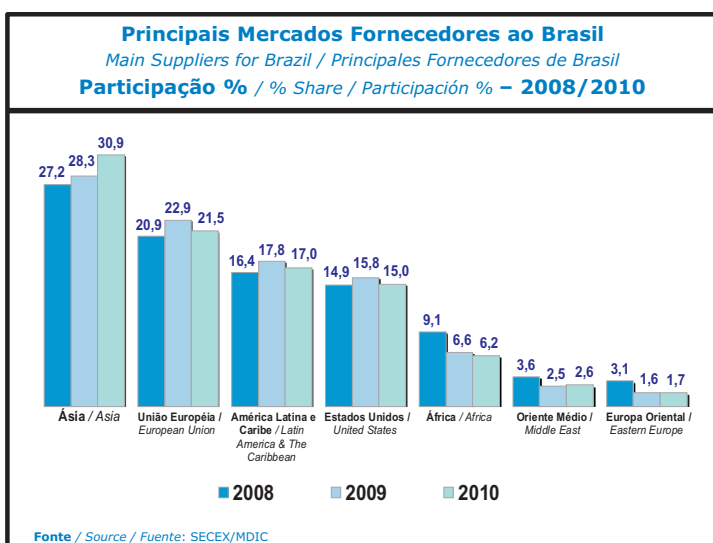
Fonte / Source / Fuente: DEINT/MDIC
Nota / Note: Posição em Junho/2011 / *Position in June/2011 / Posición Junio/2011.*

The consequence of this strategy was the shift in the main suppliers for Brazil and the main markets for Brazilian exports. Since 2008 Asia has been Brazil's most important commercial partner as it is illustrated in the following charts:²⁵

²³ Pedro da Motta Veiga, *supra* note 14, at 10.

²⁴ Ministry of Development, Industry and Foreign Trade of Brazil, *supra* note 19.

²⁵ *Id.*



Ultimately, Lula repositioned Brazil's role in the global arena with respect to multilateral trade negotiations. At the same time, Brazil adopted an offensive and defensive strategy of its national economic interests, which led the country, as it will be explained in the next Chapters, to demand at the WTO - DSU the protection and sanction of measures endangering critical sectors of Brazilian international trade.

C. Brazilian Trade Policy Today

Dilma Rousseff assumed the presidency of Brazil on January 1st, 2011. As a former member of Lula's government, Rousseff had the opportunity to witness the

transformation of the Brazilian economy and to work closely on the implementation and development of Lula's socio-economic programs.

As expected, Rousseff has maintained the policies from the previous administration with respect to international trade, focusing on the strength and growth of key sectors internally and the promotion of foreign direct investment.²⁶ Because the Brazilian economy has slowed down since 2011 from its rapid growth, the government has reacted with an increased interest to reactivate the economy and improve competitiveness by making protectionist decisions such as antidumping measures, increased taxes on imported automobiles, and controls and taxes on foreign exchange transactions.²⁷

Tax incentives have been issued to stimulate production and consumption, but these are mainly focused on the automotive industry marginalizing other critical sectors that require government support such as the exporters. Furthermore, additional trade agreements have been limited by MERCOSUR, which does not allow the individual negotiation of trade agreements by its Members and has not concluded a significant alliance in recent years.

Despite this situation, Brazil has been successful in the diversification of its markets and products and it continues supporting the liberalization and growth of its economy. Rousseff's government promises to remain active within the different international forums and keep working for the consolidation of international trade relations with strategic partners such as China.

²⁶ See Ministry of Development, Industry and Foreign Trade of Brazil, <http://www.desenvolvimento.gov.br/sitio> (last visited May 6, 2013).

²⁷ See John H. Welch, *Brazil under Dilma: Forward, Backward or Status Quo?*, in Center for Hemispheric Policy - University of Miami, *Brazil under Rousseff Task Force Papers* (2012), available at http://www.miami.edu/index.php/chp/task_force_policy_papers/brazil_under_rousseff_task_force_papers/

III. Common Issues Relating to Developing Countries within the WTO

Under principles of non-discrimination, lowering of trade barriers, transparent competition, fair practices and privilege to developing countries,²⁸ the WTO was created as a forum to negotiate trade agreements, implement and monitor WTO Agreements, support the building of trade capacity for developing countries, and to settle trade disputes through the Dispute Settlement System (DSS).²⁹

The WTO was conceived to promote trade liberalization and consequently the standards of living of the developing countries via economic development. However, despite this intended mandate, the developed world continues to exert a strong influence in the international trade landscape, and common issues have arisen for developing countries with respect to the approach to critical sectors and also the negotiation process of trade agreements.

This chapter sets out to identify main issues encountered by developing countries within the WTO. In evaluating the development of discussions and negotiations of the international trade legal system led by the developed world, the analysis will extend to the role assumed by developing countries and the outcome with respect to three particular issues: agricultural subsidies, antidumping, and the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement).

A. First Common Issue: Agricultural Subsidies

Agricultural subsidies have a distorting effect on the sector, not only because they are directly related to the type of goods that producers choose to make, resulting in a changing market dynamic, but also because subsidies discourage competition and encourage over production in the developed world.

²⁸ See World Trade Organization, *Understanding the WTO*, available at http://www.wto.org/english/thewto_e/whatis_e/what_stand_for_e.htm

²⁹ See World Trade Organization, *What is the WTO?*, available at http://www.wto.org/english/thewto_e/whatis_e/what_we_do_e.htm

Agriculture is a sensitive area for many governments as it concerns both farmers and the world's consumers. In the past, agricultural trade had been excluded from the General Agreement on Tariffs and Trade (GATT), through exceptions and waivers such as import quotas or export subsidies, and this treatment led to uncompetitive production behind market restrictions and subsidy practices worldwide.³⁰

Nevertheless, agricultural matters were included after the Uruguay Round into the WTO under the leadership of the Cairns Group,³¹ whose major negotiating objective was agricultural trade liberalization. Developed countries were also interested given that some of them were major exporters of agricultural products and that they were looking for an expansion of their markets.

The long-term objective after the Uruguay Round was to establish a fair and market-oriented agricultural trading system and to initiate a reform process through the negotiation of commitments on support and protection and through the establishment of strengthened and more operationally effective GATT rules and disciplines. The goal was to provide for substantial progressive reductions in agricultural support and protection over an agreed period of time.³²

Therefore, the Agreement on Agriculture was the first multilateral agreement dedicated to the sector and agricultural subsidies were brought into the multilateral trading system for the first time. "The agreement does allow governments to support their rural economies, but preferably through policies that cause less distortion to trade. It also allows some flexibility in the way commitments are implemented. Developing countries do not have to cut their subsidies or lower their tariffs as much

³⁰ See General Agreement on Tariffs and Trade (Organization), *The Uruguay Round: A Giant Step for Trade and Development and a Response to the Challenges of the Modern World*.

³¹ The Cairns Group of Agricultural exporting Countries was formed in 1986 including developed and developing countries such as Argentina, Australia, Brazil, Canada, Chile, Colombia, Fiji, Hungary, Indonesia, Malaysia, New Zealand, Philippines, Thailand and Uruguay, in response to the agricultural subsidies war that had arisen between the EU and the US, which was eroding the comparative advantage of middle-income agricultural exporters who could not offer competing levels of subsidy for their own producers. See Amrita Narlikar, *The World Trade Organization A very Short Introduction*, 68 (2005).

³² See World Trade Organization, Agreement on Agriculture pmb., Apr. 15, 1994.

as developed countries, and they are given extra time to complete their obligations. Least-developed countries don't have to do this at all. Special provisions deal with the interests of countries that rely on imports for their food supplies, and the concerns of least-developed economies."³³

The Agreement on Agriculture targeted three pillars of agricultural trade policy: market access, domestic support mechanisms, and export subsidies.³⁴

First of all, to improve market access and regulate trade restrictions confronting imports, a tariffication process was implemented in order to convert quotas and other types of measures into tariffs.

According to Article 4 of the Agreement on Agriculture, Members shall not maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties including quantitative import restrictions, variable import levies, minimum import prices, discretionary import licensing, non-tariff measures maintained through state-trading enterprises and voluntary export restraints, except as otherwise provided for in Article 5 (Special Safeguard Provisions) and Annex 5 (Special Treatment).

Fundamentally, the tariffication process was envisaged to ensure, via its system of tariff-quotas, that market access commitments and quantities imported before the agreement took effect could continue to be imported by applying lower tariff rates for specified quantities and higher rates for quantities that exceeded the quota.³⁵

Secondly, regarding domestic support mechanisms, an Aggregate Measure of Support (AMS) was negotiated.³⁶ AMS is used to assess how much domestic support

³³ World Trade Organization, *Agriculture: fairer markets for farmers*, available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm3_e.htm

³⁴ Cf. Amrita Narlikar, *The World Trade Organization A very Short Introduction*, 67 (2005).

³⁵ Cf. World Trade Organization, *Understanding the WTO: The Agreements*, available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/utw_chap2_e.pdf

³⁶ See World Trade Organization, Agreement on Agriculture art. 6, 7, Apr. 5, 1994.

is being provided for the agricultural sector by the subject country, which directly affects production and trade. It categorizes subsidies into four boxes: i) Red box: prohibited domestic support measures; ii) Amber box: measures to be cut as per certain rates - i.e developed countries agreed to reduce them by 20% over six years starting in 1995, developing countries agreed to reduce them by 13% over 10 years and least-developed countries were not obliged to make any cuts; iii) Green box: allows the use of domestic support measures with minimum impact on trade such as government-funded research, direct income transfers for farmers that are not coupled with production, structural adjustment assistance, food security, and other support on a small scale when compared with the total value of the product or products supported which is 5% in the case of developed countries and 10% or less for developing countries; and, iv) Blue Box: certain compensation payments for farmers required to limit production and deficiency payments.

Finally, export subsidies were prohibited under the Agreement on Agriculture, unless the subsidies are specified in a member's list of commitments.³⁷ "Where they are listed, the agreement requires WTO members to cut both the amount of money they spend on export subsidies and the quantities of exports that receive subsidies. Taking average for 1986-90 as the base level, developed countries agreed to cut value of export subsidies by 36% over the six years starting in 1995 and the developing countries by 24% over 10 years. Developed countries also agreed to reduce the quantities of subsidized exports by 21% over the six years and developing countries agreed by 14% over 10 years. Least-developed countries were not required to make any cuts."³⁸ New export subsidies were prohibited by the Agreement.

An important provision included within the Agreement on Agriculture was the Peace Clause, under the understanding that i) certain actions available under the Subsidies Agreement would not be applicable with respect to green box policies and domestic support and export subsidies maintained in conformity with commitments; ii) due restraint would be used in the application of countervailing duty rights under the General Agreement; and, iii) limits in terms of the applicability of nullifications or

³⁷ See *id.* art. 9.

³⁸ World Trade Organization, *supra* note 35.

impairment actions were set out. The aim was to reduce the likelihood of disputes or challenges on agricultural subsidies over a period of nine years, until the end of 2003.

The outcome of the Uruguay Round was far from satisfactory for developing countries, and the provisions of the Agreement on Agriculture started getting diverted from their objective to reduce trade barriers. Developed countries started using sophisticated calculations and introducing complicated definitions to find ways to maintain the already existing restrictions and subsidies. “According to the OECD (2000), the level of domestic supports given by the developed countries has risen from 31 per cent of gross receipts in 1990, to 40 per cent in 1997, without any violation of the Agreement. The reason is that the Agriculture Agreement allowed countries to omit a wide range of different types of domestic subsidy from the calculation of the aggregate measure of support. Thus, countries have been able to increase the level of their domestic subsidy to farmers by offsetting cuts in prohibited subsidies (the Amber Box) with increased subsidies in the other categories (the Green and Blue Boxes) that are deemed to be non-trade-distorting.”³⁹

Furthermore, developing countries depending on World Bank and IMF loans were forced to cut or eliminate the support payments to the farmers, in the name of trade liberalization.

Trade negotiators met at the biennial WTO ministerial meeting in September 2003 in Cancun to continue with the Doha Round negotiations initiated in 2001. The substance of the discussions was based on three issue-areas and included agriculture and cotton, both areas of continued dispute between the developed and the developing world.

The United States (US) and the European Union (EU or EC) continued with an inflexible stance on agriculture trying to include all forms of export subsidy such as food aid and export credits, while developing countries proposed large cuts in their agricultural subsidies and tariffs including a capping of Green Box subsidies.

³⁹ Nigel Grimwade, *The GATT, the Doha Round and Developing Countries*, in *The WTO and Developing Countries* 11, 21 (Homi Katrak & Roger Strange ed. 2004).

However, a new coalition of developing countries led by Brazil and India was formed,⁴⁰ and the G-20 took the discussions towards a new direction.⁴¹

The G-20 proposed greater commitments from developed countries. “On export subsidies, the G20 proposed the elimination of export subsidies of interest to developing countries within a target date and further a commitment to reduce export subsidies by a later specified date. References to Special and Differential Treatment appeared throughout the proposal.”⁴²

On the Cotton initiative, the US position was not different than their general approach on agriculture, which was made clear by their refusal to discuss cotton subsidies as proposed for African countries. The final text was closer to the US approach, calling for consultations to “address the impact of distortions that exist in the trade of cotton, man-made fibers, textiles and clothing to ensure comprehensive consideration of the entirety of the sector”. It committed no new resources towards financial compensation, and instead only instructed some of the international organizations to direct existing programs and resources to economic diversification in countries where cotton accounted for a major share in GDP. The disappointment and shock of the African countries to this proposal was considerable, and was echoed by other countries as well.⁴³

As expected, the conference at Cancun collapsed and the Doha agenda did not make any significant progress. “The balance of power in the WTO was shifting, and although developing countries were unable to push through their own negotiating proposals, they showed that any final agreement would require their active participation and consent.”⁴⁴

⁴⁰ See Amrita Narlikar, *supra* note 34, at 111.

⁴¹ The G-20 group at the 2003 Cancun Ministerial consisted of Argentina, Bolivia, Brazil, Chile, China, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, India, Mexico, Pakistan, Paraguay, Peru, Philippines, South Africa, Thailand and Venezuela.

⁴² Amrita Narlikar, *supra* note 34, at 111 – 112.

⁴³ *Cf. id* at 115.

⁴⁴ Kent Jones, *The Doha Blue Institutional Crisis and Reform in the WTO*, 45 (2010).

As stated by the G-20 chair, Brazilian Foreign Minister Celso Amorin, Cancun will be remembered as the conference that signaled the emergence of a less autocratic multilateral trading system.⁴⁵

Until today, the Doha Round has remained paralyzed with respect to agricultural liberalization due to the struggle between developed countries, which are not willing to substantially cut agricultural supports, and developing countries, which are accordingly required to make radical changes to their agricultural systems resulting in a clear opportunity for the developed world to enhance their agricultural sectors. “Achieving a significant WTO agreement in agriculture that includes developing countries is therefore likely to require some combination of progress in agricultural productivity, domestic safety nets, new jobs programs, labor-intensive direct foreign investment, and foreign aid.”⁴⁶

B. Second Common Issue: Antidumping

The adoption and implementation of Anti-dumping (AD) policies and measures has been allowed since the 1947 GATT.⁴⁷ However, it was only in 1995 with the inception of the WTO, that an Antidumping Agreement⁴⁸ (ADA) came out to establish a common set of rules applicable to all WTO members, to provide a detailed guidance for countries to implement and administer AD laws, and to address potential disputes through the WTO Dispute Settlement Understanding.⁴⁹

Dumping is said to occur if a product is exported at a price lower than the price it is normally charged for it in the home market of the exporting country.⁵⁰

⁴⁵ Cf. Fatoumata Jawara & Aileen Kwa, *Behind the Scenes at the WTO: The Real World of International Trade Negotiations*, xxii (2003).

⁴⁶ Kent Jones, *supra* note 44, at 46.

⁴⁷ See General Agreement on Tariffs and Trade, art. VI Anti-dumping and Countervailing Duties, 1947, available at http://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm

⁴⁸ See World Trade Organization, Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, available at http://www.wto.org/english/docs_e/legal_e/19-adp_01_e.htm#fnt1 [hereinafter Antidumping Agreement].

⁴⁹ Cf. Chad P. Bown, *The WTO and Antidumping in Developing Countries*, 20 *ECON POLIT* 255, 263 (2008).

⁵⁰ See Antidumping Agreement, *supra* note 48, art. 2.1

Under the ADA, governments are allowed to act against such dumping by adopting AD measures, with the previous undertaking of an investigation and consideration of economic evidence to determine its existence, degree and effect.

According to Article 5.2 of the ADA, any application alleging dumping and initiated by or on behalf of a domestic industry⁵¹ shall include evidence of (a) dumping, (b) injury and (c) a causal link between the dumped imports and the alleged injury.

An important aspect of the process is that petitioners must be able to show that dumping is causing or threatening to cause ‘material injury’ to the competing domestic industry. The determination of injury by the investigating authorities, as established in Article 3.1 of the ADA, shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.

When considering the impact of the dumped imports on the domestic industry, the Agreement provides a non-exhaustive list of relevant economic factors and indices having a bearing on the state of the industry that shall be evaluated, including actual and potential decline in sales, profits, output, market share, productivity, return on investments or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, and ability to raise capital or investments.⁵²

At the end, the authorities of the importing Members are responsible to decide whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled, and whether the amount of the anti-dumping duty to be imposed shall be the full margin of dumping or less.⁵³

⁵¹ *See id.* art. 4 Definition of Domestic Industry.

⁵² *See id.* art. 3.4.

⁵³ *See id.* art. 9.1.

After 1995, developing countries started to become frequent users of the WTO sanctioned AD trade policy instrument, displacing the four historical developed-economy users of AD – the United States, the European Union, Canada and Australia, which used to represent 73.1% of the total number of antidumping investigations.⁵⁴ As Chad P. Bown illustrates below, a sizable share of the global use of AD – 39.5% - has been recently allocated to “new user” developing countries such as Argentina, Brazil, Colombia, India, Indonesia, Mexico, Peru, Turkey and Venezuela.⁵⁵

TABLE 1 COUNTRY USE OF ANTIDUMPING UNDER RECENT GATT AND WTO PERIODS

Country	GATT period, 1985–1994	WTO period, 1995–2004	
	Number of antidumping investigations	Number of antidumping investigations	Number of antidumping measures imposed
<i>“New user” developing countries in the empirical analysis</i>			
Argentina	44	192	139
Brazil	58	116	62
Colombia	11	23	11
India	9	400	302
Indonesia	0	60	23
Mexico	123	79	69
Peru	11	55	34
Turkey	74	89	77
Venezuela	6	31	25
Subtotal (share of total)	336 (16.2%)	1,045 (39.5%)	742 (44.8%)
<i>“Historical” users of antidumping</i>			
Australia	447	172	54
Canada	223	133	80
European Union	364	303	193
United States	475	354	219
Subtotal (share of total)	1,509 (73.1%)	962 (36.4%)	546 (33.0%)
Other WTO Members (share of total)	220 (10.7%)	639 (24.1%)	368 (22.2%)
Total	2,065	2,646	1,656

Notes: The unit of observation for this table is a product-level, foreign country-specific anti-dumping investigation or measure.

Nowadays, developing countries are using the Agreement as active actors to protect their key industries from the developed world, and also as one of the few safeguard instruments allowed within the WTO for import restriction given that multilateral commitments have limited their ability to implement constraining policies. In addition, some authors⁵⁶ are of the opinion that AD has helped developing

⁵⁴ See Chad P. Bown, *Global Antidumping Database 2012*, available at <http://econ.worldbank.org/ttd/gad>

⁵⁵ Chad P. Bown, *supra* note 49, at 256

⁵⁶ See J. Michael Finger & Julio J. Nogues, World Bank, *Safeguards and Antidumping in Latin*

countries by being an escape valve to manage an overall program of trade liberalization, increasing the willingness to take on more extensive liberalization than it would take on without such an option.⁵⁷

Article 15 of the ADA recognizes a special status that developed countries must give to the situation of developing countries when considering the application of anti-dumping measures under the Agreement. Nevertheless, the AD mechanism is not always used in the best interest of the developing world.

First of all, the requirements under the Agreement allow for substantial government discretion to decide whether the dumping is causing material injury to the domestic industry.

During a dumping investigation, while a wide range of factors to be analyzed are provided, these are not always taking into account in the same way or properly evaluated by the authorities in the importing country, who end up constructing evidence under their own criteria.⁵⁸ For instance, “investigating authorities in the United States and European Union take into account both the share imports from the country under investigation as well as the growth in these imports when determining whether the imports are causing injury to the domestic industry. In contrast, authorities in Argentina, Canada and Peru appear to rely more on the share imports from the country under investigation.”⁵⁹

Secondly, AD regulations are not at all times aligned with the anti-trust law that would apply to internal investigations, which place the accused exporters in clear disadvantage because they are subject to more broad standards that determine their responsibility. “The definitive analysis of the latter point was an extensive review by

American Trade Liberalization: Fighting Fire with Fire (2005); Bernard M. Hoekman & Michael M. Kostecki, *The Political Economy of the World Trading System: The WTO and Beyond* (3rd ed. 2009).

⁵⁷ Cf. Chad P. Bown, *supra* note 49, at 285 - 286

⁵⁸ See Lindsey Brink, Cato Institute, *The US Antidumping Law: Rhetoric versus Reality*, 7 TRADE POLICY ANALYSIS 1 (1999), available at <http://www.cato.org/publications/trade-policy-analysis/us-antidumping-law-ethoric-versus-reality>.

⁵⁹ Kara M. Reynolds, *From Agreement to Application: An Analysis of Determinations under the WTO Antidumping Agreement*, 17 REV INT ECON 969, 969 – 970 (2009).

the OECD of antidumping cases in Australia, Canada, the European Union and the United States. The review found that 90 per cent of the instances of import sales found to be unfair under antidumping rules would never have been questioned under competition law, i.e., if used by a domestic enterprise in making a domestic sale. Much less than ten per cent of the antidumping cases would have survived the much more rigorous standards of evidence that applies under competition law.”⁶⁰

The consequence of these differences across countries with respect to AD measures is that antidumping investigations may be biased against certain trading partners by the use of particular methodologies or procedures to determine the level of dumping. Developing countries can face a disadvantaged situation because of their industries’ lack of resources or knowledge to defend themselves successfully during the course of an investigation, and also because countries may be more likely to impose protection measures against them considering their limited ability to retaliate.⁶¹

In a nutshell, the implementation of AD regulations and the investigation process vary from one country to the other, with the only requirement being to remain consistent with the principles of the ADA. Essentially, the WTO framework becomes only a base for the development of distinct AD structures provided by each Member country, that is not at all times beneficial to the developing world.

C. Third Common Issue: The TRIPS Agreement and Patent Protection on Pharmaceutical Products

Upon the signing of the agreement instituting the WTO in 1994, Members adhered to different binding treaties on trade in goods and services annexed to the convention,⁶² including the TRIPS Agreement.

⁶⁰ J. Michael Finger, Francis Ng & Sonam Wangchuk, *Antidumping as Safeguard Policy* 7 (World Bank, Working Paper No. 2730, 2001), available at

<http://elibrary.worldbank.org/content/workingpaper/10.1596/1813-9450-2730>

⁶¹ Cf. Kara M. Reynolds, *supra* note 59, at 973.

⁶² World Trade Organization, General Agreement on Trade in Services (GATS); Multilateral Agreements on Trade in Goods including GATT 1994; Agreement on Agriculture; Agreement on the Application of Sanitary and Phytosanitary Measures; Agreement on Textiles and Clothing; Agreement

The TRIPS Agreement today constitutes the most comprehensive multilateral agreement on intellectual property. It introduced global minimum standards that all Member States shall comply with, through national legislations for promoting effective and adequate protection of intellectual property rights, including those for patents.⁶³

Developed countries presented the negotiation on TRIPS as a necessary condition to promote innovation and to stimulate technology and capital flows to developing countries. The assumption was that people from developed and developing countries will benefit from intellectual property rights (IPRs).⁶⁴

However, the standards established by TRIPS were clearly suitable for developed countries with strong industrial sectors and technological capabilities to trade goods that would be subject to IPRs protection. This caused an increase in the costs of essential products such as pharmaceuticals and made the developing world dependent on innovation that it could not afford, reducing its competitiveness in the international trade arena.

Taking into consideration this particular situation for developing and least-developed countries (LDCs), and the challenges they could face to implement the TRIPS Agreement, a transitional period to put in place a product patent regime for technology and products such as pharmaceuticals was conferred until 2005 and 2016 respectively.⁶⁵

In addition, various flexibilities and public health safeguards were adopted including:

on Technical Barriers to Trade; Agreement on Trade-Related Investment Measures; Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994; Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994; Agreement on Preshipment Inspection; Agreement on Rules of Origin; Agreement on Import Licensing Procedures; Agreement on Subsidies and Countervailing Measures; and, Agreement on Safeguards GATS, Apr. 15, 1994.

⁶³ See Agreement on Trade-Related Aspects of Intellectual Property Rights pmbl., Apr. 15, 1994 [hereinafter TRIPS Agreement].

⁶⁴ Cf. Carlos M. Correa, *Intellectual Property Rights, the WTO and Developing Countries: The TRIPS Agreement and Policy Options*, 23 (2002).

⁶⁵ See TRIPS Agreement, *supra* note 63, Part VI Transitional Arrangements.

- **Parallel imports (Article 6)**

Under the legal principle of “exhaustion”, Members can decide if a product manufactured legally overseas is imported without the consent of the patent owner when it has been sold previously in the global market. As a consequence, even though the patent owner maintains the exclusive right to manufacture the product, the resale to other countries cannot be prevented under intellectual property rights because the patent rights have been exhausted.

- **Experimental use (Article 30)**

Use of patented inventions for research purposes.

- **Bolar exceptions (Article 30)**

This allows manufacturers of generic products to use, without the authorization of the patent owner, the patented invention for marketing approval purposes prior to patent expiration.

- **Compulsory Licensing (Article 31)**

When the law of a Member allows the government or third parties authorized by the government to manufacture, use, sell or import a product under patent protection without the authorization of the patent owner, under the requirements established in the TRIPS Agreement.

All developing countries could have made use of these flexibilities or extended periods but this was not the case, and as expected they experienced difficulties in implementing the TRIPS Agreement, which begged a further analysis of the real impact of the new system on national legislations and public interests.

The Doha Declaration

Patents on medicines have been one of the most debated matters since the adoption of the TRIPS Agreement given its direct impact on public health. Since its implementation, the obligation to grant patent protection to pharmaceutical products

and process inventions has been established,⁶⁶ and with it public health policies got affected, particularly in those countries that did not grant any form of protection to pharmaceutical products in the past.

A political consensus about the rights given by TRIPS Agreement to protect public health and the access to medicines in the developing world was only articulated in the 2001 Doha Declaration on the TRIPS Agreement and Public Health.

“Developing countries sought to clarify — through adoption of the Doha Declaration — that the provisions in the TRIPS Agreement did provide sufficient flexibility and discretion to ensure access to medicines in the interests of public health.”⁶⁷

During the 2001 WTO round of trade discussions in Doha, Qatar, a coalition was created among developing countries in order to discuss the need for greater TRIPS flexibilities. As expected, the United States aligned with multinational pharmaceutical companies opposed the inclusion of parallel importation of pharmaceutical products and liberal compulsory licensing policies.

Interestingly, one completely unexpected event changed the global political landscape in this regard. After the US World Trade Center attack in September 2001, a potential bio-terror attack with anthrax was considered and the US Secretary of Health and Human Services under the threat of issuing a compulsory license, persuaded the pharmaceutical Bayer to lower its drug prices on Ciprofloxacin. The United States subsequently found itself in the awkward position of threatening to issue a compulsory license while trying to restrict compulsory license use in developing countries fighting the AIDS epidemic.⁶⁸ Finally, a text favoring developing countries proposal was approved.

⁶⁶“1. Subject to the provisions of paragraphs 2 and 3, patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application. Subject to paragraph 4 of Article 65, paragraph 8 of Article 70 and paragraph 3 of this Article, patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced”. Id. art. 27 Patentable Subject Matter.

⁶⁷ World Health Organization, *Intellectual Property Protection: Impact on Public Health* (2005), available at <http://www.who.int/medicines/areas/policy/AccessToMedicinesIPP.pdf>.

⁶⁸ Cf. Amy Nunn, *The Politics and History of AIDS Treatment in Brazil*, 137 (2009)

In the Doha Declaration⁶⁹ it was agreed that the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health and, in particular, to promote access to medicines for all. Also, it was recognized that each member has the right to grant compulsory licenses and the freedom to determine the grounds upon which licenses are granted. Practice shows that these are issued generally on grounds of general interest, such a public health.

Members were also given the right to determine what constitutes a national emergency or other circumstances of extreme urgency, and the freedom to establish its own regime for exhaustion of intellectual property rights subject only to the most favored nation and national treatment provisions.

Article 31(f) of the TRIPS Agreement established the option to issue compulsory licenses for the local manufacturing of patented products, predominantly for the supply of the domestic market of the Member authorizing such use. This restriction meant that countries with insufficient or no manufacturing capacity were not going to be able to use a compulsory license as a source of affordable medicines.

This difficulty was recognized in the Doha declaration and the Council for TRIPS was instructed to find a solution to the problem and to report to the General Council before the end of 2002.

As a consequence, the General Council of the WTO adopted the Decision of August 30th, 2003 (WT/L/540), which authorizes WTO Members to grant compulsory licenses for the production and export of generic medicines to developing countries and least developed countries with insufficient or no manufacturing capacity in the pharmaceutical sector. This Paragraph 6 was formalized as an amendment to the TRIPS Agreement in 2005.⁷⁰

⁶⁹ World Trade Organization, Doha Declaration on the TRIPS Agreement and Public Health, Nov.14, 2001, WT/MIN(01)/DEC/1.

⁷⁰ Cf. UNAIDS, WHO & UNDP Policy Brief, *Using TRIPS flexibilities to improve access to HIV treatment* (2011), available at http://www.unaids.org/en/media/unaids/contentassets/documents/unaidspublication/2011/JC2049_PolicyBrief_TRIPS_en.pdf

Finally, paragraph 7 of the Doha Declaration exempted least developed countries from having to grant patents and from providing for the protection of undisclosed information with respect to pharmaceutical products until January 1st, 2016. In November 2005, the WTO TRIPS Council extended the transition period for least developed countries from mandatory compliance with the TRIPS Agreement other than the provisions providing for non-discriminatory treatment, until July 2013.

D. Conclusion

The developing world continuously faces economic and international trade pressures by developed countries, which become evident in the permanent and ongoing discussions and negotiations of critical sectors within the WTO.

In recent years, developing countries have obtained some protection and special treatment at the international level not only for their evident situation of disadvantage in terms of development, but also because they have come together and stood up in opposition to dominant countries within the WTO. Nevertheless, common issues continue to present themselves and developing countries seem not to be ready to give up on the policies and strategies that have allowed them to grow and empower their economies.

It is important to mention that there are sectors such as agriculture and IPRs, which despite the special and differential treatment they receive, remain on the agenda of developing countries as critical sectors to be discussed in the negotiation process.

For example, as it is explained by Constantine Michalopoulos in his book *Developing Countries in the WTO* (2001), the purpose of TRIPS agreements on patents, copyrights and related IPRs issues is to standardize minimum IPRs protection worldwide, and thereby extend it to sectors not previously covered in developing and some developed countries.

However, the main potential costs of TRIPS to developing countries are the economic losses that might be suffered by their consumers and producers, and the so-

called ‘deadweight’ efficiency losses from reduced competition.⁷¹ Under this scenario, IPRs remain as a critical issue to be negotiated within the WTO by developing countries, considering that as a group they are certain to suffer increased costs with the introduction of patents involving stronger IPRs protection.

This chapter explained how developing countries have been permanently confronting issues within the WTO through the discussion and negotiation of agreements. Nevertheless, they can also activate the dispute settlement system in order to bring particular cases affecting economic interests to the decision of an international body, as will be analyzed in the following chapter.

⁷¹ See also Samuel Oddi, *The International Patent System and Third World Development: Reality or Myth?* (1987)

IV. The Dispute Settlement System and Brazilian Cases on Common Issues Relating to Developing Countries within the WTO

Disputes in the WTO essentially involve violation of previously agreed upon trade rules. Therefore, States use the multilateral system of settling disputes instead of taking action unilaterally, which means abiding by the agreed procedures, and respecting judgment outcomes.⁷²

A dispute arises when one country adopts a trade policy measure or takes some action that one or more WTO members consider to be in breach of WTO agreements, or in a member's failure to live up to its obligations.

Settling disputes is the responsibility of the Dispute Settlement Body (DSB), which consists of all WTO members. The DSB has the sole authority to establish "panels" of experts to consider the case, and to accept or reject the panels' findings or the results of an appeal.

Trade disputes are channeled into the WTO's dispute settlement process with the objective to conform States' trade policies to WTO agreements while preserving international trade law. It is interesting to note that only economic groups and powerful States such as the United States, the European Union and Canada access the DSS repeatedly to obtain decisions that in the majority of the cases benefit their own economic interests.⁷³

This chapter sets out to examine how Brazil has been directly involved in trade disputes with developed countries, regarding some of the main issues that the developing world faces within the WTO. The chapter begins with a brief background of Brazil's participation in the dispute settlement system, and later presents particular cases related to agricultural subsidies, antidumping and the TRIPS Agreement. The

⁷² See Agreement Establishing the World Trade Organization, Annex 2 Dispute Settlement Understanding, Apr. 15, 1994, available at http://www.wto.org/english/docs_e/legal_e/04-wto.pdf

⁷³ See World Trade Organization, *Map of Disputes between WTO Members*, available at http://www.wto.org/english/tratop_e/dispu_e/dispu_maps_e.htm and *Disputes by Country/Territory*, available at http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm

chapter concludes with an outlook for developing countries vis-à-vis their usage of the dispute settlement system as an important mechanism to challenge the economic power of the developed world.

A. Background

Brazil is globally recognized as the most successful developing country using the WTO dispute settlement system to achieve its international trade and economic objectives. Until 2012, Brazil had taken 26 cases before the WTO as a complainant, obtaining in the majority of them a positive outcome. “Overall, Brazil has been the fourth most frequent complainant in the WTO dispute settlement system after the United States, the European Union, and Canada.”⁷⁴

Complaints have been primarily related to the main export markets for Brazilian products, which involve cases against commercial partners that are world economic powers such as the United States and the European Union.⁷⁵

In April 1995, Brazil filed its first WTO case as a complainant: Standards for Reformulated and Conventional Gasoline (WT/DS4) against the United States. “The U.S. regulations affected one of Brazil’s largest exporters, the state-owned company Petrobras, and Venezuela had already filed a WTO complaint against the U.S. regulations, spurred by its own state-owned oil company,”⁷⁶ which motivated Brazilian participation in the process.

The dispute concerned the implementation by the United States of its domestic legislation known as the Clean Air Act of 1990 and, more specifically, to the regulation enacted by the United States' Environmental Protection Agency pursuant to that Act, to control toxic and other pollution caused by the combustion of gasoline manufactured in or imported into the United States. This regulation was formally

⁷⁴ Gregory Shaffer, Micelle R. Sanchez & Barbara Rosenberg, *The Trials of Winning at the WTO: What Lies behind Brazil's Success*, 41 CORNELL INT LAW J 413 (2008)

⁷⁵ See Daniel Arbix, *Contenciosos brasileiros na Organização Mundial do Comércio (OMC): pauta comercial, política e instituições*, 30 CONTEXTO INTERNACIONAL 655 (2008).

⁷⁶ Gregory Shaffer, Micelle R. Sanchez & Barbara Rosenberg, *supra* note 74 at 457.

entitled "*Regulation of Fuels and Fuel Additives - Standards for Reformulated and Conventional Gasoline*", Part 80 of Title 40 of the Code of Federal Regulations, and was commonly referred to as the Gasoline Rule.⁷⁷

According to the Request for Consultations, the Government of Brazil believed that the Gasoline Regulation was inconsistent with the United States' obligation to provide national treatment, as interpreted in Article III of the GATT 1994, and applicable to Brazilian gasoline imported into the United States. Furthermore, the Gasoline Regulation also violated the United States' obligations under the Agreement on Technical Barriers to Trade, including the requirement to ensure that in applying its technical standards to imported products they are accorded treatment no less favorable than that accorded to like products of national origin.

The United States based its defense on environmental grounds alleging that it was covered under the exceptions established in paragraphs (b), (d) and (g) of Article XX of the General Agreement.⁷⁸ However, the report of the Appellate Body upheld the Panel's findings, and established that the baseline rules contained in Part 80 of Title 40 of the Code of Federal Regulations fail to meet the requirements of the chapeau of Article XX of the GATT, and accordingly were not justified under Article XX of the GATT.

Finally, the United States announced implementation of the recommendations of the Dispute Settlement Body, being in this case a successful challenge by Brazil and Venezuela of a US measure.

⁷⁷ See Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (Apr. 29, 1996).

⁷⁸ “Art. XX of the General Agreement on Tariffs and Trade (GATT) entitles Members of the World Trade Organization (WTO) to adopt WTO-inconsistent measures, provided that they fall into one of the categories listed herein, each related to a different policy objective, and they are applied in a non-discriminatory way. In particular, exceptions designed to promote public morals, human (and animal and plant) health and compliance with GATT-consistent national norms must be ‘necessary’ to achieve the sought objective”. Filippo Fontanelli, *Necessity Killed the GATT: Art XX GATT and the Misleading Rhetoric about ‘Weighing and Balancing’*, 5 EUROPEAN JOURNAL OF LEGAL STUDIES 36, 36 (2012).

In the following years Brazil started a process that allowed it to develop a more organized structure not only for the identification, organization and presentation of the cases, but also for the integration of the private sector as an active participant of Brazilian trade policy.

Brazil also started to play a key role for developing countries, assuming the defense of common interests and setting precedents with respect to problems affecting the third world in the international trade arena.

B. First Common Issue: Agricultural subsidies

Brazil over the years became more active at the WTO in order to liberalize global markets and obtain protection for critical sectors such as agribusiness. At the time of the Doha round, Brazil notably worked towards a multilateral agreement promoting its agriculture policies. “In fact, Brazil has been very important in moving the WTO's Doha discussions towards a more pro-development outcome simply because of Brazil's insistence on serious liberalization in agriculture, particularly in the rich countries where tariffs and subsidies are high. This benefits not only Brazil, but also other developing countries.”⁷⁹

Brazil built a solid framework from which to request the protection of its agribusiness sector and products as it experienced in the cases against the United States and the European Union regarding the elimination of subsidies on upland cotton and sugar. “By the time Brazil brought the *U.S.-Cotton* and *EC-Sugar* complaints in September 2002, it had developed significant dispute settlement experience. These two cases, however, were considerably more factually intensive than the complaints Brazil had filed before. Without the private sector's initiative and support, it is unlikely that Brazil would have brought them. The complaints thus exemplify how a country can work with its private sector and with lawyers hired by it

⁷⁹ Carina Nucci, World Bank, *Global Economic Prospects 2005: Trade, Regionalism, and Development*, available at <http://live.worldbank.org/global-economic-prospects-2005-trade-regionalism-and-development>

to bring and win an extremely complex and strategically important WTO case, with significant international political implications.”⁸⁰

In the Cotton Case, Dispute DS267, Brazil requested consultations regarding prohibited and actionable subsidies provided to US producers, users and/or exporters of upland cotton, as well as legislation, regulations, statutory instruments and amendments thereto providing such subsidies (including export credits), grants, and any other assistance to the US cotton industry. According to Brazil, these measures were in violation of the Agreement on Agriculture, the Agreement on Subsidies and Countervailing Measures (SCM Agreement), and GATT 1994, causing a serious prejudice because of a significant price depression and price suppression in the world markets for upland cotton during marketing years 1999-2002.⁸¹

“These Agreements set limits on subsidies equal to the amount prevailing in 1992. Brazil claimed that (i) during the four marketing years 1999-2002 the US provided domestic support to cotton that was in excess of the 1992 limit. These subsidies caused serious prejudice to the interest of Brazil under the SCM Agreement and (ii) the export subsidies (i.e., export credit guarantees, step-2 payments) are in violation of the Agreement on Agriculture.”⁸²

The Panel found: i) that agricultural export credit guarantees are subject to WTO export subsidy regulations and three United States export credit guarantee programmes are prohibited export subsidies which have no Peace Clause protection⁸³ and are in violation of those regulations; ii) that the United States also grants several other prohibited subsidies in respect of cotton; and iii) that the United States’ domestic support programmes in respect of cotton are not protected by the Peace clause, and some of these programmes result in serious prejudice to Brazil’s interests in the form of price suppression in the world market.

⁸⁰ Gregory Shaffer, Micelle R. Sanchez & Barbara Rosenberg, *supra* note 74, at 459.

⁸¹ See Request for Consultations by Brazil, United States – Subsidies on Upland Cotton, WT/DS267/1 (Oct. 3, 2002).

⁸² John Baffes, The World Bank, *Brazil vs. US: Cotton Subsidies and Implications for Development*, Trade Note 16 (2004).

⁸³ It established that if domestic support by a member was lower than the level applied in 1992, it could not be challenged before the WTO.

This decision was appealed by the United States, and the Appellate Body upheld the majority of the Panel's findings regarding the applicability of the Peace Clause; price suppression; user marketing (Step 2) payments; and, export credit guarantee programs.

At the DSB meeting of April 2005, the United States stated that it would comply with the recommendations and rulings of the DSB. However, on 18 August 2006 Brazil requested the establishment of a compliance panel that found that the United States had failed to comply with the DSB recommendations and rulings.

Due to the non-compliance by the United States, Brazil on 6 November 2009 requested authorization to suspend the application of concessions or other obligations, which it was authorized. Brazil notified that starting from 7 April 2010 it would suspend the application to the United States of concessions or other obligations under the GATT 1994 in the form of increased import duties on certain products when they are imported from the United States. Brazil also informed that it would suspend the application to the United States of certain concessions or obligations under the TRIPS Agreement and/or the GATS.

“On December 21, 2009, Brazil reported to the WTO Dispute Settlement Body that, based on U.S.-supplied fiscal and calendar year data for 2008, it was entitled to annual retaliation of \$829.3 million, with \$561 million covering trade in goods and \$268.3 million covering other sectors and agreements. At the same time, Brazil delayed announcing a final list of sanctioned products as the two countries engaged in negotiations on at least a temporary resolution of the dispute. On March 12, 2010, however, Brazil notified the WTO that, beginning on April 7, is intended to impose up to \$829.3 million in retaliation against the United States, \$591 million of which would consist of tariff increases on various agricultural products, cosmetics, cotton textiles, appliances, motor vehicles, and other items. The remainder would involve the suspension of unspecified concessions under the Agreement on Trade Related

Intellectual Property Rights (TRIPS) or the General agreement on Trade in services (GATS), or both.”⁸⁴

Finally, on 25 August 2010, Brazil and the United States informed the DSB that they had concluded a Framework for a Mutually Agreed Solution to the Cotton Dispute at the World Trade Organization. The Framework did not in itself constitute a mutually agreed solution to the dispute. It set out parameters for discussions on a solution with respect to domestic support programs for upland cotton in the United States, as well as a process of joint operation reviews as regards export credit guarantees under the program GSM-102. Brazil and the United States also agreed to hold consultations not less than four times a year, unless they agree otherwise, with the aim of obtaining convergence of views in respect of a solution to the Cotton dispute. The Framework also provided that, upon enactment of successor legislation to the US Food, Conservation and Energy Act of 2008, Brazil and the United States will consult with a view to determining whether a mutually agreed solution to the Cotton dispute has been reached.⁸⁵

At the DSB meeting on 23 October 2012, Brazil said that on 30 September 2012, the 2008 US Farm Bill had expired without the enactment of a successor legislation. However, taking into account that the current US agricultural support programs remained unchanged, Brazil had decided not to terminate the Memorandum of Understanding and the Framework Agreement and would thus not impose any countermeasures at this time.

This case was a reflection of the defensive strategy assumed by Brazil to protect national economic interests. At the same time, it created an important precedent for the rest of the developing countries that witnessed how the WTO dispute settlement system had been effectively applied to challenge one of the largest supporters of cotton subsidies in the world, the United States. This example would

⁸⁴ Jeanne J. Grimmett, Congressional Research Service, Report for Congress, *WTO Dispute Settlement: Status of U.S. Compliance in Pending Cases* 80 (Apr. 23, 2012).

⁸⁵ For the precedents of the case see WTO, available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds267_e.htm

represent a more assertive stance taken by developing economies within WTO agriculture negotiations in the future.

Another relevant case regarding the protection of the agribusiness sector was the Sugar Case, Dispute DS266. This dispute brought to consultations in September 2002, involved complaints by Australia, Brazil, and Thailand - the "Complaining Parties"- regarding export subsidies for sugar and sugar-containing products provided by the European Community in the framework of its Common Organization for Sugar, under Council Regulation No. 1260/2001 of 19 June 2001 and related instruments, together the "EC sugar regime".

The sugar regime establishes two categories of production quotas: one for A sugar and one for B sugar. These quotas constitute the maximum quantities eligible for domestic price support and direct export subsidies. EC intervention price system for sugar guarantees a high price for the sugar that is produced within A and B production quotas. A sugar is the quantity set for EU consumption. B sugar is a reserve quantity, ring-fenced to safeguard against unexpected shortages within the European Union. Both A and B sugar can be exported to third countries with the use of export refunds, which means export subsidies to the exporters that entitle them to claim back the difference between the EU price –at which the European Union is prepared and obliged to buy- and the world price.⁸⁶

Sugar produced in excess of these quotas, called C sugar, cannot be sold internally in the year in which it is produced and it is not eligible for domestic price support or export subsidies so it must be exported or carried over to fulfill the following year's production quotas.⁸⁷

Among the complaints, Brazil specifically claimed that: i) the EC was providing export subsidies above the EC's commitment levels specified in Section II

⁸⁶ See Tim Rice, *Farmgate: the Developmental Impact of Agricultural Subsidies*, in *The WTO and Developing Countries* 257, 278 - 279 (Homi Katrak & Roger Strange ed. 2004).

⁸⁷ See Request for Consultations by Brazil, *European Communities – Export Subsidies on Sugar*, WT/DS266/1 G/L/570 G/AG/GEN/53 G/SCM/D48/1 (Oct. 1, 2002).

of Part IV of its Schedule of Concessions,⁸⁸ contrary to Articles 3.3, 8, 9.1 (a) and (c), and 10 of the Agreement on Agriculture, and Articles 3.1 (a) and 3.2 of the SCM Agreement; ii) the EC's common organization of the sugar market allowed exporters of C sugar to export the same at prices below its total cost of production; and, iii) the EC sugar regime accorded less favorable treatment to imported sugar because contrary to the EC quota sugar, this is not eligible to benefit from the high intervention price guaranteed by that regulation in violation of Articles III:4 and XVI of GATT 1994.

Upon request of the Complaining Parties, the Panel was established on 29 August 2003 and concluded in a report circulated on October 15, 2004 that the European Communities, through its sugar regime, had acted inconsistently with its obligations under Article 3.3 and 8 of the Agreement on Agriculture, by providing export subsidies in the form of payments on the export financed within the meaning of Article 9.1(a) and (c) of the Agreement on Agriculture in excess of the quantity commitment level and the budgetary outlay commitment level specified in Section II, Part IV of Schedule of Concessions (Schedule CXL-European Communities). This decision was appealed by the European Communities but the Appellate body upheld the Panel's findings.⁸⁹

In June 2005, the European Communities informed the Dispute Settlement Body its intention to implement the recommendations and rulings. However, the parties were unable to reach an agreement on the reasonable period of time to do it, and as a consequence the Complaining Parties requested a binding arbitration to determine it. The reasonable period of time was established in 12 months and 3 days expiring on 22 May 2006.⁹⁰

⁸⁸ The commitments that are specified in Part IV, Section II, of a Member's Schedule describe for each product or group of products concerned, the maximum quantities in respect of which export subsidies, as defined in Article 1(e) of the *Agreement on Agriculture*, may be provided, as well as the associated maximum levels of budgetary outlays. These commitments are made an integral part of the GATT 1994 under Article 3.1 of the *Agreement on Agriculture*.

⁸⁹ See Appellate Body Report, *European Communities – Export Subsidies on Sugar*, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R (Apr. 28, 2005).

⁹⁰ See Arbitration under Article 21.3c of the Understanding on Rules and Procedures Governing the Settlement of Disputes, *European Communities – Export Subsidies on Sugar*, WT/DS265/33, WT/DS266/33, WT/DS283/14 (Oct. 28, 2005).

On 24 May 2006 the European Communities submitted a Second Status Report regarding Implementation of the DSB Recommendations and Rulings.⁹¹ The EC informed that on the basis of different legal provisions adopted by the Commission Regulation, it was then in the position to maintain its subsidized exports of sugar within its commitments as from the marketing year 2006/2007, as well as applied on a pro rata basis for the remaining of the marketing year 2005/2006.

On 8 June 2006, Australia, Brazil and Thailand informed the Dispute Settlement Body that they had reached an Understanding under Article 21 and 22 of the Dispute Settlement Understanding with the European Communities.⁹² In the Understanding signed between Brazil and the EC, it is mentioned that Brazil has made known to the European Communities that it is not satisfied with the measures adopted. As a consequence, the parties reached an agreement with regard to future procedures within the dispute, establishing among others that Brazil is entitled at any time to request the establishment of a panel pursuant to Article 21.5 of the DSU.

In a nutshell, Brazil has actively participated with a particular interest in the Doha Round negotiations to promote both changes to the legal framework and a real liberalization of agriculture in favor of the developing world, considering the deficiencies of the current system. The main target during the discussions has been the agricultural subsidies that the US and the EC permanently use in levels that affect international trade and that place in clear disadvantage farmers from the third world who cannot receive the same state support as their competitors in developed markets.

However, despite the fact that negotiations have not evolved, Brazil has enacted an interesting strategy to protect agriculture as a critical sector of its economy. The cases presented are a good example of how the Brazilian delegation at the WTO has started to challenge particular regulations in developed countries that are detrimental, by demanding the fulfillment of obligations acquired within the

⁹¹ See Status Report Regarding Implementation of the DSB Recommendations and Rulings, *European Communities – Export Subsidies on Sugar*, WT/DS265/35/Add.1, WT/DS266/35/Add.1, WT/DS283/16/Add.1 (June 2, 2006).

⁹² See e.g. Understanding between Brazil and the European Communities, *European Communities – Export Subsidies on Sugar*, WT/DS266/36 (June 9, 2005).

international trade legal system. In that process, Brazil has succeeded not only in limiting export subsidies in the US and the EC in the short term, but also in modifying some of their forward-looking agricultural policies as we saw it with the non-renewal of the Food, Conservation and Energy Act of 2008 (the 2008 US Farm Bill) in the US and the reform of the EC sugar sector⁹³ in the EC.

At the end, all these achievements benefit developing countries being affected by agricultural subsidies in particular commodities, and generate a positive precedent for future negotiations.

C. Second Common Issue: Antidumping

The Antidumping Agreement of the Uruguay Round was implemented by Brazil in March 1995. The country currently carries out antidumping investigations through its Department of Commercial Defense – DECOM, which constitutes part of the Secretariat for Foreign Trade – SECEX under the Brazilian Ministry of Development, Industry and Foreign Trade.

In Brazil as in the rest of the world, the major users of AD are industries seeking protection, which usually are of a larger size and subject to substantial import competition.⁹⁴ For example, the chemical industry followed by the metal and plastic sectors, together accounted for 73.4% of all the antidumping measures adopted between 1995 and 2002 by Brazilian authorities.⁹⁵

According to Article 17.3 and 17.4 of the Antidumping Agreement, if any Member considers that any benefit accruing to it, directly or indirectly, under the Agreement is being nullified or impaired, or that the achievement of any objective is being impeded, by another Member or Members, it may request consultations with the

⁹³ See Council Regulation 318/2006 (EC), on the common organization of the markets in the sugar sector; Commission Regulation 493/2006 (EC), laying down transitional measures within the framework of the reform of the common organization of the markets in the sugar sector; Commission Regulation No. 769/2006 (EC), suspending the lodging of applications for export licenses for C sugar from 23 May 2006; and, Amending Regulation 493/2006 (EC), as regards the transitional measures applicable to C sugar.

⁹⁴ See Chad P. Bown, *supra* note 49.

⁹⁵ Cf. Honorio Kume & Guida Piani, *supra* note 15, at 18.

Member or Members in question. In case a mutually agreed solution cannot be achieved, and if final action has been taken by the administering authorities of the importing Member to levy definitive anti-dumping duties, it may refer the matter to the DSB.

Brazil, acting as complainant, has brought AD disputes to the WTO mainly against the United States.⁹⁶ Among the different cases, two will be highlighted, given both the fact that Brazil was supported by other developed and developing countries until the last instances within the DSU, and their positive outcome: i) Dispute DS217 for the continued dumping and Subsidy Offset Act of 2000 and, ii) Dispute DS382 for anti-dumping administrative reviews and other measures related to imports of certain orange juice from Brazil.

1. Dispute DS217

On 28 October 2000, the United States enacted the amendment to the Tariff Act of 1930, signed under the title of “Continued Dumping and Subsidy Offset Act” –the Byrd Amendment.⁹⁷ The Act instructed the US customs authorities to distribute in favor of the petitioners or interested parties, the duties collected from successful petitions of countervailing or anti-dumping orders assessed on or after 1 October 2000. Payments were available as an ‘offset’ for the affected domestic producers regarding their qualifying expenditures, including manufacturing facilities, equipment, acquisition of technology, acquisition of raw material or other inputs.

In January 2001, Australia, Brazil, Chile, India, Indonesia, Japan, Korea, Thailand and the European Communities, acting jointly, requested consultations with the United States regarding the Byrd Amendment, considering that the Act appeared

⁹⁶ See Unites States – Continued dumping and subsidy Offset Act of 2000, WT/DS217 (2000); United States – Countervailing duties on certain carbon steel products from Brazil, WT/DS218 (2000); United States – Anti-dumping duties on silicon metal from Brazil, WT/DS239 (2001); United States – Definitive safeguard measures on import of certain steel products, WT/DS259 (2002); Unites States – Anti-dumping administrative reviews and other measures related to imports of certain orange juice from Brazil, WT/DS382 (2008).

⁹⁷ Public Law 106-387, 114 Stat. 1549A-72, codified at 19 U.S.C. §1675c (2000). Regulations are set out at 19 C.F.R. §§159.61-64.

to be not in conformity with the obligations of the United States under the GATT, the ADA and the SCM Agreement.

The “offsets” constitute a specific action against dumping and subsidization, which is not contemplated in the GATT, the ADA or the ASCM. Moreover, the “offsets” provide a strong incentive to the domestic producers to file or support petitions for anti-dumping or anti-subsidy measures, thereby distorting the application of the standing requirements provided for in the ADA and the ASCM. In addition, the Act makes it more difficult for exporters subject to an antidumping or countervailing duty order to secure an undertaking with the competent authorities, since the affected domestic producers will have a vested interest in opposing such undertaking in favour of the collection of anti-dumping or countervailing duties. In the view of Australia, Brazil, Chile, the EC, India, Indonesia, Japan, Korea, and Thailand, this is not a reasonable and impartial administration of the US laws and regulations implementing the provisions of the ADA and the ASCM regarding standing determinations and undertakings.⁹⁸

The consultations failed to resolve the dispute and as a consequence, the complaining states requested in July 2001 the establishment of a panel by the DSB. In particular, the Act was alleged to be inconsistent with the obligations of the United States under: i) Article 18.1 of the ADA, in conjunction with Article VI:2 of the GATT and Article 1 of the ADA; ii) Article 32.1 of the SCM Agreement, in conjunction with Article VI.3 of the GATT and Articles 4.10, 7.9 and 10 of the SCM Agreement; iii) Article X (3)(a) of the GATT; iv) Article 5.4 of the ADA and Article 11.4 of the SCM Agreement; v) Article 8 of the ADA and Article 18 of the SCM Agreement; and vi) Article XVI.4 of the Marrakesh Agreement establishing the WTO, Article 18.4 of the ADA and Article 32.5 of the SCM Agreement.⁹⁹

At its meetings on 23 August and 10 September 2001, the DSB established a single panel in accordance with Article 9 of the DSU to examine the matters referred to the DSB by Australia, Brazil, Chile, the European Communities, India, Indonesia,

⁹⁸ Request for Consultations by Australia, Brazil, Chile, the European Communities, India, Indonesia, Japan, Korea and Thailand, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/1 (Jan. 9, 2001)

⁹⁹ See Request for the Establishment of a Panel by Australia, Brazil, Chile, the European Communities, India, Indonesia, Japan, Korea and Thailand, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/5 (July 13, 2001).

Japan, Korea and Thailand (WT/DS217); and by Canada and Mexico (WT/DS234). Argentina, Canada, Costa Rica, Hong Kong, China, Israel, Mexico and Norway reserved their third party rights in DS217. Australia, Brazil, Canada –in respect of Mexico’s complainant, the European Communities, India, Indonesia, Japan, Korea, Mexico –in respect of Canada’s complainant and Thailand reserved their third party rights in DS234.¹⁰⁰

In September 2002, the WTO panel decided against the United States on a majority of the claims, establishing that the Byrd Amendment was a non-permissible “specific action against dumping or a subsidy”, contrary to ADA Article 18.1 and SCM Agreement Article 32.1. As a consequence, the Act was also in violation of paragraphs 2 and 3 of Article VI of the GATT 1994.¹⁰¹

The Panel held that the structure of the Byrd Amendment acted against dumping by conferring on “affected domestic producers” incurring “qualifying expenses” an offset payment subsidy, which would allow them to establish a competitive advantage over dumped imports. Also, the Act would have the effect of providing a financial incentive for domestic producers to file anti-dumping-countervail applications, or at least to support such applications in order to establish their eligibility for offset payments.

Regarding Article 5.4 ADA and 11.4 SCM Agreement stipulating that there must be sufficient support for the application before a Member may initiate an investigation, the Panel viewed the Byrd Amendment as operating in such a manner that would not allow the US investigating authorities to conduct an objective and impartial examination of the level of support by domestic producers, evidencing the industry concern of injury caused by dumped or subsidized imports. By requiring support for the petition as a prerequisite for receiving offset payments, the Act in effect mandates domestic producers to support the application and renders the

¹⁰⁰ See Constitution of the Panel Established at the Request of Australia, Brazil, Canada, Chile, the European Communities, India, Indonesia, Japan, Korea, Mexico and Thailand, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/6 – WT/DS234/14 (Nov. 5, 2001).

¹⁰¹ Panel Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/R. WT/DS234/R (Sept. 16, 2002)

threshold test of ADA Article 5.4 and SCM Agreement Article 11.4 completely meaningless.

ADA Article 18.4, SCM Agreement Article 32.5 and Article XVI:4 of the WTO Agreement provide that each Member shall take all necessary steps, of a general or particular character, to ensure the conformity of its laws, regulations and administrative procedures with the provisions of the respective Agreements. Since the Panel found that the Byrd Amendment was inconsistent with ADA Articles 5.4 and 18.1, and SCM Agreement Articles 11.4 and 32.1, it was considered that the Act was inconsistent with ADA Article 18.4, SCM Agreement Article 32.5, and therefore WTO Article XVI:4.

In a nutshell, the Panel concluded that the Byrd Amendment was inconsistent with ADA Articles 5.4, 18.1 and 18.4, SCM Agreement Articles 11.4, 32.1 and 32.5, Articles VI:2 and VI:3 of the GATT 1994, and Article XVI:4 of the WTO Agreement, nullifying or impairing benefits accrued to complainant parties under these Agreements.

The US appealed the Panel's decision, which was upheld by the WTO Appellate Body in January 2003, except in the findings referring to the inconsistency of the Byrd Amendment with ADA Article 5.4 and SCM Agreement Article 11.4 on industry support requirements.¹⁰² On 27 January 2003, the DSB adopted the Appellate Body Report and the Panel Report as modified by the Appellate Body Report.

On 19 March 2003, the complainants requested arbitration to determine the reasonable period of time for implementation by the US of the DSB recommendations. The compliance period was subsequently determined by arbitration to expire December 27, 2003.¹⁰³

¹⁰² Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R (Jan. 16, 2003).

¹⁰³ Arbitration under Article 21.3 (3) of the Understanding on Rules and Procedures Governing the Settlement of Disputes: Award of the Arbitrator, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/14, WT/DS234/22 (June 13, 2003)

Because the United States did not comply by the December 2003 deadline, eight complaining Members –Brazil, Chile, EU, India, Japan, Korea, Canada and Mexico- asked the WTO in January 2004 for authorization to impose retaliatory measures. The United States objected to the level of suspension of concessions proposed by the complainant parties, sending them to arbitration. The remaining three complainants –Australia, Indonesia, and Thailand- agreed to give the United States until December 27, 2003, to comply.¹⁰⁴

On 31 August 2004 the recourse to arbitration by the United States was decided,¹⁰⁵ and the complainants got the right to impose countermeasures, on a yearly basis “up to a level equivalent to the amount of antidumping and countervailing duties collected by the United States on their imports (for the most recent year where figures are available), multiplied by 0.72, a coefficient that the arbitrators said accurately reflected the value of trade negatively impacted by the Byrd Amendment.”¹⁰⁶

Since estimated U.S. disbursements for 2003 were U.S.\$240 million, the ruling would allow imposition by the complaining states of more than U.S.\$150 million in annual retaliatory duties.¹⁰⁷ In late 2004, some of the complaining states received authorization from the WTO Dispute Settlement Body to impose retaliatory measures.

On February 7 2006, the United States reported to the DSB that on 1 February 2006, the US Congress approved the Deficit Reduction Omnibus Reconciliation Act, which includes a provision that repeals the Byrd Amendment, bringing the US into conformity with its WTO obligations. The complainants welcomed these steps, nonetheless, they disagreed with the United States that it had brought its measures fully into conformity with the DSB’s recommendations and rulings.

¹⁰⁴ Cf. Jeanne J. Grimmer, *supra* note 84, at 27.

¹⁰⁵ See Recourse to Arbitration by the United States Under Article 22.6 of the DSU, *United States – Continued Dumping and Subsidy Offset Act of 2000 (Original Complaint by Brazil)*, WT/DS217/ARB/BRA (Aug. 31, 2004) (and associated decisions issued on the same date).

¹⁰⁶ Sean D. Murphy, *United States Practice in International Law: 2002 – 2004*, 190-191 (2005).

¹⁰⁷ See Daniel Pruzin, EU Japan to Seek WTO Clearance To Impose Sanctions on U.S. Imports, 21 INT’L TRADE REP (BNA) 1839 (2004).

Up until now the EC, Canada and Japan have notified the DSB about the suspension of the application of concessions and related obligations under GATT 1994 on imports of certain products originating in the United States.¹⁰⁸

2. Dispute DS382

On 27 November 2008, Brazil requested consultations with the Government of the United States, with regard to: i) certain antidumping administrative reviews as well as any assessment instructions and cash deposit requirements issued pursuant to them of the United States Department of Commerce –USDOC concerning the imports of certain orange juice from Brazil; ii) any actions taken by United States Customs and Border Protection -USCBP to collect definitive anti-dumping duties at duty assessment rates established in periodic reviews covered by number i), including through the issuance of USCBP liquidations instructions and notices; and iii) certain US laws, regulations, administrative procedures, practices and methodologies for calculating dumping margins in administrative reviews, involving the use of “zeroing” and their application in antidumping duty administrative reviews regarding imports of certain orange juice from Brazil.¹⁰⁹

Brazil considered that these measures were inconsistent with the obligations of the United States under the Marrakesh Agreement Establishing the WTO and the Agreements annexed thereto, including Articles II, VI:1 and VI:2 of the GATT 1994; Articles 1, 2.1, 2.4, 2.4.2, 9.1, 9.3, 11.2 and 18.4 of the ADA; and Article XVI:4 of the WTO Agreement.

In June 2009, Japan requested to join the further consultations, considering a substantial trade interest due to the fact that measures at issue appear to be related to the imports of orange juice products that Japan exports to the United States. These consultations also concerned the continued use by the United States of the “zeroing” procedures in its anti-dumping proceedings which Japan challenged in the dispute

¹⁰⁸ See e.g. Recourse by Japan to Article 22.7 of the DSU, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/41 (Nov. 11, 2004).

¹⁰⁹ See Request for Consultations by Brazil, *United States – Anti-Dumping Administrative Reviews and Other Measures related to Imports of Certain Orange Juice from Brazil*, WT/DS382/1, G/L/872, G/ADP/D75/1 (Dec. 1, 2008).

‘United States – Measures Relating to Zeroing and Sunset Reviews DS322’ and, must be brought into conformity with the ADA and the GATT 1994, as required by the DSB recommendations and rulings in that dispute.¹¹⁰

Brazil requested the establishment of a panel on 20 August 2009.¹¹¹ The panel was established by the DSB at its meeting on 25 September 2009, and composed on 10 May 2010. Argentina; the European Union; Japan; Korea; Mexico; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; and Thailand reserved their rights to participate in the Panel proceedings as third parties.

This case was one more related to the questionable AD practices by the United States. Twenty-one WTO complaints against the US have challenged the use of “zeroing” by the Department of Commerce. Under this practice, DOC, in calculating dumping margins for an imported product, disregards non-dumped sales and thus, complainants argue, inflates the dumping margin or establishes a dumping margin where one might not otherwise exist.¹¹² The use of zeroing has been found to be broadly prohibited in the calculation of dumping margins in U.S. antidumping proceedings, both as a general practice and as applied in particular proceedings.

On 25 March 2011, the Panel Report¹¹³ was circulated to the Members, finding that (a) the United States acted inconsistently with Article 2.4 of the ADA in using simple zeroing to determine the weighted-average margins of dumping and importer-specific assessment rates under administrative reviews; and (b) the United States continued use of zeroing under the orange juice anti-dumping duty order is inconsistent with Article 2.4 of the ADA.

¹¹⁰ Request to Join Consultations by Japan, *United States – Anti-Dumping Administrative Reviews and Other Measures related to Imports of Certain Orange Juice from Brazil*, WT/DS382/3 (June 9, 2009).

¹¹¹ Request for Establishment of a Panel by Brazil, *United States – Anti-Dumping Administrative Reviews and Other Measures related to Imports of Certain Orange Juice from Brazil*, WT/DS382/4 (Aug. 21, 2009).

¹¹² Cf. Jeanne J. Grimmett, *supra* note 84, at 15.

¹¹³ Panel Report, *United States – Anti-Dumping Administrative Reviews and Other Measures related to Imports of Certain Orange Juice from Brazil*, WT/DS382/R (Mar. 25, 2011).

Considering that the United States did not appeal the decision, at its meeting on 17 June 2011, the Dispute Settlement Body adopted the Panel report. By communication dated 17 June 2011, Brazil and the United States informed the DSB the agreement of a reasonable period of 9 months for the United States to implement the recommendations and rulings of the DSB, expiring on 17 March 2012.¹¹⁴

The United States informed the Dispute Settlement Body on 11 May 2012 that the US International Trade Commission had concluded on 14 March 2012 a five-year sunset review of the anti-dumping duty order on the products covered in this dispute and made a determination to revoke the order. In accordance with this determination, the US Department of Commerce issued a notice on 20 April 2012 revoking the antidumping duty order. As a result of the revocation, imports of orange juice from Brazil entered on or after 9 March 2011 are not subject to anti-dumping duties.¹¹⁵

On 14 February 2013, the United States and Brazil informed the Dispute Settlement Body of a mutually agreed solution to the dispute.¹¹⁶

As explained above, AD is a very complex mechanism applied differently from one country to the other, and it is valid to recognize that Brazil has been behaving strategically in the DSS with respect to the cases taken as complainant regarding this matter. Developing countries remain concerned about the broader application of anti-dumping laws affecting their products and seem to call for a toughening of the use of this instrument. However, developed countries and particularly the US remain opposed to any restriction for the protection of their industries and continue applying doubtful measures assuming the risk to be taken before the WTO.

¹¹⁴ Agreement under Article 21.3(b) of the DSU, *United States – Anti-Dumping Administrative Reviews and Other Measures related to Imports of Certain Orange Juice from Brazil*, WT/DS382/9 (June 21, 2011).

¹¹⁵ Status Report by the United States, *United States – Anti-Dumping Administrative Reviews and Other Measures related to Imports of Certain Orange Juice from Brazil*, WT/DS382/10/Add.5 (May 14, 2012).

¹¹⁶ Joint Communication from the United States and Brazil, *United States – Anti-Dumping Administrative Reviews and Other Measures related to Imports of Certain Orange Juice from Brazil*, WT/DS382/12 (Feb. 18, 2013).

In this scenario, the rules continue to be the same and further negotiations with respect to AD do not seem easy and as such do not constitute the priority for most of the countries, including Brazil. Therefore, the natural solution has been to join forces with other affected countries, either from the developed or the developing world, to challenge through the WTO complex systems and recurrent illegal mechanisms. At the end, the actions of strategic players within the WTO allow some free riders to get protection under the international trade legal system, even though developed countries such as the US do not seem ready to stop applying questionable measures in the near future.

D. Third Common Issue: The TRIPS Agreement and Patent Protection on Pharmaceutical Products

Brazil has been particularly skillful in negotiating the price of essential patented medicines required for the treatment of HIV/AIDS patients with multinational pharmaceuticals, threatening them with the use of the flexibilities established on the TRIPS Agreements for developing countries. “Faced with the challenge of carrying on its HIV/AIDS program at a considerable higher cost, in 2001 the Brazilian government started negotiations with the major pharmaceuticals companies. Backed by the threat of compulsory licensing, the government was able to effectively negotiate with pharmaceuticals suppliers. The 2001 negotiations resulted in substantial reductions in prices: 64.8% for *indinavir*, 59.0% for *efavirenz*, 40% for *nelfinavir* and 46% for *lopinavir*. In addition, a technology transfer agreement was established between Merck & Co. Inc. and the Ministry’s main national laboratory, FarManguinhos.”¹¹⁷

As a consequence of Brazil’s policies, the United States-based Pharmaceutical Research and Manufacturing Association (PhARMA) pressured the US government to initiate a trade dispute before the WTO. On January 8, 2001, the Permanent Mission of the United States at the WTO, after prior consultations and a failed resolution of the dispute with the Government of Brazil, presented a request to the Chairman of the

¹¹⁷ Lea Shaver, *Access to Knowledge in Brazil: New Research in Intellectual Property, Innovation and Development*, 120 (2012).

Dispute Settlement Body (DSB) for the establishment of a Panel pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes and Article 64 of the TRIPS Agreement:

Article 68 of Brazil's 1996 industrial property law (Law No. 9,279 of 14 May 1996; effective May 1997), imposes a "local working" requirement which stipulates that a patent shall be subject to compulsory licensing if the subject matter of the patent is not "worked" in the territory of Brazil. Specifically, a compulsory license shall be granted if the patented product is not manufactured in Brazil or if the patented process is not used in Brazil. In addition, if a patent owner chooses to exploit the patent through importation rather than "local working," then Article 68 will allow others to import either the patented product or the product obtained from the patented process. Article 68 of Brazil's 1996 industrial property law discriminates against US owners of Brazilian patents whose products are imported into, but not locally produced in, Brazil. Article 68 also curtails the exclusive rights conferred on these owners by their patents. As such, Brazil's local working requirement appears inconsistent with its obligations under Article 27.1 and Article 28.1 of the TRIPS Agreement.¹¹⁸

On February 1, 2001 the DSB established a panel and Cuba, the Dominican Republic, Honduras, India and Japan reserved their third party rights. However, on July 5, 2001 the parties notified to the DSB a mutually satisfactory solution on the matter establishing that with respect to the interpretation of Article 68, the Brazilian Government would commit, in the event it deems necessary to apply Article 68 to grant compulsory license on patents held by U.S companies, to hold prior talks on the matter with the U.S. government in the context of a special session of the U.S – Brazil Consultative Mechanism.¹¹⁹

It is interesting that on the notification to the DSB, the United States expressed that its concerns were never directed at Brazil's bold and effective program to combat HIV/AIDS. "This may be attributed to the public relations disaster of the former United States Trade Representative threats of trade sanctions against South Africa in

¹¹⁸ Request for the Establishment of a Panel by the United States, *Brazil – Measures Affecting Patent Protection*, WT/DS199/3 (Jan. 9, 2001).

¹¹⁹ Notification of Mutually Agreed Solution, *Brazil – Measures Affecting Patent Protection*, WT/DS199/4, G/L/454, IP/D/23/Add.1 (July 19, 2001).

1999, as well as the fact that Brazil's strategy to lower the cost of highly active antiretroviral therapy had not actually violated the TRIPS agreement. Since article 68 of Brazil's Industrial Property Law *did* potentially violate the TRIPS agreement, it was an indirect means of addressing Brazil's controversial AIDS treatment policies."¹²⁰

At the time the dispute was settled, Brazil's strategy to influence international institutions and the public opinion regarding the importance to protect the right to access to medicines and promote HIV/AIDS programmes had given results, pressuring the U.S. government for a mutual resolution of the dispute in order to avoid a negative image for its pharmaceutical industry.

The compulsory licensing flexibility mechanism was used for the first time in Brazil in 2007. The Ministry of Health engaged in conversations with Merck & Co. Inc. to reduce the price of *efavirenz*, a drug used by 38% of HIV/AIDS patients in Brazil. After lengthy unsuccessful negotiations, the government declared *efavirenz* a drug of national public interest and Decree No. 6.108/07 granted a compulsory license for the drug's patents.

The medicine has been imported from India where it is already produced off patent and the price dropped from US \$1.60 per dose to US \$0.45 per dose for the generic version. Therefore, with this compulsory license, the government committed to the sustainability of its policy of free access to HIV/AIDS treatment and the entire public health system.¹²¹

As explained above, Brazil has been active on the negotiation of the TRIPS Agreement on benefit of the developing world, considering that public health policy continuous to be one of its State priority providing financial and governmental

¹²⁰ Amy Nunn, *supra* note 68, at 128.

¹²¹ See Gabriela Costa Chaves, Marcela Fogaca Vieira & Renata Reis *Accesso a Medicamentos e Propriedade Intelectual no Brasil: Reflexes e Estrategias da Sociedade civil*. 8 SUR – INT'L J ON HUM RTS 173 (2008).

resources to promote and achieve major health coverage for the whole population.¹²² Brazil not only had success in promoting its policies on public health at the international arena level, but also pushed for a change on the interpretation of the right to access to medicines for HIV/AIDS treatment as a human right, favoring all developing countries.¹²³

The Brazilian strategy of obtaining public support and maintaining a strong position with respect to the TRIPS Agreement, has increased the bargaining power of the third world and has taken to a positive outcome on the disputes brought by the developed world as it was demonstrated in the dispute DS199 initiated by the US. Also, it is important to notice that developing or transition economies today constitute approximately 75% of the WTO membership, representing a majority that countries such as Brazil and India have taken advantage of on matters like this involving a growing industry of generics.

In a nutshell, the developing countries succeeded in amending the TRIPS Agreement to their favor against the developed world's will and multinational pharmaceuticals' economic interests, proving the growing ability of developing country coalitions to effect the outcome of decisions within the WTO both in the negotiation of agreements and dispute cases. The reform to the TRIPS Agreement on its own does not solve the health crisis in the developing world. However, it has contributed to the efforts to improve their protection under the IPRs system.

E. Conclusion

The WTO as the world's meeting point for international trade constitutes an ideal scenario for its members to negotiate bilateral and multilateral agreements, to discuss international trade policies, and, to arrange its differences through a neutral dispute

¹²² See Portal da Saude Brazil, <http://portalsaude.saude.gov.br/portalsaude/area/3/saude-para-voce.html> (last visited May 11, 2013).

¹²³ *E.g.*, commitments and actions to stop and reverse the spread of HIV/AIDS have been set. See 2001 Declaration of Commitment on HIV/AIDS at the UN General Assembly Special Session dedicated to HIV/AIDS, The Political Declaration on HIV/AIDS at the UN General Assembly High Level Meetings on AIDS in 2006, and the Political Declaration on HIV/AIDS at the UN General Assembly High Level Meetings on AIDS in 2011.

settlement system. In that sense, the country that “participates in WTO dispute settlement affects WTO law’s application and interpretation over time, which in turn, can affect domestic regulation and economic decision-making around the world.”¹²⁴

Through the different cases brought to the WTO and their impact on main issues encountered by developing countries in the international trade legal framework, Brazil has demonstrated its ability to use the dispute settlement system effectively to forward its trade interests setting a favorable precedent for the third world. “Brazil’s use of WTO dispute settlement and particularly its successful challenges against U.S. and EU agricultural subsidy policies have provided a vehicle for Brazil to advance its stature and positions in the WTO trade law system.”¹²⁵

This chapter has shown Brazil as a successful example on how developing countries can make a difference in using the dispute settlement system to protect their economic interests and promote international trade policies while participating actively in the negotiation of critical issues at the international level. However, it is necessary to evaluate whether the rest of the developing world shall be able to do the same by following Brazil’s example and strategies. This aspect will be analyzed in the final chapter.

¹²⁴ Gregory Shaffer, Micelle R. Sanchez & Barbara Rosenberg, *supra* note 74, at 391.

¹²⁵ *Id.* at 421.

V. Conclusion

A. The WTO as an Agent for Economic Development

In the analysis of the WTO's role as an agent for economic development, usually two perspectives are considered: the negotiations of WTO Agreements, including the approach to critical issues affecting developing countries' interests; and, the differential treatment given to developing countries within the WTO.

1. Negotiation of WTO Agreements

As explained in the previous chapters, the negotiation of WTO Agreements is a long and complex process influenced by different factors such as the creation of coalitions and the adoption of different negotiation strategies. Sonia E. Rolland in her Article *Developing Country Coalitions at the WTO: in Search of Legal Support* (2007) identifies two broad types of coalitions: i) discussion and research groups, and ii) negotiation-oriented coalitions. Indeed each one raises separate legal and institutional issues within the framework of the WTO and may use different legal tools to pursue their participants' objectives.

On the one hand, discussion and research groups are coalitions focused on sharing information and pooling research resources to help the development of common platforms and negotiating positions for their members. Robert O. Keohane and Joseph S. Nye in their Article *Transgovernmental Relations and International Organizations* (1974) have recognized the importance of these interconnections for the formation of coalitions.

On the other hand, the negotiation-oriented coalitions include coalitions designed to raise the profile of certain members that would otherwise be under-represented, coalitions designed to influence the organization's agenda, and coalitions designed to pursue specific results in the negotiations triggering the organization's decision-making procedures. This in fact has been the case of the coalitions formed between developing countries in order to negotiate agricultural matters (G20) and also

the TRIPS Agreement regarding pharmaceuticals, where developing country coalitions have been able to successfully stand up against the developed world agenda.

The WTO as an institution, with governing rules and practices, has an important impact on the formation and sustainability of developing country coalitions. However, as Rolland explains, there are trade law instruments that have a direct impact on them. First of all, competition for trade preferences awarded by developed countries (most importantly the United States and the EC), have taken to confrontations between developing countries with respect to the position to be assumed on common issues, which is reflected not only in the negotiation of agreements but also on several cases brought to the DSS. Secondly, the offering of separate individual deals has been a recurrent strategy to pull apart coalitions. The United States, in particular, has played the bilateral card, alongside - or as an alternative to - the threat of unilateral sanctions, to create incentives for individual countries to defect from coalitions that the United States viewed as promoting agendas contrary to its own interests.

Between developed countries, it is possible to perceive an implicit coalition when negotiating critical matters within the WTO, as it became exposed on the precedents of the negotiations related to the three common issues to developing countries explained in Chapter Two.

Another factor influencing the negotiation of WTO Agreements is the development of strategies to be applied in the negotiation process with other countries, particularly on critical issues affecting developing countries' interests.

Rolland identifies two major modalities of negotiation strategies: request-and-offer and formula-based. In a request-and-offer system, countries list the concessions (on tariffs or market access) they would like to obtain and offer other concessions in exchange. In contrast to the request-and-offer system, formula-based concessions require a multilateral agreement (of all members) on the type of cut, its level, and its application.

Rolland concludes that careful consideration must be given by developing countries to the modalities for negotiation in terms of the impact they will have on coalitions. On the one hand, formula-based negotiation calls for more multilateralism and may result in less flexible results as it happened with the negotiation of the TRIPS Agreement in the Uruguay Round. On the other hand, request-and-offer negotiation may put countries at the mercy of bilateral divide-and-rule tactics, even though they are not forced to accept an offer.

2. Special and Differential Treatment

With respect to the Special and Differential Treatment (SDT) given to developing countries within the WTO, Bernard Hoekman, Constantine Michalopoulos & L. Alan Winters in their Article *Special and Differential Treatment of Developing Countries in the WTO: Moving Forward After Cancun* (2004), establish that there are currently two major dimensions of SDT in the WTO: market access and rule-related.

On market access, SDT involves a call for preferential access for developing countries to developed country markets under a Generalized System of Preferences, complemented by less than full reciprocity in negotiating rounds. On rules, SDT includes calls for developed countries to provide technical assistance to lower-income economies, in order to help them implement disciplines in areas such as sanitary and phytosanitary measures, customs valuation and TRIPS, complemented with exemptions from certain WTO rules through the principle of non-reciprocity in trade negotiations, whereby other developed countries reduce or remove tariffs and other barriers to trade. Similar provisions for non-reciprocity are included in Article XIX(2) of GATS.

According to the authors, such exemptions may be transitory, and involve longer time periods for implementation. This is the case for example, for the implementation of harmonized protection of intellectual property rights under the Agreement on TRIPS. Others are permanent, such as the Article XVIII GATT.¹²⁶

¹²⁶ Article XVIII allows developing countries to use trade policies in the pursuit of industrial development objectives and to protect the balance of payments, imposing weaker disciplines than on

Even though SDT is a beneficial instrument for developing countries, as it was explained in Chapter Two, the third world faces challenges in applying and benefiting from the treatment either for lack of resources, knowledge or bargaining power. A good example to reflect this point is the fact that developing countries, even Brazil, did not make much use of its flexibilities or extended periods by the time they had to implement the TRIPS Agreement.

In assessing the outcome obtained by developing countries within the negotiation of agreements or application of SDT instruments, it is clear that the developed world continues as the predominant actor influencing both, due to its economic power and experience in managing its critical interests within emerging economies. Even though this limits the role of the WTO as an agent for economic development, the actions of developing countries and particularly key players such as Brazil and India have become relevant and effective, creating a new benchmark for future negotiations.

There is yet a long way to go in order to obtain real protection for the third world on all the different matters discussed and agreed under the WTO. Nevertheless, today there exist more examples of coalitions and negotiations producing a positive outcome that had not been imagined before.

B. New Option for the Developing World

While negotiation of agreements or application of SDT instruments are relevant to determine trade-relations between developed and developing countries as well as the role of the WTO with respect to emerging economies, an additional instrument has strengthened during the last few years. Developing countries, unable to confront the developed world only by multilateral agreements, have started using the DSS strategically to obtain effective protection under the international trade legal system.

industrialized countries. There are also many exhortations to developed countries to take into account the interests of the developing countries in the application of WTO rules and disciplines.

Among the different literature regarding the WTO dispute settlement system, it is probably Marc Galanter in his Article *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change* (1974), who gives a better understanding of the role of developing countries within the WTO system.

Galanter identifies two kinds of actors in the legal system differentiated by their size, the state of their law and their resources: those who have many occasions to utilize the courts and to make or defend claims ("repeat players" or "RP"), and those who have only occasional recourse to the courts ("one-shotters" or "OS").

An OS is a unit whose claims are too large (relative to its size) or too small (relative to the cost of remedies) to be managed routinely and rationally. An RP, on the other hand, is a unit that had and anticipates repeated litigation, which has low stakes in the outcome of any one case, and which has the resources to pursue its long run interests. This analogy can be applied to developing and developed countries within the WTO dispute settlement system, to understand the position of emerging economies when challenging economic powers for the protection of their international trade interests.

According to Galanter, we would expect an RP to play the litigation game differently from an OS, considering its advantages: i) RPs having done it before, have advance intelligence; they are able to structure the next transaction and build a record; ii) RPs develop expertise and have lower start-up costs for any case; iii) RPs have interest in their "bargaining reputation" that serves as a resource to establish "commitment" to their bargaining positions; iv) RPs can adopt strategies calculated to maximize gain over a long series of cases, even where this involves the risk of maximum loss in some cases; v) Since penetration depends in part of the resources of the parties (knowledge, attentiveness, expert services, money), RPs are more likely to be able to invest the matching resources necessary to secure the penetration of rules favorable to them.

This position of advantage is a way in which a legal system, formally neutral between "haves" and "have-not", may expand and perpetuate the advantages of the

former. However, Brazil has successfully been moving from the “have-not” group towards the “haves” exclusive group that uses the DSS permanently and strategically. As a key player for the developing world, the Brazilian delegation at the WTO has gotten important victories on critical issues affecting the emerging economies.

Brazil has applied what Galanter proposes as an “equalizing reform” with the objective to confer relative advantage on those who did not enjoy it before. It has tried to organize the “have-not” party into coherent groups that have the ability to act in coordinated fashion, play long-run strategies and benefit from high-grade legal services. This has involved upgrading capacities for managing claims by gathering and utilizing information, achieving continuity and persistence, employing expertise, exercising bargaining skills and so forth.

An organized group is not only better able to secure favorable rule changes, in courts and elsewhere, but it is better able to see that good rules are implemented as it was the case on the disputes related to AD measures explained in Chapter Three. Developing countries have then a real option to act together within the WTO dispute settlement system in order to achieve common economic interests.

However, as it is explained by Gregory Shaffer, Micelle R. Sanchez & Barbara Rosenberg in their Article *The Trials of Winning at the WTO: What Lies behind Brazil's Success* (2008), developing countries generally face challenges if they are willing to participate effectively in the WTO dispute settlement system because of: (1) the lack of capacity to organize information concerning trade barriers and opportunities to challenge them, as well as a relative lack of internal legal expertise in WTO law, which has a lengthy and increasingly factually contextualized jurisprudence, (2) constrained financial resources, including those available to hire outside legal counsel to effectively use the WTO legal system, (3) fear of political and economic pressure from the United States, the European Union, and other WTO members with large markets, resulting in reduced incentives to bring WTO claims against these WTO members, and (4) their own internal governance systems.

In similar fashion, Gary N. Horlick in his Article *The WTO and Developing Countries* (2006) explains how developing countries are prejudiced to deal with lengthy processes by lack of capacity to enforce WTO rulings considering that they cannot retaliate against larger developed countries and also, by high indirect costs of initiating WTO disputes.

Despite weaknesses of the DSS, the positive results obtained in sectors such as agriculture and intellectual property rights give hope to long-term implications for WTO jurisprudence. In the meantime, by strategically using the dispute settlement system, countries such as Brazil will keep helping the developing world, directly or indirectly, to achieve this goal.

C. The Brazilian Model

Brazil has been able to positively influence both WTO regulations as well as the dynamics of trade negotiations with world economic powers in a way that benefits developing countries. Furthermore, Brazil is today a good example of how the dispute settlement system of the WTO can be used strategically by a developing country to achieve and protect its economic interests.

As a consequence, Brazil has assumed leadership of the third world within WTO negotiations and litigation, further reinforcing its position as “one of the most important players in the twenty-first century’s world economy.”¹²⁷ Probably the best example of this is the fact that this year for the first time, a Latin American and representative of a BRIC nation, the Brazilian Roberto Azevedo, has become the head of the WTO.

In Brazil’s case it must be noted, as it has been explained in this study, that the country experienced particular milestones in the development of its economy and international trade policy that allowed it to obtain positive results after its

¹²⁷ Pedro da Motta Veiga, *supra* note 14, at 20.

liberalization process in the 1990s, which differed from the rest of the developing world.

Moreover, Brazil has brought cases to the WTO on particular issues affecting its interests that could or could not be fully in accordance with the interests and critical issues of the rest of developing countries. Therefore, even though Brazil represents hope for the third world and has positively influenced the role of developing countries within the WTO, the needs, conditions and priorities vary from one country to another, making customized strategies to achieve international trade policies within the WTO necessary, just as Brazil did.

In conclusion, the WTO DSU remains as an opportunity for developing countries to strategically influence global international trade according to their economic interests, working together towards common goals. The success of their efforts will depend only on the transformation of trade policies within their respective political and economic frameworks, along with the overcoming of the particular challenges that will allow each developing country to be a strategic player in both, negotiation of the agreements and dispute cases within the WTO.