

## The Trials of Winning at the WTO: What Lies behind Brazil's Success

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# The Trials of Winning at the WTO: What Lies Behind Brazil's Success

Gregory Shaffer,<sup>†</sup> Michelle Ratton Sanchez,<sup>††</sup> and  
Barbara Rosenberg<sup>†††</sup>

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## Introduction

Calls for greater empirical work in international law have been gaining ground.<sup>1</sup> This article, building from years of empirical investigation of

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1. See, e.g., Jeffrey Dunoff & Joel Trachtman, *The Law and Economics of Humanitarian Law Violations in Internal Conflict*, 93 AM. J. INT'L L. 394 (1999) (writing from a law and economics perspective that "[w]hile law and economics is rich in theory, it exalts empiricism (in which it is surprisingly poor)"); Ryan Goodman & Derek Jinks, *International Law and State Socialization: Conceptual, Empirical, and Normative Challenges*, 54 DUKE L.J. 983 (2005) (writing from a sociological "acculturation" perspective that

international trade dispute settlement and its impact in Brazil, aims to advance our understanding of three sets of interrelated questions: who shapes international trade law through litigation and bargaining, how do they do so, and what broader effects do international trade law and judicialization have within a country?<sup>2</sup> The article's point of entry is an examination of what lies behind Brazil's use of the legal regime of the World Trade Organization (WTO), including its use in litigation, negotiations, and ad hoc bargaining. We assess how the WTO legal regime has affected Brazil's national administration and Brazilian government-business-civil society relations regarding international trade policy and dispute settlement. In turn, we depict the strategies that Brazilian public and private actors have adopted to deploy and shape this very international legal process. We aim to show how these national and international processes are reciprocally and dynamically interrelated.<sup>3</sup>

Although earlier work has focused on the impact of the legalization and judicialization of trade relations in the United States and the European Union (EU),<sup>4</sup> this article assesses the responses and strategies of a major

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"[f]urther empirical research is required to illustrate more concretely how states are acculturated"); Gregory Shaffer, *A New Legal Realism: Method in International Economic Law Research*, in *INTERNATIONAL ECONOMIC LAW: THE STATE AND FUTURE OF THE DISCIPLINE* 29 (Colin B. Picker et al. eds., 2008) (writing from a new legal realist approach and noting that although there has been a growth in quantitative empirical work on the use of the WTO legal system, qualitative empirical studies based on extensive field work are still lacking).

2. By using the term "legalized regime," we refer to the relative precision and binding nature of WTO rules. By the term "judicialized regime," we refer to the use of a third party institution for dispute settlement—WTO panels whose decisions are subject to appeal before the WTO Appellate Body. On the concept of legalization, compare Kenneth Abbott et al., *The Concept of Legalization*, 54 *INT'L ORG.* 401, 401-03 (2000) (defining legalization in terms of a spectrum of three factors: (i) precision of rules, (ii) authority or bindingness of rules, and (iii) delegation to a third party decision-maker), with Martha Finnemore & Stephen J. Toope, *Alternatives to "Legalization": Richer Views of Law and Politics*, 55 *INT'L ORG.* 743, 743 (2001) (taking a more sociological perspective and critiquing Abbott et al.'s formal definition of legalization). On the concept of judicialization, or third party dispute resolution, see Alec Stone Sweet, *Judicialization and the Construction of Governance*, 31 *COMP. POL. STUD.* 147, 147-84 (1999).

3. For a socio-legal account of the recursive, reciprocal relation of international institutions and domestic contexts, see Terence C. Halliday & Bruce G. Carruthers, *The Recursivity of Law: Global Norm Making and National Lawmaking in the Globalization of Corporate Insolvency Regimes*, 112 *AM. J. SOC.* 1135 (2007). In political science, two-level game theory examines the interrelationship of international negotiations (Level 1) and domestic politics (Level 2), assessing the strategic role of national leaders in determining national positions and strategies at the international level in light of national political contexts. In contrast, the literature referred to as "the second image reversed" examines how international structures affect domestic political life. On two-level games, see *DOUBLE-EDGED DIPLOMACY: INTERNATIONAL BARGAINING AND DOMESTIC POLITICS* (Peter B. Evans et al. eds., 1993) and Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 *INT'L ORG.* 427 (1988). On the second image reversed, see Peter Gourevitch, *The Second Image Reversed: The International Sources of Domestic Politics*, 32 *INT'L ORG.* 881 (1978).

4. See, e.g., GREGORY C. SHAFFER, *DEFENDING INTERESTS: PUBLIC-PRIVATE PARTNERSHIPS IN WTO LITIGATION* (2003) [hereinafter SHAFFER, *DEFENDING INTERESTS*]; Gregory Shaffer, *What's New in EU Trade Dispute Settlement?: Judicialization, Public-Private Networks and the WTO Legal Order*, *J. EUR. PUB. POL'Y* 832, 837 (2006). In addition, there has been

developing country, Brazil. The article investigates, in particular, how the legalization and judicialization of international trade relations have spurred institutional transformations within Brazilian government, business, and civil society as well as in their interactions, giving rise to new Brazilian public-private partnerships for trade policy formation and trade dispute settlement. That is, we examine international law matters not in terms of compliance with individual legal decisions or treaty provisions (for which there is considerable literature)<sup>5</sup> but rather in terms of the more systemic impact of WTO legalization and judicialization on Brazilian business-government-civil society relations regarding the making and implementation of international trade law.<sup>6</sup>

By focusing on the interaction of domestic and international processes, we view international trade litigation as part of a broader structure of international trade dispute settlement, negotiation, and practice.<sup>7</sup> Brazil has aspirations for regional and global leadership and the WTO pro-

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considerable scholarship regarding the impact of the European Union within EU member states. See, e.g., *TRANSFORMING EUROPE: EUROPEANIZATION AND DOMESTIC STRUCTURAL CHANGE* (Maria Green Cowles et al. eds., 2001); Karen J. Alter, *The European Union's Legal System and Domestic Policy: Spillover or Backlash?*, 54 *INT'L ORG.* 489 (2000). Although there have been many studies of trade policy-making in Brazil, this article is, to our knowledge, the first sustained empirical study of what lies behind Brazil's approach to international trade dispute settlement and its impact within Brazil.

5. On international law generally, see ABRAM CHAYES & ANTONIA H. CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995); William C. Bradford, *International Legal Compliance: An Annotated Bibliography*, 30 *N.C. J. INT'L L. & COM. REG.* 379 (2004) (providing an excellent review of the literature); Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 *CAL. L. REV.* 1823 (2002); Harold K. Jacobson, *Conceptual, Methodological, and Substantive Issues Entwined in Studying Compliance*, 19 *MICH. J. INT'L L.* 569 (1998) (surveying major ILC theories); Robert O. Keohane, *Compliance with International Commitments: Politics Within a Framework of Law*, 86 *AM. SOC'Y INT'L L. PROC.* 176 (1992); Kal Raustiala & Anne-Marie Slaughter, *International Law, International Relations, and Compliance*, in *THE HANDBOOK OF INTERNATIONAL RELATIONS* 28 (Walter Carlsnaes et al. eds., 2002). On WTO and GATT law, see ROBERT HUDEC, *ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM* (1993); Chad Bown, *On the Economic Success of GATT/WTO Dispute Settlement*, 86 *REV. ECON. & STAT.* 811 (2004) (noting that three years after the date of adoption of a WTO judicial decision in favor of a complainant, imports of the complainant's affected goods have increased substantially into the respondent); Marc Busch & Eric Reinhardt, *Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO Disputes*, 24 *FORDHAM INT'L L.J.* 158, 162 (2000) (showing that around two-thirds of complaints "ending prior to a ruling (whether before or after the establishment of a panel), exhibited full or partial concessions by the defendant").

6. This article does not examine, in a broad sense, societal change within Brazil, but it provides material support for such an inquiry. Rather, the article focuses on this subset of change.

7. As a diplomat from a mid-sized developed country mission confirmed within the WTO context, it is a common error of trade law academics to view WTO judicial opinions as the end of the process. Cases, rather, are resolved through diplomatic negotiations and private party bargaining behind the scenes. The judicial decision simply serves to help the parties resolve their dispute. In his words, "the end game . . . ultimately involves negotiation informed by dispute settlement." Interview by Gregory C. Shaffer with Diplomat [name withheld], in Geneva, Switz. (June 24, 2002) (on file with authors).

vides a vehicle through which it can advance these aims. For Brazil to do so, however, it needed to adapt internally to meet international trade law's increasing institutional demands. In documenting these adaptations, the article shows how Brazil's strategies for WTO litigation and negotiations have enabled it to become a major player in the WTO system. The article, therefore, situates WTO legal and Brazilian domestic developments within a single frame.<sup>8</sup> The interaction between the national and international levels is our unit of analysis.

The article applies two complementary analytic frameworks to assess how WTO legalization and judicialization have interacted with Brazilian domestic factors. First, the article is part of a larger investigation of the effect of changes at the international level on domestic institutions and government-business-civil society relations around the world.<sup>9</sup> New governance processes, whether they consist of transgovernmental public networks,<sup>10</sup> mixed public-private hybrid networks,<sup>11</sup> or transnational private fields of law-making,<sup>12</sup> have reflected and responded to the challenges

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8. This article differs from socio-legal studies that focus solely on the impact of international legal norms within developing countries. For excellent work in this vein, see SALLY ENGLE MERRY, *HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE* (2006); Bruce Carruthers & Terrence Halliday, *Negotiating Globalization: Global Scripts and Intermediation in the Construction of Asian Insolvency Regimes*, 31 *LAW & SOC. INQUIRY* 521 (2006).

9. See *TRANSFORMATIONS OF THE STATE* (Stephan Leibfried & Michael Zürn eds., 2005); see also GREGORY SHAFFER & DAMIAN CHALMERS, *TRANSNATIONAL TRANSFORMATIONS OF THE STATE* (2007), available at [http://www.luc.edu/law/faculty/docs/shaffer/transnatl\\_transf\\_state.pdf](http://www.luc.edu/law/faculty/docs/shaffer/transnatl_transf_state.pdf). For a fascinating study about changes in Latin America regarding economic development and human rights policies, see YVES DEZALAY & BRYANT G. GARTH, *THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES* (2002). For a structural perspective with a realist international relations approach, see Richard H. Steinberg, *The Transformation of European Trading States*, in *THE STATE AFTER STATISM: NEW STATE ACTIVITIES IN THE AGE OF LIBERALIZATION* (Jonah D. Levy ed., 2006) and Richard H. Steinberg, *The Formation, Transformation, and Deformation of Trading States in Poor Countries* (2008) (unpublished manuscript, on file with authors).

10. See, e.g., ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 62 (2004); Mark Pollack & Gregory Shaffer, *Who Governs?*, in *TRANSATLANTIC GOVERNANCE IN THE GLOBAL ECONOMY* 287 (Mark Pollack & Gregory Shaffer eds., 2001) (creating a framework that looks at the relative roles of intergovernmental, transgovernmental, and transnational networks, including hybrid public-private networks).

11. See, e.g., JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* 3 (2000); SHAFFER, *DEFENDING INTERESTS*, *supra* note 4, at 109–16. On the increased importance of public-private networks in public interest lawyering domestically within the United States, see Louise G. Trubek, *Crossing Boundaries: Legal Education and the Challenge of the "New Public Interest Law"*, 2005 *WIS. L. REV.* 455, 461–62 (2005) (discussing a new framework for public interest lawyering, involving new public-private collaborations, more flexible tools, and greater international awareness and engagement).

12. On private transnational law-making, see KLAUS PETER BERGER, *THE CREEPING CODIFICATION OF LEX MERCATORIA* (1999); A. CLAIRE CUTLER, *PRIVATE POWER AND GLOBAL AUTHORITY: TRANSNATIONAL MERCHANT LAW IN THE GLOBAL POLITICAL ECONOMY* (2003); Daniela Caruso, *Private Law and State-Making in the Age of Globalization*, 39 *N.Y.U. J. INT'L L. & POL.* 1 (2006); Ross Cranston, *Theorizing Transnational Commercial Law*, 42 *TEX. INT'L L.J.* 597 (2007); PEER ZUMBANSEN & GRALF-PETER CALLIENS, *ROUGH CONSENSUS AND RUNNING CODE: A THEORY OF TRANSNATIONAL PRIVATE LAW* (forthcoming 2008). On private transnational law dispute settlement, see YVES DEZALAY & BRYANT G. GARTH,

posed by economic globalization and the transnational institutions and regimes that have arisen to govern it.<sup>13</sup>

Second, the article is part of a larger project on the challenges that the WTO dispute settlement system poses for developing countries, and the strategies that some of them are adopting, Brazil being a leading example.<sup>14</sup> Although the WTO's more legalized and judicialized dispute settlement system offers significant promise for developing countries, greater judicialization comes with costs. Demands on human resources, legal knowledge, and experience multiply when a WTO member wishes to invoke its international trading rights, putting a primacy on legal capacity.<sup>15</sup> The legal procedures and substantive case law have become increasingly complex and technically demanding.

Brazil is widely touted as one of the most successful users of the WTO dispute settlement system among all countries, developing and developed.<sup>16</sup> Its relative success before the WTO dispute settlement system has received national and international attention and has further motivated the government and private sector to engage actively in the Doha Round of WTO negotiations. As we will show, the political payoffs for Brazil have

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DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER (1996). On the practice of transnational law, see THE PRACTICE OF TRANSNATIONAL LAW (Klaus Peter Berger ed., 2001). On transnational contractual networks, see COMMODITY CHAINS AND GLOBAL CAPITALISM 2 (Gary Gereffi & Miguel Korzeniewicz eds., 1994).

13. We refer to globalization as "a process of widening, deepening, and speeding up of worldwide connectedness, in particular in the economic sphere." We adapt this definition from DAVID HELD ET AL., GLOBAL TRANSFORMATIONS: POLITICS, ECONOMICS AND CULTURE 2 (1999). Held et al. also gave a broader, more complex definition of globalization that includes cultural as well as economic phenomena: "A process (or set of processes) which embodies a transformation in the spatial organization of social relations and transactions - assessed in terms of their extensity, intensity, velocity and impact - generating transcontinental or interregional flows and networks of activity, interaction and the exercise of power." *Id.* at 16.

14. See, e.g., Gregory Shaffer, *How to Make the WTO Dispute Settlement System Work for Developing Countries*, in *Towards a Development-Supportive Dispute Settlement System in the WTO* 1, 26, 51-52 (Int'l Ctr. for Trade & Sustainable Dev., Resource Paper No. 5, 2003), available at [http://www.ictsd.org/pubs/ictsd\\_series/resource\\_papers/DSU\\_2003.pdf](http://www.ictsd.org/pubs/ictsd_series/resource_papers/DSU_2003.pdf) [hereinafter Shaffer, *How to Make the WTO Dispute System Work*]. The analysis builds from socio-legal studies of domestic legal frameworks' operations where parties have disparate financial resources and legal experience. See, e.g., Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 96, 107 (1974).

15. See Marc L. Busch et al., *Does Legal Capacity Matter?: Explaining Patterns of Protectionism in the Shadow of WTO Litigation* 3 (2008) (unpublished manuscript), available at [http://search.ssrn.com/sol3/papers.cfm?abstract\\_id=1091435](http://search.ssrn.com/sol3/papers.cfm?abstract_id=1091435).

16. See, e.g., William J. Davey, *The WTO Dispute Settlement System: The First Ten Years*, 8 J. INT'L ECON. L. 17, 24, 40-42 (2005) (noting that "in the last few years developing countries have become more frequent users of WTO dispute settlement, both in absolute and relative terms . . . . Among developing countries, Brazil has made the most extensive use of the WTO dispute settlement system."). A leading international trade lawyer based in Washington, D.C. thus states, "Brazil puts the lie to the claim that developing countries can't use the WTO." Telephone Interview by Gregory C. Shaffer with Gary Horlick, Partner, Wilmer, Cutler, Pickering, Hale & Dorr LLP (Feb. 27, 2008) (on file with authors) [hereinafter Horlick Interview].

been significant, helping it become a leader of developing countries in trade negotiations (the so-called G-20) and a member of a new G-4 for trade negotiations in the Doha Round, consisting of the United States, the EU, Brazil, and India.<sup>17</sup> As David Deese writes with respect to Brazilian and Indian leadership in the Doha Round, “[F]or the first time there was also a precedent set for shared structural leadership beyond the United States and the EU at the very heart of the international trade negotiating process.”<sup>18</sup> For these reasons, Brazil is cited as a model for other developing countries, one with normative implications for our assessment of the WTO legal order.<sup>19</sup> However, no one has analyzed what lies behind Brazil’s success.

This article examines for the first time how Brazil has mobilized legal capacity both in response to the challenges that the WTO regime poses and in light of domestic Brazilian factors. Changes at the international level have helped unleash competition for new expertise to take advantage of the opportunities offered by international trade law, involving law schools, policy institutes, law firms, consultancies, think tanks, business associations, and different government ministries. Brazilian expertise on international trade matters has diffused outside of the traditional foreign ministry to include broader public-private networks with the aim of enhancing Brazilian capacity to meet the challenges that the WTO legal system poses. The participants in these networks have formed a community of trade policy specialists within Brazil, one that is transnationally linked to a broader trade policy field. Although this field can be conceptualized in terms of an “epistemic community,” our study shows that there is also contestation within the Brazilian trade law community, which is not a closed one, and is pressed to respond to political and social developments.<sup>20</sup>

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17. See G-20 History, <http://www.g-20.mre.gov.br/history.asp> (last visited May 23, 2008); see also PEDRO DA MOTTA VEIGA, MANAGING THE CHALLENGES OF WTO PARTICIPATION: CASE STUDY 7: BRAZIL AND THE G-20 GROUP OF DEVELOPING COUNTRIES, available at [http://www.wto.org/english/res\\_e/booksp\\_e/casestudies\\_e/case7\\_e.htm](http://www.wto.org/english/res_e/booksp_e/casestudies_e/case7_e.htm) (last visited Mar. 14, 2008). On the G-4, see Robert Wolfe, *Canada’s Adventures in Clubland: Trade Clubs and Political Influence*, in CANADA AMONG NATIONS 2007: WHAT ROOM TO MANOEUVRE? 181, 192 (Jean Daudelin & Daniel Schwanen eds., 2008). The leaders of the G-20 are Brazil, China, India, and South Africa, with Brazil being the entrepreneur of the group. See G-20 History, *supra*. The group’s first formal common proposal during the Doha Round was on agriculture and was made at the WTO Ministerial Meeting in Cancun, Mexico. *Id.*

18. DAVID DEESE, WORLD TRADE POLITICS: POWER, PRINCIPLES AND LEADERSHIP 153–55, 170, 177–78 (2007) (noting that in 2004, “the Brazilian and Indian ministers established themselves as co-leaders in the most contentious issue area, agriculture, because they were able to gradually press the U[.S.] and EC for substantial agricultural reforms they would not offer on their own. In this way, once again the ground was prepared for deeper agreements in a future round.”).

19. We refer in particular to assessments of the fairness of the system.

20. See Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT’L. ORG. 1, 3 (1992). Policy networks of professionals that hold particularly homogeneous cognitive orientations have been viewed as forming “epistemic communities” (or knowledge communities), which hold core sets of beliefs, principles, goals, and methods for validating claims that facilitate collaboration. *Id.* The term, taken from the Greek word *episteme*, meaning “knowledge,” refers to a network of pro-

The result of these processes, in our view, has not been the weakening of the state, as some scholars contend.<sup>21</sup> Rather, we see the strengthening of Brazil's capacity to play an active role at the international level through public and private actors (with reciprocal but not identical interests) responding to a new context: the more legalized and judicialized WTO system. This article addresses, in particular, Brazil's use of mechanisms of public-private coordination to gather information and define and advance its interests in WTO negotiations and dispute settlement, adapting mechanisms analogous to those that were first developed in the United States and Europe for similar purposes.<sup>22</sup>

The WTO, its dispute settlement system, and Brazil are particularly important sites of inquiry for three reasons. First, because of its legalized and judicialized nature, catalyzing domestic initiatives to shape international law, the WTO affords significant opportunities to governments and private constituencies, particularly business constituencies.<sup>23</sup> Big money is at stake and lawyers with expertise are available for hire. The WTO, the

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professionals who share at least four attributes that facilitate collaborative problem-solving: "(1) a shared set of normative and principled beliefs . . . ; (2) shared causal beliefs . . . ; (3) shared notions of validity . . . ; and (4) a common policy enterprise . . ." *Id.* Haas defines an epistemic community as a "network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy relevant knowledge within that domain or issue-area." *Id.*; see also ETIENNE WENGER, COMMUNITIES OF PRACTICE: LEARNING, MEANING, AND IDENTITY 45-49 (1998). This competition for trade policy expertise can also be viewed in terms of the emergence of a "field" within Brazil of international trade law and policy, one that is transnational in its dimensions, being linked to lawyers and policy makers in Geneva, Switzerland (the WTO's organizational home), Washington, D.C. (with its international trade bar), and other locations around the world, particularly national capitals. On the concept of social field, see PIERRE BOURDIEU & LOIC J.D. WACQUANT, AN INVITATION TO REFLEXIVE SOCIOLOGY 16 (1992) ("[A] field consists of a set of objective, historical relations between positions anchored in certain forms of power (or capital) . . ."). For an application to the world of international arbitration, see generally DEZALAY & GARTH, *supra* note 12.

21. See, e.g., KENICHI OHMAE, THE BORDERLESS WORLD: POWER AND STRATEGY IN THE INTERLINKED ECONOMY 188-89 (rev. ed. 1999); SUSAN STRANGE, THE RETREAT OF THE STATE: THE DIFFUSION OF POWER IN THE WORLD ECONOMY 3 (1996).

22. See generally SHAFER, DEFENDING INTERESTS, *supra* note 4.

23. For examples of how WTO law catalyzes efforts to create parallel international regimes with offsetting norms that can constrain the WTO's reach, see Laurence R. Helfer, *Regime Shifting: The TRIPs Agreement and New Dynamics of Intellectual Property Lawmaking*, 29 YALE J. INT'L L. 1, 1-10 (2004) (discussing how the substantive and procedural tensions between TRIPs and other international regimes created incentives for new forms of intellectual lawmaking in other issue areas); see also GREGORY SHAFER & MARK POLLACK, WHEN COOPERATION FAILS: THE INTERNATIONAL LAW AND POLITICS OF GENETICALLY MODIFIED FOODS (forthcoming 2008) (assessing how severe conflicts between the United States and the EU over agricultural biotechnology regulation have led them to engage in "forum shopping" for the regime that will most likely produce their preferred outcome, giving rise to overlapping and sometimes purposefully inconsistent regimes for trade, the environment, and food safety and finding that these inconsistencies and conflicts among regimes have influenced the natures of the regimes themselves as "hard" and "soft" law regimes); Kal Raustiala & David G. Victor, *The Regime Complex for Plant Genetic Resources*, 58 INT'L ORG. 277 (2004) (using the regime complex for plant genetic resources to examine how clusters of international legal agreements overlap in scope, subject, and time to create a "regime complex," or an array of partially overlapping and nonhierarchical institutions governing a particular issue area).

most legalized of multilateral regimes with a compulsory judicial system, provides access to a dispute settlement forum that could help to offset power asymmetries in international trade relations under the mantle of the “rule of law” or in contrast, it could deepen them.

Second, WTO law can have a significant impact on national economies and regulatory practices. Who 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. From an instrumentalist perspective, WTO law provides tools to actors within domestic and international politics, while from a constructivist perspective, WTO law can shape perceptions of political choices.<sup>24</sup> WTO law can directly affect national laws and regulations concerning the importation of goods and services,<sup>25</sup> investment,<sup>26</sup> intellectual property rights,<sup>27</sup> telecommunications,<sup>28</sup> financial services,<sup>29</sup> government procurement,<sup>30</sup> industrial policy,<sup>31</sup> agriculture,<sup>32</sup> and customs regulations.<sup>33</sup> Moreover, WTO law indirectly affects almost all national regula-

24. See MARTIN SHAPIRO & ALEC STONE SWEET, *ON LAW, POLITICS, AND JUDICIALIZATION* 14 (2002) (noting “how mutually constitutive instrumental rationality—for example, a decision to expend resources to litigate and normativity—for example, the development of legal argument—can be”). For a contrasting, but nonetheless complementary perspective, see Robert Wolfe, *See You in Geneva? Legal (Mis)Representation of the Trading System*, 11 *EUR. J. INT’L REL.* 339, 340 (2005) (viewing WTO law as a “continuous process of social interaction” in which the judicial process plays a relatively minor role). Our article, although often focusing on the judicial process, takes a broad perspective in demonstrating how Brazil has been able to enhance its ability to participate in WTO litigation, bargaining, and monitoring.

25. See General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187 (1994) [hereinafter GATT 1994]; see also General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183 (1994) [hereinafter GATS]. For an assessment, see Judith Goldstein et al., *Institutions in International Relations: Understanding the Effects of the GATT and the WTO on World Trade*, 61 *INT’L ORG.* 37 (2007).

26. See Agreement on Trade-Related Investment Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 186.

27. See Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreements].

28. See GATS, *supra* note 25, Annex on Telecommunications.

29. See *id.*

30. See Agreement on Government Procurement, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 4B, Ar. III, 1915 U.N.T.S. 103 (1994).

31. See Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 14 (1994).

32. See Agreement on Agriculture, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 410.

33. See Appellate Body Report, *European Communities—Selected Customs Matters*, WT/DS315/AB/R (Nov. 13, 2006); see also Appellate Body Report, *European Communities—Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R (June 5, 1998).

tory laws and regulatory practices, including environmental law,<sup>34</sup> consumer protection law,<sup>35</sup> tax law,<sup>36</sup> labor law,<sup>37</sup> and so-called moral laws, such as regulation of gambling.<sup>38</sup> Thus, understanding how countries and constituencies organize to respond to and make use of the WTO legal system is important.

Third, Brazil has been the most successful developing country in its use of WTO dispute settlement. This study, therefore, should be of great interest to other developing countries. The article shows how a developing country can mobilize legal resources to respond to and advance its interests through the judicialized WTO regime, even against the most powerful WTO members, the United States and the European Union.<sup>39</sup> Brazil is a large and relatively advanced developing country and this factor needs to be taken into account.<sup>40</sup> The challenges that other developing countries face in international trade dispute settlement, nonetheless, are much closer to those faced by Brazil than they are to those confronting the United States and the European Union, the most active users of the WTO dispute settlement and whose strategies in WTO dispute settlement are better known.<sup>41</sup>

In methodological terms, this study is based on four years of empirical investigation, drawing on a wealth of primary and secondary sources. Crucially, we have cross-checked our findings from written sources against interviews with a wide range of individuals. In particular, this article builds on in-depth, semi-structured elite interviews and discussions with Brazilian government officials in Brasília, Geneva, and Washington, D.C., as well as U.S. private lawyers who have worked with the Brazilian government, representatives of Brazilian companies and trade associations, members of the Brazilian bar, Brazilian academics, leaders of Brazilian think tanks and consultancies, representatives of non-governmental organizations, and members of the WTO Secretariat. We have attempted, wherever possible, to corroborate information gleaned from interviews in other

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34. See, e.g., Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R (Dec. 3, 2007) [hereinafter Appellate Body Report, *Brazil—Tyres*]; Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶ 155–59, WT/DS58/AB/R (Oct. 12, 1998).

35. See Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled, and Frozen Beef*, WT/DS161/AB/R (Dec. 11, 2000).

36. See Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, WT/DS11/AB/R (Oct. 4, 1996); see also Notification of Mutually Agreed Solution, *United States—Equalizing Excise Tax Imposed by Florida on Processed Orange and Grapefruit Products*, WT/DS250/3 (June 2, 2004).

37. See, e.g., Christopher McCrudden & Anne Davies, *A Perspective on Trade and Labor Rights*, 3 J. INT'L ECON. L. 43, 52, 57 (2000).

38. See Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/RW (Mar. 30, 2007).

39. For juridical reasons relating to the treaty framework of the European Union, the EU is officially referred to as the European Communities (EC) in the WTO, although the term EU is most commonly used in the media, including in EU public communications. See, e.g., Glossary: A Guide to 'WTO Speak,' [http://www.wto.org/english/thewto\\_e/glossary\\_e/glossary\\_e.htm](http://www.wto.org/english/thewto_e/glossary_e/glossary_e.htm) (last visited Mar. 13, 2008).

40. Part V of this article addresses the limits of the Brazilian approach for smaller developing countries.

41. See, e.g., SHAFFER, DEFENDING INTERESTS, *supra* note 4.

sources, to minimize our own and the reader's reliance on non-replicable data. Throughout the article, we have attempted to process-trace<sup>42</sup> our hypotheses and claims at both the national and international levels, triangulating on our subject using all available sources, whether primary or secondary, written or interview-based. We have documented our sources as fully as possible in the footnotes.

Parts I and II of this article provide key background information for the core of our empirical study in Part III, which investigates the major changes that WTO judicialization has catalyzed in the Brazilian government, media, academia, law firms, business trade associations, think tanks, consultancies, and civil society organizations. Part I also provides background on the export-oriented shift in trade policy in Brazil and other Latin American countries during the 1990s, together with an overview of Brazil's participation in and organization for dispute settlement under the WTO's predecessor, the General Agreement on Tariffs and Trade (GATT). It highlights two key preexisting attributes of Brazilian government and business organization (our domestic level variables) that would facilitate Brazil's engagement in WTO negotiations and successful use of WTO litigation. Part II.A presents an overview of three particular challenges that the WTO dispute settlement system poses for developing country participation in terms of legal expertise, financial cost, and extra-legal power. Part II.B summarizes Brazil's experience in the WTO dispute settlement system, both quantitatively and qualitatively, noting the catalyzing effect for Brazil of early cases in which it was on the defensive. This leads us to Part III, the empirical core of our study, which broadly investigates what lies behind Brazil's success in WTO dispute settlement, the institutional changes and mobilization strategies that public and private actors in Brazil have developed and that have catalyzed Brazil's capacity to make effective use of the WTO legal and judicial system. Part IV then provides specific examples of the strategies of public-private coordination that Brazil has used successfully as a complainant, respondent, and third party in WTO litigation, involving companies, trade associations, civil society organizations, and elite law firms, particularly, but not exclusively, leading U.S. law firms. Part V follows by examining, in light of the challenges that an increasingly demanding WTO dispute settlement system poses, the limitations of the Brazilian approach for smaller developing countries, as well as for Brazil itself, that to which, paradoxically, Brazil's successful use of leading outside legal counsel has contributed.

We conclude by drawing out seven findings from our study. We address, in particular, how international trade law and judicialization can unleash a competition for expertise that transforms a government's relation with business and civil society over international trade policy. We contend that the process of catalyzing change within a country is not automatic but depends on key domestic factors as variables. We find that the

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42. See ALEXANDER L. GEORGE & ANDREW BENNETT, *CASE STUDIES AND THEORY DEVELOPMENT IN THE SOCIAL SCIENCES* 205-32 (2005).

resulting dynamic can strengthen the state's ability to engage effectively at the international level. We conclude by observing that the best interpretation of what lies behind Brazil's success is the rise of pluralist interaction between the private sector, civil society, and the government on trade matters. This public-private exchange is spurred by the institutionalization of a more legalized and judicialized system for international trade relations in the broader context of Brazilian democratization and global economic integration. As WTO institutions have developed, individuals and groups in Brazil have responded by investing in expertise to take advantage of the opportunities offered and to defend against the challenges posed.<sup>43</sup> The resulting public-private partnerships have significantly enhanced Brazil's ability to advance its interests in international trade negotiations and dispute settlement and in the process, have an impact on the WTO regime.

### I. Brazil's Change in Trade and Development Policy: The GATT Years

Before examining the changes catalyzed in Brazil by the WTO's judicialization of trade relations, we must provide a baseline of what existed before the WTO's creation in 1995.

#### A. Brazil's Change in Development Policy

During the 1990s, Latin American countries changed their trade and development policies, to varying degrees, from the "import substitution industrialization" policies of the 1960s and 1970s to more "export-oriented," trade-liberalizing alternatives.<sup>44</sup> In broad terms, Brazilian development policy shifted from a focus on insulating the economy from international trade pressures to a focus on integrating into the global economy through enhanced trade, while retaining some ability to use industrial policy to develop, in particular, its manufacturing sector.<sup>45</sup> These transformations occurred at a time when liberalized international trade relations

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43. That is, this expertise can be used to defend import-competing groups and domestic policies, as well as to advance the aims of export-oriented groups and those wishing to change domestic policies.

44. KATHRYN SIKKINK, *IDEAS AND INSTITUTIONS: DEVELOPMENTALISM IN BRAZIL AND ARGENTINA* 75-79 (1991). Import substitution industrialization refers to a development policy advocating local production of higher value goods and services over importation. *Id.* at 75. Such local production is facilitated through trade protection and government subsidies. *Id.* In this way, proponents hope that a developing country can move from merely supplying raw materials in trade to developed countries, to producing goods with a higher added value, having positive spillover effects for the domestic economy. *Id.* The Argentine economist Raul Prebisch, director of the UN Economic Commission for Latin America, was a major proponent of such policies. *Id.* East Asian countries, in contrast, focused more on production for global markets and less on production for domestic and regional markets, which meant that their companies had to invest more in technological developments to stay competitive. *Id.*; see also Albert O. Hirschman, *Ideologies of Economic Development in Latin America*, in *LATIN AMERICAN ISSUES: ESSAYS AND COMMENTS* 3, 3 n.1 (1961) (referring to "the ideologies of economic development" in terms of sets of "distinctive beliefs, principles and attitudes").

45. See, e.g., Report of the Secretariat, *Trade Policy Review—Brazil*, 19, 37, WT/TPR/S/140 (Nov. 1, 2004) [hereinafter *Trade Policy Review—Brazil*] (noting that export promotion is "a key element of Brazil's trade policy").

were further institutionalized at the international level through the creation of the WTO and its judicialized system for dispute settlement in 1995.

The causal explanation for change is always difficult to specify. The best explanation of Brazil's shift during the 1990s towards more outward-looking, liberalized trade and development policies (as well as Latin America's generally) appears to be a combination of internal and external structural and ideological factors involving changed economic and geopolitical contexts and the proliferation of ideas in relation to the debt crises of the 1980s.<sup>46</sup> At least as reflected in growth rates, Brazil's import substitution policies of the 1950s through the 1970s had been relatively successful. In real per capita terms (taking into account both population growth and inflation), Brazil grew at an average rate of 6.1% during the late 1950s, 4% during the 1960s, and approximately 5.5% during the 1970s.<sup>47</sup> The oil and interest rate crises of 1979 and the ensuing debt crises of the 1980s and 1990s, however, caused economic stagnation, resulting in what has been called the "lost decade" in Latin America.<sup>48</sup> Elites in Brazil, as well as

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46. See generally GLOBAL CHANGE, REGIONAL RESPONSE: THE NEW INTERNATIONAL CONTEXT OF DEVELOPMENT 6 (Barbara Stallings ed., 1995) ("exploring how international and domestic politics affect policy choice"); JOHN WILLIAMSON, THE PROGRESS OF POLICY REFORM IN LATIN AMERICA (1990); DANIEL YERGIN & JOSEPH STANISLAW, THE COMMANDING HEIGHTS: THE BATTLE BETWEEN GOVERNMENT AND THE MARKETPLACE THAT IS REMAKING THE MODERN WORLD 233-38, 257-59 (1998); Augusto Varas, *Latin America: Toward a New Reliance on the Market*, in GLOBAL CHANGE, *supra*, at 272. Simmons and Elkins test for explanations for the liberalization of capital controls in terms of the impact of economic competition (affecting the demand for liberalization) and social emulation, as through transnational networks (affecting the supply of liberalization). See Beth A. Simmons & Zachary Elkins, *Globalization and Policy Diffusion: Explaining Three Decades of Liberalization*, in GOVERNANCE IN A GLOBAL ECONOMY: POLITICAL AUTHORITY IN TRANSITION 275, 275-99 (Miles Kahler & David A. Lake eds., 2003). They find evidence for both explanations. *Id.* However, as Cason and White point out, Brazil did adopt export promotion policies "as far back as the 1960s and early 1970s" in conjunction with import substitution industrialization, but they were unsuccessful. See Jeffrey Cason & Gregory White, *The State as Naïve Entrepreneur: The Political Economy of Export Promotion in Brazil and Tunisia*, 26 POL'Y STUD. J. 46, 46 (1988). For an analysis of institutional changes in Latin America, see Andrea C. Bandeira & Fernando Garcia, *Reforms and Growth in Latin America*, 77 CEPAL REV. 79, 79-95 (2002).

47. See Alan Heston et al., Penn World Table Version 6.2 (Ctr. for Int'l Comparisons of Prod., Income and Prices, Univ. of Pa., Sept. 2006), [http://pwt.econ.upenn.edu/php\\_site/pwt62/pwt62\\_form.php](http://pwt.econ.upenn.edu/php_site/pwt62/pwt62_form.php) (select "Brazil" and "Real Gross Domestic Product per Capita"). Brazil GDP per capita figures are expressed in real terms in 2000 constant prices. *Id.* From 1955 to 1961, Brazil's GDP grew at an average rate of 9.4% in real terms. JÖRG MEYER-STAMER, TECHNOLOGY, COMPETITIVENESS, AND RADICAL POLICY CHANGE: THE CASE OF BRAZIL 38 (1997). Its GDP continued to grow rapidly through the 1960s and 1970s, increasing from \$17.2 billion in 1961, to approximately \$42.6 billion in 1970, and to \$237.8 billion in 1980, making for an average (real) GDP growth rate of 6.2% during the 1960s and 8.8% during the 1970s. For aggregate GDP data, see Ministério do Desenvolvimento, Indústria e Comércio Exterior, *Evolução do Comércio Exterior Brasileiro - 1950 a 2007*, <http://www.desenvolvimento.gov.br/arquivo/secex/evocomextbrasil/evolucaocebrasileiro.xls> (last visited May, 20, 2008). For Latin America as a whole, per capita output increased cumulatively by "almost 40 percent through the 1970s and about 30 percent through the 1960s." See WILLIAMSON, *supra* note 46, at 1.

48. See, e.g., THOMAS E. SKIDMORE & PETER H. SMITH, MODERN LATIN AMERICA 443 (6th ed. 2005).

in other Latin American countries, became disaffected with past inward-looking policies.<sup>49</sup> The “development economics” used to justify import substitution industrialization policies were in retreat.<sup>50</sup>

Latin American policy makers noted the success of the more export-oriented economies of East Asia, with which their countries had been favorably compared only two decades before. As Augusto Varas notes, in the 1970s, Latin American and East Asian countries were often “linked as successful ‘newly industrialized countries (NICs),’”<sup>51</sup> as real per capita GDP grew at relatively similar rates in the two regions during that decade.<sup>52</sup> At the end of the 1970s, it appeared that Brazil “would close the gap separating it from the OECD countries, much in the same way that South Korea and Taiwan in fact did in the 1980s.”<sup>53</sup> These countries’ growth rates, however, diverged dramatically in the 1980s, during which Brazil’s real per capita GDP grew by only about 1% annually, while the newly industrialized East Asian countries real per capita GDP grew by around 6% annually.<sup>54</sup>

In 1989, Fernando Collor de Mello won the Brazilian presidential election and pushed for policies of monetary stability, fiscal restraint, trade and capital liberalization, and privatization. Trade liberals hailed his talk of “opening [Brazil] to the outside world and unshackling the economy”<sup>55</sup> as he “emphasized deregulation and greater openness to world markets.”<sup>56</sup> Fernando Henrique Cardoso, a leading formulator of “dependency theory,” which had provided an intellectual basis for import substitution industrialization, became Minister of Finance in 1994 and then, in 1995, President

49. SIKKINK, *supra* note 44, at 7–10.

50. See, e.g., ALBERT O. HIRSCHMAN, *ESSAYS IN TRESPASSING: ECONOMICS TO POLITICS AND BEYOND 1* (1981); DEEPAK LAL, *THE POVERTY OF ‘DEVELOPMENT ECONOMICS’* 18 (2d ed. 1997); SIKKINK, *supra* note 44, at 7–10; WILLIAMSON, *supra* note 46, at 71–76 (examining the concept of “Washington Consensus”).

51. See Varas, *supra* note 46, at 273.

52. Real per capita GDP grew almost 6% annually in Brazil, approximately 7% annually in Korea and Hong Kong, and between 8% and 8.4% annually in Taiwan and Singapore. See Heston et al., *supra* note 47 (computations based on real GDP per capita in constant prices).

53. MEYER-STAMER, *supra* note 47, at 33 (also noting that “Brazil’s industrialization long appeared to be a pronounced case of success. A country that at the beginning of the 1950s still had an agrarian character turned, in the course of 30 years, into one of the world’s major industrial states”).

54. Korea’s and Taiwan’s real per capita GDP grew by between 6.3% and 6.6% annually, and Hong Kong’s and Singapore’s by between 5% and 5.75% annually during this period. See Heston et al., *supra* note 47. Varas goes further, maintaining that World Bank figures show that during the 1970s, real per capita GDP grew by approximately 6% annually in Brazil (and about 3.7% in Latin America) but during the 1980s, actually fell by about 0.6% annually in Brazil (and about 0.8% in Latin America). See Varas, *supra* note 46, at 296–97 tbl. 9.1.

55. *A Survey of Brazil*, *ECONOMIST*, Dec. 7, 1999, at 7 (“Since the election campaign, the consequences of this political and ideological change for Brazilian trade policy were not long in coming.”). Williamson, however, notes that Brazil was among the last Latin American countries to liberalize. See WILLIAMSON, *supra* note 46, at 26.

56. BRAZIL: A COUNTRY STUDY (Rex A. Hudson ed., 1997), available at <http://countrystudies.us/brazil/80.htm>.

of the Republic for two four-year terms.<sup>57</sup> Cardoso privatized more state enterprises and further opened Brazil's economy to global competition, but Brazil only gradually moved toward more liberal economic policies.<sup>58</sup> Cardoso's shift from being a leading theorist of "dependency theory" to being a strong advocate of Brazilian integration in the global economy is emblematic of the significant ideological changes among Brazilian governing elites.<sup>59</sup> Although the political left won the election of 2002, the government of President Luiz Inacio Lula da Silva has maintained Brazil's economic policies of greater budgetary discipline and relatively liberalized trade.<sup>60</sup>

External factors complemented internal domestic explanations for Brazil's change in trade and development policies. The World Bank, International Monetary Fund (IMF), and the U.S. Treasury strongly advocated Brazilian trade liberalization while Brazil negotiated new and restructured loans.<sup>61</sup> These institutions' leverage increased on account of debt crises, facilitating their demands for structural adjustment policies as loan conditions.<sup>62</sup> Moreover, as other Latin American countries liberalized their economies, Brazil, competing with them for investment and foreign market

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57. See João Resende-Santos, *Fernando Henrique-Cardoso: Social and Institutional Rebuilding in Brazil*, in *TECHNOPOLS: FREEING POLITICS AND MARKETS IN LATIN AMERICA IN THE 1990s* 145, 182 (Jorge I. Domínguez ed., 1997); Larry Rohter, *Departing President Leaves a Stable Brazil*, *N.Y. TIMES*, Dec. 29, 2002, at A10.

58. MONICA HIRST, *THE UNITED STATES AND BRAZIL: A LONG ROAD OF UNMET EXPECTATIONS* 20 (2005); see also Andrew Hurrell, *The United States and Brazil: Comparative Reflections*, in *THE UNITED STATES AND BRAZIL* 73-74 (noting Brazil "moved toward economic liberalization; but the process of economic reform domestically remained more complex and checkered than elsewhere").

59. As Winston Fritsch and Gustavo Franco write, Brazil's shift in policy reflected a "slow move of the opinion of local elites toward deregulation - especially in the sphere of trade and industrial policy," a shift that included not only government leaders but also businessmen and academics. Winston Fritsch & Gustavo Franco, *Brazil and the World Economy in the 1990s*, in *LATIN AMERICA'S INTEGRATION INTO THE WORLD ECONOMY* 9 (Winston Fritsch ed., 1991); see also Pedro da Motta Veiga, *Trade Policy-Making in Brazil: Changing Patterns in State-Civil Society Relationship*, in *PROCESS MATTERS: SUSTAINABLE DEVELOPMENT AND DOMESTIC TRADE TRANSPARENCY* 143, 144 (Mark Halle & Robert Wolfe eds., 2007) [hereinafter Veiga, *Changing Patterns in State-Civil Society Relationship*] (referring to "the change of paradigm [that market liberalization] represented for economic agents within Brazil").

60. See *Trade Policy Review—Brazil*, *supra* note 45, at 17. For example, in 2004, the WTO's Trade Policy Review of Brazil reported that from 2000 to 2004, "Brazil has continued to enhance the transparency and reduce the complexity of its trade regime, including by streamlining its import procedures and consolidating import regulations. Import licensing no longer applies to all goods, although non-automatic requirements still affect over a third of all tariff lines or parts of lines." *Id.* at 20-21 (also noting a decline in the average applied tariff "from 13.7% in 2000 to 10.4% in 2004" for Brazil as part of Mercosur's Common External Tariff).

61. See ROBERT GILPIN, *GLOBAL POLITICAL ECONOMY: UNDERSTANDING THE INTERNATIONAL ECONOMIC ORDER* 269-70 (2001).

62. *Id.* at 270 (noting that "in November [1998] the IMF offered Brazil a large assistance package of over \$40 billion and attached a precondition that the Brazilian economy be significantly revamped").

access, followed suit.<sup>63</sup>

The United States not only offered carrots in the form of new loans but also wielded sticks in the form of trade sanctions to press Brazil to open its market. During the 1980s and early 1990s, the Office of the United States Trade Representative (USTR) targeted Brazil's trade, industrial, and intellectual property policies six times under Section 301 of the 1974 U.S. Trade Act and threatened trade sanctions.<sup>64</sup> In 1989, the USTR brought what was known as a "Super 301" against Brazil, designating Brazil's import licensing regime as a "priority practice," along with those of India and Japan.<sup>65</sup> The United States filed a GATT complaint, which it settled when Brazil agreed to relax its import restrictions as part of a general liberalization initiative under the Collor Government.<sup>66</sup> In May 1993, the USTR again initiated a Section 301 investigation of Brazil's intellectual property policies, which it terminated in February 1994 in light of the creation of the WTO and the new Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), as well as Brazilian assurances.<sup>67</sup>

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63. See Marcelo de Paiva Abreu, *Trade Liberalization and the Political Economy of Protection in Brazil Since 1987*, at 8 (Inst. for the Integration of Latin America & the Caribbean & Integration, Trade & Hemispheric Issues, Div. of the Integration & Regional Programs, Dep't of the Inter-American Dev. Bank, Working Paper No. SITI-08B, 2004). De Paiva Abreu gives special emphasis to Brazil's competition with Argentina, Chile, and Mexico. *Id.*

64. See THOMAS O. BAYARD & KIMBERLY ANN ELLIOTT, RECIPROCITY AND RETALIATION IN U.S. TRADE POLICY 355-69 (1994). Under Section 301, the USTR would "investigate" foreign practices to determine if they were in violation of an "international legal right" or "unreasonable" as defined by the statute. *Id.* at 26-28, 31. If the practice met either of these criteria, the United States could apply or threaten to apply a variety of trade sanctions. *See id.* at 195. In 1982, for example, the U.S. footwear trade association and unions filed a petition to the USTR challenging the import practices of a number of countries, including Brazil's import licensing system. *Id.* at 410. In a settlement, Brazil agreed to lift a number of restrictions on footwear, "at least temporarily." *Id.* at 411. The USTR did not pursue the case against Brazil before the GATT because the USTR found that Brazil had a "balance of payments defense" on account of the debt crisis. *Id.* Nevertheless, Brazil lifted some restrictions. *See id.* Later, in 1985, the USTR self-initiated a Section 301 proceeding to investigate Brazil's industrial policies in support of an informatics industry, including Brazil's policy on software copyright protection. *Id.* at 421-24. For further information on Brazil's industrial policy toward developing an informatics industry and the U.S. response, see Peter B. Evans, *Declining Hegemony and Assertive Industrialization: U.S.-Brazil Conflicts in the Computer Industry*, 43 INT'L ORG. 207 (1989); Peter B. Evans, *State, Capital, and the Transformation of Dependence: The Brazilian Computer Case*, 14 WORLD DEV. 791 (1986); John S. Odell, *International Threats and International Politics: Brazil, the European Community, and the United States, 1985-1987*, in DOUBLE EDGED DIPLOMACY: INTERNATIONAL BARGAINING AND DOMESTIC POLITICS 233 (Peter Evans et al. eds., 1993).

65. BAYARD & ELLIOTT, *supra* note 64, at 149. The Brazilian import licensing system had been used to help allocate scarce foreign reserves. *Id.* at 156-60 (noting that the U.S. action was, once again, criticized by many GATT members).

66. *Id.* at 162. The Collor government also agreed to renounce use of Article 18(B) of the GATT, which provided special treatment for developing countries when implementing trade restrictions on balance of payment grounds. *Id.* at 155.

67. The USTR also targeted other key developing countries, including Argentina, India, South Korea, and Thailand, in its push for the TRIPs Agreement. BAYARD & ELLIOTT, *supra* note 64, at 189. It applied sanctions against Thailand in 1989, India in 1992, and Argentina in 1997, withdrawing tariff benefits under its "General System of Prefer-

In sum, there was a general shift in trade and development policy in Brazil and throughout Latin America in the 1990s. Although some Latin American countries, such as Venezuela and Bolivia, have changed course in recent years, Brazil's government under President Lula largely has retained its general international trade and macroeconomic orientations. Moreover, the liberalization of international trade has now been institutionalized through the WTO and its dispute settlement system, as well as through a growing, complex web of bilateral and regional trade agreements.<sup>68</sup> For Brazil, these include Mercosur, which was established pursuant to the 1991 Treaty of Asuncion and the 1994 Ouro Preto Protocol.<sup>69</sup> Brazil's policies can change, but they must now do so within changed international and transnational institutional contexts.

#### B. Brazil's Organization for the GATT: Two Key Attributes for the Future

Studies show that the amount a country trades is typically the most important factor for explaining a country's use of international trade dispute settlement, but it is not the only factor, as significant variation remains among countries trading at similar levels.<sup>70</sup> To understand a country's use of international trade dispute settlement, one must also examine domestic factors. In this section, we first assess how Brazil's development policy affected its views on international trade law and dispute settlement. We then note that Brazil entered the WTO with two key attributes that facilitated its successful use of WTO dispute settlement through public-private mechanisms of coordination: (1) a professional government bureaucracy for international trade and (2) a system of relatively

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ences" program. *Id.* at 189, 195. On U.S. strategies, see PETER DRAHOS & JOHN BRAITHWAITE, *INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY?* 86 (2002); MICHAEL P. RYAN, *KNOWLEDGE DIPLOMACY: GLOBAL COMPETITION AND THE POLITICS OF INTELLECTUAL PROPERTY* (1998); SUSAN K. SELL, *POWER AND IDEAS: NORTH-SOUTH POLITICS OF INTELLECTUAL PROPERTY AND ANTITRUST* (1998); SUSAN K. SELL, *PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS* (2003).

68. See PETER SUTHERLAND ET AL., *WORLD TRADE ORG., THE FUTURE OF THE WTO: ADDRESSING INSTITUTIONAL CHALLENGES IN THE NEW MILLENNIUM* 49-51 (2004), available at [http://www.wto.org/english/thewto\\_e/10anniv\\_e/future\\_wto\\_e.pdf](http://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.pdf).

69. SKIDMORE & SMITH, *supra* note 48, at 430-31. Mercosur is the *Mercado Común del Sur* (Common Market of the South). *Id.* at 431. In 1991, Brazil signed the Asuncion Treaty for the establishment of Mercosur and in 1994, Brazil signed the Ouro Preto Protocol for the establishment of Mercosur's institutional structure, including the office of a secretariat, and the parties' commitment to pursue a common market for Mercosur's four members, Argentina, Brazil, Paraguay, and Uruguay. *Id.* In 2002, the Protocol of Olivos reformed Mercosur's dispute settlement system, creating a Permanent Court of Review. See Welber Barral, U.N. Econ. Comm'n for Latin America & the Caribbean, *The Brazilian Experience in Dispute Settlement*, 21 U.N. Doc. LC/W.147 (Aug. 2007) [hereinafter, Barral, *The Brazilian Experience*]. Venezuela became a full member of Mercosur on July 4, 2006. *Profile: Mercosur—Common Market of the South*, BBCNEWS.COM, <http://news.bbc.co.uk/2/hi/americas/5195834.stm> (last visited May 20, 2008). Bolivia, Chile, Colombia, Ecuador, and Peru have been granted associate member status. *Id.*

70. See Henrik Horn et al., *Is the Use of the WTO Dispute Settlement System Biased?* (Ctr. for Econ. Pol'y Research, Discussion Paper No. 2340, 1999).

well-funded trade associations and large private companies that help businesses overcome collective action problems.

Brazil's import substitution industrialization policies shaped the structure of trade policy making within its state bureaucracy. These policies and the resulting governmental structure led to a relatively passive and fragmented role for its private sector and civil society regarding international trade negotiations and the enforcement of international trade law under the GATT, which existed from 1948 to 1994.<sup>71</sup> Before the shift in Brazilian development policy in the early 1990s, Brazil's state bureaucracy for trade-related matters was centralized within two entities. The Brazilian Ministry of Foreign Affairs (commonly known as Itamaraty after the Rio de Janeiro palace in which it was located until 1970) represented Brazil internationally, including for trade negotiations. The Brazilian Department of Foreign Trade (*Carteira de Comércio Exterior do Brasil, CACEX*), located within the Ministry of Development, Industry, and Trade, implemented Brazil's import substitution policies. Until CACEX was eliminated in 1991 as part of the Collor government's trade liberalization reforms, it handled all trade aspects of Brazil's industrial policies. CACEX oversaw export promotion through the provision of grants and tax and credit incentives, and import protection through administrative requirements for import licenses over which it operated with considerable discretion.<sup>72</sup> In reflection of Brazil's import substitution paradigm, CACEX took a dirigiste, protectionist orientation.<sup>73</sup>

The relations between CACEX and the private sector under Brazil's import substitution policies were organized on a sectoral basis. CACEX's sectoral organization for implementing Brazil's import substitution policies led the private sector to become both more fragmented and more passive on trade matters negotiated at the international level, particularly international legal matters.<sup>74</sup> Government-business relations were generally non-

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71. Pedro da Motta Veiga, *Trade-Policy Making in Brazil: Transition Paths*, in *THE TRADE POLICY-MAKING PROCESS: LEVEL ONE OF THE TWO LEVEL GAME: COUNTRY STUDIES IN THE WESTERN HEMISPHERE* 13, 14 (2002), available at [http://www.sice.oas.org/ctyindex/ARG/policymaking\\_e.pdf](http://www.sice.oas.org/ctyindex/ARG/policymaking_e.pdf) [hereinafter Veiga, *Transition Paths*].

72. Veiga, *Changing Patterns in State-Civil Society Relationship*, *supra* note 59, at 153. Veiga writes, "CACEX acted as a public agency performing regulation and operational functions, providing financial resources to the private sector, managing tax and credit incentives, promoting exports, directly trading export products and controlling imports through a wide array of non-tariff barriers." *Id.*; see also BRAZIL: A COUNTRY STUDY, *supra* note 56.

73. Veiga, *Changing Patterns in State-Civil Society Relationship*, *supra* note 59, at 153; BRAZ. COUNTRY MGMT. UNIT, POVERTY REDUCTION & ECON. MGMT. DEP'T, WORLD BANK, BRAZIL - TRADE POLICIES TO IMPROVE EFFICIENCY, INCREASE GROWTH AND REDUCE POVERTY 135 (2004), available at [http://wbi018.worldbank.org/lac/lacinfoclient.nsf/8d6661f6799ea8a48525673900537f95/ae5b14d59f188f3085256e66007d06fe/\\$FILE/Brazil%20Trade%20Policies\\_part1.pdf](http://wbi018.worldbank.org/lac/lacinfoclient.nsf/8d6661f6799ea8a48525673900537f95/ae5b14d59f188f3085256e66007d06fe/$FILE/Brazil%20Trade%20Policies_part1.pdf).

74. Veiga, *Changing Patterns in State-Civil Society Relationship*, *supra* note 59, at 153. As a result, "the dialogue and consultations between public sector and private agents . . . were almost entirely restricted to [a sectoral] articulation." *Id.* (also noting that "a remarkable characteristic of this model is that both design and management of these instruments were essentially sectoral"). Schneider likewise finds that Brazilian cross-sectoral business associations, although relatively wealthy and well-staffed, were rela-

transparent, characteristic of “an authoritarian State, [whose] economic policy instruments [were] under the control of a strong techno-bureaucracy.”<sup>75</sup> Private businesses and trade associations relied on their informal connections with the government for export promotion and import protection.<sup>76</sup> At times, specific industrial sectors responded to specific sectoral negotiations which affected them, such as the textiles sector in the Multi-Fiber Agreement negotiations or the steel sector in the negotiations of U.S. “Voluntary Export Restraints.”<sup>77</sup> Overall, however, the private sector did not coordinate to lobby the government regarding trade positions in the GATT.<sup>78</sup> Moreover, civil society representatives were largely shut out of trade policy making, and neither the Brazilian legislature nor Brazilian media paid much attention to it.

Brazil, nonetheless, had two key attributes that would later facilitate its engaged participation in WTO dispute settlement. First, it had a professionalized Ministry of Foreign Affairs with a strong *esprit de corps*, where selection and advancement of officials was largely based on merit. The ministry is known for its relative advantage over other organs within the Brazilian state in terms of its unified institutional structure, relative autonomy, professionalism, and ability to adjust to outside developments when necessary.<sup>79</sup> The ministry has long had a strong interest in international

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tively weak so that “economic and political elites regularly circumvented them.” BEN ROSS SCHNEIDER, *BUSINESS POLITICS AND THE STATE IN TWENTIETH-CENTURY LATIN AMERICA* 93-94 (2004) [hereinafter SCHNEIDER, *BUSINESS POLITICS*]. He concludes that, in contrast, “many narrow sectoral associations were so favored, which consequently encouraged participation in those associations rather than in encompassing ones.” *Id.* at 97. This sectoral focus also characterized Brazil’s approach to international trade negotiations, a model that predominated until the end of the military dictatorship in 1989 and the election of the Collor government that year. See Veiga, *Transition Paths*, *supra* note 71, at 13. Veiga notes the impact of the macro-economic crises in the late 1980s, which “led to a gradual deterioration of the sectoral mechanisms of consultation and negotiation between State and business actors typical of industry and trade-focused policy-making during the import-substitution (IS) period.” Veiga, *Changing Patterns in State-Civil Society Relationship*, *supra* note 59, at 171.

75. Veiga, *Changing Patterns in State-Civil Society Relationship*, *supra* note 59, at 153.

76. In terms of broader business-government relations, see SCHNEIDER, *BUSINESS POLITICS*, *supra* note 74, at 108-09 (“Where bureaucratic rings (personalized networks) predominated, firms had fewer incentives to invest in associations.” As a result, “institutionalized channels for participation by associations in policy making . . . became increasingly rare in Brazil.”).

77. Veiga, *Transition Paths*, *supra* note 71, at 14.

78. *Id.* Thus, Veiga finds that although “the agro-industrial sectors closely monitored the progress of the Uruguay Round, [they] rarely participated in the definition of Brazilian positions.” *Id.* Similarly, Schneider writes, “In Brazil government officials consulted occasionally with business about trade but never institutionalized concertation on an industry- or economy-wide basis.” Ben Ross Schneider, *Big Business and the Politics of Economic Reform: Confidence and Concertation in Brazil and Mexico*, in *BUSINESS AND THE STATE IN DEVELOPING COUNTRIES* 191, 207 (Sylvia Maxfield & Ben Ross Schneider eds., 1997).

79. See Zairo B. Cheibub, *A Carreira Diplomática no Brasil: o Processo de Burocratização do Itamarati*, 23 *REVISTA DE ADMINISTRAÇÃO PÚBLICA* 97, 125 (1989). In 1961 and 1973, for example, the ministry adapted its internal structure in response to the intensification of multilateral trade negotiations. *Id.* at 125. These adaptations anticipated the ministry’s changes during the 1990s and 2000s in response to the Uruguay and Doha

economic affairs and has developed corresponding expertise. As a result, the Ministry of Foreign Affairs has been able to retain its central position in determining Brazil's international trade and economic policy, but other ministries have become increasingly involved as access to Brazilian trade policy making has broadened, as we will discuss in Part III.A.<sup>80</sup>

Second, Brazil has relatively well-funded and well-staffed trade associations, as well as some large individual companies, which facilitate businesses' ability to overcome collective action problems. Brazilian businesses, thus, are better able than businesses in other developing countries to fund outside lawyers and economic consultants to assist the government with trade disputes and with the development of trade negotiation positions. For example, Brazilian legislation long included a compulsory tax, the proceeds of which went to all business associations, which often used it to hire economic expertise.<sup>81</sup> As Ben Schneider writes, "[O]ver time the statutory provisions for financing compulsory associations bankrolled some of the wealthiest business associations in Latin America," which were able to accumulate "enormous resources."<sup>82</sup> Moreover, as elites circulated between government and business, whether as employees or as consultants, relatively close relations developed between the government, trade associations, and companies.<sup>83</sup> The Brazilian government could tap these human and financial resources.

The combination of these factors is a key to successful, non-collusive government-business coordination. Although government and business representatives will have distinct interests, they can interact in ways that enhance economic and regulatory performance subject to certain conditions. To start, if businesses and government are not to collude to the detriment of development objectives, a professional government bureaucracy with some autonomy is needed as a bulwark against corruption. Complementarily, collaborative governance mechanisms benefit from enhanced

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trade negotiations and the WTO's judicialized dispute settlement system. Pedro da Motta Veiga & Roberto Magno Iglesias, *A Institucionalidade da Política Brasileira de Comércio Exterior*, in *O DESAFIO DAS EXPORTAÇÕES* 51, 51-96 (Armando Castalier Pinheiro eds., 2002).

80. See Cheibub, *supra* note 79, at 127; Veiga, *Changing Patterns in State-Civil Society Relationship*, *supra* note 59, at 176; see also *infra* Part III.A.

81. SCHNEIDER, *BUSINESS POLITICS*, *supra* note 74, at 101, 123.

82. *Id.* We thank Ben Schneider for emphasizing this point in his comments on our paper at a workshop at Northwestern University. As Haggard, Maxfield, and Schneider further write, "When we probe the question of why small businesses are able to overcome collective action problems, we often find the visible hands of state actors and political entrepreneurs." Stephan Haggard et al., *Theories of Business and Business-State Relations*, in *BUSINESS AND THE STATE IN DEVELOPING COUNTRIES* 36, 45 (Sylvia Maxfield & Ben Ross Schneider eds., 1997). This point applies both to the financing of Brazilian trade associations and as we will see, the role of entrepreneurs behind Brazil's complaints in important WTO cases, such as the *United States Subsidies on Upland-Cotton* and the *EC-Export Subsidies on Sugar* cases discussed in Part IV.A.

83. See SCHNEIDER, *BUSINESS POLITICS*, *supra* note 74, at 96 (noting "representatives of business, especially industry in São Paulo, regularly figured prominently in top positions in all sorts of governments").

transparency to ensure public accountability.<sup>84</sup> Finally, it is important for businesses to be able to pool their resources so as to be meaningful interlocutors with government officials on international economic matters, providing the government with needed information and expertise so that government is better able to implement the state's goals. As Ben Schneider and Sylvia Maxfield emphasize, "Institutionalist analyses of development have often concluded that relations between business and government account for a large part of the variation in economic performance."<sup>85</sup>

Peter Evans developed the concept of "embedded autonomy" to highlight the importance for bureaucrats both to retain autonomous, professional decision-making authority and to develop dense ties with the private sector.<sup>86</sup> As Evans writes, successful developing countries are more likely to have governments that approximate "Weberian bureaucracies" in which "highly selective meritocratic recruitment and long-term career rewards create commitment and a sense of corporate coherence."<sup>87</sup> These bureaucracies, however, also need to have links with the private sector and civil society, because a "state that was only autonomous would lack both sources of intelligence and the ability to rely on decentralized private-implementation."<sup>88</sup> Evans finds that a state with a professionalized bureaucracy is more likely to develop the necessary "ties with the business community" to facilitate "joint public-private partnerships in pursuit of economic transformation," as opposed to "capture" and "collusion."<sup>89</sup> In the WTO context, businesses can help states compile information on the trade barriers they face, evaluate options, and finance the costs of hiring economic and legal expertise to prevail in a WTO complaint or in negotiations. State bureaucracies must then manage and steer this relationship to

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84. See *infra* Part III.C. Part III.C provides evidence of a Brazilian trend toward much greater public accountability on trade policy relative to the past.

85. Ben Ross Schneider & Sylvia Maxfield, *Business, the State, and Economic Performance in Developing Countries*, in *BUSINESS AND THE STATE IN DEVELOPING COUNTRIES* 6 (Sylvia Maxfield & Ben Ross Schneider eds., 1997). Blanca Heredia and Ben Ross Schneider typologize administrative reform in developing countries along three models that reflect the points just made. See Blanca Heredia & Ben Ross Schneider, *The Political Economy of Administrative Reform in Developing Countries*, in *REINVENTING LEVIATHAN: THE POLITICS OF ADMINISTRATIVE REFORM IN DEVELOPING COUNTRIES* 1, 6-9 (Ben Ross Schneider & Blanca Heredia eds., 2003). Reform programs can attempt to ensure: (i) a professional, merit-based bureaucracy, (ii) a transparent, accountable bureaucracy, and (iii) an efficient, managerial-oriented bureaucracy that is customer-oriented. See *id.* at 7-8. They point out that reform programs often include combinations of these models but that the pursuit of their respective goals involves tradeoffs. See *id.* at 6-9.

86. PETER EVANS, *EMBEDDED AUTONOMY: STATES AND INDUSTRIAL TRANSFORMATION* 12 (1995) [hereinafter EVANS, *EMBEDDED AUTONOMY*].

87. *Id.*

88. *Id.*

89. Peter Evans, *State Structures, Government-Business Relations, and Economic Transformation*, in *BUSINESS AND THE STATE IN DEVELOPING COUNTRIES* 63, 66 (Sylvia Maxfield & Ben Ross Schneider eds., 1997). Evans contends that this is "the key to the developmental state's effectiveness." Peter B. Evans, *Predatory, Developmental, and Other Apparatuses: A Comparative Political Economy Perspective on the Third World State*, 4 *Soc. F.* 561, 574 (1989).

advance national goals.<sup>90</sup>

In sum, before the creation of the WTO and the start of negotiations to establish a Free Trade Agreement of the Americas, foreign trade was not an issue that mobilized Brazilian business or civil society. Rather, given Brazil's import substitution industrialization policies, Brazilian industry did not organize for foreign trade policy and dedicated little lobbying to it. Brazilian industry primarily targeted the large internal Brazilian market, and regarding foreign trade, industry's focus was on its relations with CACEX for ad hoc support and import relief at the national level, for which the GATT did not pose a significant risk. As Brazil's policies shifted to more open-market and export-oriented alternatives, accompanied by greater international legal commitments under a new WTO judicialized system, Brazilian industry and government began to devote more attention to international trade law and practice. They explored strategies to increase exports, retain protection for Brazil's internal market where desired, and increase economic output overall. The combination of a professionalized Ministry of Foreign Affairs and a relatively well-organized business sector that included large, export-oriented companies boded well for Brazil's ability to make effective use of the WTO judicial system.

### C. Brazil in GATT Dispute Settlement

Before we turn to Brazil's experience with WTO dispute settlement, we make two points regarding its experience under the General Agreement on Tariffs and Trade (GATT). First, Brazil participated in the less judicialized system of GATT dispute settlement, and its participation increased significantly during the GATT's final years when the system itself became more judicialized and Brazil's development and trade policies became more liberal and export-oriented. The experience provided a foretaste of the developments to come under the WTO. Second, these GATT disputes were nonetheless of a low political profile and resulted in little regulatory change. They thus did not generate Brazilian media coverage or catalyze much Brazilian business or civil society engagement.

Brazil was one of the twenty-three original GATT contracting parties in 1948.<sup>91</sup> Although it was not a frequent user of GATT dispute settlement in the early years, Brazil became more active as the GATT system became more judicialized in the 1980s, particularly during the last years of the Uruguay Round negotiations, which took place between 1986 and 1994.<sup>92</sup>

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90. On government steering of public-private governance networks, see R.A.W. Rhodes, *The New Governance: Governing Without Government*, 44 POL. STUD. 652 (1996).

91. Margaret S. Lyon, *The Impact of Foreign Imports on the Florida Citrus Industry*, 3 FLA. INT'L L.J. 443, 451 n.71 (1988). Brazil formally joined the GATT on July 30, 1948. *Id.*

92. According to a Brazilian government source, Brazil always identified dispute settlement as an important issue, although it focused greater attention on negotiations in the early years. Interviews by Gregory C. Shaffer with Brazilian officials, Brazilian Mission [names withheld], in Geneva, Switz. (Sept. 20-24, 2006) (on file with authors). Seven rounds of trade negotiations were completed between 1949 and 1979. *Id.*

Brazil filed sixteen complaints in total during the nearly forty-eight years that it was a member of the GATT, twelve of them initiated during the Uruguay Round negotiations. It was a respondent in six cases during these forty-eight years.<sup>93</sup> Overall, Brazil was the fifth most active user of the GATT dispute settlement system.<sup>94</sup> Annex I provides a descriptive, chronological overview of Brazil's experience with dispute settlement under the GATT and contains a table that lists all GATT cases in which Brazil was a party.

It is difficult to report on Brazil's organization for GATT dispute settlement because few records exist and scholars have written relatively little about it. The Ministry of Foreign Affairs controlled Brazil's approach to GATT dispute settlement, and it generally received little proactive input from the Brazilian private sector. The government did receive some support from U.S.- and EU-based lawyers in cases involving import relief measures, such as anti-dumping and countervailing duty determinations, typically where the attorneys had already contested the agency decisions at the national level.<sup>95</sup> The Brazilian private sector's general approach, however, was largely to defer to the ministry on such matters. It was not until the creation of the WTO's more judicialized (and significantly more costly) system that the government realized the extent of its need for the private sector's assistance in funding outside attorneys and the private sector became much more engaged, partly on account of the relatively greater legal certainty that the WTO dispute settlement system provided.<sup>96</sup>

Notwithstanding the gradual judicialization of GATT dispute settlement, Brazil operated with less certainty under the GATT system because defendants could still block a panel's formation or the adoption of a

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93. See *infra* Annex I.

94. E-mail from Eric Reinhardt, Assoc. Professor of Political Sci., Emory University, to Gregory C. Shaffer (Nov. 1, 2006) (on file with authors). The four most active members during the GATT negotiations were, in order, the United States, the European Community, Canada, and Australia. *Id.*

95. Telephone Interview by Gregory C. Shaffer with Washington, D.C. Legal Counsel [name withheld] (Feb. 19, 2008) (on file with authors) [hereinafter Washington Counsel Interview]. These private attorneys were funded by either the U.S. importer or the Brazilian exporter. *Id.* In Brazil's 1992 GATT case against U.S. countervailing duties on rubber footwear, for example, the U.S. industry funded outside U.S. counsel to assist Brazil. *Id.* In a 1992 case brought by the United States against Brazilian countervailing duties on milk powder, U.S. counsel again assisted Brazil, but this time funded by the Brazilian industry. *Id.*

96. Karen Alter provides an example of the differences between GATT and WTO dispute settlement for Brazil in relation to Brazil's "long-running dispute with the EU regarding [the EU's] treatment of soluble coffee." Karen J. Alter, *Resolving or Exacerbating Disputes?: The WTO's New Dispute Resolution System*, 79 INT'L AFF. 783, 786 (2003) (based on an interview with a Geneva-based diplomat). She writes, "Brazil had not pursued a complaint under the old GATT system because it knew the complaint would be blocked. Negotiations under the new system got nowhere until Brazil notified the EU that it would request formal consultations at the next Dispute Settlement Body meeting—the first step in initiating the dispute resolution process. Three days later, the EU offered concessions it had previously said were impossible, and the dispute was resolved." *Id.* In this case, the applicable substantive GATT rules had not changed, only the dispute settlement rules had. *Id.*

panel's findings.<sup>97</sup> Only a few of Brazil's complaints resulted in the formation of a panel and thus full litigation,<sup>98</sup> and most of Brazil's complaints did not result in any change in the targeted country's policies.<sup>99</sup> Because these cases were of a low political profile, they received little public attention and involved little engagement of the private sector except for some back-up support in import relief cases where a company had already hired a lawyer for a challenged domestic proceeding. In contrast, WTO dispute settlement has gained much greater attention from Brazilian government, industry, the private bar, the media, and civil society.

## II. The Challenges Posed By WTO Dispute Settlement: The Catalyzing Effects of the *Embraer* Case for Brazil

### A. The Challenges of WTO Dispute Settlement

The WTO expanded the scope of the 1948 General Agreement on Tariffs and Trade (GATT) to include nineteen agreements under a single framework and a vastly expanded membership, consisting of 151 members today.<sup>100</sup> Countries have significantly reduced tariff rates<sup>101</sup> and the

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97. See HUDEC, *supra* note 5, at 42. Since as far back as the 1960s during the GATT period, Brazil supported a stronger international trade dispute settlement system, both to help defend itself against U.S. unilateralism and to secure better access for its exports generally. *Id.* In the 1960s and 1970s, Brazil supported "a more active, prosecutorial role for the GATT Secretariat," as well as special, differential treatment procedures and remedies for developing countries, but it was largely unsuccessful in these efforts. See *id.*; Håkan Nordström & Gregory Shaffer, *Access to Justice in the WTO: The Case for a Small Claims Procedure?*, 7 WORLD TRADE REV. (forthcoming 2008) (estimating the costs of WTO litigation); Advisory Centre on WTO Law, <http://www.acwl.ch/> (last visited May 10, 2008) (noting the limited use of the April 5, 1966 GATT Decision providing for accelerated procedures for developing country complainants under Article XXIII (BISD 14S/18)). Brazil stressed that a system of remedies based on retaliation favors large, developed countries exercising market power. HUDEC, *supra* note 5, at 42. In the negotiations that led to the 1979 GATT reforms, for example, "[t]he Brazilian delegation tabled proposals [for] . . . stronger remedies for developing country complaints, such as collective retaliation or money damages." *Id.* Brazil's delegation nonetheless recognized that "the dispute settlement procedures are a very important and integral part of the GATT and . . . play a decisive role in securing reciprocity and a proper balance of rights and obligations between contracting parties." Communication from Brazil, *Uruguay Round Negotiating Group on Dispute Settlement*, MTN.GNG/NG13/W/24 (Mar. 7, 1988), available at <http://www.worldtradelaw.net/history/urdsu/w24.pdf>.

98. See GATT Panel Reports/Working Party Reports/Other Rulings, <http://www.worldtradelaw.net/reports/gattpanels/> (last visited May 24, 2008) (showing that only a few panels were formed because of Brazilian complaints).

99. See *infra* Annex I; see also SHAFER, DEFENDING INTERESTS, *supra* note 4, at 51-57. In fact, the final results of Brazil's complaints against the United States' strategic use of Section 301 were significant changes in Brazilian domestic law and practice motivated by the threat of U.S. trade sanctions. *Id.* at 52. The Brazilian practices that the United States challenged under Section 301 were further constrained by the WTO TRIPs Agreement and the Agreement on Import Licensing Procedures. *Id.* at 53. In turn, the new WTO dispute settlement system somewhat constrained U.S. unilateral Section 301 measures against Brazil. *Id.* at 51.

100. Understanding the WTO: Members and Observers, May 16, 2008, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm).

101. See U.N. Conf. on Trade & Dev., *Average Applied Import Tariff Rates on Non-Agricultural and Non-Fuel Products*, in UNCTAD HANDBOOK OF STATISTICS (2008). Since

WTO has legally constrained the use of other barriers to trade. Centrally important to our story, the WTO, in contrast with both the former GATT regime in which a defendant could block the creation of a panel or the adoption of its report and the International Court of Justice (ICJ), created a judicialized dispute settlement system with compulsory jurisdiction and an appellate process that can help to enforce these undertakings.<sup>102</sup> This judicial regime has developed in a legalistic manner, often driven by lawyers representing government and business clients, creating both opportunities and challenges for countries with fewer political, financial, and legal resources.

Although the WTO's more legalized and judicialized dispute settlement system offers significant promise for developing countries, it comes with costs. WTO legal procedures and substantive case law have become increasingly complex and technically demanding. For example, the Consultative Board to the WTO Director General reported in December 2004 that the first "81 cases for which reports are adopted, and reports whose adoption is pending, amount to more than 27,000 pages of jurisprudence."<sup>103</sup> The 2006 WTO panel decision in the *European Communities-Biotech* case alone was 1,087 pages in text, contained 2,187 footnotes, and was over 2,400 pages including annexes.<sup>104</sup> Most developing countries have not participated at all in the WTO system. In fact, over the WTO's first thirteen years, only twenty-five of the WTO's 120 non-OECD members had filed a complaint before the WTO. By the end of 2007, sixty-two non-OECD members had never even filed as a third party.<sup>105</sup> We now examine

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the 1980s, tariff rates have been significantly reduced around the world. Within Brazil, average tariffs dropped from nearly 50% in 1989 to 12% in 1995, and to 10.4% by the start of 2005. *Id.* In the two largest markets for Brazil's exports, the United States and the European Union, average tariff rates declined from 8% in the EU and 6.5% in the United States in 1990, to 6.1% in the EU and 5.8% in the United States in 1995, to 4.3% in the EU and 4.2% in the United States in 2000, and to 4.2% in the EU and 3.8% in the United States in 2005. *Id.* Tariff peaks, however, continue to affect products of export interest. For example, Brazil maintained that "discriminatory [U.S.] measures have led to the application of an average tariff of 45.6 percent on the fifteen top Brazilian exports to the U.S. market. These fifteen products represent 36.4 percent of the Brazilian total exports." HIRST, *supra* note 58, at 27.

102. See PHILLIPE SANDS & PIERRE KLEIN, *BOWETT'S LAW OF INTERNATIONAL INSTITUTIONS* 357 (5th ed. 2001) (noting the requirement that countries consent to the International Court of Justice's jurisdiction pursuant to a compromissory clause, and countries' use of reservations even where they have accepted the ICJ's compulsory jurisdiction pursuant to Article 36(2), the "Optional Clause," of the ICJ's Statute). The WTO has no police powers to "enforce" WTO rulings, but it does include mechanisms pursuant to which a complainant may have a panel review whether the defendant has complied with the WTO ruling and if not, for a panel to authorize the complainant to suspend trade concessions vis-à-vis the defendant in an equivalent amount.

103. SUTHERLAND ET AL., *supra* note 68, at 51.

104. See Panel Report, *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R (Sept. 29, 2006).

105. These figures are as of Dec. 31, 2007. This represents a considerable improvement of twenty additional non-OECD countries filing as third parties since June 2005. Cf. Gregory Shaffer, *O Sistema de Solução de Controvérsias da OMC, Seus Pontos Fracos e Propostas para Aperfeiçoamento: Uma Visão Econômica e de Mercado*, in 10 ANOS DE

the general challenges that the WTO dispute settlement system poses before examining Brazil's experience and what lies behind it.<sup>106</sup>

Developing countries vary significantly in terms of the size of their economies and the role of law and legal institutions in their domestic systems, but they generally face four primary challenges if they are to participate effectively in the WTO dispute settlement system. These challenges are: (1) 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. We can categorize these challenges as constraints of legal knowledge, financial endowment, political and market power, and internal governance or more simply, as constraints of law, money, power, and governance.

For a WTO member to use the WTO system successfully, it must develop cost-effective mechanisms to perceive injuries to its trading prospects, identify who is responsible, and mobilize resources to bring a legal claim or negotiate a favorable settlement. In the domestic socio-legal literature, these stages of dispute resolution are referred to as naming, blaming, and claiming.<sup>107</sup> In the WTO context, a member's participation in the system is, in part, a function of its ability to process knowledge of trade injuries, their causes, and their relation to WTO rights. Hiring lawyers to defend WTO claims is of little help if countries lack cost-effective mechanisms to identify and prioritize claims in the first place.<sup>108</sup> Even where countries become aware of actionable injuries, this awareness will not be transformed into legal claims if, based on experience, officials lack confidence that a claim is worth pursuing in light of high litigation costs, rela-

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OMC: UMA ANÁLISE DO SISTEMA DE SOLUÇÃO DE CONTROVÉRSIAS E PERSPECTIVAS (Luiz Olavo Baptista et al. eds., 2007).

106. This subsection draws from Gregory Shaffer, *The Challenges of WTO Law: Strategies for Developing Country Adaptation*, 5 *WORLD TRADE REV.* 177 (2006).

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

108. For example, one developing country representative stated that it "would not have thought of bringing the cotton and sugar cases against the U.S. and EU, as Brazil did, not only because of the litigation costs," but also because it would have "lacked the proper understanding that it had a claim." Interview by Gregory C. Shaffer with Representative, mid-size developing country member of the WTO [name withheld], in Geneva, Switz. (July 13, 2005) (on file with authors). As Hoekman and Kostecki write regarding WTO dispute settlement, "The Advisory Centre on WTO Law focuses only on the 'downstream' dimension of enforcement, not on the 'upstream' collection of information." BERNARD M. HOEKMAN & MICHEL M. KOSTECKI, *THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM: THE WTO AND BEYOND* 94-95 (2001) (also noting that "[o]ne option to deal with the information problem is for the private sector to cooperate and to create mechanisms through which data on trade . . . barriers are collected and analyzed.").

tively weak remedies, and political risks.<sup>109</sup> Even where a country decides to bring a case, it will need to comply with the WTO dispute settlement system's demanding procedural requirements, including its tight deadlines for legal submissions and responses to panel questions.<sup>110</sup>

Many developing country missions suffer from a lack of national legal expertise in WTO matters, both within their government institutions and their private bars. Diplomatic postings have generally been filled by non-lawyers. Developing country members often have no lawyers or at most have one or two to address WTO matters, whether in Geneva or in the home capital.<sup>111</sup> Moreover, there are likely few, if any, private lawyers in the country knowledgeable about WTO law. Although the situation is changing in some countries, WTO law, as opposed to traditional "public international law," generally has not been taught in developing countries. As a result, many developing countries have become dependent on education at law schools in the United States and Europe to develop local talent, provided that their students have the funding to attend these schools and if they do, that they return home.<sup>112</sup>

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109. Many developing countries have demanded stronger WTO remedies, especially for developing countries, in new proposals in the current review of the WTO dispute settlement understanding (DSU). For examples of more recent proposals for collective retaliation, see Communication from Kenya, *Text for the African Group Proposals on Dispute Settlement Understanding Negotiations*, TN/DS/W/42 (Jan. 24, 2003); Proposal by the African Group, *Negotiations on the Dispute Settlement Understanding*, TN/DS/W/15 (Sept. 25, 2002); Proposal of the LDC Group, *Negotiations on the Dispute Settlement Understanding*, TN/DS/W/17 (Oct. 9, 2005); Proposals on DSU by Cuba, Honduras, India, Indonesia, Malaysia, Pakistan, Sri Lanka, Tanzania & Zimbabwe, *Negotiations on the Dispute Settlement—Special and Differential Treatment for Developing Countries*, TN/DS/W/19 (Oct. 9, 2002). As for proposals for money damages, see *Contribution of Ecuador to Improvement of the Dispute Settlement Understanding of the WTO*, TN/DS/W/9 (July 8, 2002); Proposal by Ecuador, *Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding*, TN/DS/W/33 (Jan. 23, 2003). For a detailed analysis of such proposals regarding the perspective of developing countries, see A. AMARAL ET AL., *A REFORMA DO SISTEMA DE SOLUÇÃO DE CONTROVÉRSIAS DA OMC E OS PAÍSES EM DESENVOLVIMENTO* (2006).

110. This point has been repeatedly stressed by government representatives and private practitioners that Gregory C. Shaffer interviewed.

111. See generally Busch et al., *supra* note 15. As a representative from a Southeast Asian member stated, "I am the only lawyer here. I handle all DSU [WTO Dispute Settlement Understanding] matters, as well as matters before other WTO committees." Interview by Gregory C. Shaffer with government official, Southeast Asian member state [name withheld], in Geneva, Switz. (Sept. 2002) (on file with authors). Of course, there are situations where non-lawyers master WTO legal matters to lead an effective litigation team, as was the case with the former head of Brazil's unit for WTO dispute settlement, Roberto Carvalho de Azevêdo. However, this situation is likely atypical.

112. See Interviews by Gregory C. Shaffer with developing country representatives [names withheld], in Geneva, Switz. (Sept. 2002, Feb. 2003, June 2003, and July 2005) (on file with authors); Interviews by Gregory C. Shaffer with developing country representatives [names withheld], at regional African, Asian, and South American Dialogues on WTO Dispute Settlement and Sustainable Development in Kenya, Indonesia, and Brazil (2006) (on file with authors). To give just one example, a member of the Paraguayan Ministry of Foreign Relations complained that as of June 2006, no course in international trade law was offered in the country and that no professors were prepared to offer such a course. Interview by Gregory C. Shaffer with official, Paraguay Ministry of Foreign Relations [name withheld] (June 21, 2006) (on file with authors).

In addition, English is a second or third language for most developing country officials, and they have relatively little experience with the type of factually-contextualized legal reasoning used in WTO jurisprudence.<sup>113</sup> Although English, French, and Spanish are the three official languages of the WTO, English predominates so that even French and Spanish-speaking delegates are at a linguistic disadvantage.<sup>114</sup> Delegates speaking non-official languages are even worse off. In addition, the legal culture of the WTO dispute settlement system poses a greater challenge for lawyers and diplomats raised in legal cultures where dispute settlement is less factually contextualized and legal submissions require less parsing of prior court jurisprudence, such that adapting to the WTO's factually and legally complex jurisprudence is more time consuming and costly for them.<sup>115</sup> As one Brazilian lawyer stated:

Lawyers in Brazil are not used to the fact-finding part of WTO cases. The way attorneys write in Brazil is fashioned by Brazilian civil law traditions. It's not a natural way for them, the way they are trained to write. Brazilians can write in English, but they will think as Brazilian lawyers.<sup>116</sup>

A second major challenge that developing countries face is that they have fewer resources to spend on legal assistance to defend their WTO rights. WTO members face three primary types of costs in determining whether to bring a case. The first is the direct out-of-pocket cost of hiring outside legal counsel. The second is that of hiring and dedicating government personnel with expertise to oversee and provide necessary support in bringing a complaint. The third is the opportunity cost of expending scarce government resources and personnel time for this particular use as opposed to other social priorities, which in turn affects a member's perception of the cost. Because poorer countries have scarcer resources and more

113. Interview by Gregory C. Shaffer with Esperanza Duran, Director, Agency for International Trade Information and Cooperation, in Geneva, Switz. (June 20, 2002) (on file with authors). The Agency for International Trade Information and Cooperation works with the least developed organizations from Francophone Africa. *Id.*

114. See Diana Tussie & Valentina Delich, *Dispute Settlement Between Developing Countries: Argentina and Chilean Price Bands*, in *MANAGING THE CHALLENGES OF WTO PARTICIPATION* 23, 33 (Peter Gallagher et al. eds., 2005). As an Argentine representative relates, "It is tiring and time consuming to wait for the translation in hearings. But more relevantly, translation of documents may take ten days, so that panelists turn up without time to read them. This is a disadvantage vis-à-vis documents submitted promptly in English by the defendant. Panelists know where their arguments are headed while they have no clue about ours, and this is a great handicap." *Id.* Tussie and Delich also note the value of English at panel hearings: "[S]essions could technically be held in any official language; but, after the initial presentations in Spanish led to a member of the panel yawning and dozing off, a decision was taken to switch to English." *Id.*

115. Although some analysts may point to a divide between civil and common law, we do not need to enter this debate to make our point. Cf. Florencio Lopez-de Silanes et al., *Courts*, 118 Q.J. ECON. 453 (2003).

116. Interview by Gregory C. Shaffer with Brazilian attorney, São Paulo law firm [name withheld], in São Paulo, Braz. (Apr. 23, 2004) (on file with authors); Interview by Gregory C. Shaffer with former interns working on dispute settlement issues, Brazil WTO Mission [names withheld], in Geneva, Switz., in São Paulo, Braz. (Apr. 2004) (on file with authors).

immediate needs, they are particularly likely to perceive WTO legal costs as significant, especially where future benefits are uncertain.

Compared to larger, wealthier members, developing countries face much higher relative and absolute costs in WTO litigation to bring a case of the same nature. The *relative* costs of litigation are much higher for them in relation to the size of their economies and government budgets. Investing in WTO legal expertise thus makes less sense for them, especially in relation to other budgetary needs. In addition, developing countries can face higher *absolute* costs to identify and litigate an individual case unless their representation is partially subsidized, as through use of the Advisory Centre on WTO Law.<sup>117</sup> The reason is that most developing countries participate less frequently in WTO dispute settlement, and thus they do not benefit from economies of scale. For example, the United States has participated as a party or third party in approximately 99% of WTO cases that resulted in an adopted decision, and the European Union has participated in 85% of such cases.<sup>118</sup> Because of their prior and ongoing litigation experience, the United States and the European Union face fewer start-up costs for an individual case. In other words, the United States and the European Union can spread the fixed costs of developing internal legal expertise over more cases than developing countries.

The third challenge that developing countries can face is extra-legal pressure from more powerful countries, undermining the goal of objective trade dispute resolution through law.<sup>119</sup> The powerful can exploit power imbalances and rhetorically rationalize their actions in non-power-based terms. There may be little that a small developing country can do to counter threats to withdraw preferential tariff benefits or foreign aid—even food aid—in response to the country's challenge of a trade measure. Such tactics can undermine a developing country's faith in the efficacy of the legal system.

The fourth challenge is maintaining good internal governance, which affects a country's general stability and thus the role of law within it. Internal governance systems affect a country's ability to access knowledge and expertise from its private sector, local lawyers, academics, and civil society more generally. Although this particular challenge is largely external to the operation of the WTO dispute settlement system, our study of Brazil points

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117. See Shaffer, *How to Make the WTO Dispute Settlement System Work*, *supra* note 14, at 18–23. For an estimation of the costs of WTO litigation, see Nordström & Shaffer, *supra* note 97.

118. This calculation is based on an update through December 31, 2007 of Tables 6.1 and 7.1 of SHAFER, *DEFENDING INTERESTS*, *supra* note 4, at 132, 157–58 (noting 97% and 81% participation rates as of January 17, 2003).

119. See generally Andrew Guzman & Beth Simmons, *Power Plays and Capacity Constraints: The Selection of Defendants in WTO Disputes*, 34 J. LEGAL STUD. 557 (2005). Guzman and Simmons find that statistical evidence concerning the selection of defendants suggests that developing country selection is more likely to be explained by capacity rather than power because developing countries tend to bring complaints against larger WTO members who represent their largest markets. See *id.* Nonetheless, Shaffer's interviews confirmed that smaller developing countries frequently face political constraints in initiating a WTO complaint.

to the key role of national governance systems. A developing country with corrupt, avaricious leaders or bureaucrats is much less likely to effectively engage in international dispute settlement. The government does not invest in building expertise, and it is unable to obtain necessary information and collaboration from a private sector that has no confidence in it.<sup>120</sup>

The concept of legal culture must be distinguished from a country's internal governance system, but legal culture is a component of internal governance and may help to explain some variation in WTO members' use of the WTO dispute settlement system.<sup>121</sup> Courts and litigation play a more important role in Brazil than in many other developing countries, such as those in East Asia. Hence, litigation at the international level does not as dramatically diverge from Brazil's internal legal culture and structure.<sup>122</sup> The role of litigation in a country's legal system, however, does not determine a country's ability to use the WTO dispute settlement system. For example, Korea and Thailand, though not considered litigious societies, have been relatively active users of WTO litigation compared to countries such as Malaysia and Indonesia.<sup>123</sup>

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120. For quantitative analysis that suggests that this latter factor is important, see Christina Davis & Sarah Blodgett Bermeo, *Who Files?: Developing Country Participation in WTO Adjudication* 15 (Jan. 17, 2008) (unpublished manuscript), available at [http://www.princeton.edu/~cldavis/files/who\\_files.pdf](http://www.princeton.edu/~cldavis/files/who_files.pdf) (noting "a high correlation between democracy and patterns of participation in WTO adjudication . . . . Democratic states are likely to face pressures for accountability to interest groups that will lead them to take strong trade enforcement measures, including WTO adjudication"). Schneider and Maxfield write more broadly that "in poor countries the lack of trust between economic agents can inhibit all types of beneficial exchanges and retard overall development . . . . Trust increases the voluntary exchange of information, makes reciprocity more likely even without active monitoring and disciplining, and generally reduces uncertainty and increases credibility on all sides." See Schneider & Maxfield, *supra* note 85, at 12, 14; see also EVANS, *EMBEDDED AUTONOMY*, *supra* note 86 (distinguishing predatory, rent-seeking bureaucracies from "developmental" types); Charles F. Sabel, *Learning by Monitoring: The Institutions of Economic Development*, in *THE HANDBOOK OF ECONOMIC SOCIOLOGY* (Neil J. Smelser & Richard Swedberg eds., 1994).

121. See Davis & Bermeo, *supra* note 120, at 31 (stating that "the three developing countries with the highest numbers of lawyers, Brazil, Mexico, and Argentina are also leading users of WTO adjudication"). On the concept of legal culture, see David Nelken, *Legal Culture*, in 1 *ENCYCLOPEDIA OF LAW AND SOCIETY: AMERICAN AND GLOBAL PERSPECTIVES* 370, 370 (2007); see also Bradley Condon, *NAFTA at Three-and-One-Half Years: Where Do We Stand and Where Should We Be Headed? A Cross-Cultural Analysis of North American Legal Integration*, 23 *CAN.-U.S. L.J.* 347, 353 (1997) (defining legal culture as an evolving set of shared beliefs, values, attitudes, and logical processes through which lawyers, jurists, and others within a given society perceive and react to legal rules).

122. See Megan J. Ballard, *The Clash Between Local Courts and Global Economics: The Politics of Judicial Reform in Brazil*, 17 *BERKELEY J. INT'L L.* 230, 239, 276 (1999) (noting "an explosion of cases challenging the government's new economic and state reform policies" and that, "in Brazil, broad access to unfettered courts has increased the use of courts as political instruments"); Keith S. Rosenn, *Judicial Reform in Brazil*, 4 *NAFTA: L. & BUS. REV. OF THE AMERICAS* 19, 24 (1998) (noting an "avalanche of cases").

123. There is a debate among culturalists and structuralists as to the explanation of low litigation rates in Asian countries, with culturalists focusing on cultural norms, such as Confucianism in Korea and Buddhism in Thailand, and structuralists focusing on the legal systems' constriction of litigation opportunities, which we do not address in this article. Regarding Korea's and Thailand's use of WTO dispute settlement, see William J. Davey, *The WTO Dispute Settlement System: How Have Developing Countries Fared?*

In light of the considerable challenges that most members face if they are to use the WTO dispute settlement system and the actual variation in members' successful use of it, understanding the steps that Brazil took are not just of academic interest. As we will discuss, Brazil's government and private sector have responded to the challenges of the WTO legal system through a series of complementary initiatives that are of interest to other WTO members. Before we turn to them, however, we provide a brief chronological and statistical overview of Brazil's experience in trade litigation in the WTO.

## B. Brazil's Use of WTO Dispute Settlement: An Overview

Brazil has been the most successful developing-country user of the WTO dispute settlement system in terms of both the quantity of cases brought and the cases' systemic implications. Overall, Brazil has been the fourth most frequent complainant in the WTO dispute settlement system after the United States, the European Union, and Canada. It has participated in 86 of the 369 cases filed before the WTO through December 31, 2007 as complainant, respondent, or third party, constituting a 23% participation rate.<sup>124</sup> It has been a complainant in 11, a respondent in 3, and a third party in 35 of the 136 cases that resulted in an adopted WTO report during this period, constituting about a 36% participation rate.<sup>125</sup> Table 1 depicts Brazilian participation as a complainant and respondent on an annual basis, based on the dates that complaints were filed. Annex II lists all cases in which Brazil has participated in the WTO dispute settlement

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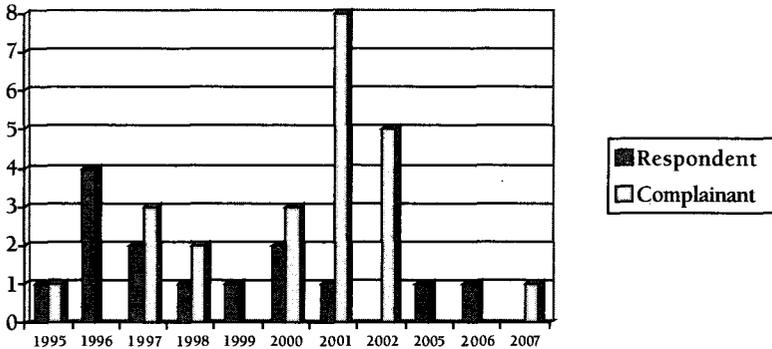
16-18 (Illinois Public Law Research Paper No. 05-17, 2005) available at [http://www.luc.edu/law/activities/publications/ilrsymposium/2008sym/davey\\_wto\\_dispute\\_paper.pdf](http://www.luc.edu/law/activities/publications/ilrsymposium/2008sym/davey_wto_dispute_paper.pdf). For assessments of dispute settlement within Korea, see JUDICIAL SYSTEM TRANSFORMATION IN THE GLOBALIZING WORLD (Dai-Kwon Choi & Kahei Rokumoto eds., 2007); RECENT TRANSFORMATIONS IN KOREAN LAW AND SOCIETY (Dae-Kyu Yoon ed., 2000); Lisa Blomgren Bingham et al., *Participatory Governance in South Korea: Legal Infrastructure, Economic Development, and Dispute Resolution*, 19 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 375, 386 (2007); Nancy J. White & Jun Lee, *Dispute Resolution in the Korean and U.S. Markets: A Comparison*, 19 MID-AM. J. BUS. 23 (2004). For assessments of dispute settlement within Thailand, see David Engel, *Globalization and the Decline of Legal Consciousness: Torts, Ghosts and Karma in Thailand*, 30 L. SOC. INQUIRY 469, 469-514 (2005); Tim L. EStrange, *Major Issues in Litigation in the Asia Pacific Rim*, INT'L COM. ARB., Apr. 1996, at 24 (discussing dispute resolution in Thailand and other Asian countries).

124. Dispute Settlement Commentary, <http://www.worldtradelaw.net> (last visited Mar. 20, 2008); Ministério das Relações Exteriores, *Contenciosos do Brasil na OMC*, [http://www.mre.gov.br/portugues/ministerio/sitios\\_secretaria/cgc/contenciosos.doc](http://www.mre.gov.br/portugues/ministerio/sitios_secretaria/cgc/contenciosos.doc) (last visited Mar. 20, 2008); World Trade Org., *Brazil and the WTO*, [http://www.wto.org/english/thewto\\_e/countries\\_e/brazil\\_e.htm](http://www.wto.org/english/thewto_e/countries_e/brazil_e.htm) (last visited May 20, 2008). A large gap separated Canada and Brazil from the two most active members, the United States and the European Union. The United States has brought eighty-eight cases as a complainant, and the EU has brought seventy-six cases as a complainant. See Dispute Settlement Commentary, *supra*. In total, the United States has been a party or third party in 258 cases, and the EU a party or third party in 214 cases. See *id.*

125. Some of the cases in which Brazil is involved were still in consultations or before a panel at the beginning of 2008. See *infra* Annex II. For the adopted reports, see WTO Panel/AB Reports, <http://www.worldtradelaw.net> (last visited Mar. 20, 2008). We do not include Article 21.5 compliance decisions in our calculations.

system, indicating the status of the case, the products covered, and the industry affected. Annex II also lists the private law firms employed in these cases as part of Brazil's public-private coordination strategy for WTO dispute settlement.<sup>126</sup>

Table 1: Brazil as a Complainant and Respondent in WTO Cases by Year (1995-2007)<sup>127</sup>



Although Brazil became one of the first users of the WTO dispute settlement system both as a complainant and respondent, the initial cases did not receive much media coverage in Brazil and can be viewed as transitional cases from the GATT.<sup>128</sup> At the end of 1996, however, Brazil faced a controversy that would receive widespread attention in Brazilian politics,

126. See *infra* Annex II.

127. See World Trade Org., *supra* note 124; see also *infra* Annex II. This chart is based on the dates on which cases were filed and not the dates on which the WTO Dispute Settlement Body adopted the rulings. The rulings typically occur about a year or year and a half after filing, depending on the complexity of the case and whether the panel decision was appealed.

128. In January and April 1995, Venezuela and Brazil brought complaints against the United States regarding its discriminatory requirements for domestic and foreign reformulated and conventional gasoline, resulting in the adoption of a rather straight forward thirty-page Appellate Body decision in May 1996. See Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (Apr. 29, 1996); Panel Report, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/R (Jan. 29, 1996). The case involved a prototypical national treatment complaint (GATT Article III) and an Article XX defense on alleged environmental grounds. See Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (Apr. 29, 1996); Panel Report, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/R (Jan. 29, 1996). The Appellate Body upheld the result but reversed the panel in its reasoning. See Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (Apr. 29, 1996); Panel Report, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/R (Jan. 29, 1996). Brazil also became a respondent in the WTO's first year in a Philippine complaint against Brazilian measures affecting the import of desiccated coconut. The case again went through the appellate process and Brazil again emerged victorious but on the technical grounds that the Brazilian measures were not covered by the new WTO regime but rather by the former GATT. See Appellate Body Report, *Brazil—Measures Affecting Desiccated Coconut*, ¶¶ 21-22, WT/DS22/AB/R (Feb. 21, 1997); Panel Report, *Brazil—Measures Affecting Desiccated Coconut*, WT/DS22/R (Oct. 17, 1996).

the private sector, and the media and would lead to a change in the government's approach to WTO dispute settlement. The case, brought by Canada on behalf of the Canadian aircraft manufacturer Bombardier, concerned Brazil's subsidization of the Brazilian aircraft manufacturer Embraer. The Brazilian government followed suit with its own case against Canada on behalf of Embraer, resulting in a complex series of decisions in which the WTO Appellate body found that both Brazil and Canada had violated provisions of the WTO agreement on subsidies.<sup>129</sup> As the Executive Director of a major Brazilian consulting firm stated, "Embraer was a wake-up for industry."<sup>130</sup> Brazilian media coverage of these parallel cases brought WTO proceedings to the broader Brazilian public for the first time.<sup>131</sup>

The challenge against Brazil's subsidization of Embraer was symbolically important for Brazil's identity as an emerging economic power. Brazil created Embraer as a government-owned enterprise in 1969 intending it to become the domestic supplier to the Brazilian Air Force during Brazil's military rule. The government privatized Embraer in December 1994 as part of the liberalization of Brazil's economy after the country's return to democratic government. Embraer became one of the two leading sellers of small and mid-size jet aircraft.<sup>132</sup> Embraer's economic success thus supported

129. The *Canada-Brazil, Bombardier-Embraer* cases were complex, involving the full range of WTO procedures, including requests and authorizations for retaliation on account of non-compliance with the ruling. The first complaint was filed in 1996 and the most recent decision was issued in 2003, but the case could flare up again. The main decisions ensuing from the initial complaints (WT/DS46 and WT/DS70) were: Panel Report, *Brazil—Export Financing Programme for Aircraft*, WT/DS46 (Apr. 14, 1999); Appellate Body Report, *Brazil—Export Financing Programme for Aircraft*, WT/DS46/AB/R (Aug. 2, 1999); Panel Report, *Brazil—Export Financing Programme for Aircraft—Recourse by Canada to Article 21.5 of the DSU*, WT/DS46/RW (May 9, 2000); Arbitrators Decision, *Brazil—Export Financing Programme for Aircraft—Recourse to Arbitration by Brazil Under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement*, WT/DS46/ARB (Aug. 28, 2000); Appellate Body Report, *Brazil—Export Financing Programme for Aircraft—Recourse by Canada to Article 21.5 of the DSU*, WT/DS46/AB/R (July 21, 2001); Panel Report, *Brazil—Export Financing Programme for Aircraft, Second Recourse by Canada to Article 21.5 of the DSU*, WT/DS46/RW/2 (July 26, 2001); Panel Report, *Canada—Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R (Apr. 14, 1999); Panel Report, *Canada—Measures Affecting the Export of Civilian Aircraft—Recourse by Brazil to Article 21.5 of the DSU*, WT/DS70/RW (May 9, 2000); Appellate Body Report, *Canada—Measures Affecting the Export of Civilian Aircraft—Recourse by Brazil to Article 21.5 of the DSU—AB-2000-4* WT/DS70/AB/RW (July 21, 2000); Appellate Body Report, *Canada—Measures Affecting the Export of Civilian Aircraft—AB-1999-2*, WT/DS70/AB/R (Aug. 2, 1999). The following decisions for complaint WT/DS222 are also related to this dispute: Arbitrator Decision, *Canada—Export Credits and Loan Guarantees for Regional Aircraft—Recourse by Canada to Article 22.6 of the DSU and Article 4.11 of the SCM Agreement*, WT/DS222/ARB (Feb. 2003); Panel Report, *Canada—Export Credits and Loan Guarantees for Regional Aircraft*, WT/DS222/R (Jan. 22, 2002).

130. Interview by Gregory C. Shaffer with Ricardo Camargo Mendes, Executive Director, Prospectiva in São Paulo, Braz. (Apr. 22, 2004) (on file with authors) [hereinafter Mendes Interview]. For more on Prospectiva, see *infra* note 279.

131. See, e.g., *Embraer Festeja Decisão da OMC Contra Canadá*, FOLHA ONLINE, Dec. 23, 2002, <http://www1.folha.uol.com.br/folha/dinheiro/ult91u61087.shtml>.

132. Cf. Tyler Brûlé, *Rediscovering Brazils Secret Assets*, INT'L HERALD TRIB., Jan. 26, 2008, at 6 (describing Embraer as the third-largest seller of small and mid-size jet aircraft); *Embraer Reaffirms Plans to Deliver on Global Orders*, TORONTO STAR, Feb. 14,

Brazil's claim that it can compete in international markets in high tech and high value-added sectors—in this case, jet aircraft for commercial, corporate, and military use.<sup>133</sup> Embraer's success exemplifies, in the words of Roberto Mangabeira Unger, Brazil's Minister of Long-Term Planning, a situation "in which a relatively more backward country may be able to enter . . . into lines of business in which a relatively more advanced one specializes."<sup>134</sup> That is, Brazil, much less economically developed than Canada in per capita terms, was not only "in striking distance," but actually was the home of the world's third or fourth largest jet aircraft manufacturer after Boeing and Airbus, competing with Canada's Bombardier.<sup>135</sup>

Canada exacerbated the dispute when it banned Brazilian beef imports to press Brazil to remove its subsidies of Embraer and comply with the Appellate Body ruling in the case. Canada did so on the grounds that there had been an outbreak of bovine spongiform encephalopathy (mad cow disease) in Brazil, but it appears that there was no such outbreak.<sup>136</sup> This drew a strong reaction from Brazilian agricultural groups, stoking Brazilian popular reaction against Canada's unilateral action, which they maintained was in bad faith. The Canadian action led to large protests, a huge barbecue before the Canadian embassy, and "a consumer boycott" of Canadian products, spurring more media coverage and public attention on the WTO and its dispute settlement system.<sup>137</sup>

The *Embraer* case was followed by an even more controversial one brought against Brazil that rallied civil society organizations in Brazil and around the world, generating significant Brazilian media coverage once more.<sup>138</sup> In 2000, the United States challenged a Brazilian patent law pro-

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2008, at B2 (describing it as the fourth-largest seller of small and mid-size jet air craft). Embraer's shares were first listed in the São Paulo stock market in 2000 and are now also quoted on the New York Stock Exchange. See Embraer, Company Profile (2006), [www.embraer.com.br/portugues/content/empresa/profile.asp](http://www.embraer.com.br/portugues/content/empresa/profile.asp) (last visited May 20, 2008). Following its privatization, Embraer was Brazil's largest exporter in 1999 and 2001, the second largest in 2002 (after Petrobras), and the third largest in 2004 (after Petrobras and Companhia Vale do Rio Doce). See Press Release, Ministério das Comunicações, Petrobras É a Maior Exportadora do País (Jan. 26, 2004), [http://www.idbrasil.gov.br/noticias/News\\_Item.2004-01-27.3216](http://www.idbrasil.gov.br/noticias/News_Item.2004-01-27.3216); Embraer, *supra*. In the market for 30 to 120 seat commercial jet aircraft, its share of the global market has risen. Press Release, Forecast International, Demand Shifting Upward in Regional Jet Market (Sept. 19, 2005), <http://www.forecastinternational.com/press/release.cfm?article=78>. Transportation consultant Ray Jawarowski of Forecast International estimated that over the next decade, Embraer will produce 1,426 regional jets, resulting in a 38.8% global share of the regional jet market, while Bombardier will make 1,210 jets, constituting a 32.5% share. *Id.*

133. ROBERTO MANGABEIRA UNGER, *FREE TRADE REIMAGINED: THE WORLD DIVISION OF LABOR AND THE METHOD OF ECONOMICS* 114-15 (2007).

134. *Id.* Unger puts forward a theory of "relative advantage" in which he argues for the need for a flexible trade regime that permits countries like Brazil to develop innovative policies and practices and thus does not preclude protection for these purposes. *Id.*

135. See *id.*

136. Barral, *The Brazilian Experience*, *supra* note 69, at 14-15 (saying it was "inexistent"); Mark MacKinnon, *Beef Ban Could End As Brazil Talks Tough; 'No Evidence' Found of Mad-Cow Disease*, *GLOBE & MAIL* (Toronto), Feb. 10, 2001, at A1.

137. See Barral, *The Brazilian Experience*, *supra* note 69, at 14-15.

138. See, e.g., Tina Rosenberg, *Look at Brazil*, *N.Y. TIMES MAG.*, Jan. 28, 2001, at 6, 26.

vision permitting compulsory licensing at a time when civil society organizations were calling for lower cost drugs to respond to the HIV pandemic and other public health concerns through, among other means, compulsory licensing.<sup>139</sup> Although the U.S. complaint did not target Brazil's AIDS policies per se, Brazil was able to frame it in that way. The U.S. complaint rallied domestic and international non-governmental organizations (NGOs) behind the Brazilian government.<sup>140</sup>

Canada's challenge to Brazilian industrial policy in the Embraer case and the United States' challenge to Brazil's intellectual property policies in the patent case helped spur the Brazilian government and private sectors to devote greater resources to WTO dispute settlement. Until these cases, the Brazilian government had been developing ad hoc, case-by-case strategies to handle WTO cases, and Brazilian industry, academia, and civil society had generally devoted less attention to the WTO system. In this sense, being a respondent in WTO litigation can be positive for a country regardless of whether one adopts a trade-liberal perspective.<sup>141</sup> Being a respondent can catalyze greater involvement in trade policy by the government as a whole, as well as by the private sector and civil society generally. After being placed on the defensive in these cases, Brazil developed new dispute settlement strategies involving a reorganization of government bureaucracy to create a specialized WTO dispute settlement unit and enhanced engagement with the private business sector, private lawyers, academics, and civil society organizations. This bolstering of Brazilian domestic WTO-related legal capacity led to Brazil's most highly touted successes in WTO litigation.

Following the Embraer and patent cases, Brazil filed a flurry of complaints from 2000 to 2002 and was actually the most active WTO complainant in 2001. Many of these cases were particularly complex, both factually and legally, and strategically important, such as the *United States-Subsidies on Upland-Cotton* and the *EC-Export Subsidies on Sugar* cases examined in Part IV.<sup>142</sup> Although Table 1 indicates that Brazil was less active between 2003 and 2007, it was in fact litigating and bargaining over compliance in the cases that it had filed earlier, including the *Cotton* and *Sugar* cases. In addition, Brazil increasingly became engaged in the Doha

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139. *Id.*

140. *See id.* (noting the relatively successful Brazilian strategy to fight the AIDS epidemic, compared to what has transpired in other developing countries).

141. Chad P. Bown & Bernard Hoekman, *Developing Countries and Enforcement of Trade Agreements: Why Dispute Settlement Is Not Enough*, 42 J. WORLD TRADE 177, 179 (2008) (noting that the lack of WTO complaints against most developing countries leads to "welfare economic losses due to continued import protection within developing economies; diminished incentives for the country to take on additional WTO commitments such as reducing tariff bindings to meaningful levels (i.e., at or close to applied rates); as well as externality costs imposed on other developing countries"). Davis and Bermeo show statistically that "previous experience with [WTO] trade adjudication, either as a complainant or defendant, is an important predictor of how often a developing country initiates a dispute." Davis & Bermeo, *supra* note 120, at 33.

142. *See* Panel Report, *EC-Export Subsidies on Sugar*, WT/DS266/R (Oct. 15, 2004); Panel Report, *US-Subsidies on Upland Cotton*, WT/DS267/R (Sept. 8, 2004).

Round of negotiations, which appear to have caused a general decline in WTO dispute settlement activity during these years, as countries focused their attention and resources on the negotiations.<sup>143</sup>

Brazil has largely prevailed in each of its complaints that resulted in an adopted WTO report, many of which were among the WTO's most challenging cases and had significant policy implications. Of the twenty-three complaints that Brazil filed, the parties settled nine during consultations,<sup>144</sup> and three after a panel was formed, while eleven resulted in panel decisions, ten of which were appealed.<sup>145</sup> All eleven of the cases resulting in an adopted ruling were, in significant part, in favor of Brazil.<sup>146</sup> Brazil was also a respondent in fourteen cases,<sup>147</sup> but only four of these resulted

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143. From 2005 to 2007, Brazil was a party in three new WTO cases, two of them as a respondent and one as a complainant against U.S. agricultural subsidies. See generally Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R (Dec. 3, 2007) (EC was the complainant); Request for Consultations by Brazil, *Brazil—Anti-Dumping Measures on Imports of Certain Resins from Argentina*, WT/DS355/1 (Jan. 7, 2007) (Argentina was the complainant); Request for Consultations by Brazil, *United States Domestic Support and Export Credit Guarantees for Agricultural Products*, WT/DS365/1 (July 11, 2007); see also *infra* Annex II.

144. The nine cases are: *US—Certain Measures Regarding Anti-Dumping Methodology*, WT/DS239; *US—US Patents Code*, WT/DS224; *US—Countervailing Duties on Certain Carbon Steel Products from Brazil*, WT/DS218; *Mexico—Provisional Anti-Dumping Measure on Electric Transformers*, WT/DS216; *EC—Measures Affecting Soluble Coffee*, WT/DS209; *Turkey—Anti-Dumping Duty on Steel and Iron Pipe Fittings*, WT/DS208; *EC—Measures Affecting Differential and Favourable Treatment of Coffee*, WT/DS154; *Peru—Countervailing Duty Investigation Against Imports of Buses from Brazil*, WT/DS112; *Canada—Measures Affecting the Export of Civilian Aircraft*, WT/DS71. More details on these cases are available *infra* in Annex II.

145. The ten appealed cases were: Panel Report, *EC—Customs Classification of Frozen Boneless Chicken*, WT/DS269/R (May 30, 2005); Panel Report, *EC—Export Subsidies on Sugar*, WT/DS266/R (Oct. 15, 2004); Panel Report, *US—Subsidies on Upland Cotton*, WT/DS267/R (Sept. 8, 2004); Panel Report, *US—Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS259/R (July 11, 2003); Panel Report, *Argentina—Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R (Apr. 22, 2003); Panel Report, *EC—Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R (Mar. 7, 2003); Panel Report, *US—Continued Dumping & Subsidy Offset Act of 2000*, WT/DS217/R (Sept. 16, 2002); Panel Report, *Canada—Export Credits & Loan Guarantees for Regional Aircraft*, WT/DS222/R (Jan. 28, 2002); Panel Report, *Canada—Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R (Apr. 14, 1999); Panel Report, *EC—Measures Affecting Importation of Certain Poultry Products*, WT/DS69/R (Mar. 12, 1998); Panel Report, *US—Standards for Reformulated and Conventional Gasoline*, WT/DS2/R (Jan. 29, 1996) (WT/DS4 consolidated in a single report with WT/DS2). The only case that was not appealed was *Argentina—Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241.

146. The Brazilian Foreign Ministry provides details about these rulings in Ministério das Relações Exteriores, *supra* note 124.

147. The fourteen cases are: *Brazil—Anti-Dumping Measures on Imports of Certain Resins from Argentina*, WT/DS355; *Brazil—Measures Affecting Imports of Retreaded Tyres*, WT/DS332; *Brazil—Anti-Dumping Duties on Jute Bags from India*, WT/DS229; *Brazil—Measures Affecting Patent Protection*, WT/DS199; *Brazil—Measures on Minimum Import Prices*, WT/DS197; *Brazil—Measures on Import Licensing and Minimum Import Prices*, WT/DS183; *Brazil—Measures Affecting Payment Terms for Imports*, WT/DS116; *Brazil—Measures Affecting Trade and Investment in the Automotive Sector*, WT/DS81; *Brazil—Certain Measures Affecting Trade and Investment in the Automotive Sector*, WT/DS65; *Brazil—Certain Measures Affecting Trade and Investment in the Automotive Sector*, WT/DS52; *Bra-*

in the establishment of a panel,<sup>148</sup> of which Brazil lost two in part,<sup>149</sup> won one,<sup>150</sup> and settled another.<sup>151</sup>

Brazil's use of the dispute settlement system roughly reflected its trade flows and thus primarily involved cases against Brazil's most important trading partners (and the WTO's most powerful members), the United States and the European Union. Approximately 39% of Brazil's complaints were against the United States and approximately 26% were against the European Union, constituting a total of 65% of its complaints. Brazil's complaints also targeted important sectors for its exports. Of Brazil's twenty-three complaints, twenty-one involved specific sectors, the most important being agricultural products (ten), steel or iron products (five), and vehicles (four).<sup>152</sup> From 2003 to 2006, agricultural products consti-

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zil—*Certain Automotive Investment Measures*, WT/DS51; *Brazil—Export Financing Programme for Aircraft*, WT/DS46; *Brazil—Measures Affecting Desiccated Coconut and Coconut Milk Powder*, WT/DS30; *Brazil—Measures Affecting Desiccated Coconut*, WT/DS22.

148. These four cases are: *Brazil—Measures Affecting Imports of Retreaded Tyres*, WT/DS332; *Brazil—Measures Affecting Patent Protection*, WT/DS199; *Brazil—Export Financing Programme for Aircraft*, WT/DS46; *Brazil—Measures Affecting Desiccated Coconut*, WT/DS22. There is another case in which a panel was established but a few months later it was suspended. Communication from the Chairman of the Panel, *Brazil—Anti-Dumping Measures on Imports of Certain Resins from Argentina*, WT/DS355/5 (Feb. 6, 2008).

149. See Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R (Dec. 3, 2007); Appellate Body Report, *Brazil—Export Financing Programme for Aircraft*, WT/DS46/AB/R (Aug. 2, 1999).

150. See Appellate Body Report, *Brazil—Measures Affecting Desiccated Coconut*, WT/DS22/AB/R (Feb. 21, 1997).

151. See Notification of Mutually Agreed Solution, *Brazil—Measures Affecting Patent Protection*, WT/DS199/4 (July 19, 1991).

152. The complaints can be broken down sectorally as follows:

(1) Agricultural products: *EC—Customs Classification of Frozen Boneless Chicken*, WT/DS269; *United States—Subsidies on Upland Cotton*, WT/DS267; *EC—Export Subsidies on Sugar*, WT/DS266; *United States—Equalizing Excise Tax Imposed by Florida on Processed Orange and Grapefruit Products*, WT/DS250; *Argentina—Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241; *EC—Measures Affecting Soluble Coffee*, WT/DS209; *EC—Measures Affecting Differential and Favorable Treatment of Coffee*, WT/DS154; *EC—Measures Affecting Importation of Certain Poultry Products*, WT/DS69.

(2) Steel products: *United States—Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS259; *EC—Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219; *United States—Countervailing Duties on Certain Carbon Steel Products from Brazil*, WT/DS218; *Turkey—Anti-Dumping Duty on Steel and Iron Pipe Fittings*, WT/DS208.

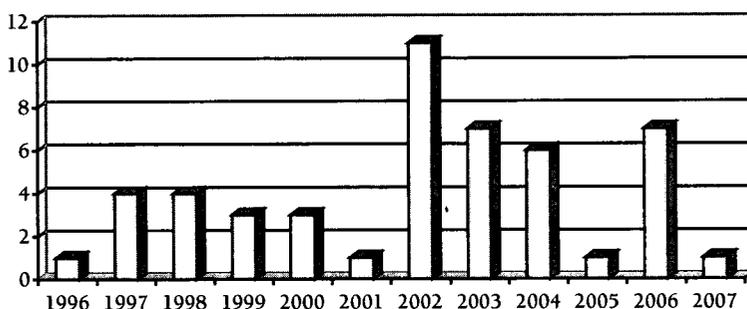
(3) Vehicles: *Canada—Export Credits & Loan Guarantees for Regional Aircraft*, WT/DS222; *Peru—Countervailing Duty Investigation Against Imports of Buses from Brazil*, WT/DS112; *Canada—Measures Affecting the Export of Civilian Aircraft*, WT/DS71; *Canada—Measures Affecting the Export of Civilian Aircraft*, WT/DS70.

(4) Cases Relating to Other Economic Sectors: *Mexico—Provisional Anti-Dumping Measure on Electric Transformers*, WT/DS216; *Argentina—Transitional Safeguard Measures on Certain Imports of Woven Fabrics of Cotton and Cotton Mixtures Originating in Brazil*, WT/DS190; *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS4.

(5) Systemic Cases: *United States—Certain Measures Regarding Anti-Dumping Methodology*, WT/DS239; *United States—US Patents Code*, WT/DS224 (a tit-for-tat maneuver in response to a U.S. challenge to the compulsory licensing provisions in Brazil's pharma-

tuted 37 to 39% of Brazil's total exports, while iron and steel and vehicles each totaled 6 to 7.5% of total exports.<sup>153</sup> Table 2 contains a breakdown by country of WTO cases where Brazil was a claimant or a respondent. Annex III lists Brazil's five most important trading partners on a yearly basis in terms of imports and exports.

Table 2: Brazil WTO Cases by Country (1995-2007)<sup>154</sup>



WTO members can also participate as a third party in WTO cases, which they primarily do when they have only a systemic interest in a dispute. Brazil has been the seventh most active participant as a third party in WTO cases, filing forty-nine times, following Japan (eighty-eight), the European Union (seventy-nine), the United States (seventy-one), Canada (sixty-four), China (sixty-one), and India (fifty) as of December 2007.<sup>155</sup> Table 3 breaks down Brazil's filings as a third party on an annual basis. To provide a complete picture, Annex IV lists the cases in which Brazil was a complainant and participated as a third party in a parallel case.<sup>156</sup>

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ceutical patent law, in which both complaints were dropped as part of a settlement); *United States—Continued Dumping & Subsidy Offset Act of 2000*, WT/DS217.

153. U.N. Commodity Trade Statistics Database, Yearbook 2006, <http://comtrade.un.org/pb/CountryPages.aspx?y=2006> (follow "Brazil" hyperlink) (last visited May 20, 2008).

154. World Trade Org., *supra* note 124; *see also infra* Annex II.

155. *See* World Trade Org., Members and Observers, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (last visited May 20, 2007). These figures are as of December 31, 2007. *See id.* China has been proportionally more active as a third party since it joined in December 2001. *Id.*

156. In sixteen of the cases in which Brazil participated as a third party, it filed its own parallel complaint. In addition, Brazil filed as a third party in eight separate parallel cases. For example, Brazil is listed as a third party seven times in the 2002 parallel complaints against U.S. safeguard measures on steel imports, inflating the number of third party participants in cases involving the steel industry. If one does not count these parallel cases multiple times, then Brazil acted solely as a third party in twenty-five distinct cases. A member normally participates as a third party in a case filed in parallel to its own in order to obtain information from the other's case, including the legal and factual arguments used. *See infra* Annex IV.

Table 3: Brazil as Third Party in WTO Cases by Year (1995-2007)<sup>157</sup>

| WTO Member     | Brazilian Complaints | Complaints Against Brazil |
|----------------|----------------------|---------------------------|
| United States  | 9                    | 4                         |
| European Union | 6                    | 4                         |
| Canada         | 3                    | 1                         |
| Argentina      | 2                    | 1                         |
| Mexico         | 1                    |                           |
| Peru           | 1                    |                           |
| Turkey         | 1                    |                           |
| India          |                      | 1                         |
| Japan          |                      | 1                         |
| Phillipines    |                      | 1                         |
| Sri Lanka      |                      | 1                         |

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. The *U.S.-Cotton* and *EC-Sugar* complaints, in particular, contributed to Brazil's status as a leader of the G-20 group of developing nations<sup>158</sup> and a member of a new "quad" for structural leadership within the WTO.<sup>159</sup> The cases helped focus considerable international political and media attention on the adverse impacts of U.S. and European agricultural subsidy programs on agricultural production in developing countries.<sup>160</sup> The cases created leverage for Brazil in the Doha Round

157. World Trade Org., *supra* note 124; *see also infra* Annex II.C (Brazil as Third Party). The cases are apportioned in the chart according to the year Brazil filed its request to participate as a third party. The list of cases in Annex II and Table 3 reflects information found in documents accessible to the public that we checked in interviews with Brazilian Foreign Ministry representatives. The various reports contained inconsistencies regarding the number of third party requests that Brazil made. For example, the WTO web page for Brazil lists forty-eight cases in which Brazil requested third party rights. World Trade Org., *supra* note 124. This calculation includes participation in the *United States—Anti-Dumping Duties on Imports of Color Television Receivers from Korea*, WT/DS89, but the authors found no evidence of Brazil's participation in WT/DS89. The WTO web site also considers neither Brazil's participation in *EC—Regime for the Importation, Sale, and Distribution of Bananas*, WT/DS27/RW/ECU, nor the request for consultations in *United States—Provisional Anti-Dumping Measures on Shrimp from Thailand*, WT/DS324, though documents of such requests may be found on the WTO database. In contrast, the Brazilian Foreign Ministry lists seventeen cases in which Brazil was a third party. *See* Ministério das Relações Exteriores, *supra* note 124. In this incomplete list, it adds Brazil's participation as a third party in *Argentina—Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56. However, no evidence of such participation was found.

158. On the G-20, *see supra* note 17 and accompanying text.

159. *See* DEESE, *supra* note 18.

160. *See, e.g.,* Elizabeth Becker & Todd Benson, *Brazil's Road to Victory Over U.S. Cotton*, N.Y. TIMES, May 4, 2004, at W1; Hardev Kaur, *Brazil's Sweet Victory Raises Poor*

negotiations and provided tools for opponents of the subsidies in U.S. and EU internal political debates.<sup>161</sup> At the WTO Ministerial Meeting in Hong Kong in December 2005, for example, WTO members declared that, subject to a final Doha Round agreement, export subsidies would be eliminated and domestic support would be reduced pursuant to a formula.<sup>162</sup> As one Brazilian official stated, "The cotton case showed not only internationally but I think mostly domestically in the U.S. . . . how distorting and unfair [U.S.] agricultural policies are. And that may be in [the] long run, a very positive element."<sup>163</sup> In this way, Brazil hoped that the cases could help catalyze a possible elimination of agricultural export subsidies and a significant reduction of European and U.S. agricultural subsidies overall.

In sum, Brazil's ambitious use of the dispute settlement system paradoxically was catalyzed in part by early cases in which Brazil was a respondent. Brazil has since been among the most active WTO members in terms of both the quantity and quality of cases, resulting in strategically important WTO judicial decisions. These decisions have provided Brazil with leverage in trade negotiations, as well as tools for allies that Brazil has within political systems abroad, such as those actors who wish to reduce agricultural subsidies in the United States and the European Union. For Brazil, the international political payoffs of its investment in WTO dispute settlement have been significant.

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*Nations' Hopes*, NEW STRAITS TIMES (Malaysia), July 1, 2005, at 23 ("These victories, the first to target developed countries' farm subsidies, have given hope to other developing countries."); Carl Mortished, *US and EU Farm Subsidies 'Face New Pressure'*, TIMES (London), June 21, 2004, at 19; Larry Rohter, *Brazil Is Ready to Use Clout to Get a Fair Deal*, INT'L HERALD TRIB., Dec. 13, 2005.

161. There are divisions within countries regarding trade policies, such as import protection and subsidization. For example, Brazil's challenges to U.S. and EU agricultural subsidies provide tools to U.S. and EU domestic actors who wish to curtail these subsidies for domestic policy reasons. See, e.g., *Brazil Scores Big Win over U.S. in Cotton Compliance Dispute*, 24 INT'L TRADE REP. (BNA) 1120, 1120 ("The ruling could also have a major impact on the current debate in the United States over U.S. farm spending plans for the coming five years, where the Bush administration is pushing Congress to accept deeper cuts in agricultural subsidies.").

162. See World Trade Organization, Doha Work Programme, Ministerial Declaration of 18 December 2005, WT/MIN(05)/DEC ("We agree to ensure the parallel elimination of all forms of export subsidies and disciplines on all export measures with equivalent effect to be completed by the end of 2013.") "On domestic support, there will be three bands for reductions in Final Bound Total AMS and in the overall cut in trade-distorting domestic support, with higher linear cuts in higher bands." *Id.* ¶ 5; see also Stephen Powell & Andrew Schmitz, *The Cotton and Sugar Subsidies Decisions: WTO's Dispute Settlement System Rebalances the Agreement on Agriculture*, 10 DRAKE J. AGRIC. L. 287, 330 (2005) ("These decisions pose serious threats to U.S. farm policy in its current form and substantially change the balance of concessions and obligations as the Doha Round renegotiation of the Agreement on Agriculture enters the critical stage of exchanging offers.").

163. Joseph A. Conti, *The Good Case: Decisions to Litigate at the World Trade Organization*, 42 LAW & SOC'Y REV. 145, 172 (2008).

### III. What Lies Behind Brazil's Success: The Building of a Pluralist Trade Law Community

Brazilian public and private sector investment in trade law and policy expertise has helped the country assume a leading role in WTO governance, whether in negotiations, dispute settlement, or monitoring WTO agreements' implementation. The WTO's judicialization of international trade relations has helped catalyze these Brazilian investments. Brazilian public officials' realization of their need for outside legal and technical economic assistance has provided incentives for business, lawyers, and consultants to organize to work with the Brazilian government in international trade negotiations and dispute settlement, resulting in the building of a pluralist trade law community in Brazil.<sup>164</sup>

To respond to the challenges and opportunities of WTO dispute settlement, Brazil has developed what officials in the Ministry of Foreign Affairs call a "three pillar" structure for WTO dispute settlement.<sup>165</sup> The structure consists of a specialized WTO dispute settlement division located in the capital, Brasilia (the "first pillar"), coordination between this unit and Brazil's WTO mission in Geneva (the "second pillar"), and coordination between both of these entities and Brazil's private sector, as well as law firms and economic consultants funded by the private sector (the "third pillar").<sup>166</sup> As part of this "third pillar," the Geneva mission started an internship program for trade specialists from government agencies and young attorneys from Brazilian law firms and business associations.

The term "three-pillar structure," however, does not fully capture the significant developments in Brazil that have facilitated its success. As one Brazilian representative notes about the internship program, "We are trying

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164. SCHNEIDER, *BUSINESS POLITICS*, *supra* note 74, at 15. Similarly, Schneider examines state-provided incentives for business to organize in Latin America, and Shaffer examines state incentives in the United States and the European Union in the specific context of WTO dispute settlement. *Id.* at 15 ("Core arguments are: (1) that state actions best explain variation in business organization in Latin America; (2) that state actors help organize business in order to reduce their own vulnerabilities and advance their policy agendas; and (3) that the diverse kinds of selective incentives states provide to business have significantly different effects on business organization"); see also SHAFER, *DEFENDING INTERESTS*, *supra* note 4, at 144-55 (examining U.S. and EU mechanisms for government-business relations in WTO dispute settlement in relation to the increasing need of state actors for outside legal and technical assistance).

165. Interviews by Gregory C. Shaffer with Brazilian officials and private sector representatives [names withheld], in São Paulo, Braz.; Brasilia, Braz.; Geneva, Switz. (Apr. 2004; June 2004) (on file with authors). Celso de Tarso Pereira, Brazil's representative in Geneva for DSU matters, confirmed these observations at a seminar that the International Centre for Trade and Sustainable Development (ICTSD) organized on WTO dispute settlement. See Celso de Tarso Pereira, *Mission of Brazil to the WTO, Reactions: The Experience of Brazil and a Comment on Some Reform Proposals*, Presentation at International Trade and Sustainable Development Conference: Making the Dispute Settlement System Work for Developing and Least Developed Countries (Feb. 7, 2003).

166. Where Brazil works with outside economic consultants as well as lawyers, some Brazilian officials refer to a "squaring" of what they call Brazil's "three pillar model" for WTO dispute settlement.

to spread knowledge of the system in order to create a critical mass.”<sup>167</sup> That comment encapsulates a central theme of this article. Through mechanisms of public-private coordination, the Brazilian government has defended Brazil’s immediate interests in individual WTO cases while facilitating the development of broader national capacity in WTO law, policy, and dispute settlement, strengthening the state by diffusing expertise.

We first assess the organizational initiatives that the Brazilian government and in particular, the Ministry of Foreign Affairs undertook to increase governmental capacity in response to the challenges of, and opportunities provided by, the legalized and judicialized WTO system for trade relations. We next provide an overview of the process behind Brazil’s litigation of a WTO complaint. We then examine the initiatives that individuals, trade associations, think tanks, universities, and civil society organizations have taken to develop their own expertise and work with industry and the government, which have resulted in the formation of a Brazilian epistemic community for trade law policy that can be tapped for WTO dispute settlement, WTO negotiations, and more generally, WTO governance.

#### A. Reorganizing Government to Respond to WTO Challenges

We stress three points regarding the Brazilian government’s organization for international trade matters in relation to that of many other WTO members. First, Brazil has a critical advantage over other countries in that it has a professionalized, meritocratic, and adaptive Ministry of Foreign Affairs, which prioritizes international trade matters. Second, Brazil has instituted an inter-ministerial process for trade matters to facilitate a more coherent, coordinated approach for trade policy and trade dispute settlement, which has helped deepen trade-related expertise in multiple ministries. Third, the Ministry of Foreign Affairs has created a specialized unit for dispute settlement in Brasília so that legal and technical expertise is developed and retained over time. This unit ensures support for affiliated members posted at the Geneva mission dedicated primarily to dispute settlement issues. It also provides a focal point for interaction with the private sector and the private counsel hired by it. Each of these elements is critical for sustained, successful use of the WTO judicial system, and each is lacking in many developing countries.

First, many developing countries lack experienced trade policy and dispute settlement professionals.<sup>168</sup> Brazil, in contrast, benefits from a professionalized, merit-based Ministry of Foreign Affairs. To pursue a career in trade policy within the ministry, a candidate must first pass difficult entry exams, then excel in the ministry’s two-year training program (the *Instituto Rio Branco*), and finally place and perform well in assigned

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167. Interview by Gregory C. Shaffer with Brazilian representative [name withheld], in Geneva, Switz. (Feb. 1, 2005) (on file with authors).

168. See Busch et al., *supra* note 15, at 3.

posts in the field.<sup>169</sup> As a result, Brazilian officials handling trade negotiations and trade litigation typically come to the task with significant experience as part of an elite group.

The Ministry of Foreign Affairs, which has long-standing responsibility for representing Brazil before international organizations and with foreign governments,<sup>170</sup> has adapted its organizational structure in response to international developments. In 2001, when WTO, regional, and bilateral trade negotiations and dispute settlement intensified, the ministry overhauled its departments for trade. Until 2001, only one department in the ministry, the Investment Goods Department, handled trade-related matters, including all WTO trade negotiations, the proposed Free Trade Area of the Americas (FTAA),<sup>171</sup> the EU-Mercosur Free Trade Agreement (FTA), and the Latin American Integration Association (ALADI).<sup>172</sup> When

169. See Lei No 11.440, de 29 de dezembro de 2006, D.O.U. de 29.12.2006, art. 35 (Braz.) (Institui o Regime Jurídico dos Servidores do Serviço Exterior Brasileiro). These diplomats have a strong reputation for competence among other diplomats and international civil servants. Interviews by Gregory C. Shaffer with members of the WTO and UNCTAD Secretariats and representatives of numerous missions [names withheld], in Geneva, Switz. (2004–2007) (on file with authors).

170. The President of Brazil is responsible for formulating and implementing Brazil's foreign policy under the Constitution. CONSTITUIÇÃO FEDERAL art. 84 § VIII (Braz.). The Ministry of Foreign Affairs carries out this policy for external relations, which it has done since its creation almost two centuries ago. Decreto No. 99.578, 10 de outubro de 1990, D.O.U. de 11.10.1990 (Braz.) (Consolida Normas sobre Organização e Funcionamento do Ministério das Relações Exteriores e dá Outras Providências); Medida Provisória No. 813, 1 de janeiro de 1995, D.O.U. de 1.1.1995 (Braz.) (Dispõe sobre a Organização da Presidência da República e dos Ministérios, e dá Outras Providências). The ministry, which has considerable authority in this area, is divided into secretariats (*sub-secretarias*), which in turn are split into departments (*departamentos*) and units (*coordenações*), together with separate coordinating, advisory, and support bodies, such as that responsible for the selection and training of diplomats. See Ministério das Relações Exteriores, Estructura, [http://www.mre.gov.br/index.php?option=com\\_content&task=view&id=1339](http://www.mre.gov.br/index.php?option=com_content&task=view&id=1339) (last visited May 20, 2008). The ministry includes those departments operating within Brazil and outside of it, such as the Overseas Departments, which consist of the Multilateral and Bilateral Diplomatic Missions and the Career Consular Departments. See *id.*

171. See Free Trade Areas of the Americas, The Preparatory Process, 1994–1998, [http://www.ftaa-alca.org/View\\_e.asp](http://www.ftaa-alca.org/View_e.asp) (last visited May 20, 2008). In 1994, the United States, under President Clinton, advocated the creation and institutionalization of Summits of America, bringing together the heads of state from the region to address a wide array of issues, from democratization and human rights to trade and investment. See David E. Sanger, *Trade Agreements End Long Debate, but Not Conflicts*, N.Y. TIMES, Dec. 4, 1994, at A1. The first Summit of the Americas was held in Miami in December 1994. *Id.* At the summit, the United States promoted the creation of a Free Trade Area of the Americas. Summit of the Americas Info. Network, First Summit of the Americas: Free Trade Area of the Americas, [http://www.summit-americas.org/Miami%20Summit/FTAA-English\(rev\).htm](http://www.summit-americas.org/Miami%20Summit/FTAA-English(rev).htm) (last visited Mar. 12, 2008). In 2002, Brazil became the co-chair with the United States of the FTAA negotiations but negotiations broke down and the last summit was held in 2005. *Id.*

172. Asociación de Latinoamérica de Integración [ALADI], Overview, [www.aladi.org](http://www.aladi.org) (last visited May 23, 2008). ALADI was created in 1980, replacing the Latin American Free Trade Association, which was founded in 1960. *Id.* ALADI aims to foster economic cooperation among its eleven members: Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Mexico, Paraguay, Peru, Uruguay, and Venezuela. *Id.* It is less ambitious than its predecessor which sought to create a common market. *Id.*

Celso Lafer, a former Ambassador at the Brazilian mission in Geneva, became Foreign Minister in 2001, the ministry created six specialized departments to which it allocated increased human and budgetary resources.<sup>173</sup> The ministry has since increased support for trade negotiations, litigation, and what Marc Galanter has called “litigotiation”—strategic litigation in the shadow of negotiation.<sup>174</sup>

Brazil’s role in the WTO also has benefited from the priority that the ministry gives to international economic and trade matters. Brazil’s last three Foreign Ministers served previously as the country’s ambassador to either the GATT or the WTO. Luiz Felipe Lampreia served as Foreign Minister from 1995 to 2001, Celso Lafer from 2001 to 2002, and Celso Amorim from 2002 through today, in each case after previously serving as Brazil’s GATT or WTO ambassador.<sup>175</sup> As a result, Brazil’s Foreign Ministers have had in-depth experience with the WTO’s organizational culture and the substantive issues at stake, and Brazil’s Geneva mission, accordingly, has received strong political and logistical support from the capital.<sup>176</sup> Compared to other developing countries, Brazil has allocated

173. Following the reorganization, the General Under-Secretariat for Matters of Integration, Economics, and Foreign Trade was assigned responsibility for WTO matters, as well as negotiations of an FTAA and trade agreements with the European Union, India, South Africa, and other countries not in Latin America. See Ministério das Relações Exteriores, FTAA—Free Trade Area of the Americas, [http://www.mre.gov.br/index.php?option=com\\_content&task=view&id=1476&Itemid=1348](http://www.mre.gov.br/index.php?option=com_content&task=view&id=1476&Itemid=1348) (last visited May 23, 2008). The Under-Secretariat for Latin America handles Latin American trade matters relating to Mercosur, the Organization of American States (OAS), and ALADI. Ministério das Relações Exteriores, Mercosur—The Common Market of the South, [http://www.mre.gov.br/index.php?option=com\\_content&task=view&id=1474&Itemid=1346](http://www.mre.gov.br/index.php?option=com_content&task=view&id=1474&Itemid=1346) (last visited May 23, 2008). In addition, after Celso Lafer became Brazil’s Foreign Minister, the ministry sent approximately half of the forty Brazilian diplomats that graduated in 2001 to the Brazilian Mission in Geneva for their three-month foreign internship. Telephone Interview by Gregory C. Shaffer with member of Brazilian Mission [name withheld], (Oct. 2006) (on file with authors). However, in 2003, a new person took charge of the Rio Branco Institute, which trains new diplomats, and once more, graduates were sent to other Latin American countries, reflecting more of a South-South orientation in trade policy. *Id.*

174. Marc Galanter, *Contract in Court; or Almost Everything You May or May Not Want to Know About Contract Litigation*, 2001 Wis. L. REV. 577, 579 (2001). As Galanter states regarding U.S. domestic litigation, “[T]he career of most cases does not lead to full-blown trial and adjudication but consists of negotiation and maneuver in the strategic pursuit of settlement through mobilization of the court process.” *Id.*; see also Marc Galanter, *Worlds of Deals: Using Negotiation to Teach About Legal Process*, 34 J. LEGAL EDUC. 268, 268 (1984).

175. Ministério das Relações Exteriores, Galeria de Ministros, [http://www.mre.gov.br/index.php?option=com\\_content&task=view&id=1390](http://www.mre.gov.br/index.php?option=com_content&task=view&id=1390) (last visited May 20, 2008). Moreover, Amorim was also Foreign Minister from 1993 to 1995, preceded by Fernando Henrique Cardoso who served from 1992 to 1993 and became President in 1994, and Celso Lafer who served in 1992. *Id.*

176. In August 2005, the Under-Secretary General for Matters of Integration, Economics and Foreign Trade in Brazil, Clodoaldo Hugueneu Filho, became Brazil’s new ambassador to the WTO, maintaining a high level foreign ministry presence in Geneva to address trade issues. Scott Alwyn, *Anti-WTO Activists Take Fight from Street to Halls of Power Dispatch from WTO Reporting from Hong Kong*, SEATTLE TIMES, Dec. 16, 2005, at A1. He replaced Ambassador Luiz Felipe de Seixas Correa who became Brazil’s Ambassador to Germany. *Id.*

significant resources to WTO-related issues, especially for dispute settlement.

Second, a developing country is likely to face a severe challenge in coordinating its government's approach to WTO dispute settlement. Brazil has attempted to address this issue through an inter-ministerial body, the Chamber of Foreign Trade (CAMEX).<sup>177</sup> In 1995, following the WTO's creation, the Brazilian government created CAMEX to formulate, adopt, coordinate and implement foreign trade policy. Before 1995, no institutionalized forum existed within the Brazilian government where ministries could reach consensus as to Brazil's positions on international trade matters. As one Brazilian official now states, "CAMEX has had a crucial role" in bringing trade issues to the attention of other ministries and clarifying issues for them, which has generated increased "expertise on trade matters within these ministries."<sup>178</sup> CAMEX includes a formalized body that also provides a focal point for the private sector, the Private Sector Consultative Council (CONEX). Although this body generally focuses on broader trade policy issues, it has brought potential trade disputes to the attention of CAMEX and has generally facilitated important input to CAMEX on trade-related issues.<sup>179</sup>

CAMEX is part of the Government Council of the Presidency and consists of six ministers, assisted by a secretariat.<sup>180</sup> Three of the ministries have primary responsibility for implementing Brazil's trade policy under guidelines that CAMEX set. Externally, the Ministry of Foreign Affairs plays the central role, both in trade negotiations and in trade dispute settlement. Internally, the Ministry of Development, Industry, and Foreign

177. Veiga, however, finds that "the problem of institutional coordination remained." Veiga, *Changing Patterns in State-Civil Society Relationship*, *supra* note 59, at 154; *see also Trade Policy Review—Brazil*, *supra* note 45, at 20. Nonetheless, other countries have no such coordinating body. Interview by Gregory C. Shaffer with South American WTO representative [name withheld], in Geneva, Switz. (July 21, 2005).

178. E-mail from Welber Barral, Sec'y, Dep't of Foreign Trade, to Gregory C. Shaffer, Professor of Law, Loyola University Chicago Law School (March 31, 2008) (on file with authors).

179. *Id.*; Telephone Interview by Gregory C. Shaffer with Welber Barral, Sec'y, Dep't of Foreign Trade (Apr. 8, 2008) (on file with authors) [hereinafter Barral Interview]. Trade disputes are primarily of interest to CONEX where they raise broader systemic concerns, such as Brazil's positions on agricultural subsidies (offensively) or industrial policy tools (defensively). *Trade Policy Review—Brazil*, *supra* note 45, at 21. CONEX is "comprised of up to 20 private sector representatives" and can "carry out public reviews and assessments of the Government's trade policy." *Id.*

180. *Trade Policy Review—Brazil*, *supra* note 45, at 20. CAMEX "consists of: the Minister of Development, Industry and Foreign Trade, who presides over it; and the Ministers of the Civil House; Foreign Affairs; Finance; Planning, Budget and Administration; and Agriculture and Supply." *See id.*; *see also* Interview by Gregory C. Shaffer with member of the Dispute Settlement Unit, Brazil Foreign Ministry [name withheld] (Apr. 19, 2004) (on file with authors) [hereinafter Apr. 2004 Dispute Settlement Unit Member Interview]. The Minister of the Civil House (*Ministro Chefe da Casa Civil*) is the President's Chief of Staff and acts as the intermediary between the executive and legislative branches. *Trade Policy Review—Brazil*, *supra* note 45, at 20. CAMEX generally meets every two months. *Id.* Veiga notes the erosion of "the Ministry of Foreign Affairs monopoly in trade negotiations." Veiga, *Changing Patterns in State-Civil Society Relationship*, *supra* note 59, at 176.

Commerce (Ministry of Development) and the Ministry of Finance divide primary responsibility for implementing Brazil's trade policy for import protection and export promotion. The Ministry of Development is responsible for anti-dumping and countervailing duty investigations and general export promotion, while the Ministry of Finance is responsible for customs matters and subsidies through Brazil's export incentives program, PROEX.<sup>181</sup> The Ministry of Agriculture is also an important player in CAMEX because of the export orientation of Brazil's agricultural sector.

In order to engage more effectively regarding Brazil's positions on, and application of, international trade policy, other Brazilian ministries have invested in creating trade policy expertise. In 1998, the government created career tracks for foreign trade analysts (*analistas de comércio exterior*).<sup>182</sup> To obtain such a position, a candidate must have a background in international law, international economics, or international relations. Candidates must pass an extremely competitive exam to enroll in the training program. After training, they work in the ministries associated with CAMEX and in particular, the Department of Foreign Trade (*Secretaria de Comércio Exterior*), which is within the Ministry of Development. In 2008, in order to hire forty new foreign trade analysts, the government approved a new call for applications, for which the government expected around ten thousand applications.<sup>183</sup>

Third, most developing countries lack continuity of specialized personnel for trade dispute settlement. During the Embraer case, Brazil's Ambassador to the WTO, Celso Lafer, realized the need for increased legal and logistical support in Brasília to respond to the legal and technical demands of the rapidly developing WTO judicial system. In 2001, the ministry created a specialized General Dispute Settlement Unit (*Coordenação*

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181. Veiga, *Changing Patterns in State-Civil Society Relationship*, *supra* note 59, at 176. Veiga declares, "[F]ollowing the dismantling of the 'Cacex model' of management, the institutional organization of the State in the trade policy field has been gradually reshaped. Since then, trade policy is dealt with through many ministries—Finance for tariffs and incentives; Development and Industry for public credits, anti-dumping and export promotion; and Foreign Affairs for coordinating trade negotiations." *Id.* The PROEX program was successfully challenged by Canada in the Embraer case, and then modified. See OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2004 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 22 (2004).

182. See Associação dos Analistas de Comércio Exterior, <http://www.aace.org.br/aace.asp> (last visited May 20, 2008). The foreign trade analyst career track was created during the Cardoso administration. Telephone Interview by Gregory C. Shaffer with Brazilian official, Ministry of Dev. [name withheld] (Apr. 8, 2008) [hereinafter Interview with Ministry of Dev. Official]. President Cardoso had earlier been Foreign Affairs Minister and wished to bring the professionalization of Itamaraty's selection process to other ministries. *Id.* In light of the changes in Brazil's policy orientation toward trade in the 1990s, the government created a special career track for foreign trade analysts. *Id.*

183. E-mail from Welber Barral, Sec'y, Dep't of Foreign Trade, to Gregory C. Shaffer, Professor of Law, Loyola University Chicago Law School (Apr. 2, 2008) (on file with authors). Brazilian federal civil servants are relatively well paid, especially for young professionals, which helps explain why there are so many applicants. A starting salary for a member of the federal Brazilian civil service is approximately 8,000 Brazilian reals (around \$5,500 per month). Interview with Ministry of Dev. Official, *supra* note 182.

*Geral de Contenciosos*), consisting of five or six professionals.<sup>184</sup> The Dispute Settlement Unit is responsible for analyzing the legal and factual grounds for a WTO complaint, defining strategies, preparing and overseeing outside lawyers' legal submissions, and representing Brazil in hearings before WTO panels, the Appellate Body, and in any settlement negotiations conducted after legal procedures have begun. The unit also handles disputes arising under Mercosur and oversees the negotiation of new dispute settlement chapters in proposed trade agreements, such as the FTAA and the EU-Mercosur FTA, as well as the amendment of existing dispute settlement chapters, such as the WTO Dispute Settlement Understanding. In this way, the ministry aims to respond more effectively to the growing demands of international trade dispute settlement.

#### B. The Brazilian Process for Bringing a WTO Complaint: An Overview

Implementing a coordinated process for identifying, evaluating, and eventually bringing a WTO complaint is a tremendous challenge for most countries. Brazil has created a process that generally works as follows (although we do not suggest that the Brazilian government is completely organized or coherent in identifying and bringing WTO complaints). To start, Brazilian government ministries provide some interactive databases to help exporters identify trade barriers. For example, INMETRO, the Brazilian agency responsible for addressing technical barriers to trade, makes available an electronic system that lists technical barriers affecting Brazilian exports.<sup>185</sup> Through this system, the private sector and its consultants can interact with government officials. The Ministry of Development has made some effort to expand the database to cover all trade barriers in major markets.<sup>186</sup> The Lula government also has launched a website

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184. Ministério das Relações Exteriores, Sítios na Secretaria de Estado—CGC—Coordenação-Geral de Contenciosos, [http://www.mre.gov.br/index.php?option=com\\_content&task=view&id=437&Itemid=351](http://www.mre.gov.br/index.php?option=com_content&task=view&id=437&Itemid=351) (last visited May 23, 2008). The Dispute Settlement Unit falls within the Under-Secretariat for Matters of Integration, Economics and Foreign Trade in the Ministry of Foreign Affairs. *Id.* It was created pursuant to Decree N. 3.959, October 10, 2001, regulating the ministry's internal organization. *Id.* This Decree and its successor have been replaced following subsequent organizational reforms within the ministry. *Id.* Roberto Carvalho de Azevêdo was the first to head the Dispute Settlement Unit, moving to it from the mission in Geneva and holding this post from 2001 to December 2005. Ministério das Relações Exteriores, Ministro Roberto Carvalho de Azevêdo, [http://www.mre.gov.br/index.php?option=com\\_content&task=view&id=61&Itemid=347](http://www.mre.gov.br/index.php?option=com_content&task=view&id=61&Itemid=347) (last visited May 23, 2008). From 1999 until 2001, he was responsible for Brazil's WTO cases at the Brazilian mission in Geneva, particularly the Embraer case. *Id.* Flavio Marega replaced Mr. Azevêdo. *Id.*

185. See Instituto Nacional de Metrologia, Normalização e Qualidade Industrial [INMETRO], <http://www.inmetro.gov.br/barreirastecnicas/pontofocal/login.asp?url=clientes/index.asp> (last visited May 20, 2008) (access to INMETRO's electronic system).

186. See Secreteria de Comércio Exterior, Barreiras ao Comércio de Bens, <http://www2.desenvolvimento.gov.br/sitio/secex/negInternacionais/barExtInfComerciais/barComBens.php> (last visited May 20, 2008). It has gathered data and prepared reports on non-tariff barriers for Brazil's most important trading partners with the list of barriers divided by category. *See id.* For example, the Ministry of Development worked with the privately funded Fundação Centro de Estudos do Comércio Exterior (Foundation Center for Studies in Foreign Trade) to prepare a general report on foreign trade barriers

designed for exporters, Portal do Exportador, which includes information on foreign regulations and trade practices.<sup>187</sup>

In addition, the Dispute Settlement Unit provides a central contact point for affected businesses, trade associations, and their lawyers regarding foreign trade problems. Private parties may still go to sectoral ministries or departments, such as the Ministry of Agriculture for agricultural issues or the Ministry of Development for issues affecting industry, but these ministries can now work with a specialized unit within the Ministry of Foreign Affairs with WTO legal expertise. Once the Dispute Settlement Unit identifies a potential case, it works with other units within the Ministry of Foreign Affairs and other ministries with specialized knowledge of the substantive issues raised. Together they gather and evaluate data and other factual support in light of the legal issues.

If officials determine that a WTO complaint should be brought, a file is submitted to CAMEX, which decides whether to authorize a request for consultations before the WTO Dispute Settlement Body (the first formal step in a WTO dispute).<sup>188</sup> This decision can generate considerable internal debate.<sup>189</sup> For example, there was considerable disagreement between ministries as to whether Brazil should file the *U.S.-Cotton* and *EC-Sugar* cases before CAMEX finally made affirmative decisions.<sup>190</sup> If Brazil wins a WTO complaint and the other side does not comply with the ruling, then CAMEX decides whether Brazil should seek retaliation in the form of a withdrawal of an equivalent amount of trade concessions. Following both the *Canada-Measures Affecting the Export of Civilian Aircraft* case and the *U.S.-Cotton* case, CAMEX authorized retaliation against Canada and the United States respectively (although no retaliation has yet been implemented). CAMEX likewise decides how Brazil will respond to a WTO complaint against a Brazilian regulatory measure, such as whether the case should be litigated or a settlement sought and if so, on what terms. The only time that CAMEX authorization is not required is when Brazil files a third party submission, in which case the Ministry of Foreign Affairs can proceed on its own initiative.

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to Brazilian exports in 1999. See SECRETARIA DE COMÉRCIO EXTERIOR, MINISTÉRIO DO DESENVOLVIMENTO, INDÚSTRIA E COMÉRCIO EXTERIOR, BARREIRAS EXTERNAS ÀS EXPORTAÇÕES BRASILEIRAS (1999), available at [http://desenvolvimento.gov.br/arquivos/dwnl\\_1196772454.pdf](http://desenvolvimento.gov.br/arquivos/dwnl_1196772454.pdf). There have been other initiatives, but to our knowledge, none have resulted in a comprehensive report since 1999.

187. See Ministério do Desenvolvimento, Indústria e Comércio Exterior, Portal do Exportador, <http://www.portaldoexportador.gov.br> (last visited May 26, 2008).

188. See Davey, *supra* note 16, at 40-42 (describing the Brazilian experience with the dispute settlement system). Within CAMEX, a lower-level body named GESEX first meets to see if there is a consensus among ministries. See Ray Goldberg et al., *Brazil's WTO Cotton Case: Negotiation Through Litigation*, in 2 CASE STUDIES IN US TRADE NEGOTIATION: RESOLVING DISPUTES 235 (Charan Devereaux et al. eds., 2006).

189. Barral interview, *supra* note 179 (noting that vigorous debates occur within CAMEX, whether over an internal anti-dumping decision or launching a WTO complaint).

190. See Goldberg et al., *supra* note 188, at 245 (noting the ministerial differences).

After CAMEX's authorization, the Dispute Settlement Unit takes responsibility for the file. The unit typically works with specialized outside counsel, especially where Brazil is a complainant. This counsel is hired by the private sector or, as in two recent cases, by the ministry. The Dispute Settlement Unit encourages companies to hire counsel and has conditioned pursuit of a WTO complaint on it.<sup>191</sup> Because of their broad experience in WTO litigation, U.S. law firms have been used most frequently. Nevertheless, Brazilian private companies and trade associations have retained some Brazilian law firms. Brazil was the first and, to our present knowledge, remains the only developing country where a domestic law firm has worked with the government in a fully litigated WTO case without further assistance from U.S. or European legal counsel.

The Dispute Settlement Unit shares information and discusses strategies with other ministries concerning Brazil's litigation and settlement positions. For example, the unit worked with the Ministry of Agriculture during the systemically important *EC-Sugar* and the ongoing *U.S.-Cotton* cases.<sup>192</sup> When settling the U.S. challenge to Brazil's patent law (DS199),<sup>193</sup> it discussed the terms with officials from the Ministry of Development, the Ministry of Health, and the intellectual property unit of the Ministry of Foreign Affairs, all of whose policy domains were implicated. The Dispute Settlement Unit, however, is the node within the government for WTO dispute settlement and controls the file, subject to CAMEX's directions.

The Dispute Settlement Unit works closely with personnel affiliated with it who are assigned to the mission in Geneva, consisting of a team of two or three people. They follow and report to the capital on WTO dispute settlement developments, including the bi-monthly meetings of the Dispute Settlement Body, meetings of other WTO bodies in which matters relating to a dispute may be raised (such as the Committee on Agriculture for agricultural disputes), and meetings on the review and proposed amendments to the Dispute Settlement Understanding.<sup>194</sup> The team's point person submits all of Brazil's filings to the WTO Secretariat, whether as a complainant, respondent, or third party. Where Brazil acts as a third party, the point person is typically responsible for drafting the submission, subject to assistance by outside counsel and personnel in Brasília, and for representing Brazil in hearings before the panel and Appellate Body. The team mem-

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191. Apr. 2004 Dispute Settlement Unit Member Interview, *supra* note 180. The official stated that the ministry's budget for investigating cases and hiring outside counsel is limited. *Id.* He pointed out that the European Commission had sent one of its lawyers from Brussels to Brazil to investigate the facts behind the *Brazil-Tyres* case, something that the Brazilian Foreign Affairs Ministry could not afford to do. *Id.* At one stage in the *U.S.-Cotton* case, the cotton producers allegedly were concerned about the cost of the case and asked the government to fund it, but the government refused, stating that it lacked funds. *Id.*

192. See *infra* Part IV.A.

193. See *infra* Part IV.B.

194. The Geneva mission generally has seven people who dedicate at least half of their time to WTO-related work.

bers also work with interns in Brazil's internship program for young attorneys from Brazilian law firms and personnel from other government agencies. The point person can face particularly severe demands because of the number of WTO cases in which Brazil participates.

The members of the Dispute Settlement Unit based in Brasília and Geneva are able to manage and effectively interact with outside legal counsel in WTO cases because of the expertise that they have acquired. They provide outside counsel with needed factual support and general guidance. This role is important because there can be disagreements between the government and the company or trade association that funds the outside lawyers. The government may have frank discussions with the private sector on what Brazil's legal positions will be.<sup>195</sup> The Dispute Settlement Unit is able to play this role more effectively than officials in other developing countries because Brazil's frequent participation in WTO dispute settlement has permitted the unit to develop a reservoir of knowledge about WTO judicial procedures and substantive law.

### C. Private Sector Networks: Developments in Information, Academic, Legal, Business, and Civil Society Networks

Complementing the government's internal reorganization for WTO negotiations and dispute settlement, Brazil has developed what officials within the Ministry of Foreign Affairs call a "third pillar." This "third pillar" consists of the private sector, which broadly includes business, law, academia, and civil society. Since the WTO's creation in 1995, Brazilian private sector initiatives have deepened knowledge about international trade issues among a broader array of individuals and groups, who have formed a Brazilian epistemic network, one that is linked transnationally with individuals and groups abroad. Brazilian media, law firms, academia, trade associations, think tanks, consultancies and non-governmental groups have undertaken important initiatives regarding international trade law and policy, which have complemented and built from each other.

#### 1. *A Diffusion of Knowledge: The Brazilian Media and Information Networks*

Until recent years, most knowledge of international trade law matters in Brazil, from negotiations to dispute settlement, was limited to government representatives. Few law firms or economic consultants dealt with WTO-related issues, and even government ministries seemed largely oblivious to international trade law constraints. For example, Brazil had a growing number of internal anti-dumping or countervailing duty cases in the early 1990s, but they were viewed largely similar to any other domestic legal procedure. A division of the Brazilian Ministry of Development handled the investigations, but it was not concerned with, or even aware of,

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195. Apr. 2004 Dispute Settlement Unit Member Interview, *supra* note 180.

international legal constraints.<sup>196</sup>

The judicialization of international trade relations, and Brazil's active participation in the new WTO system radically changed this situation. Before the Embraer dispute, WTO matters were rarely covered in the Brazilian press. Due to the importance of the Embraer case, two leading newspapers in Brazil decided to base full-time journalists in Geneva to follow WTO issues.<sup>197</sup> Today, major Brazilian newspapers report on international trade matters on a regular basis. Even though many domestic groups criticize Brazil's foreign trade policy, Brazilian commentators take pride in Brazil's success in WTO dispute settlement and in particular, the *EC-Sugar* and *U.S.-Cotton* cases brought against the United States and Europe. By 2006, in the last presidential campaign, "the two main candidates argued tirelessly about which party (the Workers' Party or Social Democratic Party) won more claims at the WTO."<sup>198</sup> The Brazilian media's coverage of these cases has played an important role in increasing broader Brazilian public awareness of WTO rules and their impact on the Brazilian economy and society.

Brazilian journalists sought training on WTO matters in light of the growing public interest in trade disputes. An agribusiness-funded think tank, the Institute of Studies on Trade and International Negotiations (ICONE) and the São Paulo American Chamber of Commerce organized a "trade for journalists course," which trained around fifty journalists in São Paulo and Rio de Janeiro.<sup>199</sup> Journalists also took part in trade courses organized by academic institutions, such as the Getúlio Vargas Foundation Law School (FGV Law School) in São Paulo.

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196. Washington Counsel Interview, *supra* note 95. One observer noted that in the 1992 GATT case against Brazil's countervailing duties on milk powder, the administration applied duties before sending out a required questionnaire to affected industries. *Id.* When the internal ministry was advised to recommence the procedures in line with GATT disciplines, it refused. *Id.* Officials in the Foreign Ministry knew that the case "was a loser" but went ahead so that internal officials could learn how GATT works, with the case viewed as a disciplining device. *Id.* Similarly, interviewees in Brazilian law firms noted that Brazilian judges hearing appeals of anti-dumping decisions lacked knowledge of trade law. Interviews by Gregory C. Shaffer with Brazilian attorneys (Apr. 2004) (on file with authors); Interview by Gregory C. Shaffer with ministry official [name withheld] (Feb. 19, 2008) (on file with authors). Brazil first adopted an anti-dumping law in 1986 and adopted its first anti-dumping measures in 1988. It revised its legislation to implement the Uruguay Round Anti-Dumping Agreement in 1995. See KOMMERSKOLLEGIUM, *THE USE OF ANTI-DUMPING IN BRAZIL, CHINA, INDIA AND SOUTH AFRICA: RULES, TRENDS AND CAUSES* 4 (2005), available at [http://www.tralac.org/pdf/Anti-dumping\\_in\\_4\\_Developing\\_Countries.pdf](http://www.tralac.org/pdf/Anti-dumping_in_4_Developing_Countries.pdf).

197. Interviews by Gregory C. Shaffer with Brazilian Mission official & Geneva-based journalist [names withheld] (Sept. 2006) (on file with authors). The newspapers were *Gazeta* and *O Estado de São Paulo*. *Id.*

198. Barral, *The Brazilian Experience*, *supra* note 69 (citing Carolina Glycerio, *Política Externa Gera Embate Acalorado Entre Lula e Alckmin*, BBCBRASIL.COM, Oct. 9, 2006, [http://www.bbc.co.uk/portuguese/reporterbbc/story/2006/10/061009\\_debatepolitica\\_externacg.shtml](http://www.bbc.co.uk/portuguese/reporterbbc/story/2006/10/061009_debatepolitica_externacg.shtml)).

199. See INSTITUTO DE ESTUDOS DO COMÉRCIO E NEGOCIAÇÕES, *REPORT OF ACTIVITIES: MARCH 2003 THROUGH MARCH 2007*, at 2 (2007), available at <http://www.iconebrasil.org.br/arquivos/projeto/20.pdf>. ICONE is the Brazilian think tank funded by agribusiness. *Id.*

Extensive positive coverage followed Brazil's 2005 victories in the *EC-Sugar* and *U.S.-Cotton*, as well as the *EC-Poultry Customs Classification* and the *EC-Regime for Importation Sale and Distribution of Bananas* arbitration cases.<sup>200</sup> Welber Barral wrote that in August 2004, "the most commented news item in Brasília—and certainly by President Lula's Administration—was the Brazilian victory in two international disputes before the World Trade Organization," the *U.S.-Cotton* and *EC-Sugar* cases.<sup>201</sup> The Brazilian media examined how these cases implicated the negotiations on agriculture in the Doha Round, highlighting their systemic importance, as Brazil pressed for a ban on all agricultural export subsidies and tighter constraints on domestic agricultural subsidies.

The government, private sector, and academia have complemented the media's coverage with specialized newsletters on international trade matters, which are of great importance for developing a national trade law knowledge network. These newsletters cover WTO negotiations and disputes in particular. The Brazilian mission in Geneva publishes the *Carta de Genebra*, which provides an update on WTO developments.<sup>202</sup> Since July 2004, FGV Law School in São Paulo, in partnership with the Geneva-based International Centre on Trade and Sustainable Development (ICTSD), publishes *Pontes-Entre Comércio e Desenvolvimento Sustentável* (Bridges Between Trade and Sustainable Development). This monthly newsletter is a Portuguese version of ICTSD's *Bridges* that includes original reporting and analysis by Brazilian academics, practitioners, and civil society representatives on WTO-related developments.<sup>203</sup> Its articles provide an outlet for their writings and a regular forum in which they can engage with each other's ideas.

## 2. *Investment in Trade Law by Brazilian Law Firms; Catalyzing Knowledge Diffusion Through Internship Programs in the Brazilian Government*

Brazil's largest law firms have invested in developing trade law expertise in the hope of tapping a new market. Although the market remains limited, knowledge of trade law within Brazilian law firms has grown to an extent unknown in other developing countries, as represented by the work

200. See, e.g., *Brasil é o Quarto País que Mais vai à OMC*, FOLHA DE SÃO PAULO, May 18, 2005, at 1; *OMC Anuncia Decisão Inapelável Contra Subsídio Europeu ao Açúcar*, REVISTA EXAME, Apr. 28, 2005, at 1; *OMC Autoriza Brasil e Outros Países a Retaliarem Exportações dos EUA*, REVISTA EXAME, Aug. 31, 2004, at 1.

201. Welber Barral, *Trade Disputes and the Brazilian Character*, BRAZIL NEWS, Oct. 2004, at 1, available at <http://www.brazilinfocenter.org/pdfs/october2004.pdf>. Likewise, the lawyer Ana Caetano remarked in a 2004 interview that no one followed trade issues three years ago but that today papers generally have two or three articles. Interview by Gregory C. Shaffer with Ana Teresa de S. L. Caetano, Attorney, O'Melveny & Meyers LLP, in Washington, D.C. (Apr. 23, 2004) [hereinafter Caetano Interview].

202. An archive of the *Carta de Genebra* is accessible at Ministério das Relações Exteriores, *Carta de Genebra*, [http://www.mre.gov.br/index.php?option=com\\_content&task=view&id=798](http://www.mre.gov.br/index.php?option=com_content&task=view&id=798) (last visited May 20, 2008).

203. The publication *Pontes-Entre Comércio e Desenvolvimento Sustentável* is available at Int'l Ctr. for Trade & Sustainable Dev., *Pontes Entre o Comércio e o Desenvolvimento Sustentável*, <http://www.ictsd.org/monthly/pontes.htm> (last visited Mar. 20, 2008).

of the Brazilian firm Veirano & Advogados in the *EC-Poultry Customs Classification* and *Argentina-Anti-Dumping Duties on Poultry* cases.<sup>204</sup> The Brazilian government has facilitated the building of trade law expertise through a series of internship programs, starting at its mission in Geneva and expanding to its Dispute Settlement Unit in Brasília and its embassy in Washington, D.C., which are, to our knowledge, unique in the realm of trade diplomacy. As one interviewee stated, the internship program can “train Brazilian lawyers to facilitate their contact with WTO rules and procedures so that in the future they can help Brazil’s private sector.”<sup>205</sup>

Brazil’s elite law firms are the largest in Latin America and they have long worked on cross-border matters, specializing in inbound investment and commercial transactions in light of Brazil’s large internal market.<sup>206</sup> Brazil’s elite law firms formed an association in 1983 named the *Centro de Estudos das Sociedades de Advogados* (The Law Firm Study Center) based in São Paulo. In 2002, in the midst of the Embraer case and the year that the *U.S.-Cotton* and *EC-Sugar* cases were initiated, the Law Firm Study Center created a technical group on international trade that brought together twenty-five practitioners from the law firms. This group has since prepared studies on international trade law topics and has coordinated meetings among lawyers and government representatives to discuss trade issues, including the role of the private bar in representing Brazil’s commercial interests in international trade disputes.<sup>207</sup>

The Law Firm Study Center played a central role in the creation of an internship program for private lawyers in Brazil’s mission to the WTO in Geneva. In August 2002, the center organized a conference in Rio de Janeiro on trade law issues, which was the first large-scale event in which Brazilian public officials and private lawyers examined the possible synergies of working together in WTO dispute settlement.<sup>208</sup> Private lawyers complained at the conference that only foreign law firms were being hired to assist the Brazilian government in WTO disputes, as in the Embraer case. Brazilian officials from the Foreign Affairs Ministry responded that the government did not select the private firms, because the private parties who paid the law firm’s fees made that decision. They emphasized that the

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204. *Argentina-Anti-Dumping Duties on Poultry*, WT/DS241; *EC-Poultry Customs Classification*, WT/DS269.

205. Apr. 2004 Dispute Settlement Unit Member Interview, *supra* note 180.

206. See Consultor Jurídico, Ranking da Advocacia: Demarest e Tozzini Lideram Lista na América Latina, <http://conjur.estadao.com.br/static/text/26975,1> (last visited May 23, 2008). The three largest and seven of the ten largest law firms in Latin America are from Brazil. See *id.* The three largest each employed over three hundred lawyers in 2007. See *id.* (noting that Demarest e Almeida, Tozzini Freire Teixeira e Silva, and Pinheiro Neto, the three largest law firms in Latin America, employed 365, 346, and 325 lawyers respectively, and that the fifth and sixth largest law firms, Machado Meyer Sendacz e Opice and Veirano & Advogados, also from Brazil, employed 293 and 223 lawyers respectively).

207. See Centro de Estudos das Sociedades de Advogados, Relatório das Atividades 2004, São Paulo (2004), [http://www.cesa.org.br/com\\_apoio\\_rel.asp](http://www.cesa.org.br/com_apoio_rel.asp).

208. The meeting was organized by the Study Center at the Brazilian Development Bank, Rio de Janeiro, in August 2002. About 200 hundred people attended the event.

government would welcome the development of capacity on WTO law with the Brazilian bar.<sup>209</sup>

The Rio de Janeiro event was followed by others that brought together government trade officials, as well as private Brazilian lawyers and business representatives. In November 2002, the Brazilian Institute of Studies on Competition and Consumer Affairs (IBRAC), “a non-governmental association of about five hundred corporations, law firms, and individuals,” organized its first conference dedicated to international trade issues.<sup>210</sup> IBRAC has since annually organized an international trade conference that brings together lawyers, economists, academics, and Brazilian trade officials, which has attracted increasing private sector interest.<sup>211</sup> In 2003, the institute changed its name to include “International Trade” in its title, reflecting the growing interest in international trade law and policy within Brazil. Its new name is the Brazilian Institute of Studies on Competition, Consumer Affairs and International Trade (*Instituto Brasileiro de Estudos de Concorrência, Consumo e Comércio Internacional*). The Ministry of Foreign Affairs followed the IBRAC event with a meeting it organized in Brasília in March 2003 that once again brought together lawyers, economists, academics, and government trade officials, aiming to catalyze the spread of knowledge and legal capacity about WTO dispute settlement in Brazil.<sup>212</sup>

In relation to these initiatives, in January 2003, the ministry created a four-month internship program for private lawyers within Brazil’s mission in Geneva, which the Law Firm Study Center co-sponsors.<sup>213</sup> The Study Center and IBRAC receive the applications of candidates interested in participating in the program and, together with Ms. Vera Thorstensen at the Geneva mission, they choose young Brazilian professionals to be part of the program, and to the extent possible, candidates who have pursued (or are pursuing) advanced legal studies in WTO law. The interns are privately funded, typically by the Brazilian law firm that employs them from which

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209. Interview by Michelle Ratton Sanchez & Barbara Rosenberg with Brazilian officials and law firm representatives [names withheld] (2005) (on file with authors).

210. IBRAC was founded in 1992. OFFICE OF ECON. COOPERATION & DEV., COMPETITION LAW AND POLICY IN BRAZIL: A PEER REVIEW 131 n.116 (2005); see generally Instituto Brasileiro de Estudos de Concorrência, Consumo e Comércio Internacional (IBRAC), <http://www.ibrac.org.br/> (last visited May 20, 2008).

211. In the first year of the conference, in 2002, there were about forty participants, while in 2005 that number increased to almost ninety, a level that has since been maintained.

212. Interviews by Michelle Ratton Sanchez & Barbara Rosenberg with Brazilian officials and law firm representatives [names withheld], in Brasília & São Paulo, Braz. (Jan.-Sept. 2005) (on file with authors).

213. The program at the Geneva mission was established with the support of the Ambassador in Geneva, Luiz Felipe de Seixas Corrêa, and was coordinated by Ms. Vera Thorstensen. Thorstensen, an economist with a doctorate from Fundação Getúlio Vargas (FGV) who regularly lectures on trade matters (from Sciences Politiques in Paris to conferences in Latin America), has been the contact point at the mission for the traineeship program and played a key role in supporting and coordinating the program. She has worked there since the 1990s to provide the mission with technical support on economic issues. She is known for continuing to push the trainees to conduct research on international trade law issues after they return to Brazil.

they take a leave of absence. As a condition of the internship, the intern and the law firm sign a confidentiality agreement with the government. The Geneva mission's staff organizes a training program for the interns to prepare them for the WTO disputes on which they will work and the meetings that they will attend.<sup>214</sup> During the program's first five years (2003-2007), fifty-three young lawyers from thirty-eight Brazilian law firms had participated in the internship program.<sup>215</sup> Interns come predominantly from Brazil's largest law firms located in São Paulo and in Rio de Janeiro, but a few firms from other parts of the country also have participated.<sup>216</sup> Although the number of new legal interns has decreased as law firms saw a limit to the market for WTO law expertise, a base of knowledge of WTO law and the WTO as an institution has now been formed within the Brazilian bar.

The Foreign Affairs Ministry expanded the internship program in order to spread knowledge of WTO law more broadly within the government and the private sector, enhancing departmental knowledge and interministerial coordination. As such, eighteen interns have been accepted from other government ministries since the program's inception.<sup>217</sup> Although the program initially was conceived to train lawyers, individuals in the private sector with international policy backgrounds expressed interest in participating. Starting in 2005, the program was expanded to include interns from Brazil's largest industry associations, such as FIESP and CNI, who sent five individuals with international trade policy portfolios.<sup>218</sup>

The Geneva program's success spurred the Dispute Settlement Unit within the Foreign Affairs Ministry to create its own internship program in Brasília in 2004.<sup>219</sup> These interns then formed a Brasília-based, public-private trade law study group to continue to assess developments in WTO dispute settlement relevant to Brazil. The Brazilian Embassy in Washington, D.C. created an analogous program in 2003 to develop capacity in international trade matters.<sup>220</sup> The embassy also sponsors the ABCI Insti-

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214. The point person for dispute settlement at the mission has taught courses and organized seminars on WTO issues for the interns to prepare them for WTO meetings and inform them about current trade disputes.

215. VERA THORSTENSEN, *O PROGRAMA DE FORMACAO DA MISSAO DO BRASIL EM GENEBRA* (2008). A number of former interns to the Brazilian mission are contributors to this volume. *Id.*

216. Three interns came from Brasília, and two interns came from each of Recife, Salvador, Curitiba, Florianópolis, and Belo Horizonte. *Id.*

217. They came from the Ministry of Development (including its trade remedies department), the Ministry of Agriculture, the Brazilian Development Bank (BNDES), and the Solicitor General's Office (AGU). *Id.*

218. *See infra* Part III.C.4.

219. Some interns in Geneva also worked as interns in Brasília for an additional four-month period.

220. Statistical evidence reveals that lower-income developing countries fare far worse in U.S. anti-dumping proceedings than do developed country defendants, probably because they have less capacity to defend themselves in the U.S. proceedings and pose less of a threat of a WTO legal challenge. Chad Bown et al., *The Pattern of US Anti-Dumping: The Path from Initial Filing to WTO Dispute*, 2 *WORLD TRADE REV.* 349, 349-71

tute, a program launched in 2004 that brings together academics and practitioners in the U.S. capital to exchange ideas in seminars and symposia “on international trade matters of interest to Brazil.”<sup>221</sup> By the end of 2007, the Brasília program had hosted eight interns and the embassy in Washington, D.C. had hosted twenty.<sup>222</sup>

The WTO has resulted not only in the legalization of international trade relations but also of domestic import protection mechanisms. The Brazilian law firms that have invested in building internal capacity for WTO issues are often those that wish to develop an anti-dumping business within Brazil. Anti-dumping work is a way for lawyers to become known in the business community for trade-related expertise, especially because Brazil’s use of anti-dumping measures has increased following the trade liberalization of the 1990s.<sup>223</sup> The development of Brazilian law firm capacity in trade law can thus be used both to impede and gain access to Brazil’s internal market because lawyers can work both sides of an anti-dumping case.<sup>224</sup> Brazilian law firms asked for an internship program to be created within the Brazilian entity responsible for anti-dumping investigations, a division within the Department of Foreign Trade in the Ministry of Development.<sup>225</sup> The law firms hoped to increase their knowledge in this area, both to develop their domestic practice and potentially to work on these cases if they are brought to the WTO. The government finally created an internship program for undergraduate students, for which it planned to select twenty-eight interns in 2008.<sup>226</sup> Although the anti-dumping work of

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(2003). Bown et al. find that these countries “are more likely to be targeted, less likely to settle cases, more likely to confront high dumping duties and less likely to bring cases to the WTO.” *Id.* at Abstract; see also Busch et al., *supra* note 15 (finding that members with more legal capacity are more likely to challenge anti-dumping suits brought against them at the WTO and less likely to be named in anti-dumping petitions in the first place).

221. See Analistas Brasileiros de Comércio Internacional (ABCI), <http://www.abciinstitute.org/> (last visited Mar. 20, 2008); see also Barral, *The Brazilian Experience*, *supra* note 69, at 16. Mr. Aluisio Campos, a Brazilian diplomat at the Washington, D.C. Embassy who created the internship program, was also responsible for the creation of Analistas Brasileiros de Comércio Internacional.

222. The latest intern left the Dispute Settlement Unit in Brasilia in 2006. Interview by Barbara Rosenberg with official, Dispute Settlement Unit (Mar. 4, 2008) (on file with authors). In contrast, the internship program expanded in Washington, D.C. likely because of the interest of Brazilian graduate law students studying at the law schools at Georgetown University, George Washington University, and American University in developing practical knowledge of U.S. anti-dumping law and extending their stay in Washington.

223. KOMMERSKOLLEGIUM, *supra* note 196, at 25.

224. Caetano Interview, *supra* note 201. Caetano notes that Brazilian law firms do not specialize in work for complainants or respondents in anti-dumping cases, as in the United States, but can be hired to work on either side. *Id.* She also notes how there is much more internal anti-dumping work than on safeguards or countervailing duties in Brazil. *Id.*

225. Interview by Gregory C. Shaffer with Vera Sterman Kanas, Attorney, Tozzini Freire, in São Paulo, Braz. (Apr. 25, 2004) (on file with authors) [hereinafter Kanas Interview].

226. E-mail from Welber Barral, Sec’y, Dep’t of Foreign Trade, to Gregory C. Shaffer, Professor of Law, Loyola University Chicago Law School (Mar. 10, 2008) (on file with

Brazilian law firms has remained relatively limited, there is clearly more work than under the non-legalized mechanisms for import relief of the former CACEX system discussed in Part I.<sup>227</sup>

Some Brazilian attorneys, on their own initiative, have explored the possibility of working with U.S. firms in the United States on trade-related matters, including anti-dumping investigations involving Brazilian products. U.S. law firms can train Brazilian lawyers in these subject area, as well as in U.S. approaches to trade law and litigation generally. Ana Caetano's experience with O'Melveny & Myers is an example. She returned to Brazil and started working on anti-dumping investigations. She became acquainted with representatives of Brazilian companies and trade associations, leading to her WTO work for the poultry trade association (ABEF), the first case involving an Argentine anti-dumping measure.<sup>228</sup>

The internship programs generally have been a success for the Brazilian government and the lawyers involved. Some interns continued to work on WTO cases on a pro bono basis for the government after they returned to Brazil. For example, former Geneva interns helped to research and discuss Brazil's strategy in response to the EU's request for WTO consultations in *Brazil-Measures Affecting Imports of Retreaded Tyres*.<sup>229</sup> Sometimes the former interns even flew back from Brazil to Geneva to observe panel and Appellate Body hearings on matters on which they continued to work.<sup>230</sup> Although Brazilian law firms funded the interns and the interns may not have generated the amount of work that the law firms had hoped, the firms and interns have taken a longer-term view, hoping that the experience will provide them with business in the future. Some Brazilian interns have since been hired by the private sector to provide counsel on WTO disputes, as in the *EC-Banana* arbitration procedure of 2005 and in the *Brazil-Tyres* case.<sup>231</sup> Brazilian law firms, including the former interns

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authors). The government also created a summer internship program for graduate students, granting internships to three individuals in 2007. *Id.*

227. *Id.*; Interview by Gregory C. Shaffer with Adriana Dantas, Attorney, Trench, Rossi e Watanabe Advogados (Associate of Baker & McKenzie), in São Paulo, Braz. (Apr. 15, 2004) [hereinafter Dantas Interview] (on file with authors); Interview by Gregory C. Shaffer with Jose Diaz, former Intern, Demarest & Almeida, in São Paulo, Braz. (Apr. 22, 2004) [hereinafter Diaz Interview] (on file with authors). Dantas "has represented clients in a number of trade remedies investigations before the Brazilian Trade Remedies Department, as well as investigations opened against Brazilian exporters abroad, particularly India, European Union and Russia." Georgetown Inst. of Int'l Econ. Law, 2007-2008 IHELL Fellows, <http://www.law.georgetown.edu/iell/fellows/currentfellows.html> (last visited May 20, 2008). Former intern Jose Diaz of Demarest & Almeida in São Paulo noted that after returning from his internship, he was working on an anti-dumping case and hoped to have another one shortly. Diaz Interview, *supra*.

228. *See infra* Part IV.A.

229. Interview by Gregory C. Shaffer with diplomat, Dispute Settlement Unit, Brazil Foreign Ministry [name withheld], in São Paulo, Braz. (Feb. 2006) (on file with authors).

230. Kanas Interview, *supra* note 225 (noting that she returned for the second hearing of the *EC-Sugar* case, providing free services for the government, and that a former intern at Pinheiro Neto was also flying back for the *EC-Sugar* hearing).

231. In the *EC-Bananas* arbitration case, the law firm of Machado, Meyer, Sendacz e Opice, worked for the Brazilian banana sector. One of the lawyers on the case, Andre

at the Geneva mission, have provided counsel on many WTO-related issues, not only in relation to litigated WTO disputes, but also as regards the Doha Round negotiations, foreign market access issues that WTO law implicated, and internal anti-dumping cases in Brazil.<sup>232</sup> The interns have seen how the WTO operates, and they now are part of an international trade law network that can provide them with long-term career benefits.<sup>233</sup>

In sum, Brazilian public officials and private lawyers have overlapping, albeit not identical, interests in WTO dispute settlement. The government can benefit from the diffusion of WTO legal expertise in Brazil, as qualified Brazilian lawyers are now locally available. Through the internship program in Geneva, Brazilian practitioners have learned about WTO law and dispute settlement in order to better market themselves to companies, trade associations, and the government to act as consultants, whether for the identification and analysis of potential claims, the litigation of actual claims, or settlement negotiations. For Brazil, even if these lawyers do not work on actual WTO cases, they retain knowledge about the system which can be of use. They also can advise clients when they have a potential WTO case and bring the case to the government's attention.<sup>234</sup> Moreover, because most trade disputes are settled, other WTO members' perception of greater Brazilian capacity in WTO law can be helpful in settlement negotiations conducted in the shadow of a potential WTO proceeding.

### 3. *Developments in Legal Education and the Creation of Trade Law Study Networks*

The increased interest in international trade law and policy has generated a competition for expertise, which is reflected in increased offerings of international trade law courses in universities, the formation of trade policy institutes, and the creation of trade law study networks in which

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Areno, was a former intern at the Geneva mission. Another of the lawyers, Pablo Bentes, was an intern in the Brazilian Embassy in Washington, D.C. and in 2006, joined the Legal Division of the WTO Secretariat. In the *EC-Tyres* case, a former intern at the Geneva mission worked for the retreaded tire industry opposed to the Brazilian ban.

232. Interview by Gregory C. Shaffer with Carolina Saldanha, Attorney, Felsberg, Pedretti, Mannrich e Aidar Advogados, in São Paulo, Braz. (Apr. 23, 2004) (on file with authors) (concerning work for the Brazilian shrimp industry regarding U.S. anti-dumping duties on shrimp imports in which Brazil was a third party in complaints that Ecuador and Thailand brought); see also Caetano Interview, *supra* note 201 (regarding advice to clients on Doha Round negotiating positions and e-mails from U.S. law firms regarding potential partnerships in challenging import relief decisions); Dantas Interview, *supra* note 227; Diaz Interview, *supra* note 227 (noting research for one of Brazil's largest exporters of cashews on market access issues).

233. One could view the interns as also investing in the professional status gained from selection in the Geneva internship program, which they can add to their internationalist portfolios. They are now part of an elite network of participants in the Geneva internship. On investing in the "international" as a means to build domestic social capital, see DEZALAY & GARTH, *supra* note 9.

234. A member of the Dispute Settlement Unit confirms that the Brazilian private sector is now "engaged in bringing its proposals." Interview by Gregory C. Shaffer with member of Dispute Settlement Unit, Brazil Foreign Ministry [name withheld], in São Paulo, Braz. (June 22, 2006) (on file with authors). He states that the private sector "identifies claims and brings memos, including from law offices in Brazil." *Id.*

academics engage with Brazilian trade officials, private lawyers (in particular those returned from the internship programs), and specialists that trade associations hired. Together, they form part of a Brazilian epistemic trade law community.

Brazilian university departments and course offerings have changed significantly in the last decade in response to the phenomenon of globalization, the opening of the Brazilian economy, and the increased focus of Brazilian policy on trade-related matters. Specialized “international relations” schools were not created until the late 1990s,<sup>235</sup> and Brazilian universities offered few international trade courses and typically no courses on international trade law. Until the mid-1990s, Brazilian law schools were not required to offer an international law course. When law schools offered courses in public and private international law, they were general introductory courses that covered little to no trade law. The situation reflected a lack of public interest in the GATT/WTO system and career opportunities for graduates. Businesses, law firms, and the Brazilian government had little interest in hiring graduates specialized in this area so there was no demand for schools to introduce classes. A few private practitioners handled occasional customs matters and starting in the 1990s, anti-dumping matters, but they did little else involving trade law. As a result, knowledge of WTO matters was limited to a few officials in the Ministry of Foreign Affairs.

The situation has changed dramatically since 2000. As interest in the impact of WTO rules on Brazil grew, spurred by the *Embraer*, *U.S.-Cotton* and *EC-Sugar* cases, together with the intensification of the Doha Round negotiations, the demand for courses in international trade law did as well. The law school of the University of São Paulo, Brazil’s flagship institution for higher education, offered three optional, upper-level trade-related law courses in 2000 for its five-year undergraduate program.<sup>236</sup> By 2005, the law school had doubled its offerings and made one of them mandatory, providing six trade-related undergraduate courses, two of them focusing on the WTO.<sup>237</sup> In addition, students increasingly pursued masters and doctorate theses focused on trade-related issues, and these graduate students joined trade law study groups coordinated with representatives from the government and the private sector.

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235. Shiguenoli Miyamoto, *O Estudo das Relações Internacionais no Brasil: o Estado da Arte*, 12 *REVISTA DE SOCIOLOGIA E POLÍTICA* 83, 83–98 (1999). The University of Brasília offered the first course on international relations in Brazil in 1974, and it established a masters program in international relations ten years later. Other Brazilian institutions offered courses in international relations for the first time in the 1990s, and they were mainly located in the South and Southeast regions.

236. Students take upper-level courses during the last two years of Brazil’s five-year undergraduate program. For more information on the University of São Paulo’s Law School, see Faculdade de Direito, Universidade de São Paulo, <http://www.direito.usp.br> (last visited May 20, 2008).

237. The list of courses at the University of São Paulo Law School can be viewed on its website, <http://www.direito.usp.br/> (follow “Departamentos,” “Internacional,” “Disciplinas” links).

In 2002, the Fundação Getulio Vargas (FGV) in São Paulo founded a new private law school called FGV Law School (*Direito GV*) whose aim was to respond to changes “in the international commerce and investment circuit,” which “has led to the redefinition of the contents of the classic fields of law, and to the conception of new fields and new types of law.”<sup>238</sup> The law school launched a post-graduate WTO course in 2003 which, for the first time, brought together trade law professors and practitioners in the public and private sectors as teachers, many of whom had been instrumental in other Brazilian initiatives to build WTO-related capacity. They included Celso Lafer, former Foreign Minister under whose auspices the Dispute Settlement Unit was created; Roberto Carvalho de Azevêdo, the first head of the Dispute Settlement Unit who had litigated the Embraer case while at the Geneva mission; José Roberto Mendonça de Barros, economist and former Secretary General of CAMEX; Marcos Jank, agricultural economist and President of ICONE; Christian Lohbauer, former head of the department of foreign affairs at the Industry Federation of the State of São Paulo, FIESP, and current President of ABEP; and private lawyers, some of them former interns. A team of four young law professors who had just returned from studying in the United States and Geneva coordinated the course, focusing on WTO law and jurisprudence of specific relevance for Brazil and its economic sectors.<sup>239</sup> The team of instructors collectively covered the core aspects of the WTO, including the GATT, the Agreement on Agriculture, the DSU, the General Agreement on Trade and Services (GATS), and the TRIPs Agreement.

The FGV Law School initiated complementary projects in São Paulo to further understanding of WTO law and dispute settlement. In 2003, FGV professors coordinated a collaborative research project on textile trade chosen because the sector was to be integrated into the GATT following the termination of the Agreement on Textiles and Clothing on January 1, 2005. The GATT’s inclusion of textile trade could affect Brazilian producers because of increased competition from Asia, in particular from China, in key export markets, such as the United States. FGV professors helped coordinate the project to examine these concerns and the research group discussed the results with the Brazilian Textile Association (*Associação Brasileira da Indústria Têxtil e de Confecção*).<sup>240</sup> In July 2004, the law school also helped UNCTAD organize a workshop at FGV on WTO dispute

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238. See Fundação Getulio Vargas (FGV) *Direito GV* (Escola de Direito de São Paulo), Mission, <http://www.direitogv.com.br/english> (follow “Mission” link) (last visited May 20, 2008) (providing the FGV Law School statement).

239. Michelle Rattón Sanchez and Barbara Rosenberg were two of the four professors. The other two were Rabih Ali Nasser and Maria Carolina Mendonça de Barros. Mendonça de Barros had been an intern at the Geneva mission.

240. See Guido Soares Silva, *The Impact of the WTO Agreement on Textiles & Clothing on Brazilian Exports of Textiles and Clothing to the United States*, *CADERNOS DIREITO GV*, Apr. 2005, at 1, available at [http://www.direitogv.com.br/AppData/Publication/Impact\\_20of\\_20the\\_20WTO\\_20Agreement\\_20on\\_20Textiles.pdf](http://www.direitogv.com.br/AppData/Publication/Impact_20of_20the_20WTO_20Agreement_20on_20Textiles.pdf). Rattón Sanchez was one of the co-authors.

settlement with a focus on trade remedy laws.<sup>241</sup>

Other universities in a number of different Brazilian cities also began integrating trade-related courses into their curricula, including specific courses on the WTO, trade and development, and international economic relations.<sup>242</sup> They organized conferences and public seminars on international trade law as well. The primary locations of these seminars and conferences were São Paulo, Rio de Janeiro, Brasília, and the major cities of southern Brazil. Universidade Federal de Santa Catarina in Florianópolis, for example, began an annual conference on Current Issues in International Trade (*Temas de Comércio Internacional em Debate*) in 2004 in a partnership with the Universidad de Buenos Aires in Argentina.<sup>243</sup>

Professors also created research institutes and centers for international trade law and policy, such as the Institute on International Trade Law and Development (*Instituto de Direito do Comércio Internacional e Desenvolvimento*, IDCID) and the Center for the Study of International Negotiations (*Centro de Estudos das Negociações Internacionais*, CAENI) at the University of São Paulo. In 2003, professors and researchers at the law school created the IDCID, aiming to build capacity to address trade law issues from a development perspective. It has produced research papers and organized conferences on trade dispute settlement, intellectual property, and trade in services, focusing particularly on WTO law. In 2005, working with the Brazilian member of the WTO Appellate Body, Luiz Olavo Baptista, the institute hosted one of five official Appellate Body conferences commemorating the Appellate Body's tenth anniversary.<sup>244</sup> CAENI is a multidisciplinary research centre that is linked to the university's political science department and which aims to bring researchers together with gov-

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241. See Press Release, U.N. Conf. on Trade & Dev., Workshop on WTO Dispute Settlement: Commercial Defense Measures (June 21-23, 2004), available at <http://r0.unctad.org/disputesettlement/pdfs/saopaulo0604.pdf>. The Brazilian Institute of Studies on Competition, Consumer Affairs and International Trade (IBRAC) was also a co-sponsor of the workshop. *Id.* The United Nations Conference on Trade and Development (UNCTAD) likely came to FGV Law School because of the school's reputation for launching its own WTO dispute settlement course. UNCTAD has developed a general course for developing countries on WTO dispute settlement and it looks for local partners to help conduct workshops. For a description of UNCTAD's mission and goals, see U.N. Conf. on Trade & Dev., Mission Statement on the Project of Dispute Settlement, <http://r0.unctad.org/disputesettlement/mission.htm> (last visited May 23, 2008).

242. These universities included: Universidade Estadual de São Paulo, Universidade de Brasília, Universidade de Campinas, Universidade Federal de Santa Catarina in Florianópolis, Universidade Federal do Rio Grande do Sul, and Universidade Federal de Santa Maria. These universities are based in southern Brazil, the country's most developed economic region. The University of Brasília created a "Trade Negotiations Course" to which it invited experts from São Paulo as lecturers. The University of Campinas and other universities in the federal state of São Paulo followed suit. Campinas is located eighty miles northwest of São Paulo.

243. E-mail from Welber Barral, Sec'y, Dep't of Foreign Trade, to Gregory C. Shaffer, Professor of Law, Loyola University Chicago Law School (Mar. 6, 2008) (on file with authors). Barral founded the program before he became head of the Foreign Trade Department of the Ministry of Development. *Id.*

244. To view IDCID's webpage, see Instituto de Direito do Comércio Internacional e Desenvolvimento, <http://www.idcid.org.br/> (last visited May 20, 2008).

ernment and private sector representatives to advance study and assess developments in international negotiations.<sup>245</sup> An important part of CAENI's research focuses on South-South cooperation strategies. The center is funded in part by the government's Institute of Applied Economic Research and the Inter-American Development Bank's Institute for the Integration of Latin America and the Caribbean (INTAL), with the Ford Foundation sponsoring specific projects.<sup>246</sup>

In 2003, academics and professionals created a research group specifically to assess developments in international trade negotiations, the *Grupo de Negociações Comerciais* (Trade Negotiations Group). Vera Thorstensen from the Brazilian mission in Geneva helped to coordinate the group with Marcos Jank from the agribusiness-funded think tank ICONE. The team was composed of economic consultants, academics, trade specialists from business associations, and legal practitioners, again including former interns at Brazil's WTO mission in Geneva. The group analyzed specific trade issues under negotiation in the Doha Round, including in agriculture, services, anti-dumping, subsidy and safeguard rules, intellectual property, trade and the environment, trade and competition policy, and the ongoing review of the WTO Dispute Settlement Understanding. The group met once a month in 2003 and produced a book consisting of thirteen studies in 2005.<sup>247</sup>

In 2004, some FGV professors worked with two Brazilians from the Geneva mission, Vera Thorstensen and Victor do Prado, to help create a separate study group in São Paulo on WTO dispute settlement named the *Núcleo de Estudos sobre Solução de Controvérsias* (Dispute Settlement Study Group).<sup>248</sup> The study group aimed to deepen, spread and deploy the knowledge that the interns developed from their stay in Geneva after they returned to Brazil, where they rejoined their law practice and worked to complete their dissertations. A central task of the São Paulo study group was to prepare teaching materials on WTO dispute settlement that could be used in trade courses throughout the country. Former interns at the

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245. CAENI works with *Núcleo de Pesquisas em Relações Internacionais*, a multi-disciplinary research centre which has been at the University of São Paulo since 1989 that addresses a broad range of international issues from security to political economy. For information on CAENI, see Centro de Estudos das Negociações Internacionais, <http://www.caeni.com.br> (last visited May 20, 2008). For information on NUPRI, see Núcleo de Pesquisa em Relações Internacionais, Universidade de São Paulo, UPRI, <http://www.usp.br/cartainternacional/modx/> (last visited May 20, 2008).

246. See Inst. for the Integration of Latin America & the Caribbean (INTAL), Inter-American Development Bank, <http://www.iadb.org/intal/index.asp?idioma=eng> (last visited May 20, 2008).

247. VERA THORSTENSEN & MARCOS JANK, *O BRASIL E OS GRANDES TEMAS DE COMÉRCIO INTERNACIONAL* (2005).

248. Victor do Prado is a member of the WTO Secretariat who previously worked in the Brazilian Foreign Ministry where he was responsible for some dispute settlement cases. At the WTO, do Prado was part of the Secretariat's Rules Division until he became Deputy Chief of Cabinet of the Director General Pascal Lamy in 2005. See World Trade Inst., Biography of Victor do Prado, [http://www.wti.org/index.php?option=com\\_content&task=view&id=741&Itemid=390&PHPSESSID=ca338fa0e47900c464b1128df27b0c78](http://www.wti.org/index.php?option=com_content&task=view&id=741&Itemid=390&PHPSESSID=ca338fa0e47900c464b1128df27b0c78) (last visited May 20, 2008).

Geneva mission organized parallel initiatives in Rio de Janeiro, Brasília, and Belo Horizonte. Government officials were an integral part of the groups in Rio de Janeiro and Brasília since Brasília is the capital and Rio hosts a number of trade-related government agencies.<sup>249</sup> The government officials in Brasília, in particular, suggested topics for research that could help Brazil in current and potential WTO cases.

These developments evidence a boom of academic-related activities in Brazil from 2002-2004 concerning international trade law, spurred by the high profile WTO dispute settlement cases involving Brazil and the launching of the Doha Round of negotiations. Trade-related courses grew with perceptions of the implications of the WTO for Brazil and demands for professional specialization. Academic and policy-oriented trade law study groups, seminars, and colloquia proliferated. Since 2005, the study groups have become less active and the development of international trade law courses targeted at post-graduate professionals has been suspended. This turn likely reflects the reduced ambitions of the Doha Round and the FTAA where negotiations reached a standstill in 2004, the relative decline in Brazil's dispute settlement activity, the fact that the Brazilian market can only sustain so many trade specialists, and the Brazilian private sector and government's predominant use of non-Brazilian law firms for WTO dispute settlement.<sup>250</sup>

Although the market in Brazil for WTO-related knowledge has its limits, it has developed significantly over the last six years so that expertise on trade law, policy, and dispute settlement is no longer limited to the diplomatic realm.<sup>251</sup> New course offerings and advanced degree programs have generated knowledge of international trade law and the international trading system that can be used by the public and private sectors. Brazilian academics continue to play an important role for the country in following trade agendas, mobilizing responses to developments in trade fora, and

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249. The study group in Brasília included officials from the Dispute Settlement Unit of the Ministry of Foreign Affairs, the Secretariat of Foreign Trade from the Ministry of Development, the Secretariat for International Matters from the Ministry of Agriculture, and the Secretariat of Economic Law from the Ministry of Justice, in addition to lawyers and academics. The Brazilian diplomat Haroldo de Macedo Ribeiro, a member of the Dispute Settlement Unit, played an important role in these meetings. The group in Rio de Janeiro brought together interns, academics, trade specialists from industry (mainly from the Confederação Nacional da Indústria (CNI)), economic consultants, and officials from government agencies, such as the Brazilian Development Bank, the Institute of Applied Economic Research (IPEA), and INMETRO. INMETRO is the National Institute of Metrology, Standardization and Industrial Quality (Instituto Nacional de Metrologia, Normalização e Qualidade Industrial) and is within the Ministry of Development. IPEA is the Instituto de Pesquisa Econômica Aplicada and is part of the Ministry of Planning.

250. It appears that the awarding of the bid to an international law firm in 2005 decreased the incentives for private practitioners to provide their services to the government on a pro bono basis in connection with the study groups on dispute settlement and negotiations. As for specialized courses designed for professionals, they charge higher fees and the market has not supported them.

251. Dezalay and Garth found that economics became the leading expertise in South American states in the 1990s, replacing law to some extent, but they also noted the rise of business law. DEZALAY & GARTH, *supra* note 9, at 30, 47-51. We likewise find a rise of interest in business law but for the first time, in terms of international trade law.

offering a contact point for professionals for the organization of courses, meetings, and conferences. Today, universities in Brazil's most important cities commonly accept that a graduating law student should have at least a basic knowledge of public international law, including WTO law. While there was almost no academic debate on international trade law in Brazil in the 1990s, there is considerable debate today.

#### 4. *Initiatives of Business Trade Associations, Think Tanks, Consultancies, and Civil Society Organizations Regarding Brazilian Trade Policy*

Changes in Brazilian economic policies during the 1990s, the launching of the Doha Round, and high profile WTO trade disputes mobilized Brazilian business trade associations and civil society organizations, creating new opportunities for those investing in trade-related expertise. Brazil's major business associations reorganized to respond to the challenges posed by the opening of Brazil's internal market and the new opportunities offered in foreign markets, now backed by a judicialized international trading regime. Brazilian business associations began to coordinate to enhance their ability to provide input to the government on trade matters. They wished, in particular, to engage more effectively with government officials over Brazil's negotiating positions in the WTO, the proposed Free Trade Area of the Americas, and the EU-Mercosur Free Trade Agreement, hoping to influence the government's offers to reduce Brazilian trade barriers in exchange for the opening of foreign market opportunities. Industrial and agricultural trade associations held different views, with industry being much more protectionist, but they worked to strengthen their alliances in order to coordinate their demands. Brazilian businesses' new orientation diverged dramatically from its approach during the years of import substitution industrialization under the CACEX system, in which Brazilian business organized sectorally to obtain ad hoc government support and protection.

The Summit of the Americas in Belo Horizonte, Brazil in 1997 was a turning point for Brazilian business. The summit of governmental leaders included a parallel meeting of an FTAA "Business Forum," which brought together heads of state with business leaders who put forth the proposals of the business sector.<sup>252</sup> The FTAA meetings helped to trigger the creation of an official partnership between Brazil's industrial and agricultural sectors under a new all-encompassing Brazilian Business Coalition (*Coal-*

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252. The Belo Horizonte Summit was the third trade ministerial meeting that the Summit of the Americas process launched in Miami in 1994. Paragraph 14 of the Joint Declaration of the meeting provides, "We received with interest the contributions for the Third Business Forum of the Americas relating to the preparatory process for the FTAA negotiations, which we consider may be relevant to our future deliberations. We acknowledge and appreciate the importance of the private sector's role and its participation in the FTAA process." See *Summit of the Americas: Third Trade Ministerial Meeting - Joint Declaration ¶ 14* (May 16, 1997), available at [http://www.ftaa-alca.org/ministerials/Belo/Belo\\_e.asp](http://www.ftaa-alca.org/ministerials/Belo/Belo_e.asp); see also HIRST, *supra* note 58, at 35 (noting that "the demands of Brazilian business sectors and labor organizations became part of the FTAA negotiating process").

ção *Empresarial Brasileira*). The Coalition was an “institutional novelty not only because it puts together . . . different sectors,” breaking with Brazil’s sectoral traditions for interest articulation, but also because it “focused on one issue: trade negotiations.”<sup>253</sup> The Coalition brought together 166 Brazilian business associations and enterprises under a single umbrella, including the Brazilian National Confederation of Industries (*Confederação Nacional da Indústria*), the Brazilian National Confederation of Agriculture (*Confederação Nacional da Agricultura*), the Brazilian National Confederation of Commerce (*Confederação Nacional do Comércio*), federations of industries of different Brazilian states such as the State of São Paulo Industry Federation (*Federação das Indústrias do Estado de São Paulo*), unions of employers such as *Força Sindical*, and sector-specific associations.<sup>254</sup> The Confederation of Industries (CNI) assumed the leadership within the Coalition.<sup>255</sup>

Created at a time when the industrial sector was wary of the FTAA negotiations and agribusiness wished to push for greater market access abroad, the Coalition aimed to coordinate common positions regarding trade negotiating positions and to establish communication channels with the Brazilian government to advance these views. Toward that purpose, it first had to promote the exchange of information and views among businesses and trade associations on trade matters, including through organizing formal and informal meetings among sectoral associations and federations.<sup>256</sup> It organized working groups on trade topics and prepared position papers regarding negotiations, aiming to build private sector capacity on trade issues. It then attempted to follow trade negotiations “by means of the ‘room next door,’ where interlocution with government agents is processed before and after the negotiations.”<sup>257</sup> As Veiga and Ventura-Diaz write,

The establishment of the Brazilian Coalition was a landmark for two reasons: first, because business associations accepted that access to important markets (investment, services and government procurement) could result from exchanging concessions among partners. Second, because the Coalition was an autonomous expression of the business community with respect to the Brazilian government. Therefore it helped to determine a trade agenda

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253. Veiga, *Changing Patterns in State-Civil Society Relationship*, *supra* note 59, at 158.

254. See *Confederação Nacional da Indústria, A Alca na visão da Coalizão Empresarial Brasileira* (Aug. 2003), [http://www.fiec.org.br/palestras/negocios\\_internacionais/alca190803/alcaCNI\\_arquivos/frame.htm](http://www.fiec.org.br/palestras/negocios_internacionais/alca190803/alcaCNI_arquivos/frame.htm).

255. *Id.*

256. Veiga notes the tensions between the export-oriented agribusiness sectors and the import-competing industrial sectors. Veiga, *Changing Patterns in State-Civil Society Relationship*, *supra* note 59, at 160–61. He also declares that small-scale farmers took a defensive position, as did Brazil’s Landless Worker’s Movement (*Movimento dos Trabalhadores Rurais Sem Terra*), whose positions are better represented in the Brazilian Ministry of Agrarian Development than in the Ministry of Agriculture, which is closer to agribusiness. *Id.* at 171 (explaining small-scale farmers’ positions).

257. *Id.* at 159.

based on a different rationale.<sup>258</sup>

Since the late 1990s, Brazil's largest industry and agricultural trade associations and companies have created new international trade departments and personnel positions. The two largest industry associations in the country, the Confederation of Industries and the State of São Paulo Industry Federation (FIESP), have had departments on foreign trade policy since the 1950s, but in the 1990s, they dealt primarily with tariff and other customs matters, including internal anti-dumping matters. By the end of the 1990s, the associations developed specialized branches that took a more proactive approach to foreign trade issues, focused in particular on trade negotiations. The State of São Paulo Industry Federation, whose members represent around 80% of the country's industrial capacity, established a department on international trade relations (*Departamento de Relações Internacionais e Comércio Exterior*),<sup>259</sup> while the Confederation of Industries, the association that represents industries at the national level, created a Unit for International Negotiations (*Unidade de Negociações Comerciais*). These departments hired professionals with international policy backgrounds, primarily economists and those with a degree in international relations, as well as some lawyers. Major companies in Brazil, such as Companhia Vale do Rio Doce (CVRD)<sup>260</sup> and Embraer, likewise created specialized international trade departments, hiring top trade specialists in a new competition for expertise. By the time of the 2003 FTAA negotiations in Miami, Brazilian business associations came with specific proposals that they distributed. Other Latin American business associations noted their organization and preparation as "extraordinary."<sup>261</sup>

Many trade associations and companies hired former government officials for their knowledge and access to government trade policy networks.<sup>262</sup> For example, in 2005, Mario Marconini, who worked at the

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258. See Pedro da Motta Veiga & Vivianne Ventura-Diaz, *Brazil: The Fine-Tuning of Trade Liberalization*, in *TRADE POLICY REFORMS IN LATIN AMERICA: MULTILATERAL RULES AND DOMESTIC INSTITUTIONS* 98 (Miguel Lengyel & Vivianne Ventura-Diaz eds., 2004).

259. Interview by Gregory C. Shaffer with Christian Lohbauer, former Director, Int'l Relations Dep't, State of São Paulo Indus. Fed'n, in São Paulo, Braz. (Apr. 23, 2004) (on file with authors) [hereinafter Lohbauer Interview]. Lohbauer noted that until around 2002, the State of São Paulo Industry Federation (FIESP) was purely defensive. *Id.* The aim of creating the department was to permit industry to play a more proactive role in trade negotiations. *Id.* Before 2002, he said that "there was no systematic following of negotiations" within FIESP. *Id.*

260. Companhia Vale do Rio Doce is the second largest mining company in the world and the world's largest exporter of iron ore. *Nerves of Steel in Brazil*, *ECONOMIST*, May 10, 1997, at 64. It was privatized in 1997. *Id.*

261. Lohbauer Interview, *supra* note 259.

262. These practices parallel what one sees in the United States. See SHAFER, *DEFENDING INTERESTS*, *supra* note 4, at 122-34 (concerning U.S. revolving door bureaucratic culture for trade policy). At the highest level in Brazil, for example, during the first administration of President Lula, the Minister of Development was Luiz Fernando Furlan, who had been President of Brazil's biggest meat exporter (Sadia S.A.), and the Minister of Agriculture was Roberto Rodrigues, who had been President of the Brazilian Association of Agribusiness. Furlan is currently the President of the Board of the Sustainable Amazon Foundation (Fundação Amazonas Sustentável). See Fundação Amazo-

GATT and the WTO from 1988 to 1996 and served as International Trade Secretary in the Ministry of Development and Deputy Secretary for International Affairs in the Ministry of Finance in the late 1990s, became a consultant for the State of São Paulo Industry Federation (FIESP). In 2006, he joined the Washington, D.C.-based consulting firm Manatt Jones Global Strategies to lead its new São Paulo office.<sup>263</sup> Marconini is one of the few Brazilians who worked in both the GATT and WTO secretariats.

Agribusiness associations have been particularly active in engaging former government officials in light of agribusinesses' increasing export orientation. The São Paulo Agribusiness Union on Sugar Cane (UNICA) hired Elisabeth Serodio, who alternated between UNICA and appointments in agriculture-related government agencies. Serodio had served as the manager of a government export program for sugar and alcohol in 2000 within the Ministry of Development.<sup>264</sup> She joined UNICA as a consultant in 2003, returned to the government in 2005 as the Secretary for International Relations in the Ministry of Agriculture and then rejoined UNICA in 2006. Former Deputy Minister in the Ministry of Agriculture Pedro de Camargo Neto became a consultant for agricultural trade associations and helped to promote and coordinate Brazil's successful WTO complaints in the *U.S.-Cotton* and *EC-Sugar* cases, working with Serodio and UNICA in the *EC-Sugar* case and the cotton trade association (ABRAPA) in the *U.S.-Cotton* case.<sup>265</sup> These individuals' prior experience in government helped them to coordinate the Brazilian public-private partnerships for these WTO cases. Complementing these initiatives, the State of São Paulo Industry Federation organized a business training program for new Brazilian diplomats so that they would "be trained in the commercial area before starting to work at Brazilian embassies" and, thus, better promote Brazilian trade abroad.<sup>266</sup>

Paralleling these developments, entrepreneurs created think tanks and consultancies to inform, advise, and assist the government and private sector on international trade issues. These entities, organized on a profit or non-profit basis, generally maintain their offices in São Paulo or Rio de Janeiro, the economic centers of Brazil. They aim to assist the Brazilian

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nas Sustentável, [http://www.fas-amazonas.org/pagina\\_interna.php?cod=4](http://www.fas-amazonas.org/pagina_interna.php?cod=4) (last visited May 20, 2008). Rodrigues currently coordinates the Agribusiness Center at FGV, is the President of the Superior Board of Agribusiness at FIESP, and together with the Interamerican Bank of Development and the State of Florida, has launched the Interamerican Commission on Ethanol. See Fundação Getulio Vargas, Centro de Estudos, <http://www.eesp.fgv.br/gvagro> (last visited May 26, 2008).

263. See Manatt Jones Global Strategists, Biography of Mario Marconini, [http://www.manattjones.com/bios/marconini\\_mario.htm](http://www.manattjones.com/bios/marconini_mario.htm) (last visited May 26, 2008); Press Release, Manatt Jones Global Strategists, Mario Marconini to Lead New Sao Paolo Office (June 8, 2006), <http://www.manattjones.com/press/pr20060607e.htm>.

264. E-mail from official [name withheld], to Gregory C. Shaffer, Professor of Law, Loyola University Chicago Law School (Mar. 31, 2008) (on file with authors).

265. See *infra* notes 306-14 and accompanying text.

266. See Isaura Daniel, *Brazilian Diplomats to Have Hands-On Training in Trade*, *BRAZIL MAG.*, Oct. 28, 2004, available at <http://www.brazilmag.com/content/view/560/41/> (involving an agreement between FIESP and the Ministry of Foreign Affairs).

government and private sector in developing positions in international trade negotiations and litigation. The Institute of Studies on Trade and International Negotiations (*Instituto de Estudos do Comercio e Negociacoes Internacionais*, ICONÉ), DATAGRO, and Prospectiva Consulting Firm on International Affairs (*Consultoria Brasileira de Assuntos Internacionais*) are leading examples of Brazilian consultancies for international trade.

ICONÉ was created as a research institute in 2003 with the financial support of large agribusiness associations to provide technical support to Brazil in international trade negotiations regarding agriculture.<sup>267</sup> Professor Marcos Jank founded it after teaching and conducting research in the United States at Georgetown University and the University of Missouri-Columbia and working for a year at the Inter-American Development Bank.<sup>268</sup> The institute aimed “to offer technical support to policy makers, negotiators and representatives of the private sector” and help “them to build long-term strategies on trade liberalization and integration.”<sup>269</sup> It, more generally, aimed to “disseminate information and research on trade policy and agricultural trade through seminars” organized for different audiences, including to build “technical capacity for journalists.”<sup>270</sup> Jank participated in numerous Brazilian public-private trade research networks and helped catalyze the creation of the Trade Negotiations Study Group examined above.<sup>271</sup> The institute became a major presence both in Brazil and internationally for its work and was frequently cited in the Brazilian and international media and invited to present at symposia around the world.<sup>272</sup>

ICONÉ, in particular, has provided crucial support for the government in Doha Round negotiations as part of an internal Brazilian working group in which Jank served as a special assistant to the Minister of Agriculture. It

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267. See MARCOS SAWAYA JANK & ANDRÉ MELONI NASSAR, *ICONÉ, REPORT OF ACTIVITIES: MARCH 2003 THROUGH MARCH 2007*, at 3 (2007), available at <http://www.iconebrasil.org.br/arquivos/projeto/20.pdf>. ICONÉ also receives funding from foreign development agencies and foundations for specific projects. See *id.*; see also Inst. for Int'l Trade Relations, *ICONÉ Sponsors*, <http://www.iconebrasil.org.br/en/?actA=3&areaID=4&secaoID=12> (last visited May 26, 2008).

268. See Marcos Sawaya Jank, *The FTAA and Agriculture in Brazil-U.S. Relations, Address Before the Brazil and the FTAA Seminar* (Oct. 23-24, 2001), available at <http://www.netamericas.net/Researchpapers/Documents/Jank/Jank1.pdf>. In June 2007, Jank left ICONÉ to become President and CEO of UNICA, the sugar cane trade association. Monica Scaramuzzo, *Uniao da Industria da Cana-de-Acucar Trabalha na Abertura de Mercados*, *NOTÍCIAS FINANCEIRAS*, June 26, 2007, at 1.

269. See JANK & NASSAR, *supra* note 267, at 5.

270. *Id.*

271. See *supra* note 267 and accompanying text.

272. JANK & NASSAR, *supra* note 267. ICONÉ's report for its first four years of operation (2003-2007) states that during this period, “the Institute produced 65 specialized publications (57 in Portuguese and 18 in English), 19 working papers and 78 articles published in Brazilian and international press.” *Id.* (translation by authors). It further states that “ICONÉ was invited to give 286 presentations, 197 in Brazil and 89 abroad,” and that it “prepared 62 confidential technical papers and simulations for the Brazilian government.” *Id.* (translation by authors). The report notes that “172 different national and international media outlets published reports mentioning ICONÉ.” *Id.* (translation by authors).

generated key econometric simulation analyses of the impact on Brazil of different methodologies for tariff and subsidy reductions. These analyses were instrumental in the development of Brazil's negotiating positions, and they provided the analytic heft for the G-20 in the Doha Round agricultural negotiations. Because of its negotiating leadership and the sophistication of its analyses, Brazil became part of the "G-4" group of WTO members together with the United States, the European Union, and India, which played the key role in setting the framework for the Doha Round agricultural negotiations.<sup>273</sup>

DATAGRO has focused most of its expertise on one key sector of Brazilian agribusiness. It is the leading Brazilian consulting firm for market analysis of the domestic and foreign sugar, ethanol, and biofuels sectors. Founded in 1984 by the U.S.-trained economist Plinio Nastari, it consists of a group of economists, statisticians, and consultants who provide global market analysis and statistical studies for companies and government ministries in Brazil and abroad.<sup>274</sup> It has become particularly active in international consulting for the global biofuels market, which represents significant export potential for Brazilian sugar producers.<sup>275</sup> Like ICONE, DATAGRO has provided analyses for the government and private sector for the WTO Doha Round negotiations.<sup>276</sup> Particularly noteworthy for this study, DATAGRO produced the econometric analysis for Brazil and the sugar sector in the *EC-Sugar* case and provided further technical support in the *EC-Bananas* arbitration and the *EC-Tyres* cases.<sup>277</sup> It also has helped to coordinate Brazilian ethanol companies' defenses in U.S. anti-dumping and countervailing duty investigations.<sup>278</sup> As a result, DATAGRO has become an important player in Brazilian public-private partnerships for trade negotiations and trade litigation.

Prospectiva Consulting Firm, like ICONE, is a creation of the early 2000s, formed in 2001 to help Brazilian companies strategize in response

273. For example, Brazil was central to creating the "July Framework" for agricultural trade negotiations in 2004. See Ernesto Zedillo, *Summer of Setbacks*, *FORBES*, Aug. 13, 2007, at 31; see also Wolfe, *supra* note 17, at 192; Robert Wolfe, *New Groups in the WTO Agricultural Trade Negotiations: Power, Learning and Institutional Design* (Can. Agric. Trade Pol'y Res. Network Paper No. CP 2006-2, May 2006), available at [http://www.uoguelph.ca/~catprn/PDF/commissioned\\_paper\\_2006-2.pdf](http://www.uoguelph.ca/~catprn/PDF/commissioned_paper_2006-2.pdf) (discussing the Doha Round and the Five Interested Parties, which consisted of the G-4 plus Australia).

274. See Todd Benson, *More Brazilian Drivers Turn to Ethanol*, *N.Y. TIMES*, Oct. 20, 2004, at W1; DATAGRO, <http://www.datagro.com/> (last visited Mar. 20, 2008). Datagro's President Plinio Nastari received his Ph.D. in agricultural economics from Iowa State in 1983. See *infra* note 313 and accompanying text.

275. See DATAGRO, *supra* note 274.

276. See Gordon Feller, *Regions: Middle East and Africa—Thinking Beyond Oil*, *FOREIGN DIRECT INVESTMENT*, Feb. 1, 2008, at 1.

277. Interviews by Gregory C. Shaffer with Brazilian officials, Ministry of Foreign Affairs [names withheld] (Apr. 20, 2004) (on file with authors) (confirming that DATAGRO provided key technical support in the *EC-Sugar* case); see also DATAGRO, *supra* note 274.

278. See Interviews by Gregory C. Shaffer with Brazilian officials, Ministry of Foreign Affairs [names withheld] (Apr. 20, 2004) (on file with authors).

to the globalized business environment.<sup>279</sup> Prospectiva has since become one of the leading Brazilian business consultants for trade and investment-related matters, specializing in the services sectors.<sup>280</sup> It counsels Brazilian companies regarding their international strategies and foreign companies regarding the Brazilian market. It has advised Brazilian companies and the government in the development of trade negotiating positions, specializing in trade in services, a domain in which public-private coordination in trade policy has been underdeveloped. Prospectiva has also prepared economic analysis for anti-dumping cases.

Brazilian think tanks are organized on a non-profit basis as well, many of which we have covered earlier. Some are linked to universities, while others are independent. The Brazilian Center of International Relations (*Centro Brasileiro de Relacoes Internacionais*, CEBRI), founded in 1998 in Rio de Janeiro by a group of intellectuals, business leaders, government authorities, and academics, aims to be the most important Brazilian think tank on international affairs, modeling itself in some ways on the U.S. Council of Foreign Relations.<sup>281</sup> CEBRI sponsors research programs and commissions studies on a broad range of international issues, including trade issues involving the WTO, FTAA, and Mercosur.<sup>282</sup> In conjunction, it organizes roundtables, symposia, and debates with partner institutions, such as ICONE, regarding trade negotiations.<sup>283</sup> The center is sponsored by the largest exporting companies in Brazil, such as Companhia Vale do Rio Doce, Embraer, and Petrobras, as well as by international foundations, such as the Ford Foundation, and private law firms, such as Veirano & Advogados and Pinheiro Neto Advogados. Its leadership includes important Brazilian public figures, such as its Honorary President, Fernando Henrique Cardoso, former President of Brazil; its President, José Botafogo Gonçalves, former Minister of Development and Ambassador to Mercosur; and its founding Vice-President, Luiz Felipe Lampreia, former Minister of Foreign Affairs and Ambassador to the WTO.<sup>284</sup>

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279. See Prospectiva, *Prospectiva—Consultoria Brasileira de Assuntos Internacionais*, <http://www.prospectiva.consultoria.com.br/> (last visited Mar. 14, 2008). Prospectiva provides analysis of market access and market development strategies, advice about trade negotiations and business strategies in response to their projected outcomes, counsel on the development of international supply chains, evaluation of customs matters, and economic advice in anti-dumping and safeguard cases. See Prospectiva, *Prospectiva—Services*, <http://www.prospectivaconsultoria.com.br/eng/quem.asp#nossa> (last visited Mar. 14, 2008).

280. Mendes Interview, *supra* note 130.

281. Interview by Gregory C. Shaffer with leading representative of the Brazilian private sector [name withheld], in São Paulo, Braz. (Apr. 2004) (on file with authors). One interviewee noted that CEBRI would like to see itself as a counterpart of the U.S. Council of Foreign Relations, but that it had not attained such status within Brazil.

282. See Centro Brasileiro de Relacoes Internacionais (CEBRI), <http://www.cebri.org.br/> (last visited Mar. 20, 2008).

283. See e.g., CENTRO BRASILEIRO DE RELACOES INTERNACIONAIS, 4<sup>º</sup> CURSO SOBRE COMÉRCIO E NEGOCIAÇÕES INTERNACIONAIS PARA JORNALISTAS (2007), available at [http://www.cebri.org.br/pdf/401\\_PDF.pdf](http://www.cebri.org.br/pdf/401_PDF.pdf).

284. See CENTRO BRASILEIRO DE RELACOES INTERNACIONAIS, <http://www.cebri.org.br/> (last visited Mar. 20, 2008).

Trade concerns have also generated considerable civil society contestation in Brazil, as represented by the Porto Alegre World Social Forum movement and its opposition to neoliberalism. As Veiga writes, the FTAA negotiations triggered “the mobilization of civil society . . . [which] reached new heights and imposed a set of new mechanisms for consultation and dialogue between State and civil society, a process pioneered by the business sector, followed by NGOs.”<sup>285</sup> The result was a relative increase in government transparency and access for these groups involving a “consistent trend towards the diversification and ‘intensiveness’ of the channels of consultation and position-building between the State and different groups of civil society in the area of trade negotiations.”<sup>286</sup>

Brazilian NGOs have organized and coordinated to enhance their ability to engage with the government over trade policy. In 2001, key Brazilian NGOs created a new institutional body to coordinate positions over international trade matters. They formed the Brazilian Network for the Integration of Peoples (*Rede Brasileira pela Integração dos Povos*, REBRIP), a coalition based in Rio de Janeiro of approximately thirty-five NGOs that include major Brazilian trade unions and social movement organizations.<sup>287</sup> REBRIP’s goal is to coordinate civil society positions regarding existing and proposed trade agreements, building on analyses of the social impacts of trade agreements in Brazil, in particular in relation to labor, agriculture, the environment, intellectual property, services, and investment. REBRIP gained greater access to government officials and international fora under the Lula government. In November 2003, its

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285. Veiga, *Changing Patterns in State-Civil Society Relationship*, *supra* note 59, at 173. The FTAA negotiations resulted in greater politicization of trade policy within Brazil. See HIRST, *supra* note 58, at 30; Hurrell, *supra* note 58, at 103 (noting that “there has been considerable grassroots opposition (including within and around the Workers Party)” to the FTAA).

286. Veiga, *Changing Patterns in State-Civil Society Relationship*, *supra* note 59, at 173. The only formal institutionalization of consultation with civil society organizations nonetheless is under Mercosur where the member governments created a Social-Economic Consultative Forum (*Fórum Consultivo Econômico e Social*) to engage with civil society. *Id.* at 172. In contrast, the FTAA created a Committee of Government Representatives on the Participation of Civil Society, which encouraged “sectors of civil societies to present their views on trade matters in a constructive manner.” See Summit of the Americas Information Network, Open Invitation to Civil Society in FTAA Participating Countries, <http://www.summit-americas.org/civilsociety-invitation.htm> (last visited Mar. 20, 2008). The Brazilian government created a National Coordination Unit on FTAA-Related Issues (*Seção Nacional da Alca*) to organize numerous meetings and seminars regarding the FTAA for civil society representatives. See Free Trade Area of the Americas (FTAA), [http://www.ftaa-alca.org/SPCOMM/SOC/cs24r1\\_e.asp](http://www.ftaa-alca.org/SPCOMM/SOC/cs24r1_e.asp) (last visited Mar. 20, 2008).

287. REBRIP was formalized as an organization under Brazilian law in 2001, but the NGOs first informally agreed to coordinate their positions through it in 1998. See Veiga, *Changing Patterns in State-Civil Society Relationship*, *supra* note 59, at 165; Rede Brasileira pela Integração dos Povos (REBRIP), Apresentação, [http://www.rebrip.org.br/\\_rebrip/pagina.php?id=616](http://www.rebrip.org.br/_rebrip/pagina.php?id=616) (last visited Mar. 20, 2008). Veiga notes how Brazilian labor follows trade negotiations largely through REBRIP. *Id.* at 164 (noting how the biggest trade union confederation, Central Única dos Trabalhadores, “accompanies the trade negotiations, and especially the FTAA negotiations, through REBRIP, although it manifests its specific positions publicly at critical moments of the negotiations”).

representatives were included in Brazil's delegation to the FTAA negotiations in Miami.<sup>288</sup>

Like the Brazilian Business Coalition, REBRIP represents an "institutional novelty" in Brazil. Mobilized by the FTAA negotiations, Brazilian civil society organizations for the first time created an institutional structure that has "focused essentially on trade negotiations."<sup>289</sup> Although REBRIP's members generally have opposed trade liberalization initiatives, there are divisions within REBRIP that the institution aims to resolve in order to form coordinated, common positions so that civil society organizations can be proactive instead of purely defensive.<sup>290</sup> REBRIP is particularly active in debates over the effects of international intellectual property rights, such as under the TRIPs Agreement, on access to medicines in developing countries. It has sought to mobilize civil society against the further strengthening of intellectual property rights through new intellectual property chapters in regional and bilateral trade agreements, such as the FTAA and the EU-Mercosur FTA. Although REBRIP focuses greater attention on trade negotiations than trade disputes, it also supports the government when Brazil is a respondent in WTO cases that raise social policy concerns. For instance, REBRIP strongly supported the government's positions against the EU in the *Brazil-Tyres* case.<sup>291</sup>

In the early 2000's, as WTO negotiations and litigation intensified and knowledge of the WTO system spread in Brazil, a new niche opened for academic study and private legal and consulting work, generating competition for new expertise. Private parties sought means to make use of this new expertise, whether to obtain greater access to foreign markets or to defend Brazilian internal policies. Today, these various groups can be viewed as components of a small Brazilian epistemic community specializing in trade matters. Individuals are often members of more than one group, and the groups coordinate with each other. A lawyer-doctoral student that had an internship at the Brazilian mission in Geneva can participate in meetings of the Law Firm Study Center (CESA) as a representative of a law firm, of symposia, and trade-related study groups to engage with academics, as well as the Brazilian Business Coalition (CEB) in order to engage with business representatives. Academics are active participants in these groups, and elite law practitioners speak in courses and at academic colloquia, especially those organized in São Paulo.<sup>292</sup> These groups, as a result, often co-sponsor and attend each other's events, facilitating group

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288. Veiga, *Changing Patterns in State-Civil Society Relationship*, *supra* note 59, at 167.

289. *Id.* at 164-66, 172. The FTAA negotiations resulted in greater politicization of trade policy within Brazil. See HIRST, *supra* note 58, at 30; HURRELL, *supra* note 58, at 103 (noting that "there has been considerable grassroots opposition (including within and around the Workers Party)" to the FTAA).

290. Veiga, *Changing Patterns in State-Civil Society Relationship*, *supra* note 59, at 167.

291. See, e.g., Rede Brasileira pela Integração dos Povos (REBRIP), Declaração tribunal sobre pneus reformados na OMC, [http://www.rebrip.org.br/\\_rebrip/pagina.php?id=880](http://www.rebrip.org.br/_rebrip/pagina.php?id=880) (last visited Mar. 20, 2008).

292. Initiatives outside of São Paulo are less developed, but dispute settlement study groups were formed in Rio de Janeiro, Brasília, and Belo Horizonte.

interaction. Over time, individuals develop careers in trade policy and trade law as they move among firms and between the private and public sectors. The trade law academic Welber Barral, for example, moved from being a trade law professor at the Universidade Federal de Santa Catarina in Florianópolis to become Secretary of the Department of Foreign Trade in the Ministry of Development. Christian Lohbauer moved from head of the department of foreign affairs at the Industry Federation of the State of São Paulo, to lead the international department of the City of São Paulo, and then become President of the Brazilian poultry trade association, ABEF. Pablo Bentes, after working as a lawyer in Washington, D.C., became an associate at the law firm of Machado, Meyer, Sendacz e Opice in São Paulo and then in 2006, joined the Legal Affairs Division of the WTO secretariat, where he joined another Brazilian, Lauro Locks.

These groups and individuals also form part of transnational epistemic trade policy networks and therefore are well-positioned to act as intermediaries between the international and national levels. To give just a few examples of a general pattern, the founders of the agribusiness think tank ICONE, Marcos Jank, and of the Rio-based international relations think tank CEBRI, José Botafogo Gonçalves, have close ties with international trade policy leaders around the world.<sup>293</sup> Mario Marconini, the former International Trade Secretary in the Ministry of Development who had worked at the GATT and WTO, now leads the São Paulo office of a Washington, D.C.-based consulting firm. Members of the Dispute Settlement Study Group (NESC) have worked with the Geneva-based organizations UNCTAD and the International Centre on Trade and Sustainable Development (ICTSD) to coordinate conferences and publications concerning WTO dispute settlement, competition policy, intellectual property, and other trade-related matters. A large number of the former interns at the Geneva mission have received advanced degrees or fellowships from leading universities in the United States and Europe, including the law schools of Paris I, Cambridge, Georgetown, and New York University, and some of them have worked in U.S. law firms.

REBRIP has worked closely with Doctors Without Borders and Oxfam on intellectual property-related issues, as has the Institute on International Trade Law and Development (IDCID) at the University of São Paulo. The Ford Foundation has helped to fund the work of a large number of these organizations, including the University of São Paulo think tanks IDCID and CAENI, the Rio-based think tank CEBRI, and the NGO network REBRIP. By linking with international networks, these individuals and groups are empowered to act as intermediaries between the national and international realms in the field of international trade law and policy. Through their national and international network connections, they are better able to inform themselves of developments at home and abroad, which in turn

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293. As noted above, Jank has now become President of UNICA, the Brazilian sugar trade association. See *supra* note 268. Gonçalves was a “board founder” of CEBRI. See text accompanying notes 280-83.

facilitates their ability to provide input into Brazilian policy debates and represent Brazilian perspectives in international fora.

Bruce Carruthers and Terry Halliday have typologized intermediaries between the national and international levels in terms of their competencies, power, and loyalty.<sup>294</sup> Intermediaries may, for example, have greater competence in economic or legal expertise, have variable power to translate international scripts into national contexts, and have variable loyalties to actors at the national and international levels. Carruthers and Halliday's study focuses primarily on the translation of global bankruptcy norms into national environments. In contrast, this article has addressed the reciprocal interaction of law and politics at the national and international levels. We, thus, have also examined how national actors use their expertise to advance their national, corporate, or other interests at the international level. In terms of loyalty, Brazilian individuals who develop the relevant expertise can work for the Brazilian government, Brazilian industries, foreign governments, or foreign industries, whether in WTO cases where Brazil is a claimant or respondent, or in Brazilian anti-dumping and other import-relief cases. Overall, they have brought more of a Brazilian perspective to the international level, and more of a cosmopolitan one within Brazil.

#### IV. The Brazilian Approach Applied: Mechanisms Used in Specific WTO Cases

We now move from our broader assessment of what lies behind Brazil's engagement and highly touted success in the WTO to take a closer look at the public-private coordinating mechanisms that Brazil has applied as a complainant, respondent, and third party in specific WTO cases. The willingness of Brazil's private sector to organize, engage with the government, and fund outside counsel has been critical to Brazil's successful use of the dispute settlement system.<sup>295</sup> Brazil's strategies have nonetheless varied as a function of whether it is a complainant, respondent, or third party and whether the private sector is able and willing to fund a foreign or Brazilian law firm to assist the government in its preparation of Brazil's positions and legal submissions. Over time, Brazil's relatively active use of the WTO dispute settlement system has led to a gradual institutionalization of its handling of cases.

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294. See Carruthers & Halliday, *supra* note 8, 529-32.

295. For example, a representative to the WTO from Argentina echoed the views of many other developing country representatives in stating that it "had been difficult to convince constituents to pay for legal counsel." Interview by Gregory C. Shaffer with Argentine Representative to the WTO [name withheld], at São Paulo, Braz. (July 22, 2005) (on file with authors). According to this official, the government has "ideas for cases, but they can only be done if the private sector created the pressure on the government. And the private sector is not aware of how to use the WTO dispute settlement system . . . of the tools offered by the dispute settlement system." *Id.*

### A. Brazil as Complainant

Following Brazil's complaints against the U.S. cotton and EU sugar subsidy regimes in 2002, commentators have highlighted how a developing country like Brazil can make effective use of the WTO legal system.<sup>296</sup> Nevertheless, it took time for Brazil, one of the largest developing countries, to build the confidence and capacity to bring these cases. Brazil approached its first cases before the more judicialized WTO dispute settlement system much as it had approached its GATT cases, changing neither the structure of its mission in Geneva nor that of its Ministry of Foreign Affairs. It had no specialized bureaucratic unit to work on dispute settlement issues and had developed no systematic reflex to seek complementary assistance from the private sector to fund private law firm support.

Brazil's first WTO case as a complainant, *United States-Standards for Reformulated and Conventional Gasoline* (WT/DS4), filed in 1995, involved different U.S. regulatory requirements for foreign and domestic reformulated gasoline.<sup>297</sup> 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. It was fairly clear that the U.S. regulations in question were discriminatory, as demonstrated by U.S. Congressional records that the resulting panel decision cited.<sup>298</sup> Therefore, Brazil's WTO filing was easy to justify. Petrobras hired a Washington, D.C.-based law

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296. See, e.g., Davey, *supra* note 16.

297. See Appellate Body, *United States-Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (Apr. 29, 1996); Panel Report, *United States-Standards for Reformulated and Conventional Gasoline*, WT/DS2/R (Jan. 29, 1996).

298. Appellate Body, *United States-Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (Apr. 29, 1996); Panel Report, *United States-Standards for Reformulated and Conventional Gasoline*, WT/DS2/R (Jan. 29, 1996). The complaints brought by Brazil and Venezuela concerned a rule promulgated by the Environmental Protection Agency ("the Gasoline Rule") pursuant to a 1990 amendment to the Clean Air Act § 211(k), 42 U.S.C. § 7545(k) (2006). The EPA was charged with determining the specifications of gasoline with respect to individual refiners, blenders, and importers. Appellate Body, *United States-Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (Apr. 29, 1996); Panel Report, *United States-Standards for Reformulated and Conventional Gasoline*, WT/DS2/R (Jan. 29, 1996). The resulting Gasoline Rule allowed certain entities, including domestic refiners, to establish individual baselines for performance while others, including most importers, were automatically assigned a more stringent statutory baseline. Panel Report, *US-Standards for Reformulated and Conventional Gasoline*, ¶¶ 2.5-2.8, WT/DS2/R (Jan. 29, 1996). Venezuela and Brazil argued that the rule discriminated against imported gasoline. The complainants cited public statements of U.S. officials, which "showed that the Gasoline Rule discriminated both in effect and in intent against foreign refiners." *Id.* at ¶ 3.13. Brazil, for example, pointed to an official's testimony to a congressional subcommittee that "on its face, the [Gasoline Rule] subjects imported gasoline to different rules than those applied [to] domestically refined reformulated gasoline, and it does pose an unmistakable GATT question. This issue was under discussion within the U.S. government for more than a year and recognized as a serious potential issue." Second Written Submission of Brazil, *US-Standards for Reformulated and Conventional Gasoline*, WT/DS2 (Sept. 13, 1995) (quoting Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce, 103d Cong. 2d Sess. 66 (June 22, 1994) (statement of Ira S. Shapiro, General Counsel, Office of the U.S. Trade Rep.).

firm, Mudge Rose, to advise it on the U.S. regulations and WTO options and to work with Brazilian diplomats in the preparation of written submissions and communications to the WTO Panel and Appellate Body, including statements for the oral hearings.<sup>299</sup> Although Petrobras funded the preparation of the case, the amount of preparation more closely resembled that used in late GATT cases than what was to come.<sup>300</sup>

The *Canada-Aircraft* and *Brazil-Export Financing Programme for Aircraft* cases, involving Embraer and Bombardier, were landmark cases in terms of the intensity with which Brazilian officials worked with law firms that Embraer hired in a public-private partnership for WTO litigation. The WTO legal culture had changed following the “scorched earth” litigation tactics that the United States used in the *EC-Bananas* and *EC-Measures Concerning Meat and Meat Products Meat (Hormones)* cases, intensifying the demands for and on lawyers.<sup>301</sup> In the words of one Washington counsel handling WTO cases, the legal complexities involved in the aircraft cases were “light years away” from the GATT.<sup>302</sup> The aircraft cases, as a result, were the first in which outside U.S. lawyers attended the panel hearings as part of the Brazilian delegation. There was no longer any pretense that this was simply a state-to-state dispute to be resolved with the assistance of a quasi-legal process where diplomats presented their positions to a panel of other diplomats.

Embraer, with its large international market share for medium-size civil aircraft, represented a crown jewel for Brazil’s industrial policy. Thus, the case was of critical importance for the government. Embraer’s experience in international markets and its close ties with the government favored the formation of a public-private partnership, both as respondent and complainant in the WTO litigation.<sup>303</sup> Embraer had the financial capacity to hire U.S. legal counsel to respond to Canada’s legal challenge against Brazil. Embraer engaged David Palmeter and his team of lawyers, which started at Graham & James and then switched to Powell Goldstein, to help the government prepare the legal submissions. A key part of Brazil’s response was to commence a WTO complaint against Canada’s subsi-

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299. Interviews by Gregory C. Shaffer with Brazilian diplomats, Brazil Mission to the WTO [names withheld], in Geneva, Switz. (June 2006) (on file with authors); Interviews by Gregory C. Shaffer with Brazilian diplomats, in Brasília, Braz. (Apr. 2006) (on file with authors) [hereinafter *Brazilian Diplomats Interview*]. These Brazilian diplomats worked in the Brazilian Embassy at the time of the case.

300. Washington Counsel Interview, *supra* note 95 (noting the statement of a former USTR official who found, in terms of legal practice, that *US-Reformulated Gasoline* was “the last GATT case”).

301. The term “scorched earth” was used by a trade law attorney in a discussion with Gregory C. Shaffer in February 2008.

302. Washington Counsel Interview, *supra* note 95. Similarly, Gary Horlick, who has worked on GATT and WTO cases, first at O’Melveny & Myers and then at Wilmer Cutler & Pickering, refers to WTO and GATT disputes as “two different worlds.” Horlick Interview, *supra* note 16.

303. Embraer, Annual Report 2001, [http://www.embraer.com/relatorios\\_anuais/relatorio\\_2001/eng/index.htm](http://www.embraer.com/relatorios_anuais/relatorio_2001/eng/index.htm) (last visited May 25, 2008). Embraer was a state-owned company until 1994. *Id.* Former Brazilian Foreign Minister and WTO ambassador Lampreia became a member of its Board of Directors in 2001. *Id.*

dization of Embraer's rival Bombardier, for which Embraer also hired Canadian consultants.<sup>304</sup>

On the Brazilian government's side, the Embraer cases were handled almost completely out of its Geneva diplomatic office with no structure of support from the Brazilian capital. The outside lawyers' work was overseen by Roberto Carvalho de Azevêdo, a diplomat, who in turn was supervised by the Ambassador at the Geneva Mission, Celso Lafer.<sup>305</sup> Lafer had been a professor of law at the University of São Paulo, Brazil's flagship university.<sup>306</sup> This highly technical, time-demanding experience would spur government and private efforts toward more systematized public-private coordination initiatives for trade dispute settlement and in particular, the government's creation of a specialized Dispute Settlement Unit in Brasília, an internship program for private Brazilian attorneys organized at Brazil's Geneva mission, and many of the dispute settlement research groups and networks organized in major cities in Brazil that we examined in Part III.C.

By the time Brazil brought the *U.S.-Cotton* and *EC-Sugar* complaints in September 2002 against the United States and the European Union respectively, 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 to bring and win an extremely complex and strategically important WTO case, with significant international political implications.

The major challenge for Brazil in the *U.S.-Cotton* case was to gather the required factual evidence and economic and legal expertise.<sup>307</sup> The government would not do so without private sector support, and the Brazilian cotton sector consisted of many producers, of varying size, with limited capacity to address international trade issues. Therefore, the producers had to be convinced to coordinate and pool their resources through a trade association in order to help pay for outside legal and economic consultants. A former secretary of agricultural policy in the Brazilian Ministry of Agriculture, Pedro de Camargo Neto, played an important catalyzing role in the case, working as a consultant to the cotton sector, among others,

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304. Washington Counsel Interview, *supra* note 95. The law firms assisted Brazil in its complaint against Canada (WT/DS70) and in its defense in Canada's complaint against Brazil (WT/DS46). *Id.* Palmeter and the international trade practice group in Powell Goldstein joined Sidley Austin near the end of the cases, which had a conflict of interest. *Id.* The last stage of the cases involved requests by both sides for authorization to suspend WTO concessions because of non-compliance by the other with the WTO ruling against it. *Id.* Embraer thus had to seek other outside counsel. *Id.*

305. Interviews by Michelle Ratton Sanchez & Barbara Rosenberg with Brazilian officials [names withheld], in Brasília, Braz. (Jan.-Sept. 2005) (on file with authors); see also William J. Davey, *Introduction: Mini-Symposium on the Consultative Board's Report on the Future of the WTO*, 8 J. INT'L ECON. L. 591, 591 (2005) (noting Lafer's background).

306. *Id.*

307. For an excellent overview of the case, see Goldberg et al., *supra* note 188.

after he left the government.<sup>308</sup> Private attorneys assured the producers and the government of the legal merits of the case, and together they collected the financial resources required.<sup>309</sup> With this funding, the producers hired the U.S. law firm Sidley Austin to provide support to the government for the litigation.<sup>310</sup> In particular, the law firm would help prepare the legal submissions, attend the hearings, and help the government respond to questions that the panel and the Appellate Body posed. Daniel Sumner, a U.S. economist at the University of California at Davis who had previously worked for the U.S. Department of Agriculture, worked with Sidley Austin to provide the economic analysis and explanations of the formula that the U.S. government used to subsidize its cotton farmers and to assess the impact on global prices and trade that these practices had. Mr. Sumner's study showed that U.S. subsidies significantly affected international cotton trade, causing "serious prejudice" in the words of the WTO Agreement on Subsidies and Countervailing Measures.<sup>311</sup> Although the case was costly, the public-private coordination worked. The U.S. law

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308. See *id.* Goldberg et al. note how de Camargo Neto went from being President of the Brazilian Rural Society to Deputy Minister in the Ministry of Agriculture to a consultant. *Id.* As Deputy Minister, he "had this idea to do dispute cases" and thought first of a case against U.S. soybean subsidies before turning to a challenge of cotton subsidies after prices in the world soy market rose so that U.S. soy farmers were no longer eligible for large subsidies and "the soybean case disappeared." *Id.* at 240-41. Camargo Neto was Secretary of Production and Trade in the Ministry of Agriculture of Brazil, where he was responsible for agriculture negotiations at the WTO, the Free Trade Area of the Americas, the MERCOSUR-EC Free Trade Agreement, and other bilateral agreements. Camargo Neto served as president of the Sociedade Rural Brasileira from 1990 to 1993 and founded and was president of Fundo de Desenvolvimento da Pecuária de São Paulo (FUNDEPEC) from 1991 to 2000.

309. The actual amount of the costs may have exceeded \$2 million. Interview by Gregory C. Shaffer with private lawyer [name withheld] (July 20, 2005) (on file with authors) (noting a figure of \$2 million); see also Elizabeth Becker, *Lawmakers Voice Doom and Gloom on W.T.O. Ruling*, N.Y. TIMES, Apr. 28, 2004, at C1, C7 ("[T]he litigation has already cost \$1 million."). A major Brazilian newspaper reported, at one point, that funding of the law firm was collected from: (i) the cotton producers in the amount of R\$300 000 (U.S. \$130,000), (ii) the Export Promotion Agency (Agência de Promoção de Exportações) in the amount of R\$200 000 (U.S. \$ 86,000), and (iii) amounts collected from a lottery sale in the amount of R\$1.2 million (U.S. \$520,000). *Produtores de algodão fazem rifa para bancar painel na OMC*, ESTADO DE SÃO PAULO, Sept. 18, 2003, available at <http://www.comexnet.com.br/noticom.asp?paNumero=4215>.

310. Washington Counsel Interview, *supra* note 95. Sidley's team had come from Powell Goldstein, which had helped to litigate the Embraer case. *Id.*

311. See generally Goldberg et al., *supra* note 188, at 7. Sumner's study showed that without the subsidies, the United States "would have shipped about 41 percent less cotton abroad; [which] would have raised the world price about 12.6 percent." See Paul Blustein, *In U.S.: Cotton Cries Betrayal*, WASH. POST, May 12, 2004, at E1. Sumner was considered a traitor by U.S. cotton interests. *Id.* "[Sumner] joined forces with the enemy to cut the heart out of our farm program," said Don Cameron, Vice Chairman of the California Cotton Growers Association and chairman of the California Tomato Growers Association, Inc. *Id.* Cameron said "such an act was 'unethical' because Sumner is an employee of California's public university system." *Id.* Cameron continued, "[T]here are research projects that he's been involved with in the past that we'll direct elsewhere." *Id.* Earl P. Williams, President of the California Cotton Growers Association, asserted, "If this was governmental or military related, it might be called treason and court martial proceedings would be in order." *Id.*

firm and Mr. Sumner did the majority of the work, this time overseen by the Dispute Settlement Unit in Brasília, given that Brazil now had a dedicated group in its capital.<sup>312</sup>

In the *EC-Sugar* case, Sidley Austin again was hired by the private sector as the external law firm, but it worked this time with the Brazilian economic consulting firm DATAGRO. DATAGRO, led by Plinio Natari, a U.S.-trained economist, specializes in sugar and ethanol market analysis.<sup>313</sup> It was the first time that a Brazilian consulting firm was used for a WTO dispute. The law firm and economic consultants again worked with the government but were funded by the private sector, this time by the São Paulo-based sugar cane association UNICA. Former government officials, including Elisabeth Serodio, who alternated working for UNICA and in government agencies, assisted UNICA. The resulting public-private partnership was composed of the Ministry of Foreign Affairs' Dispute Settlement Unit in Brasília, the Brazilian mission in Geneva, the team of lawyers from Sidley Austin, and DATAGRO's team of economic consultants.<sup>314</sup> DATAGRO would again provide technical analytic support in the *EC-Bananas* arbitration regarding the EU's revised bananas import regime and the *Brazil-Tyres* case.<sup>315</sup>

Brazil also became the first developing country and to our knowledge, remains the only developing country in which a domestic law firm was hired to work with the government in a litigated WTO dispute without the additional participation of a U.S. or European law firm.<sup>316</sup> The Brazilian Ministry of Foreign Affairs worked with a lawyer in a São Paulo-based law firm, Veirano & Advogados, in two successful WTO cases involving Brazilian exports of poultry, brought against Argentina (WT/DS241) and the EC (WT/DS269).<sup>317</sup> In these cases, the Brazilian Poultry Association (*Associação Brasileira dos Produtores Exportadores de Frango*) funded Veirano &

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312. The work of the legal interns at the Brazilian mission in Geneva was reportedly also helpful in providing backup support, as they helped to collect, process, and organize information in Geneva, including archival research in the WTO library on the negotiating history of relevant texts. Brazilian Diplomats Interview, *supra* note 299.

313. *Id.* For more on DATAGRO, see *supra* Part III.C.4.

314. The Brazilian Geneva mission was also in contact with Brazil's mission in Brussels, Belgium regarding the operation of the EU's sugar subsidy program.

315. See DATAGRO, *supra* note 274.

316. When China hires foreign law firms, it requires them to work with a Chinese law firm so that the domestic law firms can build expertise. The Chinese law firm may, in particular, provide and coordinate translation services. Interview by Gregory C. Shaffer with a U.S. attorney who has worked with China in this capacity [name withheld], in São Paulo, Braz. (June 23, 2006) (on file with authors). China also solicits bids from Chinese law firms in Beijing to provide assistance in the drafting of the legal brief in cases in which it is a third party. Interview by Gregory C. Shaffer with member, Ministry of Foreign Trade and Econ. Cooperation [name withheld] (Feb. 2006) (on file with authors). In addition, there appear to be recent developments in India in which Indian lawyers work with the Indian government in some WTO cases, but the government has consistently hired the Advisory Centre on WTO Law for WTO disputes. E-mail from Indian attorney [name withheld], to Gregory C. Shaffer, Professor of Law, Loyola University Chicago Law School (Mar. 15, 2008) (on file with authors).

317. *Argentina—Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241; *EC—Customs Classification of Frozen Boneless Chicken*, WT/DS269.

Advogados in São Paulo to help the Ministry of Foreign Affairs defend its and Brazil's interests.<sup>318</sup> The WTO panel and Appellate Body ruled in Brazil's favor in both poultry cases in 2003 and 2005.

The lead lawyer at Veirano & Advogados, Ana Caetano, had received an LL.M. degree at Georgetown University Law Center and worked in Washington, D.C. for the law firm O'Melveny & Myers in which she gained expertise in trade law matters.<sup>319</sup> Caetano also handled the *EC-Soluble Coffee* complaint after she returned to Brazil from working with O'Melveny & Myers, where she had worked on a related matter.<sup>320</sup> ABICS, Brazil's soluble coffee industry association, funded the case on account of the impact of the EU measures on its exports. Brazil successfully settled the case for ABICS only days after filing its complaint in October 2000, and the European Union granted Brazilian coffee a larger quota under the EU's preferential import system.<sup>321</sup> Similarly, the Brazilian law firm of Machado, Meyer, Sendacz e Opice worked with the government in the *EC-Bananas* arbitration, funded by Del Monte, the largest exporter of bananas from Brazil.<sup>322</sup> These examples show how Brazil has broadened its inter-

318. Caetano Interview, *supra* note 201. ABEF issued a call for bids from Brazilian law firms and selected Veirano Advogados. *Id.*

319. *Id.* Ana Caetano had worked with Gary Horlick for almost four years at O'Melveny and Myers. *Id.* She moved to Brazil at the end of 2000, shortly after the settlement of the soluble coffee case. *Id.*

320. *Id.* The 2000 complaint followed an earlier one also brought by Brazil against the European Union's system of preferences program. *Id.* Caetano had worked with the lead lawyer at O'Melveny & Myers in this complaint, *EC—Measures Affecting Differential and Favourable Treatment of Coffee*, WT/DS154, brought by Brazil against the European Union. *Id.*

321. See Alter, *supra* note 96 (concerning the 2000 soluble coffee case); Caetano Interview, *supra* note 201; *infra* Annex II. The case anticipated India's later challenge of the EU's enhanced preferences program for selected countries engaged in combating drug production. See Appellate Body Report, *EC—Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R (Apr. 7, 2004). For an overview of the case, see Gregory Shaffer & Yvonne Apea, *Institutional Choice in the GSP Case: Who Decides the Conditions for Trade Preferences: The Law and Politics of Rights*, 39 J. WORLD TRADE 977 (2005).

322. The *EC—Bananas* Arbitration is linked to EU compliance with the decision in the original *EC-Bananas* case (WT/DS27). Brazil was among nine Latin American countries to join WTO arbitration proceedings initiated on March 31, 2005 against the EU to determine whether the EU's revised banana tariffs regime would maintain at least the same market access for Brazil's bananas as under the original tariff regime. An arbitration panel ruled in favor of the complainants on August 1, 2005. The parties could not agree on the revised tariff figure proposed by the EU in response to the August 1 arbitration ruling and on September 26, the EU asked the WTO to carry out a second arbitration review. On October 27, an arbitration panel again ruled in favor of the Latin American exporters. Subsequent talks to resolve the issue were complicated by disagreements among the Latin countries themselves. Brazil, Costa Rica, Ecuador, and Guatemala favored a single tariff system, albeit significantly lower than that proposed by the EU. Honduras, Panama, and Nicaragua preferred a solution within the EU's existing quota system. See *EU Asks for Second Arbitration Review by WTO on Revised Banana Tariff Scheme*, INT'L TRADE REP. (BNA), Sept. 29, 2005; *EU, Latin American Exporters Discuss New Banana Tariff; Latins Unimpressed*, INT'L TRADE REP. (BNA), Dec. 22, 2005; *EU Loses Second Challenge at WTO on Banana Tariffs to Latin American Nations*, INT'L TRADE REP. (BNA), Nov. 3, 2005; *WTO Arbitrators Side with Latin American Nations on EU's Proposed Banana Import Regime*, INT'L TRADE REP. (BNA), Aug. 4, 2005; *Three More*

nal expertise so that Brazilian private parties can obtain domestic WTO-related legal assistance at a lower cost, whether for actual litigation or for preparation of a complaint to facilitate a favorable settlement.<sup>323</sup>

Brazil, as many other WTO members, has also challenged U.S. and EU countervailing duty and anti-dumping measures. In these cases, the government typically works with the law firm that assisted the industry or the importer in the domestic proceeding. Thus, the government worked with the Washington, D.C. law firm Wilkie Farr & Gallagher in Brazil's complaints against both U.S. countervailing duties and safeguards on steel products and the U.S. Continued Dumping and Subsidy Offset Act of 2000. As these cases all affected the steel sector, in each case, the Brazilian Steel Institute, the trade association for Brazilian steel companies, funded the outside law firm.<sup>324</sup> Because a number of these cases involved multiple complainants, the law firm had to coordinate positions with the representatives of other WTO members. Similarly, Brazil worked with the Brussels office of the law firm of Theodor Goddard in Brazil's complaints against EU anti-dumping duties on malleable cast iron tube and pipe fittings.<sup>325</sup>

Civil society organizations can also help a country as a complainant, but countries have more frequently obtained their support when the country is a defendant. Non-governmental organizations, such as Oxfam, for example, helped rally support against U.S. cotton subsidies at the time of the *U.S.-Cotton* case, especially in terms of the subsidies' impact on West African cotton farmers.<sup>326</sup> Brazil attached a statement from Oxfam to its legal submissions in the *U.S.-Cotton* case regarding the impact of the subsidies on West African producers, which the panel referenced.<sup>327</sup> Oxfam also assisted Benin and Chad as third parties in the case, which referred to

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*Nations Join WTO Case Against EU Tariff Regime on Bananas*, INT'L TRADE REP. (BNA), Apr. 7, 2005. The case then returned to litigation before a WTO panel, which expected to issue its final report to the parties in March 2008. See Communication from Chairman of the Panel, *EC Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/86 (Feb. 22, 2008).

323. Although Brazilian law firms are relatively less experienced than U.S.-based international ones in WTO disputes, the firm's fees are also lower. Interviews by Gregory C. Shaffer with Brazilian lawyers [names withheld], in São Paulo, Braz. (Apr. 2004) (on file with authors).

324. Telephone Interview by Michelle Ratton Sanchez with officials, Dispute Settlement Unit, Brazilian Ministry of Foreign Affairs [names withheld], in Brasília, Braz. (Aug. 16, 2007) (on file with authors) [hereinafter Ratton Sanchez Ministry Interview]. On the Brazilian Steel Institute and the history of the Brazilian steel industry, see Instituto Brasileiro de Siderurgia, <http://www.ibs.org.br/> (last visited May 25, 2008).

325. Ratton Sanchez Ministry Interview, *supra* note 324.

326. See discussion in Goldberg et al., *supra* note 188, at 7.

327. See Panel Report, *United States—Subsidies on Upland Cotton*, WT/DS267/R, ¶ 7.54, n. 120 (Sept. 8, 2004) ("Brazil has explained the situation in Benin and/or Chad in its further submission dated 9 September 2003 (executive summary included as Annex E item 1) at paragraph 1; in its answers dated 27 October 2003 to questions from the Panel at paragraphs 61, 121, 159 (see Annex I item 5); in Exhibit BRA-294, and in its further rebuttal submission dated Nov. 18, 2003 (executive summary included as Annex G item 1) at paragraph 87. Numerous exhibits also pertain to the cotton sectors in Benin and/or Chad, in particular, Exhibit BRA-15, an OXFAM briefing paper, Exhibits BRA-264 through BRA-268 and BRA-294.").

OXFAM studies in their third party submissions that the panel cited in its decision.<sup>328</sup>

The private sector is not always willing to fund a case that the Foreign Ministry believes Brazil should pursue or that it must defend as a respondent, particularly cases of a systemic nature for which the Ministry believes that it needs outside legal assistance. In 2005, the Ministry of Foreign Affairs therefore called for bids from international law firms based in the U.S. and in Brussels, Belgium to propose terms for assisting Brazil in these cases. It chose Sidley Austin. The first case in which Brazil hired the firm to assist it as a complainant without private sector funding was in Brazil's 2007 challenge to U.S. agricultural subsidies in the case *United States-Domestic Support and Export Credit Guarantees for Agricultural Products* (WT/DS365).<sup>329</sup> Brazil identified the case as one of systemic importance, in particular, in light of developments in the Doha Round negotiations and as a tool to exert pressure on U.S. domestic political consideration of farm subsidies. It brought the case alongside Canada, which filed first.<sup>330</sup>

Finally, Brazil, like other countries, often successfully settles complaints that it brings without litigation. Brazil's success with WTO litigation using a public-private partnership model coordinated by a specialized dispute settlement unit has enhanced Brazil's credibility in WTO circles, which, in turn, has arguably strengthened its hand in settlement negotiations conducted in the shadow of potential litigation. Brazil settled ten of its first twenty-three WTO complaints without litigation. The Foreign Ministry handled most of these cases without the assistance of an outside law firm, but law firms advised the affected private sector and government in some of them.<sup>331</sup>

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328. See *id.* ¶ 7.1211, n.1330 ("According to Benin and Chad, the Oxfam report-using data from the International Cotton Advisory Committee-estimates that in 2001 alone, sub-Saharan exporters lost \$302 million as a direct consequence of United States cotton subsidies. The Report further notes that Benin's actual cotton export earnings in 2001/02 were \$124 million. However, had United States subsidies been withdrawn, Benin's export earnings are estimated to have been \$157 million. Therefore, the value lost to Benin as a result of United States subsidies was \$33 million. Chad's cotton export earnings in 2001/02 were \$63 million, although in the absence of United States subsidies, Chad would have earned \$79 million, thus reflecting a loss of \$16 million. For the period from 1999/2000 to 2001/2002, Oxfam estimates a total cumulative loss of export earnings of \$61 million for Benin and \$28 million for Chad. Benin and Chad agrees with Oxfam when it emphasizes, 'the small size of several West African economies and their high levels of dependence on cotton inevitably magnify the adverse effects of United States subsidies. For several countries, U.S. policy has generated what can only be described as a major economic shock.'")

329. See Request for Consultations by Brazil, *United States-- Domestic Support and Export Credit Guarantees for Agricultural Products*, WT/DS365/1 (July 11, 2007).

330. See *Brazil Prepares Canada-Like Challenge to U.S. Farm Subsidies in WTO*, 25 INSIDE U.S. TRADE, July 20, 2007 ("A Brazilian official said the case is meant to exert pressure on the U.S. at a time when the Congress is preparing a farm bill").

331. See Annex II concerning *US-Equalizing Excise Tax Imposed by Florida on Processed Orange and Grapefruit Products*, WT/DS250; *US-Anti-Dumping Duties on Silicon Metal from Brazil*, WT/DS239; *US-US Patents Code*, WT/DS224; *US-Countervailing Duties on Certain Carbon Steel Products from Brazil*, WT/DS218; *Mexico-Provisional Anti-Dumping Measure on Electric Transformers*, WT/DS216; *EC-Measures*

## B. Brazil as a Respondent

Two aspects stand out when Brazil is a respondent. First, if the complaint raises social concerns, civil society activists may indirectly assist the government in its response. Second, the private sector may be less willing to fund a private lawyer to assist the government in a case against Brazil, and the government has no choice but to defend it. In that case, the government may need to hire outside counsel on its own. As of December 31, 2007, WTO members have filed requests for consultations fourteen times against Brazil, but only three of these complaints have been fully litigated: *Brazil-Measures Affecting Desiccated Coconut*, the Embraer case, and the *Brazil-Tyres* case.<sup>332</sup> The Brazilian government worked with private law firms in each of the three cases in which a panel was formed, but it had to pay the outside counsel fees in the *Brazil Tyres* case.

Civil society organizations can be helpful for Brazil as a respondent in WTO cases that raise social implications. Brazil's response to the U.S. challenge to its patent law in 2000 (WT/DS199) exemplifies both the role that civil society organizations can play in WTO dispute settlement, as well as the links between WTO dispute settlement, trade negotiations, and the broader social, political, and institutional context.<sup>333</sup> The United States brought the complaint under the TRIPs Agreement against Article 68, paragraph 1 of the Brazilian Intellectual Property Law, which requires the "local working" of a patent—that is, the local production of a patented invention as a condition for the recognition of an exclusive patent right.<sup>334</sup> The Ministry of Foreign Affairs, maintaining that Brazil's intellectual property law

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*Affecting Soluble Coffee*, WT/DS209; *Turkey—Anti-Dumping Duty on Steel and Iron Pipe Fittings*, WT/DS208; *Argentina—Transitional Safeguard Measures on Certain Imports of Woven Fabric Products of Cotton and Cotton Mixtures Originating in Brazil*, WT/DS190; *EC—Measures Affecting Differential and Favourable Treatment of Coffee*, WT/DS154; *Peru—Countervailing Duty Investigation Against Imports of Buses from Brazil*, WT/DS112. For example, we learned that Wilkie Farr & Gallagher assisted Brazil in the Florida excise tax case and the U.S. countervailing duty case on steel, and that O'Melveny & Myers assisted with the first soluble coffee case. Ratton Sanchez Ministry Interview, *supra* note 324.

332. Brazil won the desiccated coconut case on technical grounds, came to a draw in the aircraft case (winning as a complainant, losing as a respondent, and then settling), and formally lost the tires case, although the decision substantially favored Brazil as discussed below. Embraer funded the outside lawyers in the *Aircraft* case and a trade association funded them in the *Desiccated Coconut* case. Panel Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R (June 12, 2007) [hereinafter Panel Report, *Brazil—Tyres*]; Panel Report, *Brazil—Export Financing Programme for Aircraft*, WT/DS46/R (Apr. 14, 1999); Panel Report, *Brazil—Measures Affecting Desiccated Coconut*, WT/DS22/R (Oct. 17, 1996).

333. See SUSAN ARIEL AARONSON & JAMIE M. ZIMMERMAN, *TRADE IMBALANCE: THE STRUGGLE TO WEIGH HUMAN RIGHTS CONCERNS IN TRADE POLICYMAKING* 107-10 (2008).

334. Interview by Gregory C. Shaffer with Brazilian official [name withheld], in Geneva, Switz. (June 19, 2002). A Brazilian official alleged that the United States also brought the case to pressure Brazil not to challenge U.S. subsidization of soybean producers. *Id.* Brazil eventually did not bring the case because the world price for soybeans increased, reducing the amount of U.S. subsidies. *Id.*; see Goldberg et al., *supra* note 188.

was TRIPs-compliant, devised and implemented a strategic response.<sup>335</sup> NGO reactions to the case helped Brazil in its settlement negotiations with the United States. Advocacy groups maintained that the U.S. government had placed corporate interests above life-and-death medical concerns.<sup>336</sup> This NGO pressure was complemented by prodding from international health and human rights organizations.<sup>337</sup> In June 2001, the Bush administration withdrew the U.S. complaint.<sup>338</sup> The international response that the case spurred helped shift the terms of debate over the protection of pharmaceutical patents, strengthening Brazil's and other developing countries' negotiating position that intellectual property rules must be interpreted, applied, and where necessary, modified in order to grant developing countries "flexibility" to address public health issues.<sup>339</sup> These debates ultimately gave rise to a modification of Article 31 of the TRIPs agreement in August 2005, shortly before the WTO Ministerial Meeting in Hong Kong.<sup>340</sup>

Brazil's response to the EU's 2005 complaint against a Brazilian ban on the importation of retreaded tires in *Brazil-Tyres* provides another example where NGOs supported Brazil in its defense, but this time the case was fully litigated.<sup>341</sup> Brazil based its defense on the environmental and health risks posed by the accumulation of waste tires. Brazil argued that they increase the risk of transmission of mosquito-borne diseases, such as dengue fever and malaria, and of toxic emissions from tire fires.<sup>342</sup> The Brazilian government indicated its interest in generating civil society support in the case by taking "the unusual step of making all of its written submissions and oral statements in the tyre dispute publicly available," both in English and Portuguese,<sup>343</sup> and by meeting with civil society organizations

335. The ministry worked without the assistance of an outside law firm, which was not needed at least in part because the case was settled before litigation commenced. Raton Sanchez Ministry Interview, *supra* note 324.

336. The point is further developed in Shaffer, *supra* note 106.

337. For example, fifty-two countries of a fifty-three member United Nations Human Rights Commission endorsed Brazil's AIDS policy and backed a resolution sponsored by Brazil that called on all states to promote access to AIDS drugs. See *UN Rights Body Backs Brazil on AIDS Drugs*, NEWS24.COM, Apr. 24, 2001, [http://www.news24.com/contentDisplay/level4Article/0,1113,2-1134\\_1014970.00.html](http://www.news24.com/contentDisplay/level4Article/0,1113,2-1134_1014970.00.html).

338. See Notification of Mutually Agreed Solution, *Brazil—Measures Affecting Patent Protection*, WT/DS199/4 (July 19, 2001); see also Shaffer, *supra* note 106.

339. World Trade Org., Ministerial Declaration on the TRIPs Agreement and Public Health, WT/MIN(01)/DEC/2 (Dec. 20, 2001).

340. World Trade Org., General Council, *Amendment of the TRIPs Agreement*, WT/L/641 (Dec. 8, 2005).

341. See Appellate Body Report, *Brazil—Tyres*, *supra* note 34; Panel Report, *Brazil—Tyres*, *supra* note 332; Annex II.

342. See Panel Report, *Brazil—Tyres*, *supra* note 332, at ¶¶ 4.15–4.19.

343. See *Brazil Tyres Update*, BRIDGES MONTHLY REV., Sept.–Oct. 2006, at 8. This reflects steps that the Foreign Ministry has taken to be more transparent regarding WTO matters. A member of the Dispute Settlement Unit of Brazil's Foreign Ministry indicated in 2004 that the Ministry was planning to make Brazil's future case submissions available on the Ministry's website. Apr. 2004 Dispute Settlement Unit Member Interview, *supra* note 180.

concerning the case.<sup>344</sup> In response, NGOs came to the Brazilian government's defense. For the first time, Brazilian NGOs filed an *amicus curiae* brief before a WTO panel on behalf of Brazil, together with a U.S.-based NGO.<sup>345</sup> In support of the government's position, the NGOs helped to spur media coverage of the case from an environmental and health perspective.<sup>346</sup> Most developing countries have, in contrast, generally been wary of enhancing transparency of the WTO "intergovernmental" dispute settlement system.<sup>347</sup>

Although Brazil lost the decision, the WTO panel and Appellate Body made a number of findings in support of Brazil's right to take the measures in question. In particular, the Appellate Body recognized that the ban on tires, if implemented on a non-discriminatory basis, would pass WTO scrutiny.<sup>348</sup> The Appellate Body further indicated that WTO panels must consider a developing country's regulatory capacity constraints in determining

344. See *Civil Society Throws Weight Behind Brazil in Retreaded Tyres Dispute*, BRIDGES WKLY. TRADE NEWS DIG., July 12, 2006, at 6 (noting that "Brazilian Environment Minister Marina Silva met with civil society representatives in Geneva . . . following the first panel hearing"). The Brazilian Environment Ministry provided key support on the environment-related issues in the case. *Id.*

345. The *amicus curiae* brief was filed by: Associação de Combate aos Poluentes (ACPO), Associação de Proteção ao Meio Ambiente de Cianorte (APROMAC), Center for International Environmental Law (CIEL), Centro de Derechos Humanos y Ambiente (CEDHA), Conectas Direitos Humanos, Justiça Global, Instituto O Direito por Um Planeta Verde Planeta Verde. See Brief for Associação de Combate aos Poluentes (ACPO) et al. as Amici Curiae Supporting Respondent, *Brazil–Tyres*, 12 WT/DS332/AB/R (Dec. 3, 2007) [hereinafter ACPO Brief], available at [http://www.ciel.org/Publications/Brazil\\_Tires\\_Amicus11Oct07.pdf](http://www.ciel.org/Publications/Brazil_Tires_Amicus11Oct07.pdf) (focusing on how "tire waste and disposal is a worldwide health and environmental problem" and discussing relevant international law on the question, such as the Basel Convention on Transboundary Movements of Hazardous Wastes and Their Disposal, the Stockholm Convention on Persistent Organic Pollutants, and the International Covenant on Economic, Social and Cultural Rights). The Humane Society of the United States filed a separate *amicus* brief that, like the ACPO Brief, supported Brazil's defense of environmental and health concerns. See Brief for Humane Soc'y of the U.S. as Amicus Curiae Supporting Respondent, *Brazil–Tyres*, WT/DS332/R (June 12, 2007), available at [www.hsus.org/web-files/PDF/Brazil-Retreaded-Tyres-Submission-of-Non-Party-Humane-Society-International.pdf](http://www.hsus.org/web-files/PDF/Brazil-Retreaded-Tyres-Submission-of-Non-Party-Humane-Society-International.pdf).

346. See, e.g., Juana Kweitel, *O Caso dos Pnêus*, FOLHA DE SÃO PAULO, Aug. 7, 2006, available at [http://www.riosvivos.org.br/canal.php?canal=34&mat\\_id=9401](http://www.riosvivos.org.br/canal.php?canal=34&mat_id=9401); see also Merluzza Mattos, *Ministerio do Meio Ambiente, ONGs pedem fim do contencioso contra o Brasil na OMC* (Sept. 27, 2006), <http://www.mma.gov.br/ascom/ultimas/index.cfm?id=2830>; Rede Brasileira de Justicia Ambiental, *UE Quer Transformar o Brasil na OMC* (Sept. 27, 2006), [http://www.justicaambiental.org.br/\\_justicaambiental/pagina.php?id=858](http://www.justicaambiental.org.br/_justicaambiental/pagina.php?id=858). For these and other documents regarding the case, see Trade&Environment.org, *Retreaded Tyres Case*, <http://www.trade-environment.org/page/theme/tewto/tyrescase.htm> (last visited June 1, 2008).

347. See Gregory C. Shaffer, *The World Trade Organization Under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and Environment Matters*, 25 HARV. ENV. L. REV. 1, 67-70 (2001).

348. Appellate Body Report, *Brazil–Tyres*, *supra* note 34, at ¶ 258(a)(i). The Appellate Body upheld the panel's finding "that the Import Ban can be considered 'necessary' within the meaning of Article XX(b) and is, thus, provisionally justified." *Id.* The Appellate Body rejected the EU's claims that alternative waste management and disposal measures were available that would meet Brazil's environmental health policy objectives and would have a less restrictive impact on trade. *Id.* at ¶ 211.

whether its regulatory measure is justifiable.<sup>349</sup> Brazil lost the case only because of lower court injunctions requiring Brazil to import used tires and an exemption for Mercosur members, which respectively undermined the government's stated environmental and health objectives.<sup>350</sup> The Brazilian government responded that the Mercosur policy was being renegotiated and that the "court orders were being challenged" and would "be reviewed by Brazil's Supreme Court."<sup>351</sup>

The *Brazil-Tyres* case is also of interest because it was the first time that the Brazilian government hired an outside law firm's assistance without private sector funding. The government began to coordinate research on Brazil's defense of a potential complaint when the EU initiated informal consultations in 2003.<sup>352</sup> It worked with interns from Brazilian law firms in Brasília and former interns who had returned to Brazilian law firm practice from its Geneva mission.<sup>353</sup> Because the private sector did not hire a law firm to assist the government to defend Brazil's position, the Ministry of Foreign Affairs issued an international call for tender in December 2005, hiring a major U.S. law firm on account of its considerable experience and its offices in the United States and Europe.<sup>354</sup> As determined by the government, the U.S. law firm could support the Foreign Affairs Ministry with its defense in the case, as well as others in the future.

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349. *Id.* at ¶ 171. The Appellate Body maintained, "[T]he capacity of a country to implement remedial measures that would be particularly costly, or would require advanced technologies, may be relevant to the assessment of whether such measures or practices are reasonably available alternatives to a preventive measure, such as the Import Ban, which does not involve 'prohibitive costs or substantial technical difficulties.'" *Id.*

350. *Id.* at ¶ 258(b). The Appellate Body only held against Brazil because Brazil did not apply the ban to all used and retreaded tires on account of court injunctions blocking application of the law in question and an exemption granted to imports of certain retreaded tires from members of Mercosur. *Id.*

351. See Daniel Pruzin, *EU Accuses Brazil of Contradictory Stance in WTO Dispute Over Ban on Retreaded Tires*, 24 INT'L TRADE REP. (BNA) 1465 (Oct. 18, 2007); see also Michael Kepp, *Brazil's Chief Justice Overturns Lower Court, Citing Health Risks from Imported Tires*, 24 INT'L TRADE REP. (BNA) 1554 (Nov. 1, 2007) (also noting the government's attempt to pass parallel legislation "that would ban the import of all reusable, recyclable, or recycled solid waste that poses a public health or environmental risk").

352. The European Union started informal consultations in 2003 in the context of its own internal investigation of the legality of the Brazilian regulations. The investigation was initiated under the EU's Trade Barriers Regulation following a complaint by the Bureau International Permanent des Associations de Vendeurs et Rechapeurs de Pneumatiques (BIPAVÉR), dated November 5, 2003, on account of adverse trade effects suffered by the European Union retreaded tire sector resulting from Brazil's import ban on foreign retreaded tires.

353. For a discussion of the internship program, see *supra* Part III.C.2.

354. Ratton Sanchez Ministry Interview, *supra* note 324. The case affected two Brazilian industries, one for the production of new tires and one for the sale and import of used and retreaded tires. The ministry maintained that the case was of systemic importance, because it implicated environmental and health concerns and, thus, the defense should not be based on the partial, commercial points of view of affected industries. *Id.*; see also Appellate Body Report, *Brazil-Tyres*, *supra* note 34, at ¶ 57-58.

### C. Brazil as a Third Party

Brazil will choose to file as a third party rather than as a complainant when the country has more of a systemic interest in a dispute than a direct commercial one. In these cases, the government typically has less need of assistance from outside law firms, and the dispute settlement personnel in Brazil's Geneva mission may do most of the work on their own. The Geneva mission will communicate with and obtain the approval of the Dispute Settlement Unit in Brasilia before filing the third party submission, but it can act with much more autonomy than when Brazil is a complainant or respondent, largely because the stakes are much lower. Third party participation is also not as costly to the government in terms of expertise, because a third party is not required to file a formal submission and when it does, the submission can be short and non-technical in nature. Brazil's approach has changed somewhat since Brazil hired an outside law firm pursuant to its 2005 call for tenders noted in Part IV.B, as shown in Annex II.<sup>355</sup>

The Brazilian mission in Geneva often has used its interns for research support for its third party filings since the beginning of the internship program in 2003. Because the cases last longer than the four-month internship, former interns often continued to assist the government with the matter on a pro bono basis after they return to legal practice in Brazil.<sup>356</sup> In this way, the interns can continue to gather experience in international trade dispute settlement for use in the future, enhancing their credentials. The interns reportedly have made important contributions to Brazil's participation as a third party. To our knowledge, this program is unique among WTO members.

Although the Brazilian government typically does not develop partnerships with the private sector when it participates as a third party in a WTO case, there are exceptions. To start, when Brazil files a third party submission in parallel with a complaint of its own, which will occur until a WTO panel consolidates the complaints, then an outside law firm will likely help prepare both submissions.<sup>357</sup> In addition, some WTO cases can have such implications for the private sector that the private sector nonetheless becomes involved. Embraer, for example, funded an outside law firm to assist the government as a third party in the U.S.-EU dispute over the subsi-

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355. The information in the Annex was confirmed in Raton Sanchez Ministry Interview, *supra* note 324.

356. See *supra* Part III.C.2.

357. For example, Brazil participated as a third party when it also was a complainant in the steel safeguard cases and the U.S. Continued Dumping and Subsidy Offset Act of 2000. See Annex II. In a slightly different situation, India's complaint on the EU general preference system in the *EC-Tariff Preferences* case implicated Brazil's earlier settlement in its soluble coffee complaint against these same EU preferences. Associação Brasileira das Indústrias de Café Solúvel (ABCIS), the private trade association representing the coffee producers in Brazil's earlier *EC-Soluble Coffee* complaint, hired the Brazilian law firm Veirano Advogados to assist with Brazil's third party submissions to the panel and the Appellate Body in the *EC-Tariff Preferences* case. See *infra* Annexes II and IV; *supra* note 318 and accompanying text.

dization of Boeing and Airbus, for which complaints were initially filed in 2004. The law firm assisted Embraer and worked with the Brazilian government in Brazil's filings as a third party in which Brazil assumed an engaged role.<sup>358</sup> Similarly, in a case involving U.S. countervailing duty methodologies for privatized companies, Brazil retained Wilkie Farr & Gallagher, funded by the Brazilian Steel Institute, and filed a complaint but remained a third party during the litigation, letting the European Union take the lead.<sup>359</sup> In sum, although Brazil has less need of sophisticated legal assistance when it acts as a third party in a dispute, it has developed mechanisms to assist it in these cases, including a specialized dispute settlement unit, an internship program for private lawyers in its mission in Geneva, and for some cases, the hiring of an outside law firm.

## V. The Limits of the Brazilian Approach

We have examined the response of Brazil to the legalization and judicialization of international trade relations, which has enabled it to play an important role in WTO negotiations, litigation, and their strategic combination. This response should not be seen in "top-down" terms pursuant to which the Brazilian government created a "model," which some call the "three pillar model," that can be exported to other countries. Rather, we have seen domestic and international factors interact reciprocally and dynamically, affecting the responses of an array of public and private actors.

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358. Ratton Sanchez Ministry Interview, *supra* note 324; *ee also* King & Spalding, Latin American Practice: Recent Matters, <http://www.kslaw.com/portal/server.pt?space=KSPublicRedirect&control=KSPublicRedirect&PageId=310> (last visited May 25, 2008) ("Provided strategic advice and assistance to Embraer Empresa Brasileira Aeronautica, S.A. in support of Embraer's Washington Affairs office involving Congress, the Federal Aviation Administration, Department of Defense, and state and local governments where they have a presence; in various trade issues involving government subsidies provided to its competitors; and in complying with U.S. export licensing laws for civil and military products and assisting it in obtaining relevant licenses when necessary."). *See, e.g.,* Brazil Sides with EU in Arguments Before WTO Boeing Panel, INSIDE U.S. TRADE, Feb. 1, 2008; *see also* Communication from the United States, Answers to Questions from Brazil, *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/8 (May 15, 2006); Constitution of the Panel Established at the Request of the European Communities—Note by the Secretariat, *United States—Measures Affecting Trade in Large Civil Aircraft*, WT/DS317 (Oct. 25, 2005); Constitution of the Panel Established at the Request of the European Communities—Note by the Secretariat, *European Communities—Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS347/5 (July 24, 2006); Constitution of the Panel Established at the Request of the European Communities—Note by the Secretariat, *United States—Measures Affecting Trade in Large Civil Aircraft—(Second Complaint)*, WT/DS353/3 (Dec. 4, 2006).

359. *See* Communication from the European Communities, *EC—Cast Iron Tube*, WT/DS219/13 (Mar. 23, 2004); Request for Consultations by Brazil, *European Communities—Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/1 (Jan. 9, 2001). The United States modified its methodology following the first WTO case, which the EU then challenged, again successfully. Brazil also acted as a third party in a number of other steel-related cases for which Wilkie Farr & Gallagher provided representation. *See infra* Annex II.

Brazil's successful use of the WTO dispute settlement system deservedly has attracted attention and is of clear interest to other WTO members. Nonetheless, in this section, we address the limits of Brazil's approach both for Brazil and for other developing countries whose politics are less democratic and whose economies are smaller and less diversified. We first examine the following challenges for Brazil: retaining continuity of government personnel in a system based on diplomatic rotation within the Ministry of Foreign Affairs; the willingness and ability of private industry to fund private lawyers, especially for complex cases such as those over agricultural subsidies in the United States and the European Union; the handling of cases of systemic importance that the private sector will not fund; the management of private law firms funded by the private sector where public and private interests do not fully coincide; and the reciprocal impact of Brazil's successful use of WTO litigation in contributing to the growing complexity of the system as part of a recursive process. We then explain why the challenges are even starker for other developing countries.

A first challenge for Brazil's approach is to ensure that successful innovations are not abandoned, such as the specialized Dispute Settlement Unit within the Ministry of Foreign Affairs, the career track for "foreign trade analysts," the internship program in Brazilian missions, and the overlapping public-private networks of practitioners, consultants, business representatives, academics, NGOs, and government officials. The last three governments in Brazil have invested significant resources on foreign trade issues, including those for addressing trade disputes. Yet as Heredia and Schneider note in their study of administrative reform in developing countries, "administrative reforms take a long time to become consolidated or institutionalized" and are subject to change in light of "political fluidity and turnover."<sup>360</sup> Veiga derives similar conclusions in his study of Brazilian trade policy, finding that "despite the diversification of the channels of dialogue and participation, the great majority of these are still not institutionalized."<sup>361</sup>

As for most WTO members, a first challenge for Brazil is to ensure a continuity of government personnel who have developed expertise for handling WTO negotiations and dispute settlement. There is a growing tension between the increasingly technical demands of the WTO and its dispute settlement system and the traditional model of diplomatic rotation in ministries of foreign affairs. Both the traditions and the career incentives within Brazil's Ministry of Foreign Affairs are for diplomats to have broad-based knowledge and to move to different posts every two to three years. Therefore, there is a strong possibility that once diplomats are

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360. Heredia & Schneider, *supra* note 85, at 20.

361. Veiga, *Changing Patterns in State-Civil Society Relationship*, *supra* note 59, at 178 (further noting that "civil society is invited by the State, which defines the actors to be invited, the occasions for these invitations, the convenience of circulating information pertinent to the meetings, and so on."). Veiga declares that the Brazilian Business Coalition has proposed procedures for business sector participation in trade policy-making, but "these efforts have never led to any formal government commitment to the proposed procedures." *Id.*

trained in WTO dispute settlement, they can be replaced by personnel with little to no knowledge of the procedural and substantive complexities of WTO dispute settlement. Although Brazil's Ministry of Foreign Affairs prioritizes international trade matters<sup>362</sup> and has attempted to keep diplomats interested in trade policy by assigning them to trade-oriented posts,<sup>363</sup> this practice is not institutionalized. Officials within Brazil's Ministry of Foreign Affairs are divided as to whether to prefer within the Ministry specialized career tracks, such as in trade, or broader-based experience through diplomatic rotations. Gifted individuals who wish to rise within the ministry still face career incentives not to specialize but to broaden their experience. No matter how bright a new diplomat and how fast the diplomat may learn, WTO dispute settlement dynamically changes and involves considerable technical complexity so that countries that assign WTO matters to a ministry with a system of diplomatic rotation can be disadvantaged unless they develop techniques to foster specialization within it.

There are a number of alternatives that a country may consider. One alternative is for countries to create a separate ministry for international trade relations, such as the Office of the United States Trade Representative or the European Union Trade Directorate General. In Brazil's case, it seems doubtful whether this would be a good idea given the existing power and reputation of the Ministry of Foreign Affairs within the government.<sup>364</sup> A new trade ministry might have lesser authority. Alternatively, the ministry could provide special training programs for diplomats that work on trade negotiations and dispute settlement and create a distinct career track for them. The ministry could also hire permanent staff, such as international trade lawyers and economists, or network closely with specialized analysts in other ministries to support the work of the diplomats who would continue their diplomatic rotations.<sup>365</sup>

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362. Brazil's prioritization of trade policy already creates more trade-oriented career incentives within its foreign ministry than for diplomats in other countries' foreign ministries.

363. For example, Celso Almeida Pereira, who was in charge of dispute settlement in the Brazilian mission in Geneva for about four years, left the mission in Geneva to work in Brazil's embassy in Ottawa, Canada and then moved back to Brasilia to work in the cabinet of the Ministry of Foreign Affairs. The Ministry of Foreign Affairs replaced him with Nilo Ditz, an individual who had worked in the Dispute Settlement Unit in Brasilia for four years. Continuity, therefore, was assured, although Nilo Ditz assumed new responsibilities at the mission in 2007. Similarly, Roberto Carvalho de Azevêdo, who first led the Dispute Settlement Unit, was then appointed to be the Director of the Economic Affairs Department (Departamento de Assuntos Econômicos) in late 2005, and then became the General Under-Secretary of Economic and Technological Affairs. Flávio Marega replaced him in the Dispute Settlement Unit, which is within the Under-Secretary of Economic and Technological Affairs, so that Azevêdo can still oversee the work.

364. See also Hurrell, *supra* note 58, at 86 ("Itamaraty, despite many predictions, has maintained its general position in foreign policy, including in relation to trade negotiations."). Moreover, the ministry would not easily relinquish this important portfolio.

365. Brazil's approach, which is still being implemented, is for specialized "foreign trade analysts" to be largely in other ministries, such as the Ministry of Development,

The challenge of how to structure a country's response to the demands of a legalized and judicialized international trade regime will be ongoing. We have seen how Brazil has responded, more so than other developing countries, by creating a specialized Dispute Settlement Unit in Brasília and Geneva so that expertise is developed and retained. There is currently no reason to suspect that these innovations will be disbanded because the unit's success has received high-level Brazilian political attention and the government and the business community perceive trade to be an important factor for Brazil's economic development. Nevertheless, the ministry's organization has changed in the past, and there is no guarantee that these changes will be retained.

A second constraint that Brazil faces is whether the affected private sector can afford and is willing to pay for a law firm to assist the government in a WTO case. Sectors composed of relatively small producers often face collective action problems to coordinate and pool the necessary resources. Even in the famous cotton case, it appears that the cotton trade association, ABRAPA, had significant budgetary concerns when it became evident that the U.S. law firm's legal fees would exceed \$1 million.<sup>366</sup> The cotton producers had to question whether the costs were justified in light of the uncertainty of the WTO legal outcome and if favorable, U.S. compliance in a manner that would enhance market access. Countries thus face a greater challenge if they wish to address foreign trade barriers adversely affecting their less-organized business sectors.

A third related constraint is that a country may have potential complaints that are of systemic importance for the economy, but businesses do not fund outside legal assistance because the complaints are not targeted to benefit their sector. The government may not have the funds to hire outside counsel in these cases because of limited budgetary resources. Nevertheless, systemic issues can have large impacts over time so that a country will be prejudiced if it does not have resources available. Brazil's creation of mechanisms to identify and evaluate potential claims, its reorganization of its ministry to manage litigation, its internship program, and its allocation of money to engage a top private law firm's assistance through an international bid, all point to ways in which Brazil is attempting to respond to this challenge. Finding the resources for specific cases, however, will remain a constraint.<sup>367</sup>

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and to work through inter-ministerial networks on specific trade-related issues. Barral Interview, *supra* note 179.

366. See *supra* note 309 and accompanying text.

367. For example, although the Brazilian internship program in Geneva is admirable, it is still questionable whether the cost for law firms to develop WTO-related expertise is worth the investment. The Ministry of Foreign Affairs and private sector have largely hired foreign law firms to defend Brazil's interests before the WTO dispute settlement system because of their experience and expertise. Although their selection is understandable because the private sector and government wish to do all they can to win a case, this practice may also discourage Brazilian law firms from investing resources to build domestic capacity.

A fourth challenge is that even when the private sector provides financial support for the hiring of an outside law firm, the private sector's interests may not coincide with the government's perception of the public interest. There may also be divisions within the private sector so that only that portion of the private sector with the means to fund the outside lawyers will be represented. If private lawyers take the lead in a case and the government does not sufficiently monitor the positions taken, arguments could be used against the country in a later case. Although it makes sense, in our view, for a country like Brazil to hire outside legal counsel because of the procedural and substantive demands of WTO dispute settlement, a country needs to ensure that it has technically astute personnel who can define dispute settlement positions and supervise the arguments that private counsel use in legal submissions in light of broader political perspectives.

Governments face a related risk that they could settle a case in the interests of a specific commercial sector in a manner that constrains the country's ability to defend the interests of other sectors and the broader national interest in the future. For example, in the case involving soluble coffee, Brazil initiated a complaint against the EU regarding the EU's provision of enhanced tariff preferences for exporters from thirteen developing countries in order "to combat drug production and trafficking."<sup>368</sup> In settling the complaint, the EU agreed to increase the import quotas for the Brazilian soluble coffee sector and Brazil agreed to refrain from further challenging this aspect of the EU's GSP program. Such a settlement, however, could conceivably constrain Brazil in defending other sectors that might be affected by the EU's preferences, and it may explain why Brazil was only a third party in India's challenge to these preferences in *EC-Conditions for the Granting of Tariff Preferences to Developing Countries*, which was of great systemic importance for Brazil and developing countries.<sup>369</sup> Although Brazil has created new institutions to help it to manage and collaborate with outside legal counsel, which go beyond those developed by most other developing countries, the challenges remain.

None of the above tasks are easy for any government to manage. On the one hand, a government should ensure ongoing collaboration with the private sector to obtain information and to supplement the government's constrained human and budgetary resources. On the other hand, a government must have sufficient autonomy and expertise to manage the private sector input that it receives and to engage effectively at the

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368. These preferences were above those granted pursuant to the EU's normal preference system for developing countries permitted by the WTO, the "Generalized System of Preferences" (GSP). See *EC-Measures Affecting Soluble Coffee*, WT/DS209 (Oct. 12, 2000); *EC-Measures Affecting Differential and Favourable Treatment of Coffee*, WT/DS154 (Dec. 7, 1998); Council Regulation 2501/2001, Applying a Scheme of Generalised Tariff Preferences for the Period from 1 January 2002 to 31 December 2004, 2001 O.J. (L 346).

369. See Appellate Body Report, *EC-Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R (Apr. 7, 2004); Panel Report, *EC-Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/R (Dec. 1, 2003).

international level where confidentiality is required. Brazilian academics and private sector and civil society representatives have requested the government to facilitate their access to Brazil's positions before the WTO, such as its written submissions before dispute settlement panels and its statements made during oral hearings.<sup>370</sup> Although these groups may remain unsatisfied regarding their access, the Brazilian Ministry of Foreign Affairs has organized more frequent meetings regarding WTO developments over the last years and since 2005, it has made its legal submissions in WTO cases available on its website, as in the *Brazil-Tyres* case. Although these changes have not been institutionalized, they represent significant developments in Brazilian governmental practice, especially compared to Brazil's authoritarian past involving two decades of military dictatorship from 1964 to 1984.

Developing countries with smaller, less diversified economies and less democratic governments face even greater constraints than Brazil. Although Brazil represents less than 1 percent of global trade, it has a much larger and more diversified economy than most developing countries.<sup>371</sup> Because of the size of Brazil's economy, which represents over half of the GDP of South America,<sup>372</sup> its industries and elite companies are larger and thus relatively better able to fund lawyers for WTO dispute settlement. Behind Brazil's successful WTO complaints are huge companies, such as Embraer and Petrobras, and well-funded agribusiness and industrial trade associations, such as UNICA for sugar and the Brazilian Steel Institute for iron and steel. In addition, Brazil's elite law firms are among the largest in the developing world, reflecting both the size of the Brazilian market for trade and investment and the role of lawyers and courts in Brazil. These law firms are thus better able to invest in developing trade-related expertise, including through funding young attorneys in internships in the Brazilian mission in Geneva, the Brazilian embassy in Washington, D.C., or the Brazilian Ministry of Foreign Affairs in Brasilia.

Smaller, poorer developing countries have fewer incentives to organize for international trade dispute settlement, because they trade less in aggre-

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370. Brazilian academics contend that the documents could be more broadly used as teaching and training materials and that the private sector could then provide better input to the government in the future.

371. Brazil's gross domestic product was nearly \$1.1 trillion in 2006. In 2006, Brazil had the tenth largest economy (in terms of gross domestic product), the fifth largest territory, and the fifth largest population in the world. See WORLD BANK, *WORLD DEVELOPMENT INDICATORS 2006* (2007). Brazil ranks as an upper-middle income country under World Bank criteria (defined as gross national income per capita between \$3,596 to \$11,115), having a per capita gross national income of \$4,730 in 2006. *Id.* The country has, however, high levels of income disparity and poverty. According to the U.N. Development Programme's Human Development Report, Brazil ranked seventieth among countries in this respect. See UNITED NATIONS DEVELOPMENT PROGRAMME, *HUMAN DEVELOPMENT REPORT 2007/2008: FIGHTING CLIMATE CHANGE: HUMAN SOLIDARITY IN A DIVIDED WORLD* tbl. 3 (Human and Income Poverty: Developing Countries) (2008), available at [http://hdr.undp.org/en/media/hdr\\_20072008\\_en\\_complete.pdf](http://hdr.undp.org/en/media/hdr_20072008_en_complete.pdf).

372. Total GDP for South America was just over \$1.9 trillion in 2006, and Brazil alone contributed \$1.1 trillion. WORLD BANK, *supra* note 371.

gate, they trade a narrower range of products, and their opportunity costs are greater.<sup>373</sup> They face not only more immediate demands for the funding of basic human needs, but they are also unable to spread the costs of developing expertise over as large a number of cases. Preparing for any single case thus requires higher start-up costs. These countries are thus less likely to invest in capacity-building for WTO disputes by creating a specialized unit for WTO dispute settlement, a coordinated governmental structure and systems of public-private partnerships. The benefits from such initiatives are simply less likely to outweigh the costs. Interestingly, when members of the U.S. Congress expressed concern that the successful Brazilian cotton complaint could lead other countries to challenge U.S. agricultural subsidies, some analysts responded that there was little to fear. They concluded that the required legal fees would constitute "a sum that is prohibitive for the poor nations that suffer the most harm from cheap subsidized imports."<sup>374</sup>

Paradoxically, Brazil's successful use of the system through hiring talented U.S. litigators has contributed to the growing procedural, factual, and legal demands of WTO litigation and has thus created a *de facto* requirement of further specialization. The case-by-case orientation of WTO jurisprudence with its factual contextualization and use of elaborate precedent poses significant challenges, especially to those who practice in legal systems without such traditions. This trend explains not only why Brazil has had to adapt its approach to WTO dispute settlement, but also how Brazil's sophisticated use of WTO litigation through working with outside attorneys and economic consultants has contributed to the development of more demanding requirements. Striving to win each case recursively drives the jurisprudence and thus the system's demands. Over the last years, parties increasingly use econometric studies to support a WTO claim, hiring economic consultants to work with outside lawyers.<sup>375</sup> The more that parties use them, the more that this expertise will be required. Smaller, poorer countries are thus more likely to find themselves outside of the legal process and in a traditional bargaining relationship with their major trading partners, a situation in which they are relatively disadvantaged. Alternatively, their best hope is to become a member of the Advisory Centre on WTO Law (ACWL), established in 2001, which provides developing countries with lower-cost legal support for WTO dispute settlement and legal analysis.<sup>376</sup> The ACWL alone, however, cannot resolve a country's capac-

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373. See Nordström & Shaffer, *supra* note 97.

374. See Becker, *supra* note 309, at C1.

375. See e.g., WORLD TRADE ORG., WORLD TRADE REPORT 2005: EXPLORING THE LINKS BETWEEN TRADE, STANDARDS, AND THE WTO 171-211 (2005), available at [http://www.wto.org/english/res\\_e/booksp\\_e/anrep\\_e/world\\_trade\\_report05\\_e.pdf](http://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report05_e.pdf) [hereinafter WORLD TRADE REPORT 2005] (discussing the use of quantitative methods in WTO dispute settlement).

376. See Shaffer, *supra* note 106. For information on the Advisory Centre on WTO Law (ACWL) program, see its web site at: Advisory Ctr. on WTO Law, [http://www.acwl.ch/e/training/training\\_e.aspx](http://www.acwl.ch/e/training/training_e.aspx) (last visited May 25, 2008). Under the annexes to the agreement establishing the centre, developing countries are divided into three categories, A, B, and C, with least developed countries as defined by UN rules constituting a

ity challenges in WTO dispute settlement.<sup>377</sup>

Finally, Brazil has become a functioning democracy in which the private sector and civil society press the government to be responsive to their concerns. Statistical evidence suggests that countries without democracies are less likely to use WTO dispute settlement.<sup>378</sup> The best explanation appears to be that they are less likely to have a private sector that identifies trade harms, presses the government to bring a WTO case, and funds the required outside lawyers. Improving a country's internal governance generally should improve its ability to use the WTO system more effectively. Here, we refer, in particular, to the use of a professional, meritocratic bureaucracy that has dense ties with the private sector, as reflected in the concept of "embedded autonomy" that Peter Evans used.<sup>379</sup> This article has documented a diffusion (or democratization) of Brazilian expertise for trade law and policy, a central finding to which we return in our conclusion.

### Conclusion: Our Findings

There has been considerable analysis of the WTO dispute settlement system within law, political science, and economics. Nevertheless, there has been a dearth of empirical work that probes beneath the surface to examine the impact of the WTO legal system within a state and the processes through which that state engages the WTO legal system, in turn affecting the system. Brazil has been touted for exemplifying that developing countries can successfully use the WTO legal system and is thus an important site for inquiry. Until this article, however, there was little knowledge of what Brazil actually did to enable it to use the system, reflecting a general lack of empirical work in the field at the micro- and meso-levels.

In this article's conclusion, we highlight seven findings from our study. First, we argue that international trade law and judicialization have mattered in Brazil, unleashing a competition for expertise and helping to

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fourth category. *Id.* In 2006, hourly rates for the centre's members for WTO litigation support were set at \$200 for category A countries, \$150 for category B countries, and \$100 for category C countries. Least developed countries hourly rates were \$25 per hour. Non-member developing country rates were set at \$350 for category A countries, \$300 for category B countries, and \$250 for category C countries. See ADVISORY CENTRE ON WTO LAW, THE AGREEMENT ESTABLISHING THE ADVISORY CENTRE ON WTO LAW 13-14 (1999), [http://www.acwl.ch/e/pdf/agreement\\_estab\\_e.pdf](http://www.acwl.ch/e/pdf/agreement_estab_e.pdf). Brazil has not joined the ACWL, as it has been able to defend itself in large part because of the willingness of its private sector to fund outside legal assistance. Brazil has nonetheless worked with the ACWL in cases involving other developing country complainants, as when Thailand used the ACWL in the *EC-Sugar* case. The ACWL would cost Brazil, as an "upper middle income country," \$100,000 to join. See *id.* at 10. The ACWL has limited resources, so that if Brazil were to join the ACWL and actively use it, there would likely be fewer ACWL resources available for smaller developing countries.

377. See e.g., HOERMAN & KOSTECKI, *supra* note 108, at 94-95; Nordström & Shaffer, *supra* note 97.

378. Busch et al., *supra* note 15; Davis & Bermeo, *supra* note 120.

379. See *supra* notes 86-87 and accompanying text.

transform the government's relations with business and civil society regarding trade policy. Second, and related to this point, we contend that being a defendant in WTO cases can help catalyze these changes, giving rise to mechanisms of public-private coordination to defend a country's interests at the international level. Third, we find that these developments have not represented a weakening of the state, but rather the strengthening of the state's ability to engage at the international level through a diffusion of international trade law and policy expertise. Fourth, we observe that these processes reflect a growth of pluralism for trade policy making within Brazil, as the government has been pressed to become more transparent and open to dialogue. Fifth, we maintain that these processes are not automatic but are a function of domestic as well as international factors. We highlight the roles of Brazil's professional, merit-based Ministry of Foreign Affairs, the development of Brazilian career paths in the international trade field, Brazil's private sector that has been able to overcome collective action problems to engage with the government, and a general shift in orientation in Brazil's development strategies. Sixth, we find that although the example of Brazil offers some hope to other developing countries, these countries generally face greater challenges and will need to develop their own strategies in light of their own contexts. Seventh, we conclude by arguing that it is necessary to take into account the reciprocal interaction of the domestic and international spheres to understand national and international developments.

(1) *The Impact of WTO Judicialization in Brazil: Inciting a New Competition for Expertise*

The legalization and judicialization of international trade relations has exercised considerable influence on government-business-civil society relations in Brazil over foreign trade law and policy, spurring government reorganization and a new competition for expertise. The WTO legal and judicial system has catalyzed more than competition in product markets. It has spurred competition in professional markets to build careers that take advantage of the new opportunities offered. The number of career opportunities is limited, but it is much broader than one might initially think, involving academics, lawyers, government officials, companies, trade associations, think tanks, and consultancies. These professionals work with public and private actors to attempt to use and shape the WTO legal and judicial regime.

At the governmental level, multiple Brazilian ministries have become engaged with trade law and policy, creating new foreign trade career tracks.<sup>380</sup> Their involvement has reduced the Ministry of Foreign Affairs' former monopoly position within the government over foreign trade policy.<sup>381</sup> The Ministry of Foreign Affairs now receives instructions from

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380. See *supra* Part III.A.

381. Veiga, *Changing Patterns in State-Civil Society Relationship*, *supra* note 59, at 176. Veiga notes the erosion of "the Ministry of Foreign Affairs monopoly in trade negotiations" in Brazil as other ministries have become increasingly engaged, advancing the

CAMEX, an inter-ministerial coordinating body for trade policy. The ministries that participate in CAMEX have hired professionals in a governmental career track for “foreign trade analysts” who specialize in the law, economics, or politics of foreign trade, pass a highly competitive civil service exam, and undergo further government training before assuming their posts. The Ministry of Foreign Affairs, in turn, has created what its officials call a “three pillar model,” which lies behind Brazil’s successful use of WTO dispute settlement. The ministry’s approach includes a new Dispute Settlement Unit in Brasília (the “first pillar”), complemented by ministry personnel in Geneva dedicated to dispute settlement (the “second pillar”) who together work directly with the private sector, as well as lawyers and economic consultants hired by the private sector (the “third pillar”).

Increased business and societal interest in trade law and policy has spurred a competition for expertise within the private sector in Brazil. At the university level, this competition for expertise is reflected in increased university course offerings, graduate dissertations, and the formation of trade policy institutes and centers.<sup>382</sup> In the private commercial sector, we see the rise of new consultancies and think tanks that provide services to the business sector and the government for WTO negotiations and WTO litigation.<sup>383</sup> These think tanks and consultancies seek to help their clients obtain greater access to foreign markets, to defend Brazilian internal policies, or to open up the Brazilian market itself. They have produced statistical analysis critical for Brazil’s negotiating positions in the Doha Round and the success of its complaints in WTO disputes. Brazil’s largest law firms have co-sponsored, through the Law Firm Study Center, new internship initiatives within the government to gain expertise that they can market.<sup>384</sup> The Brazilian business community has responded by not only funding, hiring, and participating in many of these initiatives but also by creating a new encompassing business association specialized on trade policy, the Brazilian Business Coalition; new international trade departments within existing associations, such as in the State of São Paulo Industry Federation and the Brazilian Confederation of Industries; and new company personnel positions focused on trade law and policy.<sup>385</sup> Individuals from these various groups have gathered in trade negotiation and dispute settlement study groups, forming a trade policy epistemic community within Brazil. These various networks link legal and economic knowledge, which was well-developed in the United States and Europe, to Brazilian trading interests, with Brazil’s lawyers being trained and becoming entrepreneurs in the process.

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concerns of different constituencies. *Id.* The ministry nonetheless retains the leading role in the formation and execution of Brazil’s trade policy at the international level. See Hurrell, *supra* note 58, at 86.

382. See *supra* Part III.C.3.

383. See *supra* Part III.C.4.

384. See *supra* Part III.C.2.

385. See *supra* Part III.C.4.

The government's coordination with these groups for WTO trade negotiations and litigation represents a dramatic change in practice of what once was considered to be the most insular of Brazilian government ministries. As Barral writes, "The Ministry of Foreign Affairs (Itamaraty) itself is an example of how the evolution in trade relations promoted institutional openness. Traditionally the most hermetic bureaucratic organization in the Brazilian government, Itamaraty was progressively opened to inputs from civil society and the business community."<sup>386</sup> Government officials not only participated in a number of these initiatives, such as the trade negotiations and dispute settlement study groups, they also invested in facilitating the creation of this expertise through offering competitive internship programs in the mission in Geneva, the embassy in Washington, D.C., the Dispute Settlement Unit of the Ministry of Foreign Affairs, and the Trade Department of the Ministry of Development in Brasília.

In sum, we have shown how WTO legalization and judicialization have catalyzed public and private investment in trade law expertise in Brazil, constituting one type of "shadow effect" of the law. This investment, in turn, has enabled Brazil to bargain more effectively with third countries, constituting a reciprocal "shadow of the law" effect.<sup>387</sup>

### (2) *The Catalyzing Effect of Being a Defendant*

For most politicians, being a defendant in WTO litigation is bad and being a complainant is good. Trade liberals, in contrast, respond that being a defendant is best for a country's general welfare because inefficient trade barriers will be removed. We have taken a different track, showing how being a defendant in high-stakes cases can catalyze greater public and private sector engagement regarding international institutions, building capacity for a country to become more engaged in international processes and to make use of the opportunities that they provide. Canada's challenge of Brazil's industrial policy in the Embraer case was a pivotal moment for Brazil, which resulted in much greater media coverage of the WTO in the country, helping to spur the creation of broader-based capacity on WTO-related matters.<sup>388</sup> The Embraer case, together with the U.S. challenge against Brazilian patent policy, made a broader Brazilian public aware of international legal rules, spurring the government, private sector, and civil society to coordinate and become more engaged.

### (3) *Strengthening the State Through Diffusing Expertise*

Since Brazil increasingly has worked with the private sector, private lawyers, private consultancies, and civil society groups on international trade matters, some might contend that these developments represent a weakening of the state in that expertise is no longer consolidated within

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386. Barral, *The Brazilian Experience*, *supra* note 69, at 14.

387. This second "shadow of the law" effect has been addressed to a greater extent by socio-legal scholars. See, e.g., Robert Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L. J. 950 (1979).

388. See *supra* Parts II.B, III.C.1.

governmental departments but rather shared and developed through Brazilian public-private policy networks. In contrast, we find that Brazil has strengthened its ability to represent Brazilian interests through the diffusion of WTO expertise in the private sector and civil society. Brazil would not have won the strategically important *U.S.-Cotton* and *EC-Sugar* cases without outside agribusiness and law firm support, and it would not have had the statistical analysis which empowered it in its negotiations over new agricultural rules as leader of the G-20 and a member of a new G-4, consisting of the United States, the European Union, Brazil, and India, in the Doha Round.<sup>389</sup> Moreover, even when not working directly with the government, Brazilian academics and policy analysts help to ensure that Brazilian ideas, perspectives, and priorities are more likely represented before transnational policy communities.<sup>390</sup> Brazilian individuals and groups certainly challenge the Brazilian government, but in doing so, they also provide it with essential resources to enable it to better represent Brazilian perspectives in the WTO legal system. From a simple cost-benefit analysis, the political gains for Brazil from its investment in WTO-related expertise and the broader diffusion of this expertise outside the government have been considerable. Compared to investing in military means to gain international influence, Brazil's approach has been brilliantly inexpensive.

#### (4) *Growth of Pluralism and Government Transparency*

Whether one views the processes, mechanisms, and adaptations that we describe positively or negatively depends, in part, on one's ideological perspective. Brazil's engagement may be viewed as evidence of a deepening of WTO norms both internally in Brazil (through Brazil's internal adaptations and the diffusion of expertise and social learning) and externally (through its challenging of other countries' policies). Some readers could interpret these changes as evidence of the WTO's normative power, finding that the WTO system provides tools for actors, especially elite actors, within Brazil to advance neoliberal agendas within Brazilian politics and

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389. See *supra* Part IV.A. The former "Quad" consisted of the United States, the European Union, Canada, and Japan. See DEESE, *supra* note 18; Wolfe, *supra* note 17.

390. Cf. Shaffer & Apea, *supra* note 321, at 977-1008. This earlier article points to the need for greater engagement of developing countries' academics at the international level and notes, regarding an important WTO case involving the EU's preferential tariff system, that:

The discourse regarding the interpretation of the Enabling Clause in the GSP case was dominated by an interpretive community of predominantly North American and European scholars publishing in the major trade law journals that are read by WTO judicial decision-makers. The discourse inevitably reflects and privileges certain backgrounds and normative priorities. To give two examples from the GSP case, one leading North American scholar admirably published three articles on the GSP case before the Appellate Body rendered its decision and at least two additional contributions after the decision. Within a few months of the decision's publication, the *World Trade Review* published a special issue on the case in July 2004. All six of the commentators were either from North America or the United Kingdom, and five of the six taught at U.S. law schools.

for the Brazilian economy. Certainly international institutions can, and in the WTO's case do, create opportunities and provide tools. In this way, they can affect national regulatory policy decisions.

Our empirical work, however, suggests that such conclusions would miss crucial developments within Brazil toward a pluralist politics that involves considerable contestation over policy choices, both within and outside of government, and has led to greater government transparency. There is contestation within and among Brazilian governmental ministries,<sup>391</sup> as well as business and civil society groups.<sup>392</sup> For the first time, the Brazilian legislature has begun to pay greater attention to the WTO trade negotiation agenda.<sup>393</sup> As we have seen, the WTO has also helped to open up Brazilian trade policy from a closed state bureaucracy from a time when Brazil was under military rule to one in which both business and other civil society organizations have much greater access to government policy making, which has become much more transparent.

In his study of Brazilian trade policy, Veiga likewise finds an "impressive growth in the number of actors involved in the policy process, both in State and civil Society" and "a strong diversification of positions in respect to the issues treated in trade negotiations" as opposed to domination by a "traditional type of protectionist coalition putting together the State and import-competing business sectors."<sup>394</sup> As he writes in referring to the enhanced role of the Brazilian Network for the Integration of Peoples, the network of unions and NGOs created to coordinate common trade policy positions,<sup>395</sup> Brazilian trade policy making "has become more transparent, which reflects not only more access to formal and informal channels of information and influence, but also convergence between the broad political views and negotiating guidelines currently expressed through the State's negotiating strategy and those sponsored by the entities that comprise the Network."<sup>396</sup> He finds that the Brazilian Business Coalition has

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391. See Goldberg et al., *supra* note 188 (noting the ministerial differences within CAMEX regarding the launching of the U.S.—Cotton case); Barral Interview, *supra* note 179. There are also differences within the Ministry of Foreign Affairs, for example, regarding whether to focus on Mercosur or trade agreements with the EU. Barral Interview, *supra* note 179.

392. See *supra* note 256 and accompanying text (regarding differences between the agricultural sectors and business sectors in the Brazilian Business Coalition); *supra* note 287 (regarding differences among civil society organizations within REBRIP).

393. The Brazilian legislature (the Congress) has the power to approve or reject, in whole or part, the international commitments undertaken. CONSTITUIÇÃO FEDERAL art. 49 § 1 (Braz.). In the case of WTO dispute settlement, the Congress plays no formal role. Veiga, *Changing Patterns in State-Civil Society Relationship*, *supra* note 59, at 156. However, "as the trade negotiations agenda gained weight in the domestic policy debate in the 2000s, it began to draw the attention of the legislature." *Id.*

394. *Id.* at 176–77; see also *supra* Part I.

395. See *supra* note 287 and accompanying text.

396. Veiga, *Changing Patterns in State-Civil Society Relationship*, *supra* note 59, at 169 (an excellent work on civil society participation in the formation of Brazilian trade negotiating positions over time). Veiga observes how, under the Lula government, Brazil has moved away from a neo-corporatist institutional model to a more pluralist one. See *id.* at 174. However, Veiga also notes the possibility of the government being transparent instrumentally when it is assured of a convergence of views with key stakeholders,

lost some influence in the Lula administration to labor and civil society organizations who have gained greater access to policy makers.<sup>397</sup> Veiga concludes that the “recent history of trade policy making in Brazil reveals the growing participation of civil society in this area of policy.”<sup>398</sup>

In sum, we see a country that is moving toward a more pluralist model of interest group representation in trade policy.<sup>399</sup> In order to be successful in the WTO regime, the Brazilian government has needed to coordinate with the private sector to harness the private sector’s resources and expertise. The government has outsourced part of its traditional functions in trade policy to the private sector through the mechanism of public-private partnerships. This process, in turn, has generated more competition for expertise within the private sector. This growth of pluralism could be viewed, in part, as reflecting a U.S. export, but we remain agnostic on this point.<sup>400</sup> Whatever its origins, this mode of pluralist governance has been adapted to the Brazilian context.

#### (5) *The Importance of Domestic Factors*

The catalyzing impacts of international processes are not automatic. One cannot understand Brazil’s response and successful use of a legalized and judicialized system of trade dispute settlement without also examining domestic Brazilian factors. First, Brazil has a highly professionalized, merit-based Ministry of Foreign Affairs, and has now developed foreign trade analyst career tracks in other ministries. These officials can effectively manage and use the information that the private sector provides. Second, Brazil has large companies and well-organized trade associations that help to overcome collective action problems. These companies and trade associations have invested in international trade law, funding outside law firms and economic consultants for trade litigation, and providing the government with information and technical analyses for trade negotiations. Third, Brazil’s development policy has shifted toward greater reliance on

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which then grant it legitimacy. *Id.* He writes, “Since there is acknowledged convergence of viewpoints between the State and many of these sectors [business, trade unions and NGOs] in the area of trade negotiations, the net result for the State of democratizing access to the policy arena—without giving access to the instances where the strategy is actually framed—is assured *ex ante*: options and strategies will be referended [sic] by these sectors and gain legitimacy.” *Id.* at 175.

397. *Id.* at 161.

398. *Id.* at 179.

399. For work regarding a general shift toward a pluralist approach of business-government relations in Brazil, see ELI DINIZ & RENATO BOSCHI, *EMPRESARIOS, INTERESSES E MERCADO: DILEMAS DO DESENVOLVIMENTO NO BRASIL* (2004).

400. *Id.* Paradoxically, the resulting Brazilian public-private partnerships have been used by Brazil at the international level quite successfully, including through the hiring of U.S. lawyers and U.S.-trained Brazilian lawyers to assist with claims against the United States. *Id.* We note, in addition, the growth of “cause lawyering” and the “judicialization of politics” in Brazil. See generally Fabiano Engelman, *Tradition and Diversification in the Uses and Definitions of the Law: A Proposed Analysis*, 1 *BRAZ. POL. SCI. REV.* 53 (2007). These developments in cause lawyering and judicial politics also could be viewed in terms of a diffusion of U.S. legal practices translated into the Brazilian context, but we again remain agnostic for purposes of this article.

global markets and the private exporting sector to increase economic growth. Just as Brazil's economic development policy has moved "in the direction of greater support for (and increased reliance on) the private sector,"<sup>401</sup> we have seen a delegation of traditional government functions in international trade law and policy to collaborative networks of state officials, trade associations, companies, think tanks, consultancies, and law firms. Combining these domestic factors, Brazil has become a major player in the WTO system, using litigation and negotiation strategies to push for systemic changes in international rules and foreign domestic practices and in the process, affect the interpretation of WTO law.<sup>402</sup> Brazil has developed and deployed its domestic factors to attempt to shape the international field.

#### (6) *Lessons for Other Developing Countries*

This article should be of great interest to developing countries generally, as our findings provide both hope and caution. Brazil's public-private network approach for WTO dispute settlement exemplifies what a country can do to adapt to the challenges that the WTO system poses. Nevertheless, we have also addressed the limits of the Brazilian approach for Brazil and even more so, for smaller developing countries. The market for expertise that WTO legalization and judicialization spurred has had little resonance in smaller developing countries. Both for the government and the private sector in these countries, investing in WTO-related expertise is less beneficial at the margins because of their smaller size and the relatively smaller aggregate gains at stake for them.<sup>403</sup> By documenting the extent of Brazilian public and private investment in trade law and policy, this article may be disconcerting for some developing country analysts.

Nonetheless, all countries and constituencies can benefit through evaluating the experiences of others. Ultimately, because developing countries face different contexts, there is no single strategy that fits all of them. Exporting legal strategies across cultures regardless of context has never worked.<sup>404</sup> Each country can attempt to determine how best to adapt strategies in light of its particular circumstances. As Roberto Mangabeira Unger writes, the goal "can be reached only by obeying Piaget's maxim that 'to imitate is to invent.' The new will have to be combined with the old, the

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401. Thomas Biersteker, *The 'Triumph' of Liberal Economic Ideas in the Developing World*, in GLOBAL ECONOMIC CHANGE, REGIONAL RESPONSE: THE NEW INTERNATIONAL CONTEXT OF DEVELOPMENT 178 (Barbara Stallings ed., 1995). For a discussion of general shifts in Latin America, see Varas, *supra* note 46, at 284, see also Juan de Onis, *Brazil's New Capitalism*, 79 FOREIGN AFF. 107 (2000) (noting "the 'new model' reforms created by President Fernando Henrique Cardoso feature a political economy in which private enterprise, including foreign investment, is assigned and expanded responsibility for economic development").

402. See *supra* Part IV.

403. See *supra* Part II.A.

404. See, e.g., David Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062, 1068-69, 1080-85 (1974).

foreign with the local.”<sup>405</sup> This article has investigated developments in Brazil in response to the challenges of WTO dispute settlement, noting the state and private sector transformations that have occurred. In this way, we hope to provoke reflection over, as well as debate and experimentation with, strategies that countries at varying levels of development and their constituencies may adopt to better defend themselves in the international trading system.

### (7) *What Lies Behind Brazil's Success*

To conclude, we maintain that the best interpretation of what lies behind the trials of Brazil's success is the rise of pluralist interaction between the private sector, civil society, and the government on trade matters. The institutionalization of a legalized and judicialized system of international trade relations, combined with Brazilian democratization and a shift in Brazilian development policy, has catalyzed the formation of new public-private trade policy networks. We find that a combination of these international and domestic factors, involving intermeshed processes working from above and from below, best explains Brazil's successful capacity-building initiatives for international trade negotiations and dispute settlement. More broadly, our study suggests that one cannot fully understand international legal developments without examining dynamics within key countries and that one cannot understand these dynamics without examining how they respond to international processes, in our case of WTO legalization and judicialization. The two recursively and dynamically interact. We look forward to future research that addresses how these processes interact in other countries.

## Annex

### I. Brazil in the GATT Dispute Settlement System

During the GATT's first three decades, Brazil was an infrequent participant in dispute settlement.<sup>406</sup> Although it was a respondent in one of the first GATT cases, *Brazilian Internal Taxes*, which was brought by France in 1949,<sup>407</sup> it was not until 1962 that Brazil brought its first complaint, one against the United Kingdom (UK) in response to a proposed tariff that would have increased the margin of preferences that the UK provided to Commonwealth countries for bananas.<sup>408</sup> Brazil did not participate in the GATT again for another fifteen years, when it brought a complaint against EC sugar export subsidies in 1978, which resulted in a panel decision

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405. UNGER, *supra* note 133, at 111.

406. All cases involving Brazil during the GATT period are listed in Annex I.

407. Third Session of the Contracting Parties, *Summary Record of the Ninth Meeting* 9 (Apr. 25, 1949), GATT/CP.3/SR.9 (1950). The working party recommended that Brazil liberalize its discriminatory internal taxes. *Id.* Brazil reportedly liberalized its internal taxes ten years later in 1958.

408. Report of the Panel, *UK—Increase in Margin of Preferences on Bananas*, GATT Doc. SR.19/12 (Dec. 9, 1961). The UK abandoned its proposed tariff increase a few months after the panel's report.

against the EC in 1980 but no significant change in EC policy.<sup>409</sup> These earlier GATT cases prefigured cases that were to come before the more judicialized WTO system decades later.

Brazil significantly increased its use of GATT dispute settlement after the reforms to the GATT dispute settlement system as part of the Tokyo Round of Trade Negotiations. As a result of these reforms, the GATT established a specialized legal division in 1981 within its secretariat to assist the three-member panels that heard GATT complaints.<sup>410</sup> Because the GATT panelists were largely diplomats designated on an ad hoc basis, the GATT secretariat's legal division became a font of knowledge of GATT precedent, working to create a jurisprudence that was more legally rigorous and less diplomatically oriented. In this way, the post-1979 reforms served as a foretaste of the more intensive judicialization that would come with the establishment of the WTO and its Appellate Body. Under the revised GATT system, Brazil initiated seven complaints in the 1980s, four of them between November 1987 and August 1988. In 1980, Brazil brought a case against Spain concerning its tariff treatment of unroasted coffee, with the panel finding that Spain's measures were not in conformity with GATT Article I, the most-favored-nation clause.<sup>411</sup> In 1982, Brazil joined eight other sugar-producing countries in a second complaint against EC sugar subsidies, with the United States filing separately. This complaint again resulted in no change in EC policy.<sup>412</sup> In 1986, Brazil brought a complaint against the United States in response to a tariff increase and production subsidies for non-beverage ethyl alcohol but did not pursue the complaint, allegedly because of the limited amount of relevant Brazilian exports.<sup>413</sup>

Two of Brazil's complaints during the 1980s were in response to U.S. unilateral trade measures under Section 301 of the U.S. 1974 Trade Act, but these complaints also served to little avail. In 1987, Brazil initiated a GATT complaint in response to U.S. threats "to impose retaliatory tariff increases on \$700 million of Brazilian exports" because of Brazilian restrictions affecting the informatics sector.<sup>414</sup> The case was settled after Brazil

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409. Brazilian Communication, *European Communities—Refunds on Exports of Sugar*, GATT Doc. L/4722 (Nov. 14, 1978).

410. See HUDEC, *supra* note 5, at 42, 55-56, 137-38 (noting the Agreed Description of Customary Practice and the Understanding on Dispute Settlement, which respectively "certified that objective third-party adjudication was established GATT practice" and committed to make this practice "more effective in the future," including through "a definition of procedures for creating panels, and some rule-of-thumb time limits for the various phases of the overall procedure").

411. Brazilian Permanent Delegation, *Spain—Tariff Treatment of Unroasted Coffee*, GATT Doc. L/4948 (Feb. 29, 1980). Spain then equalized the tariff rates for all coffee. See HUDEC, *supra* note 5, at 484.

412. Permanent Mission of Colombia, *EC—Sugar Regime*, GATT Doc. L/5309 (Apr. 8, 1982).

413. Permanent Mission of Brazil, *Brazilian Exports of Non-Beverage Ethyl Alcohol into the United States*, GATT Doc. L/5993 (May 13, 1986); see HUDEC, *supra* note 5, at 529-30.

414. Permanent Representative of Brazil, *United States—Tariff Increase and Import Prohibition on Brazilian Products*, GATT Doc. L/6274 (Nov. 27, 1987); see also HUDEC, *supra* note 5, at 552-53.

agreed to some legislative and administrative changes.<sup>415</sup> In 1988, Brazil filed a complaint in response to U.S. retaliatory tariffs of \$39 million in a Section 301 case concerning pharmaceutical patent protection.<sup>416</sup> It too was settled, this time in the context of Brazil's acceptance of the TRIPs agreement as part of the new WTO.<sup>417</sup>

Brazil also brought unsuccessful complaints against the United States for violation of most-favored-nation treatment in U.S. countervailing duty proceedings involving rubber footwear, which it followed with a similar complaint in 1992,<sup>418</sup> and for an export subsidy program benefiting soybean oil.<sup>419</sup> The panel decided against Brazil in one case, and Brazil did not request the formation of a panel in the other. The United States, in turn, brought two complaints against Brazil during the decade, one in 1983 against Brazilian export subsidies on poultry,<sup>420</sup> and the other in 1989 against the Brazilian import licensing regime following the Super 301 listing,<sup>421</sup> both of which were settled.<sup>422</sup>

In the first half of the 1990s (just before the WTO's creation), Brazil brought seven more cases and was a respondent in one, four of which resulted in a panel report.<sup>423</sup> These cases, however, largely involved import relief measures and had a low political profile. Five of Brazil's seven complaints were again against the United States and the European Community, while two were against Mexico. They were:

415. HUDEC, *supra* note 5, at 552–53.

416. Permanent Mission of Brazil, *United States—Request for Consultations Under Article 12:1 of the Agreement*, GATT Doc. SCM/89 (Aug. 31, 1988) [hereinafter *Pharmaceuticals Retaliation*].

417. *Id.*

418. See Comm. on Subsidies & Countervailing Measures, *United States—Collection of Countervailing Duty on Non-Rubber Footwear*, ¶¶ 87–93, GATT Doc. SCM/M/38 (May 31, 1988). The panel found against Brazil, but Brazil blocked adoption of the report. *Id.* A separate GATT panel in a subsequent 1992 Brazilian case against the same countervailing duty order found against the United States. See *id.* No settlement, however, appears to have been reached to Brazil's satisfaction. See HUDEC, *supra* note 5, at 566.

419. See *Pharmaceuticals Retaliation*, *supra* note 416, at 1. Brazil, however, never requested formation of a panel.

420. Comm. on Subsidies & Countervailing Measures, *Brazil—Subsidies on the Export and Production of Poultry*, GATT Doc. SCM/Spec/19 (Sept. 27, 1983). The U.S. complaint followed a similar complaint against the EC. See HUDEC, *supra* note 5, at 514. The complaints allegedly were settled after the “major exporters reached an understanding about mutual restraint on export subsidies.” *Id.*

421. Request for Consultations by Brazil, *Brazil—Restrictions on Imports of Certain Agricultural and Manufactured Products*, GATT Doc. DS8/1 (Oct. 11, 1990). It was settled when the Collor government significantly liberalized Brazil's import policies. See Communication Request by United States, *United States—Restrictions on Imports of Certain Agricultural and Manufactured Products*, GATT Doc. DS8/2 (Jan. 12, 1990).

422. See Communication Request by United States, *United States—Restrictions on Imports of Certain Agricultural and Manufactured Products*, GATT Doc. DS8/2 (Jan. 12, 1990); HUDEC, *supra* note 5, at 514.

423. The only complaint brought against Brazil during the 1990s, listed in Annex I, was the EC complaint brought in 1992 under the Subsidies Code in response to Brazilian countervailing duties on milk powder. See *Brazil—Imposition of Provisional and Definitive Countervailing Duties on Milk Powder and Certain Types of Milk from the European Economic Community*, GATT Doc. SCM179, BISD 31S/467 (Jan. 27, 1994).

(1) complaint against EC anti-dumping measures involving cotton yarn,<sup>424</sup>

(2) complaint concerning U.S. quantitative restrictions on wool suits,<sup>425</sup>

(3) complaint against anti-dumping measures imposed by the United States on steel products,

(4) complaint against the European Community in respect of the concession compensation provided to the United States following the U.S. GATT complaint against EC protection of oilseed producers,

(5) complaint brought with ten other countries against U.S. internal measures favoring U.S. tobacco,<sup>426</sup> and

(6) two complaints against Mexico concerning anti-dumping measures on textiles and electric power transformers respectively, neither of which resulted in the formation of a panel.<sup>427</sup>

This spurt of Brazilian complaints under the GATT was a response to the opportunities that the judicialization of GATT dispute settlement offered, as well as a reflection of internal and external pressures for change in Brazil's trade and development policies. This early use of GATT dispute settlement would anticipate Brazil's active engagement under the WTO system.

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424. *EC—Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil*, GATT Doc. ADP/121 (Apr. 8, 1995).

425. *US—Restrictions on Imports of Wool Suits from Brazil*, GATT Doc. DS37/1 (Jan. 28, 1992).

426. *United States—Measures Affecting the Importation, Internal Sale and Use of Tobacco*, GATT Doc. DS44/9Rev.1 (Feb. 28, 1994). The U.S. measures were challenged as a violation of GATT Article III. *Id.* at ¶ 1.

427. Brazil brought two complaints against Mexico concerning anti-dumping measures on textiles and electric power transformers, but neither of them resulted in the formation of a panel.

(22 cases: 16 as complainant and 6 as respondent)

| Complainant | Respondent | File Date  | Duration  | Case title   | Consultations | Panel |
|-------------|------------|------------|-----------|--|---------------|-------|
| France      | Brazil     | 4/25/1949  | 1949–1957 | Internal Taxes                                     | x             | x     |
| UK          | Brazil     | 9/15/1953  | 1953–1954 | Compensatory Concessions                           | x             |       |
| USA         | Brazil     | 9/15/1953  | 1953–1954 | Compensatory Concessions                           | x             |       |
| Brazil      | UK         | 12/9/1961  | 1961–1962 | Preferences on Bananas                             | x             | x     |
| Brazil      | EEC        | 11/14/1978 | 1978–1981 | Refunds on Exports of Sugar                        | x             | x     |
| Brazil      | Spain      | 2/29/1980  | 1980–1982 | Unroasted Coffee                                   | x             | x     |
| Brazil      | EEC        | 4/8/1982   | 1982–1983 | Sugar Regime                                       | x             |       |
| USA         | Brazil     | 9/27/1983  | 1983–1984 | Subsidies on Poultry                               | x             |       |
| Brazil      | USA        | 5/13/1986  | 1986–1987 | Non-Beverage Ethyl Alcohol                         | x             |       |
| Brazil      | USA        | 11/27/1987 | 1987–1988 | Informatics Retaliation                            | x             |       |
| Brazil      | USA        | 5/31/1988  | 1988–1992 | CVD on Non-Rubber Footwear                         | x             | x     |
| Brazil      | USA        | 8/24/1988  | 1988–1990 | Pharmaceuticals Retaliation                        | x             | x     |
| Brazil      | USA        | 8/31/1988  | 1988–1990 | EEP Subsidy  | x             |       |
| USA         | Brazil     | 10/11/1989 | 1989–1990 | QRs on Certain Agriculture & Manufactured Products | x             |       |
| Brazil      | Mexico     | 1/1/1992   | 1992–1992 | AD Proceeding on Brazilian Textiles                | x             |       |
| Brazil      | Mexico     | 9/1/1991   | 1991–     | AD Actions on Electric Power Transformer           | x             |       |
| Brazil      | EEC        | 3/1/1992   | 1992–1995 | AD Duties on Cotton Yarn                           | x             | x     |
| Brazil      | USA        | 4/1/1992   | 1992–1993 | QR on Wool Suits                                   | x             | x     |
| Brazil      | USA        | 6/1/1992   | 1992–     | AD Actions on Steel Products                       | x             |       |
| EEC         | Brazil     | 7/1/1992   | 1992–1994 | CVD on Milk Powder                                 | x             | x     |
| Brazil      | EEC        | 5/1/1993   | 1993–     | Oilseed Concession Compensation                    | x             |       |
| Brazil      | USA        | 7/23/1993  | 1993–1994 | US Tobacco Restrictions                            | x             | x     |

## II. Brazil in the WTO Dispute Settlement System (1995-2007)

### A. Brazil as Complainant

| WT/DS Respondent - Case Title   | File Date and Stages of Proceeding  | Products Covered  | Industry/ Company Funding | Private Consultant Hired                   |
|---|---|---|---------------------------|--|
| 365<br>United States – Domestic Support and Export Credit Guarantees for Agricultural Products              | 07/11/2007<br>Consultations   | Systemic for Agricultural<br>X                                  |                           | Sidley, Austin, Brown & Wood LLM           |
| 269<br>European Communities – Customs Classification of Frozen Boneless Chicken                             | 10/11/2002<br>Consultations/ Panel report/ Appellate Body report adopted/ Article 21.3 (c) Arbitration report adopted         | Frozen Poultry; Meat (Poultry); Meats (processed); Salt<br>ABEF |                           | Veirano Advogados                          |
| 267<br>United States – Subsidies on Upland Cotton   | 09/27/2002<br>Consultations/ Panel report/ Appellate Body report adopted  | Cotton<br>ABRAPA  |                           | Sidley, Austin, Brown & Wood LLM           |
| 266<br>European Communities – Export Subsidies on Sugar   | 09/27/2002<br>Consultations/ Panel report adopted/ Appellate Body report adopted/ Article 21.3 (c) Arbitration report adopted | Sugar<br>UNICA  |                           | Sidley, Austin, Brown & Wood LLM / Datagro |
| 259<br>United States – Definitive Safeguard Measures on Imports of Certain Steel Products                   | 05/21/2002<br>Consultations/ Panel report adopted/ Appellate Body report adopted  | Steel Products<br>IBS   |                           | Wilkie, Farr & Gallagher LLM               |
| 250<br>United States – Equalizing Excise Tax Imposed by Florida on Processed Orange and Grapefruit Products | 03/20/2002<br>Consultations/ Panel Formed; Mutually Agreed Solution   | Citrus Products; Fruit Juices (Citrus)                          | ABECITRUS                 | Wilkie, Farr & Gallagher LLM               |
| 241<br>Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil                                    | 11/07/2001<br>Consultations/ Panel report adopted   | Meat (Poultry)<br>ABEF  |                           | Veirano Advogados                          |
| 239<br>United States – Certain Measures Regarding Anti-Dumping Methodology                                  | 09/18/2001<br>Consultations   | Systemic<br>X   |                           | X  |
| 224<br>United States – US Patents Code  | 01/31/2001<br>Consultations   | Systemic<br>X   |                           | X  |
| 222<br>Canada – Export Credits & Loan Guarantees for Regional Aircraft                                      | 01/22/2001<br>Consultations/ Panel report adopted/Article 22.6 Arbitration report adopted                                     | Aircraft<br>Embraer   |                           | Sidley, Austin, Brown & Wood LLM           |
| 219<br>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil  | 12/21/2000<br>Consultations/ Panel report/ Appellate Body report adopted  | Cast Iron; Tube Oil Pipe Fittings<br>Tupy                       |                           | Theodor Goddard                            |

| WT/DS Respondent - Case Title   | File Date and Stages of Proceeding   | Products Covered                                    | Industry/ Company Funding | Private Consultant Hired   |
|---|--|---|---------------------------|--|
| 218<br>United States –<br>Countervailing Duties on<br>Certain Carbon Steel<br>Products from Brazil  | 12/21/2000<br><br>Consultations  | Steel Products<br><br>IBS                           |                           | Wilkie, Farr &<br>Gallagher LLM  |
| 217<br>United States – Continued<br>Dumping & Subsidy Offset<br>Act of 2000   | 12/21/2000<br><br>Consultations/ Panel report<br>adopted/ Appellate Body<br>report adopted/ Article<br>21.3 (c) Arbitration report<br>adopted/ Recourse to<br>Article 22.6 Arbitration<br>report adopted | Steel Products<br><br>IBS                           |                           | Wilkie, Farr &<br>Gallagher LLM  |
| 216<br>Mexico – Provisional Anti-<br>Dumping Measure on<br>Electric Transformers  | 12/20/2000<br><br>Consultations  | Transformers<br>(Electrical)<br><br>X               |                           | X  |
| 209<br>European Communities –<br>Measures Affecting Soluble<br>Coffee   | 10/12/2000<br><br>Consultations/ Mutual<br>Agreed Solution   | Coffee<br><br>ABICS                                 |                           | Veirano<br>Advogados   |
| 208<br>Turkey – Anti-Dumping<br>Duty on Steel and Iron Pipe<br>Fittings   | 10/09/2000<br><br>Consultations  | Steel and Iron<br>Pipe Fittings<br><br>X            |                           | X  |
| 190<br>Argentina – Transitional<br>Safeguard Measures on<br>Certain Imports of Woven<br>Fabrics of Cotton and<br>Cotton Mixtures<br>Originating in Brazil | 02/11/2000<br><br>Consultation/Panel-<br>Mutually Agreed Solution  | Clothing;<br>Textiles;<br>Woven<br>Fabrics<br><br>X |                           | X  |
| 154<br>European Communities –<br>Measures Affecting<br>Differential and Favourable<br>Treatment of Coffee   | 12/07/1998<br><br>Consultations  | Coffee<br><br>ABICS                                 |                           | O'Melveny &<br>Myers   |
| 112<br>Peru – Countervailing<br>Duty Investigation Against<br>Imports of Buses from<br>Brazil   | 12/23/1997<br><br>Consultations  | Buses and<br>Coaches<br><br>X                       |                           | X  |
| 71<br>Canada – Measures<br>Affecting the Export of<br>Civilian Aircraft   | 03/10/1997<br><br>Consultations  | Civil Aircraft<br><br>Embraer                       |                           | Graham & James<br>LLP/ Gowling,<br>Strathy &<br>Henderson, Shaw,<br>Pittman, Potts &<br>Trowbridge/<br>Powell, Goldstein,<br>Frazer & Murphy<br>LLP  |
| 70<br>Canada – Measures<br>Affecting the Export of<br>Civilian Aircraft   | 03/10/1997<br><br>Consultations/ Panel report<br>adopted/ Appellate Body<br>report adopted/ Panel<br>Article 21.5 report<br>adopted/ Appellate Body<br>Article 21.5 report adopted                       | Civil aircraft<br><br>Embraer                       |                           | Graham & James<br>LLP / Gowling,<br>Strathy &<br>Henderson, Shaw,<br>Pittman, Potts &<br>Trowbridge/<br>Powell, Goldstein,<br>Frazer & Murphy<br>LLP |

| WT/DS Respondent - Case Title   | File Date and Stages of Proceeding   | Products Covered      | Industry/ Company Funding | Private Consultant Hired                     |
|---|--|-----------------------|---------------------------|--|
| 69<br>European Communities – Measures Affecting Importation of Certain Poultry Products | 02/24/1997<br>Consultations/ Panel report/ Appellate Body report adopted/ Mutually agreed solution | Poultry<br>ABEF       |                           | Bernard O'Connor                             |
| 4<br>United States – Standards for Reformulated and Conventional Gasoline               | 04/10/1995<br>Consultations/ Panel report/ Appellate Body report adopted                           | Gasoline<br>Petrobras |                           | Mudge, Rose, Guthrie, Alexander & Ferdon LLP |

### B. Brazil as Respondent

| WT/DS Respondent - Case   | File Date; Complainant Stages of Proceeding   | Products Covered; Industry/ Company Funding | Private Consultants Hired                           |
|---|---|---|---|
| 355<br>Brazil – Anti-Dumping Measures on Imports of Certain Resins from Argentina | 12/26/2006<br>Argentina<br>Consultations / Panel (ongoing)  | Pet Resin<br>M&G                            | To be determined                                    |
| 332<br>Brazil – Measures Affecting Imports of Retreaded Tires                     | 06/20/2005<br>European Communities<br>Consultations/ Panel report/ Appellate Body (ongoing) (reports not yet adopted) | Retreaded Tires<br>Systemic                 | Sidley, Austin, Brown & Wood LLM/ Datagro           |
| 229<br>Brazil – Anti-Dumping Duties on Jute Bags from India                       | 04/09/2001<br>India<br>Consultations  | Bags; Jute                                  | Carvalho de Freitas e Ferreira Advogados Associados |
| 199<br>Brazil – Measures Affecting Patent Protection                              | 05/30/2000<br>United States<br>Consultations/ Panel Mutually Agreed Solution  | Systemic<br>X                               | X   |
| 197<br>Brazil – Measures on Minimum Import Prices                                 | 05/30/2000<br>United States<br>Consultations  | Clothing, Textiles<br>X                     | X   |
| 183<br>Brazil – Measures on Import Licensing and Minimum Import Prices            | 10/14/1999<br>European Communities<br>Consultations   | Agricultural Products; Textiles<br>X        | X   |
| 116<br>Brazil – Measures Affecting Payment Terms for Imports (EC)                 | 01/08/1998<br>European Communities<br>Consultations   | Systemic<br>X                               | X   |

| WT/DS<br>Respondent - Case  | File Date;<br>Complainant<br>Stages of Proceeding  | Products Covered;<br>Industry/ Company<br>Funding        | Private<br>Consultants Hired  |
|---|--|--|---|
| 81<br>Brazil – Measures<br>Affecting Trade and<br>Investment in the<br>Automotive Sector (EC)       | 05/07/1997<br><br>European<br>Communities<br><br>Consultations   | Automobiles<br><br>X                                     | X   |
| 65<br>Brazil – Certain<br>Measures Affecting<br>Trade and Investment<br>in the Automotive<br>Sector | 01/10/1997<br><br>United States<br><br>Consultations   | Automobiles<br><br>X                                     | X   |
| 52<br>Brazil – Certain<br>Measures Affecting<br>Trade and Investment<br>in the Automotive<br>Sector | 08/09/1996<br><br>United States<br><br>Consultations   | Automotive Parts;<br>Motor Vehicles; Parts<br><br>X      | X   |
| 51<br>Brazil – Certain<br>Automotive Investment<br>Measures   | 07/30/1996<br><br>Japan<br><br>Consultations   | Motor Vehicles; Parts<br><br>X                           | X   |
| 46<br>Brazil – Export<br>Financing Programme<br>for Aircraft  | 06/19/1996<br><br>Canada<br><br>Consultations/ Panel<br>report adopted/<br>Appellate Body report<br>adopted/ Article 21.5<br>Panel report adopted/<br>Article 21.5 Appellate<br>Body report adopted/<br>Recourse to Article<br>22.6 Arbitration report<br>adopted/ Second<br>Recourse to Article<br>21.5 Panel report<br>adopted | Aircraft<br><br>Embraer                                  | Graham & James LLP/<br>Gowling, Strathy &<br>Henderson, Shaw,<br>Pittman, Potts &<br>Trowbridge/ Powell,<br>Goldstein, Frazer &<br>Murphy LLP |
| 30<br>Brazil – Measures<br>Affecting Desiccated<br>Coconut and Coconut<br>Milk Powder               | 02/23/1996<br><br>Sri Lanka<br><br>Consultations   | Coconut; Coconut Milk<br>Powder<br><br>Trade Association | X   |
| 22<br>Brazil – Measures<br>Affecting Desiccated<br>Coconut  | 11/30/1995<br><br>Philippines<br><br>Consultations/ Panel<br>report adopted/<br>Appellate Body report<br>adopted   | Coconut<br><br>Trade Association                         | O'Melveny & Myers   |

## C. Brazil as Third Party

| WT/DS;<br>Respondent/Title   | File Date;<br>Complainant;<br>Stages of Proceeding                             | Products Covered;<br>Industry/<br>Company Funding | Private<br>Consultants<br>Hired        |
|--|--|---|--|
| 353<br>United States – Measures<br>Affecting Trade in Large<br>Civil Aircraft – Second<br>Complaint                      | 06/27/2005<br><br>European Communities<br><br>Consultations/Panel<br>(ongoing) | Civil Aircraft<br><br>Embraer                     | King & Spalding<br>LLP                 |
| 350<br>United States – Continued<br>Existence and Application of<br>Zeroing Methodology                                  | 10/02/2006<br><br>European Communities<br><br>Consultations/Panel<br>(ongoing) | Systemic<br><br>X                                 | Sidley, Austin,<br>Brown & Wood<br>LLM |
| 347<br>European Communities –<br>Measures Affecting Trade in<br>Large Civil Aircraft (Second<br>Complaint)               | 01/31/2006<br><br>United States<br><br>Consultations/Panel<br>(ongoing)        | Civil Aircraft<br><br>Embraer                     | King & Spalding<br>LLP                 |
| 345<br>United States – Customs<br>Bond Directive for<br>Merchandise Subject to Anti-<br>Dumping/Countervailing<br>Duties | 06/06/2006<br><br>India<br><br>Consultations/Panel<br>(ongoing)                | Systemic<br><br>X                                 | Sidley, Austin,<br>Brown & Wood<br>LLM |
| 343<br>United States – Measures<br>Relating to Shrimp from<br>Thailand   | 04/24/2006<br><br>Thailand<br><br>Consultations/Panel<br>(ongoing)             | Systemic<br><br>X                                 | Sidley, Austin,<br>Brown & Wood<br>LLM |
| 342<br>China – Measures Affecting<br>Imports of Automobile Parts   | 04/13/2006<br><br>Canada<br><br>Consultations/Panel<br>(ongoing)               | Systemic<br><br>X                                 | Sidley, Austin,<br>Brown & Wood<br>LLM |
| 340<br>China – Measures Affecting<br>Imports of Automobile Parts   | 03/30/2006<br><br>United States<br><br>Consultations/Panel<br>(ongoing)        | Systemic<br><br>X                                 | Sidley, Austin,<br>Brown & Wood<br>LLM |
| 339<br>China – Measures Affecting<br>Imports of Automobile Parts   | 03/30/2006<br><br>European Communities<br><br>Consultations/Panel<br>(ongoing) | Systemic<br><br>X                                 | Sidley, Austin,<br>Brown & Wood<br>LLM |
| 335<br>United States – Anti-<br>Dumping Measure on<br>Shrimp from Ecuador  | 11/17/2005<br><br>Ecuador<br><br>Consultations/Panel Report<br>adopted         | Systemic<br><br>X                                 | Sidley, Austin,<br>Brown & Wood<br>LLM |

| WT/DS;<br>Respondent/Title  | File Date;<br>Complainant;<br>Stages of Proceeding  | Products Covered;<br>Industry/<br>Company Funding | Private<br>Consultants<br>Hired        |
|---|---|---|--|
| 324<br>United States – Provisional<br>Anti-Dumping Measures on<br>Shrimp from Thailand                                      | 12/09/2004<br><br>Thailand<br><br>Consultations (no panel<br>established nor settlement<br>notified)                  | Shrimps;<br>Processed shrimps<br><br>X            | X                                      |
| 321<br>Canada – Continued<br>Suspension of Obligations in<br>the EC - Hormones Dispute                                      | 11/08/2004<br><br>European Communities<br><br>Consultations/Panel<br>(ongoing)  | Hormones<br><br>X                                 | X                                      |
| 320<br>United States – Continued<br>Suspension of Obligations in<br>the EC - Hormones Dispute                               | 11/08/2004<br><br>European Communities<br><br>Consultations/Panel<br>(ongoing)  | Hormones<br><br>X                                 | X                                      |
| 317<br>United States – Large Civil<br>Aircraft  | 10/06/2004<br><br>European Communities<br><br>Consultations/Panel<br>(ongoing)  | Civil Aircraft<br><br>Embraer                     | Sidley, Austin,<br>Brown & Wood<br>LLM |
| 316<br>European Communities and<br>Certain Member States –<br>Large Civil Aircraft  | 10/06/2004<br><br>United States<br><br>Consultations/Panel<br>(ongoing)   | Civil Aircraft<br><br>Embraer                     | Sidley, Austin,<br>Brown & Wood<br>LLM |
| 315<br>European Communities –<br>Selected Customs Matters   | 09/21/2004<br><br>United States<br><br>Consultations/Panel<br>(ongoing)   | Systemic<br><br>X                                 | X                                      |
| 294<br>United States – Laws,<br>Regulation and Methodology<br>for Calculating Dumping<br>Margins (“Zeroing”)                | 06/12/2003<br><br>European Communities<br><br>Consultations/Panel report<br>adopted/ Appellate Body<br>report adopted | Steel Products<br><br>IBS                         | Wilkie, Farr &<br>Gallagher LLM        |
| 293<br>European Communities –<br>Measures Affecting the<br>Approval and Marketing of<br>Biotech Products (United<br>States) | 05/14/2003<br><br>Argentina<br><br>Consultations/Panel<br>(ongoing)   | Biotech<br><br>X                                  | X                                      |
| 292<br>European Communities –<br>Measures Affecting the<br>Approval and Marketing of<br>Biotech Products                    | 05/13/2003<br><br>Canada<br><br>Consultations/Panel<br>(ongoing)  | Biotech<br><br>X                                  | X                                      |
| 291<br>European Communities –<br>Measures Affecting the<br>Approval and Marketing of<br>Biotech Products (Argentina)        | 05/13/2003<br><br>United States<br><br>Consultations/Panel<br>(ongoing)   | Biotech<br><br>X                                  | X                                      |

| WT/DS;<br>Respondent/Title   | File Date;<br>Complainant;<br>Stages of Proceeding   | Products Covered;<br>Industry/<br>Company Funding   | Private<br>Consultants<br>Hired                  |
|--|--|---|--|
| 290<br>European Communities –<br>Protection of Trademarks &<br>Geographical Indications for<br>Agricultural Products and<br>Foodstuffs (Australia) | 04/17/2003<br><br>Australia<br><br>Consultations/Panel report<br>adopted   | Agricultural<br>Products and<br>Foodstuffs<br><br>X | X  |
| 286<br>European Communities –<br>Customs Clarification of<br>Frozen Boneless Chicken<br>Cuts (Thailand)  | 03/25/2003<br><br>Thailand<br><br>Consultations/Panel report<br>adopted/Appellate Body<br>report adopted/ Article<br>21.3(b) Arbitration report<br>adopted   | Frozen Boneless<br>Chicken<br><br>ABEF              | Veirano<br>Advogados                             |
| 283<br>European Communities –<br>Export Subsidies on Sugar<br>(Thailand)   | 03/14/2003<br><br>Thailand<br><br>Consultations/Panel report<br>adopted/ Appellate Body<br>report adopted/ Article<br>21.3(b) Arbitration report<br>adopted  | Sugar<br><br>UNICA                                  | Sidley, Austin,<br>Brown & Wood<br>LLM           |
| 265<br>European Communities –<br>Export Subsidies on Sugar<br>(Australia)  | 09/17/2002<br><br>Australia<br><br>Consultations/Panel report<br>adopted/Appellate Body<br>report adopted/ Article 21.3<br>(b) Arbitration report<br>adopted | Sugar<br><br>UNICA                                  | Sidley, Austin,<br>Brown & Wood<br>LLM / Datagro |
| 258<br>United States – Definitive<br>Safeguard Measures on<br>Imports of Certain Steel<br>Products   | 05/14/2002<br><br>New Zealand<br><br>Consultations/Panel report<br>adopted/ Appellate Body<br>report adopted   | Steel Products<br><br>IBS                           | Wilkie, Farr &<br>Gallagher LLM                  |
| 254<br>United States – Definitive<br>Safeguard Measures on<br>Imports of Certain Steel<br>Products   | 04/04/2002<br><br>Norway<br><br>Consultations/Panel report<br>adopted/ Appellate Body<br>report adopted  | Steel Products<br><br>IBS                           | Wilkie, Farr &<br>Gallagher LLM                  |
| 253<br>United States – Definitive<br>Safeguard Measures on<br>Imports of Certain Steel<br>Products   | 04/03/2002<br><br>Switzerland<br><br>Consultations/Panel report<br>adopted/ Appellate Body<br>report adopted   | Steel Products<br><br>IBS                           | Wilkie, Farr &<br>Gallagher LLM                  |
| 252<br>United States – Definitive<br>Safeguard Measures on<br>Imports of Certain Steel<br>Products   | 03/26/2002<br><br>China<br><br>Consultations/Panel report<br>adopted/ Appellate Body<br>report adopted   | Steel Products<br><br>IBS                           | Wilkie, Farr &<br>Gallagher LLM                  |

| WT/DS;<br>Respondent/Title  | File Date;<br>Complainant;<br>Stages of Proceeding   | Products Covered;<br>Industry/<br>Company Funding | Private<br>Consultants<br>Hired |
|---|--|---|---------------------------------|
| 251<br>United States – Definitive<br>Safeguard Measures on<br>Imports of Certain Steel<br>Products                                    | 03/20/2002<br><br>Korea<br><br>Consultations/Panel report<br>adopted/ Appellate Body<br>report adopted   | Steel Products<br><br>IBS                         | Wilkie, Farr &<br>Gallagher LLM |
| 249<br>United States – Definitive<br>Safeguard Measures on<br>Imports of Certain Steel<br>Products                                    | 03/20/2002<br><br>Japan<br><br>Consultations/Panel report<br>adopted/ Appellate Body<br>report adopted   | Steel Products<br><br>IBS                         | Wilkie, Farr &<br>Gallagher LLM |
| 248<br>United States – Definitive<br>Safeguard Measures on<br>Imports of Certain Steel<br>Products                                    | 03/07/2002<br><br>European Communities<br><br>Consultations/Panel report<br>adopted/ Appellate Body<br>report adopted  | Steel Products<br><br>IBS                         | Wilkie, Farr &<br>Gallagher LLM |
| 246<br>European Communities –<br>Conditions for the Granting<br>of Tariff Preferences to<br>Developing Countries                      | 03/05/2002<br><br>India<br><br>Consultations/Panel report<br>adopted/ Appellate Body<br>report adopted/ Article<br>21.3(c) Arbitration report<br>adopted   | Coffee<br><br>ABICS                               | Veirano<br>Advogados            |
| 245<br>Japan – Measures Affecting<br>the Importation of Apples  | 03/01/2002<br><br>United States<br><br>Consultations/Panel report<br>adopted/ Appellate Body<br>report adopted/ Article 21.5<br>Panel report adopted/<br>Mutually Agreed Solution                                      | Apples<br><br>X                                   | X                               |
| 244<br>United States – Sunset<br>Review of Anti-Dumping<br>Duties on Corrosion-<br>Resistant Carbon Steel Flat<br>Products from Japan | 01/30/2002<br><br>Japan<br><br>Consultations/Panel report<br>adopted/ Appellate Body<br>report adopted   | Steel (Carbon)<br><br>X                           | X                               |
| 234<br>United States – Continued<br>Dumping and Subsidy Offset<br>Act of 2000   | 05/21/2001<br><br>Canada<br><br>Consultations/Panel report<br>adopted/ Appellate Body<br>report adopted/Article 21.3<br>(c) arbitration a report<br>adopted/ Recourse to Article<br>22.6 Arbitration report<br>adopted | Steel Products<br><br>IBS                         | Wilkie, Farr &<br>Gallagher LLM |

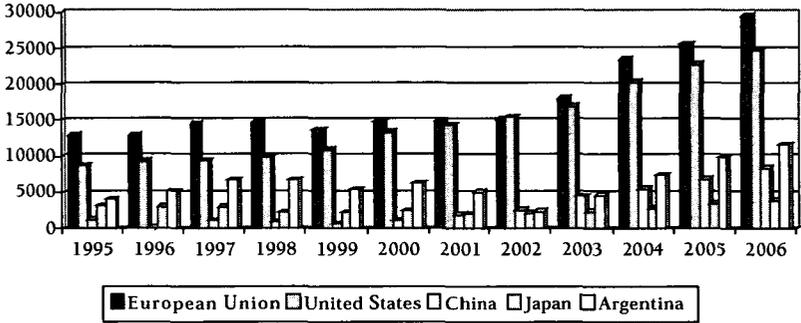
| WT/DS;<br>Respondent/Title   | File Date;<br>Complainant;<br>Stages of Proceeding   | Products Covered;<br>Industry/<br>Company Funding                                | Private<br>Consultants<br>Hired |
|--|--|--|---------------------------------|
| 212<br>United States –<br>Countervailing Measures<br>Concerning Certain<br>Products from the European<br>Communities   | 11/10/2000<br><br>European Communities<br><br>Consultations/Panel report<br>adopted/ Appellate Body<br>report adopted/ Article 21.5<br>Panel report adopted  | Pasta; Stainless<br>Steel Plate; Steel<br>(Carbon); Steel<br>Products<br><br>IBS | Wilkie, Farr &<br>Gallagher LLM |
| 207<br>Chile – Price Band System<br>and Safeguard Measures<br>Relating to Certain<br>Agricultural Products   | 10/05/2000<br><br>Argentina<br><br>Consultations/Panel report<br>adopted/ Appellate Body<br>report adopted/Article 21.3<br>(c) Arbitration report<br>adopted/ Article 21.5 Panel<br>report adopted/ Article 21.5<br>Appellate Body report<br>adopted | Agricultural<br>Products<br><br>X  | X                               |
| 204<br>Mexico – Measures<br>Affecting<br>Telecommunications Services   | 08/17/2000<br><br>United States<br><br>Consultations/Panel report<br>adopted   | Systemic<br><br>X  | X                               |
| 184<br>United States – Anti-<br>Dumping Measures on<br>Certain Hot-Rolled Steel<br>Products from Japan   | 11/18/1999<br><br>Japan<br><br>Consultations/Panel report<br>adopted/Appellate Body<br>report adopted/Recourse to<br>Article 21.3 (c) arbitration<br>report adopted  | Steel Products<br><br>X  | X                               |
| 174<br>European Communities –<br>Protection of Trademarks<br>and Geographical<br>Indications for Agricultural<br>Products and Foodstuffs                                 | 06/01/1999<br><br>United States<br><br>Consultation/Panel report<br>adopted  | Agricultural<br>Products<br><br>X  | X                               |
| 160<br>United States – Section<br>110(5) of the U.S. Copyright<br>Act  | 01/26/1999<br><br>European Communities<br><br>Consultation/Panel report<br>adopted/Article 21.3 (c)<br>Arbitration report adopted/<br>Recourse to Article 22.6<br>Arbitration report adopted   | Systemic<br><br>X  | X                               |
| 152<br>United States – Section 301-<br>310 of the Trade Act of 1974  | 11/25/1998<br><br>European Communities<br>Consultations/ Panel report<br>adopted   | Systemic<br><br>X  | X                               |
| 138<br>United States – Imposition<br>of Countervailing Duties on<br>Certain Hot-Rolled Lead and<br>Bismuth Carbon Steel<br>Products Originating in the<br>United Kingdom | 06/12/1998<br><br>European Communities<br><br>Consultations/Panel report<br>adopted/ Appellate Body<br>report adopted  | Steel (Carbon)<br><br>IBS  | Wilkie, Farr &<br>Gallagher LLM |

| WT/DS;<br>Respondent/Title  | File Date;<br>Complainant;<br>Stages of Proceeding  | Products Covered;<br>Industry/<br>Company Funding | Private<br>Consultants<br>Hired |
|---|---|---|---------------------------------|
| 135<br>European Communities –<br>Measures Affecting Asbestos<br>and Asbestos-Containing<br>Products                   | 05/28/1998<br><br>Canada<br>Consultations/Panel report<br>adopted/ Appellate Body<br>report adopted   | Asbestos<br><br>X                                 | X                               |
| 121<br>Argentina – Safeguard<br>Measures on Imports of<br>Footwear  | 04/06/1998<br><br>European Communities<br><br>Consultations/Panel report<br>adopted/ Appellate Body<br>report adopted   | Foot-wear<br><br>X                                | X                               |
| 114<br>Canada – Patent Protection<br>of Pharmaceutical Products   | 12/19/1997<br><br>European Communities<br><br>Consultation/Panel report<br>adopted/ Arbitration under<br>Article 21.3 (c)   | Pharmaceutical<br>Products<br><br>X               | X                               |
| 108<br>United States – Tax<br>Treatment for “Foreign Sales<br>Corporations”   | 11/18/1997<br><br>European Communities<br><br>Consultations/Panel report<br>adopted/ Appellate Body<br>report adopted/ Article 21.5<br>Panel report adopted/ Article<br>21.5 Appellate Body report<br>adopted/ Recourse to Article<br>22.6 Arbitration report<br>adopted/ Second Recourse to<br>Article 21.5 Panel Report<br>adopted/ Second Recourse to<br>Article 21.5 Appellate Body<br>Report adopted | Systemic<br><br>X                                 | X                               |
| 89<br>United States – Imposition<br>of Anti-Dumping Duties on<br>Imports of Colour Television<br>Receivers from Korea | 07/10/1997<br><br>Korea<br><br>Consultation/Panel<br>(withdrawn)  | Colour Television<br>Receivers<br><br>X           | X                               |
| 76<br>Japan – Measures Affecting<br>Agricultural Products   | 04/07/1997<br><br>United States<br><br>Consultations/Panel report<br>adopted/ Appellate Body<br>report adopted  | Agricultural<br>Products<br><br>X                 | X                               |
| 27<br>Article 21.5 European<br>Communities – Regime for<br>Importation, Sale and<br>Distribution of Bananas           | 02/05/1996<br><br>Ecuador; Guatemala;<br>Honduras; Mexico; United<br>States<br><br>Consultations/Panel report<br>adopted/ Appellate Body<br>report adopted/ Article 21.3<br>(c) Arbitration report<br>adopted/ Article 21.5 Panel<br>report adopted/ Recourse to<br>Article 22.6 Arbitration<br>report adopted/ Mutually<br>Agreed Solution   | Bananas<br><br>X                                  | X                               |

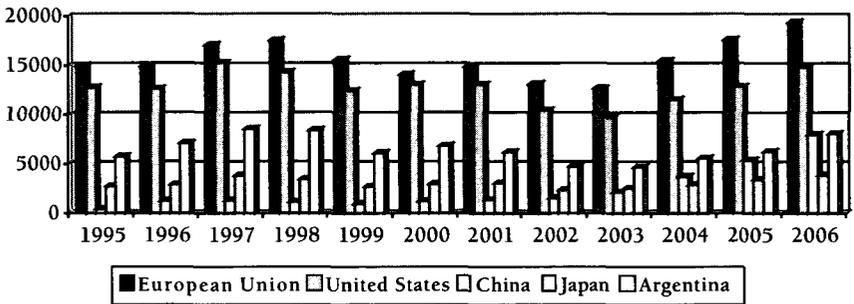
| WT/DS;<br>Respondent/Title   | File Date;<br>Complainant;<br>Stages of Proceeding  | Products Covered;<br>Industry/<br>Company Funding           | Private<br>Consultants<br>Hired |
|--|---|---|---------------------------------|
| 56<br>Argentina – Measures<br>Affecting Imports of<br>Footwear, Textiles, Apparel<br>and Other Items | 10/04/1996<br><br>United States<br><br>Consultations/ Panel report<br>adopted/ Appellate Body<br>report adopted | Footwear, Textiles,<br>Apparel, and<br>Other Items<br><br>X | X                               |

III. Brazilian Exports and Imports 1995-2006<sup>428</sup>

Brazil Exports (in USD million)



Brazil Imports (in USD million)



428. United Nations Commodity Trade Statistics Database, available at <http://comtrade.un.org/>.

#### IV. List of Connected Cases in Which Brazil Was a Complainant and Third Party (1995-2007)<sup>429</sup>

| Product Sector/Issue | Brazil as a Complainant or Respondent | Brazil as a Third Party  | Single, Consolidated Panel or AB Report Adopted |
|----------------------|---------------------------------------|--|---|
| Boneless Chicken     | DS269 (Brazil/EC)                     | DS286 (Thailand/EC)  | Yes   |
| Sugar                | DS266 (Brazil/EC)                     | DS283 (Thailand/EC)<br>DS265 (Australia/EC)  | Yes   |
| Steel                | DS259 (Brazil/US)                     | DS258 (New Zealand/US)<br>DS254 (Norway/US)<br>DS253 (Switzerland/US)<br>DS252 (China/US)<br>DS251 (Korea/US)<br>DS249 (Japan/US)<br>DS248 (EC/US) | Yes   |
| AD Methodology       | DS239 (Brazil/US)                     | DS244 (Japan/US)   | No*   |
| CVD                  | DS218 (Brazil/US)                     | DS212 (EC/US)<br>DS138 (EC/US)   | No*   |
| Byrd Amendment       | DS217 (Brazil/US)                     | DS234 (Canada/US)  | Yes   |
| Coffee               | DS154 (Brazil/EC)                     | DS209 (Brazil/EC)<br>DS246 (India/EC)†   | No*   |

| Issue       | Brazil as a Third Party | Brazil as a Third Party in a Parallel Case | Single, Consolidated Panel or AB Report Adopted |
|-------------|-------------------------|--|---|
| Footwear    | DS121 (EC/Argentina)    | DS56 (US/Argentina)                        | No*   |
| Trademarks  | DS174 (US/EC)           | DS290 (Australia/EC)                       | Separate**                                      |
| Biotech     | DS291 (US/EC)           | DS292 (Canada/EC)<br>DS293 (Argentina/EC)  | Yes   |
| Aircraft    | DS316 (US/EC)           | DS317 (EC/US)                              | In process                                      |
| EC/Hormones | DS320 (EC/US)           | DS321 (EC/Canada)                          | Yes   |
| Automobiles | DS339 (EC/China)        | DS340 (US/China)<br>DS342 (Canada/China)   | In process                                      |

† The cases were only indirectly related because both involved tariff preferences, which is why the Brazilian coffee trade association hired the same counsel to follow the case.

\* "No" means that neither of the cases resulted in an adopted panel report.

\*\* The cases were litigated before a single panel but, pursuant to a request by the EC, the Panel submitted separate reports. See Panel Report, *EC—Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, ¶¶ 2.13-2.15, WT/DS174/R (Mar. 15, 2005).

429. Documents Online, <http://docsonline.wto.org> (last visited May 25, 2008). Cases are as of December 31, 2007.

