

# BRIEFING PAPER



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## Brazil in the WTO Dispute Settlement Understanding *A Perspective*

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### Introduction

Negotiators at the Uruguay Round strove for a more efficient dispute settlement system over the consensus-driven dispute mechanism of the General Agreement on Tariffs and Trade (GATT). While the Dispute Settlement Understanding (DSU) of the World Trade Organisation (WTO) is more rule-driven, its accessibility to developing countries is still a matter of disagreement with many. Over the last sixteen years (1995-2010) of dispute settlement through the WTO's DSU, developing countries have brought forth complaints in 40 percent of the cases. At the same time, two countries, the US and European Union (EU, formerly the European Community/EC), combine for over 40 percent of the complaints before the Dispute Settlement Body (DSB). While developed countries may dominate the DSU, out of the top ten most frequent complainants, five of them are developing countries. They are (in order of complaints brought) Brazil, Mexico, India, Argentina and Thailand. Meanwhile, only one least developed country, Bangladesh, has brought a complaint and that case settled before it went to litigation.

Brazil is the most active developing country user and the fourth most active user overall of the WTO's DSU, after the US, the EU and Canada. Brazil has brought complaints in 25 cases, been a respondent in 14 cases and participated as a third party in 64 cases. Therefore, Brazil has participated in one form or another in 103 of the 419 cases brought to the DSU through 2010, which equates to a 24 percent participation rate. Brazil is often touted for not only the quantity but the quality of its cases before the DSU. This paper examines why it is that Brazil, a developing country, has been successful in its usage of the DSU by examining its history during the GATT years, its WTO cases and by looking at its strategy for working with the DSU.

### Brazil and the GATT Years

Brazil was one of the twenty-three original members of GATT in 1948. Dispute settlement under GATT is most remarkable because it was entirely voluntary. Every

decision, whether it was the appointment of a panel, the adoption of the panel's report, to the authorisation of remedies, was consensus-driven. A respondent could at any time veto any part of the proceedings.

During the GATT years, Brazil filed 16 complaints and was a respondent in six cases. It was the fifth most active user of the GATT dispute settlement system. However, most of the cases were during the Uruguay Round of negotiations in the 1980s and 1990s.

In the beginning, even though Brazil was involved as a respondent in one of the first cases, Brazil was an infrequent user of the dispute settlement system of GATT. In 1949, France brought a complaint against Brazil regarding different levels of taxation Brazil imposed on a variety of domestic and international products in the *Brazilian Internal Tax* case. Brazil was able to put the case on hold by telling its Congress about the variance and then, in 1950, it presented to the GATT membership the legislation necessary to bring Brazil's internal tax code into compliance, which was not supposedly found to be sufficient until 1958.

It was not until 13 years later, in 1962, that Brazil had its first panel report on a complaint in the *UK – Bananas* case.<sup>1</sup> The complaint was against the UK for their proposed tariff to increase the margin of preferences on bananas that the UK provided to commonwealth countries. After another long interval, this time for sixteen years, Brazil brought forth a complaint against the EC regarding refunds on exports of sugar.<sup>2</sup> The panel report found that the EC's refunds amounted to subsidies and were, therefore, contrary to the GATT. In the 1980s and 1990s, Brazil intensified its usage of the GATT's dispute settlement system, which resulted in four more panel reports.

Brazil has served as a respondent in GATT cases far less than it has brought complaints itself. Other than the initial case brought by France, Brazil has been a respondent in just one other case that ended up before a panel. The United States had initiated a case against Brazil and the EC regarding poultry subsidies, but that case was settled before a panel was formulated. The case

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### Box 1: The Uruguay Round and the Dispute Settlement Understanding

The Uruguay Round of trade negotiations began in 1986 and lasted until 1994. It was created to address areas of deficiencies within the GATT and brought about a number of changes. First, it created the WTO and covers twenty agreements and forty decisions/declarations, including GATT. The second major change was the creation of the Dispute Settlement Body (DSB) and the DSU.

The DSB is comprised of all WTO members and has the power to create panels, adopt panel and Appellate Body (AB) reports, supervise and implement rulings and recommendations and authorise the suspension of concessions and other obligations under WTO agreements. In order to initiate the dispute settlement process, a member must start by seeking bilateral consultations. If the consultations are not satisfactory, then the moving party may request the establishment of a panel, which must be authorised by the DSB. When the panel is authorised, it is comprised of three panelists whose deliberations are confidential. Once the panel submits its report, then the DSB must either adopt it or there must be a notice of appeal. On appeal, the Appellate Body, which is comprised of seven members, takes up the case and issues a report based on issues of law. Retaliatory action is the last avenue of action if a losing party does not comply with the DSB's recommendations and rulings.

Source: Deduced from various sources including WTO website

that concluded with a panel report was the *Brazil – EEC Milk* case, whereby the EC alleged that Brazil had imposed countervailing duties on milk powder and certain types of milk. The panel concluded in favour of the EC and found that what Brazil had done was not simply ‘harmless error.’

### Brazil and the WTO's DSU

It has been through Brazil's use of the DSU that Brazil has become a focus of international respect and intrigue for the quantity and quality of its cases. Brazil's position as one of the top users of the DSU overall and the most active user from developing countries can be linked to its ability to coordinate between its government bodies and the private and public sectors of society. This coordination was not always in existence and, instead, developed through a series of political and

economic changes and with increased awareness of the WTO within the private and public sectors of Brazil.

Brazil was one of the first users of the new DSU as both a complainant and respondent. As a complainant Brazil, alongside Venezuela, brought a case (WT/DS4) against the United States, claiming that a US gasoline regulation discriminated against their gasoline.

The panel found in favour of the complainants and, upon an appeal from the United States, the Appellate Body upheld the panel's decision. Brazil was then the respondent in a case brought by the Philippines and later by Sri Lanka regarding a duty imposed by Brazil on the export of desiccated coconut (WT/DS22 and WT/DS30). The panel, and later the Appellate Body, concluded that the provisions of the GATT and WTO that the complainants relied upon were inapplicable to the dispute. Therefore, Brazil won the cases on the procedural technicality.

It was Brazil's fourth case, *Brazil-Aircraft* (WT/DS46), which was the catalyst case for Brazil to become a prominent and successful user of the DSU.<sup>3</sup> Canada brought the complaint against Brazil on the grounds that export subsidies granted by the Brazilian government to foreign purchases of Brazil's Embraer aircraft were inconsistent with the Subsidies Agreement. Brazil responded with a case of its own against Canada (WT/DS70) regarding subsidies the Government of Canada granted to support the export of civilian aircraft, as they were inconsistent with the Subsidies Agreement. For five years (1996-2001) the cases went through panels, the appellate body, arbitration and second recourses to the panels, to eventually conclude that both states had violated the WTO agreement on subsidies.

The aircraft subsidy cases brought the WTO and the DSU to the attention of the private and public sectors in Brazil. Embraer, as a company, was important to Brazil's identity as an emerging international power and its competitiveness in international markets. Therefore, when the company was put on the defensive with the government of Brazil, the rest of Brazil started to take notice.<sup>4</sup>

Following *Brazil-Aircraft* was another controversial case that again agitated the Brazilian people. The case was brought by the United States regarding patent protection of pharmaceuticals (WT/DS199). The US challenged a Brazilian patent law over compulsory licensing and this increased public awareness and

### Box 2: Economic and Political Changes that Spurred Brazil's WTO Usage

Brazil's emergence as a powerhouse at the WTO and especially within the DSU is often attributed to the economic and political changes in Brazil in the late 1980s through the early 1990s. During that time, Brazil moved from “import substitution industrialisation” policies towards “export-oriented” trade liberalising alternatives, which was, at the same time, that liberalised trade relations were institutionalised at the WTO. Fernando Collor de Mello's government initiated the move towards monetary stability, fiscal restraint, trade and capital liberalisation and privatisation. His economic policies have stayed largely intact through 2010. These shifts highlight the reliance Brazil placed on the global markets and the usage of the private sector to increase economic growth, which ultimately led it to be a leader of developing countries in front of the WTO's DSU.

Sources: Various sources such as Brazilian Commerce & Trade ministry, WTO, etc.

outrage as the case was brought at a precocious time when there were many calls from the country to lower the cost of drugs to deal with HIV and other public health problems.<sup>5</sup> The case also brought nongovernmental organisations (NGOs) into the movement and further increased awareness of the WTO around the country. The United States and Brazil were able to come to a mutually agreed solution before the panel put together its report.

While Brazil had been active in the first six years of the WTO (1995-2000) by initiating seven cases, the government had been dealing with each case on an ad-hoc basis without a broader strategy involved. Being on the defensive in the *Brazil-Aircraft* and *Brazil-Patent* cases motivated the Brazilian government, alongside the private and public sectors, to come up with a new approach for dealing with the WTO's DSU.

### **Brazil's WTO Strategy**

In 2001, Brazil overhauled its departments for trade and created an inter-ministerial body that was created to investigate, prepare and approve the filing of WTO disputes.<sup>6</sup> The inter-ministerial body is also a part of Brazil's 'three pillar' structure that addresses issues with the DSU:

- The first pillar is the government's specialised WTO dispute settlement unit based in Brazil's capital, Brasilia;
- The second pillar is the coordination between the dispute settlement unit and the mission based in Geneva, Switzerland; and,
- The third pillar is the coordination between the first two pillars and Brazil's private sector and law firms.<sup>7</sup>

The expansion of world trade knowledge among the different sectors of Brazil's society has created a depth of resources when it comes to WTO disputes. Most developing countries do not have the same level of knowledge or resources available to them when it comes to WTO disputes. In fact, many developing countries, especially least developed countries, do not have an office in Geneva or staff with the time or training to deal with trade matters. While the WTO works to address these inequities by holding workshops and subsidising office space, they do not make up for the absence of resources that are available to Brazil and developed countries.

With the resources provided by the Brazilian government and the private sector, Brazil has been able to enhance its reputation as a global trade negotiator. In addition, Brazil is strengthened by the size of its industries, such as cotton, that can help fund disputes at the WTO. Two cases, in particular, both initiated in September of 2002, have established Brazil as a newfound powerhouse when it comes to utilisation of the DSU. Both cases deal with agricultural subsidies against the largest developed countries.

### **i) Agricultural Subsidy Cases, 2002**

Both the *EC-Export Subsidies on Sugar* case and *US-Upland Cotton* case were complex cases that required the full support of Brazil's government and private sector. For the *EC-Export Subsidies on Sugar* case (WT/DS266), the government relied on economic consultants from Brazil (funded by the sugar cane association in Brazil), foreign lawyers, the dispute settlement unit and the mission in Geneva.<sup>8</sup> The four groups coalesced around the complaint that the EC was breaking trade rules by providing sugar export subsidies in excess of WTO limits. The panel found that the EC had acted inconsistently with its obligations of the Agreement on Agriculture. The EC appealed the panel's report, but the Appellate Body upheld most of the panel's report. The parties were unable to reach an agreement as to a reasonable time to comply with the ruling and an arbitrator was brought in to facilitate the arrangement. Then, after another year, the parties were able to reach an understanding. Afterwards, the President of Brazil's sugar association commented on how the sugar case (and cotton case) "completely changed the way subsidies for agricultural products are viewed in international trade...and that opens the door for developing countries."<sup>9</sup> Not only did attitudes change about international trade but so has the industry itself. At the time of the complaint, Europe was the biggest sugar exporter. Now, Europe is a net importer of sugar, with Brazil as the number one exporter of sugar.<sup>10</sup>

### **ii) US-Upland Cotton Case**

The other landmark victory for Brazil has been the *US-Upland Cotton* case (WT/DS267). This was another complex case and it required the cotton industry of Brazil to pool its resources to hire legal and economic consultants to provide the basis of the case to the Brazilian government. Brazil claimed that more than "\$3bn in subsidies that the US pays its cotton farmers distorts global prices and violates international trade rules."<sup>11</sup> The panel agreed with Brazil and found the subsidies to the cotton industry were prohibited. The US appealed and the Appellate Body upheld the substantive portions of the panel's report. The US said in 2005 that it had the intention of complying with the recommendations and rulings of the DSB.

Despite its intentions, the US was not able to comply with the recommendations and rulings of the DSB. Brazil requested the establishment of a compliance panel a year later. The compliance panel sided with Brazil and found that the US 'failed to bring its measures into conformity with the Agreement on Agriculture and has failed 'to withdraw the subsidy without delay'.<sup>12</sup>

In 2008, the US appealed the compliance report to the Appellate Body, which upheld the panel's report. Because of the US' non-compliance, the DSB authorised Brazil to enter into countermeasures. Brazil then reached out to powerful American business groups and threatened to use its ability to tax imports from the US.<sup>13</sup>

The business groups were able to persuade the US government to negotiate with Brazil in order for them not to retaliate. The two states negotiated a settlement where the US would pay Brazilian cotton farmers US\$147mn a year, which is the amount the WTO authorised; the two parties would meet four times a year; the US would evaluate if fresh beef could be imported from Brazil; and, the US would address the issue of its cotton subsidies with the next Farm Bill in 2012.<sup>14</sup>

Even though the US hasn't "complied" with the WTO ruling, the case is a substantial victory for Brazil and showcases the reality that developing countries can enforce their rights under trade rules against the largest developed countries.

### Most Recent WTO Cases

Brazil has initiated a total of twenty-five cases between 1995 and 2010. Thirteen of those have involved litigation, while the remaining twelve have been settled. Brazil was most active in bringing complaints in the early 2000s (seven in 2000, four in 2001 and five in 2002) and has since slowed its pace of initiating complaints to just one case in 2007, 2008 and 2010, respectively. This decrease could be explained in part due to the continued litigation of some of the earlier cases, most notably the US-Cotton case.

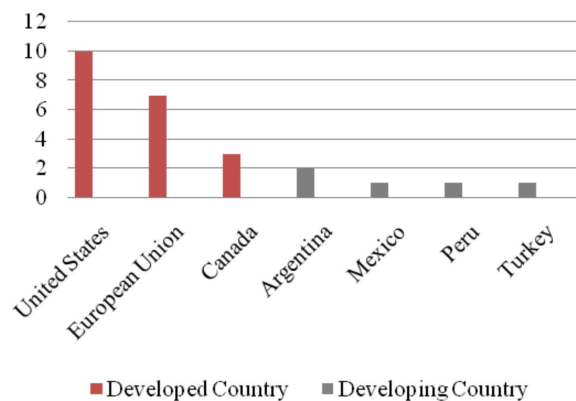
The most recent complaint initiated by Brazil is a case against the European Union and the Netherlands specifically for seizure of generic drugs (WT/DS409). Similar to the *US-Patent* case, this case involves the issue of generic drugs, intellectual property and public health. Seventeen Indian generic drugs had been seized in European territory and Brazil and India brought separate claims that the seizure was in violation of the GATT, the Trade Related Aspects of Intellectual Property Rights (TRIPs) and the WTO Agreement. As of July 2011, India has come to an interim settlement with the European Union that will allow Indian drugs to pass through Europe.<sup>15</sup> However, it is unclear if India's agreement will affect Brazil's case before the WTO.

Of the fourteen cases in which Brazil has been a respondent, only three of those have involved litigation. The first two were the early *Brazil-Aircraft* and *Brazil-Patent* cases and the most recent is a case brought by the European Union regarding re-treaded tyres (WT/DS332). The EU claimed that Brazil had initiated a number of measures, including a ban, which adversely affected exports of re-treaded tyres from the EU to Brazil. Brazil countered that the ban on re-treaded tyres was necessary to protect health and the environment, which can be an allowable exemption under GATT. The panel report concluded that the ban, while necessary to protect health and the environment, was applied in a WTO-inconsistent manner, because Brazil failed to enforce a similar ban on used tyre imports. The Appellate Body upheld the Panel's Report that Brazil's ban constituted unjustifiable discrimination.

Brazil has participated as a third party in 64 cases between 1995 and 2010. Generally, Brazil acts as a third

### Box 3: Countries That Brazil Has Initiated Complaints Against

Brazil has initiated complaints against developed countries in 80 percent of the cases it has brought before the WTO's DSB, as demonstrated in the chart below. Conversely, 10 of the 14 (71 percent) cases where Brazil was a respondent were initiated by developed countries.



party because it has a systematic rather than direct commercial interest in the case.<sup>16</sup> Furthermore, the procedure is less stringent and costs are much reduced when participating as a third party as there is no requirement to file a formal submission.

### Efforts for Reform

Because of its successes at dispute settlement within the WTO, Brazil has increasingly become a leading player in trade negotiations. Even before Brazil gained its notoriety from its WTO disputes, it has long been championing reform within the WTO. During the Uruguay negotiations, Brazil emphasised the difficulties that face developing countries in dispute settlement and that there should be a higher level of equity between developed and developing countries. Brazil has also argued that the Appellate Body needs to exercise extreme caution when inviting *amicus curiae* briefs from nongovernmental organisations and that the admission of the briefs is a substantive question for the members to decide. In addition, Brazil has argued in favour of a more efficient DSU by implementing a "fast track panel", whereby if a measure has already been addressed by a panel or is in an appeal proceeding than it would not need to be addressed as a new issue.

While Brazil has not been successful in many of its attempts for reforms within the DSU, it has been successful at using its power and clout to thwart the power of the developed countries in the Doha Development Round of WTO negotiations whenever required. Talks have repeatedly broken down with Brazil at the helm alongside India against the United States and the European Union, mostly over the issue of agricultural subsidies.

## Conclusion

Brazil epitomises the ideal of a developing country in its utilisation of the DSU of the WTO. Not only is it the fourth most active user of the DSU but it is the most active developing country user. It is not just the amount of cases that Brazil has participated in that has given it such a perception, but rather the quality of them, especially the *EC-Export Subsidies on Sugar* and *US-Upland Cotton* cases. Brazil has been successful in large part to its “pillared” approach which incorporates the private and public spheres into the process of dispute settlement. The pillars have increased the government’s

resources both financial and informational, which has allowed Brazil to address trade disputes against the largest and most developed nations. In the twenty-five cases that Brazil brought before the DSB, twenty of those have been against developed countries, which is an 80-percent rate of complaints against developed countries, whereas developing countries as a whole tend to bring complaints against developed countries 58 eight of the time (based on numbers from 2006-10). With its increased clout, Brazil has been able to participate more proactively in trade negotiations and now can rival the developed countries.

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## Endnotes

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