

Winning at the WTO:
The Development of a Trade Policy Community
within Brazil

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Introduction *

Brazil is widely touted as one of the most successful users of the dispute settlement system of the World Trade Organization (WTO) among all countries, developing and developed, in terms of both the quantity of cases brought and the cases' systemic implications.¹ Brazil has been the fourth most frequent complainant in the WTO dispute settlement system after the United States (U.S.), European Union (EU), and Canada.² It has won strategically important cases against the WTO's leading powers, and in particular in its agricultural subsidy cases against the U.S. and EU.³ Its 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. The political payoffs for Brazil have been significant, helping it become a leader of developing countries in trade negotiations (the so-called G-20) and become a member of a G-4 for trade negotiations in the Doha Round, consisting of the US, EU, Brazil and India.⁴ 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."⁵

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¹ See, e.g., Davey (2005:40-42) (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 author).

² Source: Authors, as per the WTO database (January 2008).

³ See EC—*Export Subsidies on Sugar* (2005) and *United States—Subsidies on Upland Cotton* (2005).

⁴ The leaders of the G-20 are Brazil, China, India, and South Africa, with Brazil being the entrepreneur of the group. 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. See G-20 History, <http://www.g-20.mre.gov.br/history.asp> (last visited Mar. 14, 2008); see also Veiga (2005). On the G-4, see Wolfe (2008).

⁵ Deese (2007:155) (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 US and EC for substantial

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.⁶

This paper responds to two sets of interrelated questions: what effects has the international trade law system had within Brazil; and how, in turn, have public and private actors within Brazil attempted to deploy and shape this system? It builds on and complements earlier work which addressed the WTO's impact in the United States and European Union.⁷ The paper's point of entry is an examination of what lies behind Brazil's engagement with the WTO system, including in negotiation, litigation and *ad hoc* bargaining. We assess how the WTO legal regime has catalyzed a competition for trade-related expertise within the country, affecting its national administration and 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 process. We thus aim to show how these national and international processes are reciprocally and dynamically interrelated.⁸ The interaction between the national and international levels is our unit of analysis.

This paper assesses, in particular, the responses and strategies of Brazil to the legalization and judicialization of international trade relations. The paper investigates 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 networks for trade policy formation and trade dispute settlement. By the term legalization, we refer to the relative precision and binding nature of WTO rules.⁹ By the term judicialization, we refer to the use of a third party institution for dispute settlement: in our case, WTO panels whose decisions are subject to appeal before the WTO Appellate Body.¹⁰ In short, we examine how international law matters not in terms of compliance with individual legal decisions or treaty provisions (for which there is a considerable

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." See *also* at 153–155, 170, 177–178.

⁶ We refer in particular to assessments of the fairness of the system. Confirmed in numerous interviews and discussions between Gregory C. Shaffer and WTO officials, trade diplomats and private lawyers, as well as symposia and workshops attended by him, 2003–2007.

⁷ See, e.g., Shaffer (2003); Shaffer (2006:837)

⁸ For a socio-legal account of the recursive, reciprocal relation of international institutions and domestic contexts, see generally Halliday and Carruthers (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 generally Evans et al. (1993) and Putnam (1988). On the second image reversed, see Gourevitch (1978).

⁹ On the concept of *legalization*, compare Abbot et al. (2000:401-03) (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 Finnemore and Toope (2001:743) (taking a more sociological perspective, and critiquing Abbott et al.'s formal definition of legalization).

¹⁰ On the concept of *judicialization*, or third party dispute resolution, see Sweet (1999:147-84).

literature), 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.¹¹

This paper examines how Brazil has mobilized legal capacity both in response to the challenges posed by the WTO regime and in light of domestic Brazilian factors. Changes at the international level have helped unleash a competition for new expertise for individuals and institutions 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. As a result, 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 posed by the WTO system, while advancing individual career goals. 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.¹² This community can be conceptualized in terms of an “epistemic community,” a “community of practice,” or an emerging trade policy “field.”¹³ Our study shows that there is contestation within this Brazilian trade policy community, and that that the field is not a closed one, but is pressed to respond to political and social developments.

In methodological terms, this study is based on four years of empirical investigation, drawing on a wealth of primary and secondary sources. We have cross-checked our findings from written sources against interviews with a wide range of individuals. In particular, this paper 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

¹¹ This paper does not examine, in a broad sense, societal change within Brazil, although it provides material support for such an inquiry. Rather, the paper focuses on this subset of change.

¹² In this paper, we examine the role of not just lawyers, but lawyers as part of a broader trade policy community which includes individuals within government bureaucracies, elite law firms, business trade associations, academia, consultancies, think tanks and civil society organizations. These individuals are typically based in Brazil, but they have links with transnational networks and often travel internationally.

¹³ 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. See Haas (1992:3). The term, taken from the Greek word *episteme*, meaning “knowledge,” refers to a network of professionals who share at least four attributes which 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.* Wegner (1998:45-49), in contrast, applies a social learning perspective, and assesses the impact of “communities of practice” on meaning and identity; international trade and development networks can also be viewed in these terms. The 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 which is transnational in its dimensions, being linked to lawyers and policymakers 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 Bourdieu and Wacquant (1992:16) (“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 and Garth (2002).

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 sources, to minimize our own and the reader's reliance on non-replicable data. Throughout the paper, we have attempted to process-trace our claims at both the national and international levels, triangulating on our subject using all available sources, whether primary or secondary, written or interview-based.¹⁴ We have documented our sources as fully as possible in the footnotes.

Parts I and II of this paper provide background information for the core of our empirical study in Part III. Part I provides background on the export-oriented shift in trade policy in Brazil and other Latin American countries during the 1990s, and 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 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 the major changes that the WTO system has catalyzed in the Brazilian government, media, academia, law firms, business trade associations, think tanks, consultancies and civil society organizations, and which, in turn, have increased 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 and respondent in deploying the WTO dispute settlement system, involving companies, trade associations, civil society organizations and elite law firms, in particular (but not exclusively) leading US law firms.

We conclude by drawing out seven findings from our study. We maintain that international trade law and judicialization have unleashed a competition for expertise within Brazil which has transformed the government's relation with business and civil society over international trade law and policy. We contend that this process of catalyzing change is not automatic, but depends on key domestic factors as variables. We find that the 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 through

¹⁴ On process-tracing, see George and Bennett (2005:205-232).

the diffusion of expertise. 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.¹⁵ 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 legalization and judicialization of trade relations, we need to provide a baseline of what existed before the WTO's creation in 1995, which we do in this Part I.

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.¹⁶ 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.¹⁷ These transformations occurred at a time when liberalized international trade relations were further institutionalized at the international level through the creation of the WTO and its judicialized system for dispute settlement in 1995.

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

¹⁵ 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.

¹⁶ Sikkink (1991:75-79). Import substitution industrialization refers to a development policy advocating local production of higher value goods and services over importation. Such local production is facilitated through trade protection and government subsidies. *Id.* See also Hirschman (1961:3 n. 1) (referring to "the ideologies of economic development" in terms of sets of "distinctive beliefs, principles and attitudes").

¹⁷ See, e.g., World Trade Organization (2004:19, 37) (noting that export promotion is "a key element of Brazil's trade policy").

and unshackling the economy”¹⁸ as he “emphasized deregulation and greater openness to world markets.”¹⁹ 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 of the Republic for two four-year terms.²⁰ Cardoso privatized more state enterprises and further opened Brazil’s economy to global competition, although Brazil only gradually moved toward more liberal economic policies.²¹ 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.²² 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.²³

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

While 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, it is not the only factor, as there remains significant variation among countries trading at similar levels.²⁴ 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, such that international trade law expertise was centralized within a single government ministry. We then note that Brazil nonetheless entered the WTO with some key attributes that facilitated its successful use of WTO dispute settlement through public-private mechanisms of coordination: a professional government bureaucracy for international trade, a system of relatively well-funded trade associations and large private companies that help businesses overcome collective

¹⁸ *Economist* (Dec. 7, 1999, p. 7) (“Since the election campaign, the consequences of this political and ideological change for Brazilian trade policy were not long in coming.”).

¹⁹ Hudson (1997).

²⁰ See Resende-Santos (1997:145, 182).

²¹ Hirst (2005:20); see also Hurrell (2005:73–74) (Brazil “moved toward economic liberalization; but the process of economic reform domestically remained more complex and checkered than elsewhere”).

²² As Fritsch and Franco (1991:9) 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. See also Veiga (2007:143-44) (referring to “the change of paradigm [that market liberalization] represented for economic agents within Brazil”).

²³ See World Trade Organization (2004:17), above note 17. For example, the WTO’s Trade Policy Review of Brazil in 2004 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).

²⁴ See Horn et al. (1999); see also Francois and Horn (2008).

action problems, and well-educated elites that have access to international networks through their education and job experiences abroad.

Brazil's import substitution industrialization policies shaped the structure of trade policymaking within its state bureaucracy so that expertise was centralized. These policies and the resulting governmental structure further 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 General Agreement on Tariffs and Trade (GATT), which existed from 1948 to 1994.²⁵ 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 GATT negotiations. The Brazilian Department of Foreign Trade, (Carteira de Comércio Exterior do Brasil, or 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.²⁶ In reflection of Brazil's import substitution paradigm, CACEX took a *dirigiste*, protectionist orientation.²⁷

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.²⁸ Government-business relations were generally non-transparent, characteristic of "an authoritarian State, [whose] economic policy instruments [were] under the control of a strong techno-bureaucracy."²⁹ Private businesses and trade associations relied on their informal

²⁵ Veiga (2002:13-14)

²⁶ Veiga (2007:153), above note 22. 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 Hudson (1997), above note 19.

²⁷ Veiga (2007:153), above note 22; Carrizosa et al. (2004:135).

²⁸ As a result, "the dialogue and consultations between public sector and private agents . . . were almost entirely restricted to [a sectoral] articulation." Veiga (2007:153), above note 22 (also noting that "a remarkable characteristic of this model is that both design and management of these instruments were essentially sectoral"). Schneider (2004:93-94) likewise finds that Brazilian cross-sectoral (encompassing) business associations, while relatively wealthy and well-staffed, were relatively weak, so that "economic and political elites regularly circumvented them."

²⁹ Veiga (2007:153), above note 22.

connections with the government for export promotion and import protection.³⁰ 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.”³¹ Overall, however, the private sector did not coordinate to lobby the government regarding trade positions in the GATT.³² Moreover, civil society representatives were largely shut out of trade policymaking, and neither the Brazilian legislature nor Brazilian media paid much attention to it.

Brazil, nonetheless, had three 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.³³ The ministry has long had a strong interest in international 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, although other ministries have become increasingly involved as trade policy expertise has diffused and as access to Brazilian trade policy making has broadened, as we will see.³⁴

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 and creates opportunities for individuals to develop expertise and build trade policy careers. Brazilian businesses are thus better able to fund outside lawyers and economic consultants to assist the government with trade disputes and with the development of trade negotiation positions than businesses in other developing countries. 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.³⁵ As Ben Schneider writes, “over time the statutory

³⁰ In terms of broader business-government relations, see Schneider (2004:108-09), above note 28 (“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”).

³¹ Veiga (2002:14), above note 25.

³² Thus, Veiga finds, although “the agro-industrial sectors closely monitored the progress of the Uruguay Round, [they] rarely participated in the definition of Brazilian positions.” *Id.*

³³ In 1961 and in 1973, for example, the ministry adapted its internal structure in response to the intensification of multilateral trade negotiations. Cheibub (1989:125). These adaptations anticipated the ministry’s changes during the 1990s and 2000s in response to the Uruguay Round and Doha trade negotiations and the WTO’s judicialized dispute settlement system. Veiga and Iglesias (2002:51–96).

³⁴ See Veiga (2007:176), above note 22; Cheibub (1989: 127), above note 33.

³⁵ Schneider (2004:101, 123), above note 28.

provisions for financing compulsory associations bankrolled some of the wealthiest business associations in Latin America,” which were able to accumulate “enormous resources.”³⁶ 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.³⁷ The Brazilian government could tap these human and financial resources, as we will see below.

Third, Brazilian elites in the public and private sector who engage with international business tend to be well-educated, internationally networked and hard-working within a competitive career structure which is meritocratically-oriented, as we will see in Part III. Brazilian law firms are among the largest in Latin America and have long engaged in international trade and investment-related work on the private side. Leading Brazilian lawyers, economists and consultants have typically studied abroad in the United States or Europe, and many have had internships, job postings or other connections with international or regional trade and development institutions, such as the WTO, the United Nations Conference on Trade and Development (UNCTAD), the World Bank and the Inter-American Development Bank, as we will show.

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 which 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, overall, increase economic output. The combination of a professionalized Ministry of Foreign Affairs, a relatively well-organized business sector which included large, export-oriented companies, and an educated and networked elite boded well for Brazil’s ability to make effective use of the WTO judicial system.

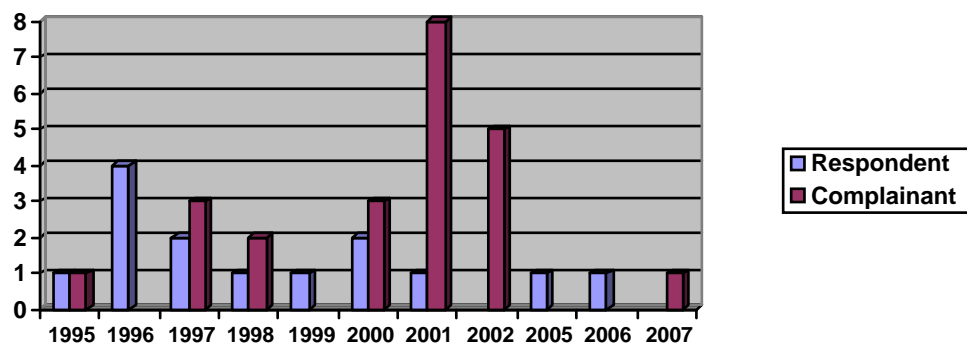
³⁶ *Id.* As Haggard, Maxfield, and Schneider further write, “[w]hen we probe the question of why small businesses are able to overcome collective action problems, we often find the visible hands of state actors and political entrepreneurs.” Stephan Haggard et al. (1997:36, 45).

³⁷ See Schneider (2004:96), above note 28 (“representatives of business, especially industry in São Paulo, regularly figured prominently in top positions in all sorts of governments.”).

II. 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 after the United States, European Union, and Canada since the WTO's creation. It has participated in eighty-six of the 369 cases filed before the WTO through December 31, 2007 as complainant, respondent or third party, constituting a 23% participation rate.³⁸ It has been a complainant in eleven, a respondent in three, and a third party in thirty-five of the 136 cases that resulted in an adopted WTO report during this period, constituting about a 36% participation rate.³⁹ Table 1 depicts Brazilian participation as a complainant and respondent on an annual basis, based on the dates that complaints were filed.

Table 1: Brazil as a Complainant and Respondent in WTO Cases by Year (1995–2007)⁴⁰



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. At the end of 1996, however, Brazil faced a controversy that would receive widespread

³⁸ World Trade Organization (2008); Ministério das Relações Exteriores (2008); Dispute Settlement Commentary, <http://www.worldtradelaw.net>. A large gap nonetheless separated Canada and Brazil from the two most active members, the United States and the European Union.

³⁹ Some of the cases in which Brazil is involved were still in consultations or before a panel at the beginning of 2008. For the adopted reports, see Dispute Settlement (2008), above note 38. We do not include Article 21.5 compliance decisions in our calculations.

⁴⁰ Source: Authors, as per the WTO database (January 2008). 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.

attention in Brazilian politics, the private sector, and the media, and which 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.⁴¹ As the Executive Director of a major Brazilian consulting firm stated, "Embraer was a wake-up for industry."⁴² Brazilian media coverage of these parallel cases brought WTO proceedings to the broader Brazilian public for the first time.⁴³

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.⁴⁴ Embraer's economic success thus supported 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.⁴⁵

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, although it appears that there was none.⁴⁶ This drew a strong reaction from Brazilian agricultural groups which stoked 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

⁴¹ 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, although the case could flare up again.

⁴² Interview by Gregory C. Shaffer with Ricardo Camargo Mendes, Executive Director, Prospectiva (Apr. 22, 2004) (on file with author). For more on Prospectiva, see below note 161.

⁴³ See, e.g., *Folha de São Paulo* (Dec. 23, 2002); *Exame* (Dec. 24, 2002).

⁴⁴ Forecast International (Sep. 19, 2005). 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 percent share. *Id.*

⁴⁵ Unger (2007:114-15).

⁴⁶ Barral (2007:14-15) (saying it was "inexistent"); MacKinnon (2007:A1).

products, spurring more media coverage and public attention on the WTO and its dispute settlement system.⁴⁷

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, once more generating significant Brazilian media coverage. In 2000, the United States challenged a Brazilian patent law provision permitting for compulsory licensing at a time when civil society organizations were calling for lower cost drugs (through, among other means, compulsory licensing) to respond to the HIV pandemic and other public health concerns.⁴⁸ 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.⁴⁹

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 not only catalyzed Brazilian media investment in WTO coverage as we will see in Part III; it also helped spur the Brazilian government and private sectors to invest greater resources regarding WTO law and 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. 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, factually and legally, and strategically important, such as the *US-Cotton* and the *EC-Sugar* cases examined in Part IV.⁵⁰

⁴⁷ See Barral (2007:14–15), *id.*

⁴⁸ See, e.g., Rosenberg (2001:6, 26).

⁴⁹ See *id.* (noting the relatively successful Brazilian strategy to fight the AIDS epidemic, compared to what has transpired in other developing countries).

⁵⁰ See *EC—Export Subsidies on Sugar* (2005) and *United States—Subsidies on Upland Cotton* (2005), above note 3.

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 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.

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 filed by Brazil, nine were settled by the parties during consultations, three were settled after a panel was formed, and eleven resulted in panel decisions, ten of which were appealed. All eleven of the cases resulting in an adopted ruling were, in significant part, in favor of Brazil. Brazil was also a respondent in fourteen cases, but only four of these resulted in the establishment of a panel, of which Brazil lost two in part, won one and settled another.⁵¹

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. Around 39% of Brazil's complaints were against the United States, and around 26% against the European Union, constituting, in total, 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 (10), steel or iron products (5) and vehicles (aircraft and bus, 4 complaints). From 2003 to 2006, agricultural products constituted 37–39% of Brazil's total exports, and iron and steel and vehicles each totaled 6–7.5% of total exports.⁵² Table 2 contains a breakdown by country of WTO cases where Brazil was a claimant or a respondent.

⁵¹ See Shaffer et al. (2008) at Annex II for a full break-down of these cases,

⁵² U.N. Commodity Trade Database (2008).

Table 2: Brazil WTO Cases by Country (1995–2007)⁵³

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

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 US-cotton and EC-sugar complaints, in particular, contributed to Brazil's status as a leader of the G-20 group of developing nations,⁵⁴ and a member of a "quad" for structural leadership within the WTO.⁵⁵ 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.⁵⁶ The cases created leverage for Brazil in the Doha Round negotiations and provided tools for opponents of the subsidies in U.S. and EU internal political debates.⁵⁷ 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.⁵⁸ In this way, Brazil hoped that the cases could help catalyze a possible elimination of

⁵³ Source: Authors, based on the WTO database at <http://docsonline.wto.org> (last visited Mar. 20, 2008).

⁵⁴ On the G-20, see above note 4.

⁵⁵ See Deese (2007), above note 5.

⁵⁶ See, e.g., Rohter (2005); Kaur (2005:23) ("These victories, the first to target developed countries' farm subsidies, have given hope to other developing countries."); Becker and Benson (2004:W1); Mortished (2004:19).

⁵⁷ There are divisions within countries regarding trade policies, such as the import protection and subsidization. For example, Brazil's challenges to U.S. and EU agricultural subsidies that we examine below provide tools to U.S. and EU domestic actors who wish to curtail these subsidies for domestic policy reasons. See, e.g., Pruzin (2007a: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.")

⁵⁸ See World Trade Organization (2005a) ("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.* at ¶15).

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 both in terms of the quantity of cases brought and their quality, 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 European Union. The international political payoffs for Brazil of its investment in WTO dispute settlement have been significant.

III. THE BUILDING OF A PLURALIST TRADE POLICY COMMUNITY IN BRAZIL

The WTO's legalization and judicialization of international trade relations has helped to catalyze Brazilian public and private investments in trade law and policy expertise. Brazilian public officials' realization of their need for outside legal and technical economic assistance has provided incentives for business, lawyers and consultants to invest in developing expertise and 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. Brazilian public and private sector investment in trade law and policy expertise have, in turn, helped the country to assume a leading role in WTO governance, whether in negotiations, dispute settlement, or monitoring WTO agreements' implementation.

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.⁵⁹ The structure consists of a specialized WTO dispute settlement division located in the capital, Brasília (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, together with

⁵⁹ Interviews by Gregory C. Shaffer with Brazilian officials and private sector representatives [names withheld], in São Paulo, Braz.; Brasília, Braz.; Geneva, Switz. (Apr. 2004; June 2004) (on file with author). Celso de Tarso Pereira, Brazil's representative in Geneva for DSU matters, confirmed these observations at a seminar organized by the International Centre and Trade and Sustainable Development (ICTSD) 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).

law firms and economic consultants funded by the private sector (the “third pillar”).⁶⁰ As part of this “third pillar,” the Geneva mission started an internship program for young attorneys from Brazilian law firms and business associations, as well as trade specialists from government agencies.

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 to spread knowledge of the system in order to create a critical mass.”⁶¹ That comment encapsulates a central theme of this paper. 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, by diffusing expertise.

We first assess the organizational initiatives undertaken by the government and the diffusion of trade-related expertise within the government to increase governmental capacity in response to the challenges of, and opportunities provided by, the legalized and judicialized WTO system for trade relations. We then examine the initiatives that the government’s demand for trade-related expertise has spurred, including those taken by individuals, trade associations, think tanks, universities, and civil society organizations. These individuals have developed expertise to work with industry and the government. The result has been the formation of a Brazilian epistemic community for trade law policy which can be tapped for WTO dispute settlement, WTO negotiations, and, more generally, WTO governance. The creation of this community has enhanced Brazil’s ability to play a meaningful role in the WTO system.

A Reorganizing Government to Respond to WTO Challenges

Brazil has developed a professionalized, meritocratic and Ministry of Foreign Affairs which prioritizes international trade matters, a specialized unit for dispute settlement so that legal and technical expertise is developed and retained over time, and a foreign trade career track in other ministries. The result has been both a broadening and deepening of trade-related expertise within the Brazilian government. These elements are critical for sustained, successful engagement with the WTO system, and each is lacking in many developing countries.⁶²

⁶⁰ 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.

⁶¹ Interview by Gregory C. Shaffer with Brazilian representative [name withheld], in Geneva, Switz (Feb. 1, 2005) (on file with author).

⁶² See Busch et al. (2008:3).

Brazil, unlike many developing countries, 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 then place and perform well in assigned posts in the field.⁶³ 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, 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), the EU-Mercosur Free Trade Agreement (FTA), and the Latin American Integration Association (ALADI). When 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. The Ministry has since increased support for trade negotiations, litigation and what Marc Galanter has called "litigotiation" — strategic litigation in the shadow of negotiation.⁶⁴

Brazil's role in the WTO 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.⁶⁵ As a result, Brazil's Foreign Ministers have had in-depth experience with the WTO's organizational culture and the substantive issues at stake. Brazil's Geneva mission, accordingly, has received strong political and logistical support from the capital. Compared to other developing

⁶³ See Law No 11.440, art. 35 and ff (2006). 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 author).

⁶⁴ Galanter (2001:579). As Galanter states regarding U.S. domestic litigation, "the 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 Galanter (1984:268).

⁶⁵ Ministério das Relações Exteriores (2008). Moreover, Amorim was also Foreign Minister from 1993 to 1995, preceded by Fernando Henrique Cardoso (from 1992 to 1993, and who became President in 1994), and Celso Lafer (in 1992). *Id.*

countries, Brazil has allocated significant resources to WTO-related issues, especially for dispute settlement.

In response to the demands of the WTO system, multiple Brazilian ministries have developed their own trade-related expertise. Brazil has attempted to coordinate ministry views through an inter-ministerial body, the Chamber of Foreign Trade (CAMEX).⁶⁶ 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. In order to participate effectively in CAMEX, ministries have invested in developing WTO expertise. 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."⁶⁷ CAMEX includes a formalized body which also provides a focal point for the private sector, the Private Sector Consultative Council (CONEX). This body has helped to catalyze activity in the private sector to address trade negotiation and dispute-related issues.⁶⁸

CAMEX is part of the Government Council of the Presidency and consists of six ministers, assisted by a secretariat.⁶⁹ Three of the ministries have primary responsibility for implementing Brazil's trade policy under guidelines set by CAMEX. 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 Commerce (hereinafter the 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 antidumping and countervailing duty investigations and general export promotion, while the Ministry of Finance is responsible for customs matters and subsidies through

⁶⁶ However, Veiga (2007:154), above note 22, finds that "the problem of institutional coordination remained." See also World Trade Organization (2004:20), above note 17. 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).

⁶⁷ E-mail from Welber Barral, head of the Department of Foreign Trade (SECEX) within the Ministry of Development, March 31, 2008.

⁶⁸ Email from Welber Barral, above note 67, Telephone interview by Gregory C. Shaffer with Welber Barral, head of SECEX (Apr. 8, 2008) (on file with author). CONEX is "comprised of up to 20 private sector representatives," and can "carry out public reviews and assessments of the Government's trade policy." World Trade Organization (2004:21), above note 17.

⁶⁹ 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. World Trade Organization (2004:20), above note 17; see Decree No. 4.732 (2003); see also Interview by Gregory C. Shaffer with Member of the Dispute Settlement Unit [name withheld], Brazil Foreign Ministry (Apr. 19, 2004) (on file with author). CAMEX generally meets every two months. *Id.*

Brazil's export incentives program, PROEX.⁷⁰ 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, multiple Brazilian ministries have invested in creating trade policy expertise. In 1998, the government created career tracks for foreign trade analysts ("analistas de comércio exterior").⁷¹ 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*, SECEX) which is within the Ministry of Development. In 2008, the government approved a new call for applications (a "concurso público") in order to hire forty new foreign trade analysts, for which the government expected around ten thousand applications.⁷² The differential between the supply and demand of applications in the selection process reflects the highly meritocratic nature of the process.

The Brazilian government has responded to the WTO's judicialization of international trade relations by creating a specialized unit consisting of specialized personnel for international trade dispute settlement, again unlike most developing countries. 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 Geral de Contenciosos*) (hereinafter Dispute Settlement Unit), consisting of around five or six professionals.⁷³ The Dispute Settlement Unit is responsible for analyzing the

⁷⁰ Veiga (2007:176), above note 17, notes, "[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."

⁷¹ See Associação dos Analistas de Comércio Exterior, <http://www.aace.org.br/>. The foreign trade analyst career track was created during the Cardoso administration. President Cardoso had earlier been Foreign Affairs Minister and wished to bring the professionalization of Foreign Affairs Ministry's selection process to other ministries. 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. Telephone interview by Gregory C. Shaffer with Brazilian official [name withheld], Ministry of Development (Apr. 8, 2008)..

⁷² Email to Gregory Shaffer from Welber Barral, head of SECEX (Apr. 2, 2008). Associação dos Analistas de Comércio Exterior (2008), above note 71 (listing the call for proposals). Brazilian federal civil servants are relatively well paid, especially for young professionals, which helps to explain why there are so many applicants. A starting salary for a member of the federal Brazilian civil service is around 8,000 Brazilian reales (around \$5,500 per month). Telephone interview by Gregory C. Shaffer with Brazilian official [name withheld], Ministry of Development (Apr. 8, 2008) (on file with author).

⁷³ Ministério das Relações Exteriores, Contenciosos do Brasil na OMC, http://www.mre.gov.br/portugues/ministerio/sitios_secretaria/cgc/contenciosos.doc (last visited Mar. 20, 2008). The Dispute Settlement Unit falls within the Under-Secretariat for Matters of Integration, Economics and Foreign Trade in 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 and the Appellate Body and in any settlement negotiations conducted after legal procedures have begun. In this way, the Ministry aims to respond more effectively to the growing demands of international trade dispute settlement.

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.⁷⁴

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.⁷⁵ 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.

In sum, Brazil has deepened international trade law expertise within the Ministry of Foreign Affairs and diffused it within multiple government ministries. In response to

Ministry of Foreign Affairs. It was created pursuant to Decree N. 3.959, October 10, 2001, regulating the ministry's internal organization. This Decree and its successor have been replaced following subsequent organizational reforms within the Ministry. The unit handles disputes arising under Mercosur as well as under the WTO. 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. From 1999 until 2001, he was responsible for Brazil's WTO cases at the Brazilian mission in Geneva (in particular, the Embraer case).

⁷⁴ 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 (ongoing) *US-Cotton* cases. When settling the U.S. challenge to Brazil's patent law (DS199), 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. Interviews by Gregory C. Shaffer with Brazilian officials (on file with author).

⁷⁵ Interview by Gregory C. Shaffer with Member of Dispute Settlement Unit [name withheld], Brazil Foreign Ministry (Apr. 19, 2004) (on file with author).

the WTO dispute settlement system, Brazil has created a new unit for handling WTO disputes which operates as a node within a broader Brazilian trade law network. This network includes the private sector which has invested significantly in trade law-related expertise, unlike under the former GATT system, as we shall now see.

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

The WTO has also catalyzed the development of trade law expertise in the private sector, including in business, think tanks, academia, media and civil society. 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" for WTO matters — support from the private sector. Since the WTO's creation in 1995, Brazilian media, law firms, academia, trade associations, think tanks, consultancies and non-governmental groups have invested in international trade law and policy expertise. The resulting 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.

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 who were predominantly located within the Brazilian Ministry of Foreign Affairs. Few law firms or economic consultants dealt with international trade-related issues, and even government ministries seemed largely oblivious of 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 like any other domestic legal procedure. A division of the Brazilian Ministry of Development handled the investigations, but it was not very concerned with, or even aware of, international legal constraints.⁷⁶

⁷⁶ Telephone Interview by Gregory C. Shaffer with U.S. legal counsel [name withheld] (Feb. 19, 2008) (on file with author). 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 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 lawyers, April 2004; confirmed in Interview by Gregory C. Shaffer with Ministry Official [name withheld] (Feb. 19, 2008) (on file with author). 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 Antidumping Agreement in 1995. See Barral (2005:4).

The legalization and 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 at the time decided to base full-time journalists in Geneva to follow WTO issues.⁷⁷ Today, major Brazilian newspapers report on international trade matters on a regular basis, spurring greater interest in international trade matters among the broader Brazilian public. 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 cotton and sugar 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."⁷⁸ 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 trade disputes and the growing public interest in them. 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.⁷⁹ 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.

Extensive positive coverage followed Brazil's 2005 victories in the *EC-Sugar* and *US-Cotton*, as well as the *EC-Poultry Customs Classification* and the *EC-Bananas* arbitration cases.⁸⁰ Welber Barral, for example, writes 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 *US-Cotton* and *EC-Sugar* cases.⁸¹ The Brazilian media examined how these cases implicated the negotiations on agriculture in the Doha Round,

⁷⁷ Interview by Michelle Ratton Sanchez with Brazilian Mission Official & Geneva-Based Journalist [names withheld] (on file with author). The newspapers were *Gazeta* and *O Estado de São Paulo*. *Id.*

⁷⁸ Barral (2007), above note 46, citing Glycerio (2006).

⁷⁹ See Instituto de Estudos do Comércio e Negociações (2007:2). ICONE is the Brazilian think tank funded by agribusiness, which we examine in Part III.B.4.

⁸⁰ These cases are discussed in Part IV. See, e.g., *Revista Exame* (Aug. 31, 2004; Apr. 28, 2005); *Folha de São Paulo* (May 18, 2005).

⁸¹ Barral (2004:1). 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, Lawyer, O'Melvey and Meyers LLP (Apr. 23, 2004) ("Caetano Interview").

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 have facilitated the development of 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.⁸² 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* (or *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.⁸³ Its articles provide an outlet for their writings and a regular forum in which members of the network 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 of the Brazilian firm Veirano & Advogados in handling fully litigated WTO disputes in the *EC-Poultry Customs Classification* and *Argentina-Antidumping Duties on Poultry* cases.⁸⁴ 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.⁸⁵ These firms formed an association in 1983 named the *Centro de Estudos das Sociedades de Advogados* (CESA, or the Law Firm Study Center) based in São Paulo. In 2002, in the midst of the Embraer case and the year that the US-

⁸² 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 (last visited Mar. 20, 2008).

⁸³ The publication *Pontes-Entre Comércio e Desenvolvimento Sustentável* is available at Int'l Ctr. for Trade & Sustainable Development, Pontes Entre o Comércio e o Desenvolvimento Sustentável, <http://www.ictsd.org/monthly/pontes.htm> (last visited Mar. 20, 2008).

⁸⁴ See Part IV.A. *EC—Poultry Customs Classification* (2005) and *Argentina-Antidumping Duties on Poultry* (2003).

⁸⁵ The three largest, and seven of the ten largest, law firms in Latin America are from Brazil. The three largest each employed over three hundred lawyers in 2007. See Consultorio Juridico, Ranking da advocacia, at http://conjur.estadao.com.br/static/text/26975_1 (noting that Demarest e Almeida; Tozzini Freire Teixeira e Silva; and Pinheiro Neto, the three largest law firms in Latin America, respectively employed 365, 346 and 325 lawyers, and that the fifth and sixth largest, Machado Meyer Sendacz e Opice and Veirano & Advogados, also from Brazil, respectively employed 293 and 223 lawyers).

Cotton and *EC-Sugar* cases were initiated, the Law Firm Study Center created a technical group on international trade which 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.⁸⁶

The Brazilian government has facilitated the building of trade law expertise within the elite Brazilian bar 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 DC, programs that 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.”⁸⁷ The Law Firm Study Center played a central role in the creation of the 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.⁸⁸ 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, since that decision was made by the private parties who paid the law firm’s fees. They emphasized that the government would welcome the development within the Brazilian bar of capacity on WTO law.⁸⁹

The Rio de Janeiro event was followed by others that brought together government trade officials and 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.⁹⁰ IBRAC has since annually organized an international trade conference

⁸⁶ See *Cesa realiza estudos sobre comércio*, VALOR ECONÔMICO, July 28, 2003. For detailed information about this work, see Centro de Estudos das Sociedades de Advogados, Relatório das Atividades 2004, São Paulo (2004), http://www.cesa.org.br/com_apoio_rel.asp.

⁸⁷ Interview by Gregory C. Shaffer with Member of Dispute Settlement Unit [name withheld], Brazil Foreign Ministry (Apr. 19, 2004) (on file with author).

⁸⁸ 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.

⁸⁹ Raton Sanchez and Rosenberg interviews with Brazilian officials and law firm representatives, 2005.

⁹⁰ IBRAC was founded in 1992. Office of Economic Cooperation and Development (2005:131 n. 116); see generally Instituto Brasileiro de Estudos de Concorrência, Consumo e Comércio Internacional (IBRAC), <http://www.ibrac.org.br/> (last visited Mar. 20, 2008).

which brings together lawyers, economists, academics and Brazilian trade officials, which has attracted increasing private sector interest.⁹¹ 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 which 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.⁹²

In relation to these initiatives, the Ministry created in January 2003 a four-month internship program for private lawyers within Brazil’s mission in Geneva, which the Law Firm Study Center co-sponsors.⁹³ 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 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.⁹⁴ 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.⁹⁵ Interns come predominantly from Brazil’s largest law firms located in São Paulo and in Rio de Janeiro, although a few firms from other parts of the country also have participated.⁹⁶ Although the number of new legal interns has decreased as law firms saw a limit to the market for WTO law expertise, a

⁹¹ In the first year of the conference, in 2002, there were about forty participants, while in 2005 that number increased to almost ninety, which level has been maintained since then.

⁹² Interviews by Michelle Ratton Sanchez and Barbara Rosenberg with Brazilian officials and law firm representatives [names withheld], in *Brasília and São Paulo* (from January until September 2005) (on file with author).

⁹³ 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 FGV who regularly lectures on trade matters (from Sciences Politiques in Paris to conferences in Latin America organized by the Inter-American Development Bank), 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.

⁹⁴ 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.

⁹⁵ Thorstensen (2008) (for an edited volume on Brazil’s participation in WTO disputes, organized by Maria Lucia Pádua Lima (at FGV) and Barbara Rosenberg) (on file with authors). A number of former interns to the Brazilian mission are contributors to this volume.

⁹⁶ Three interns came from Brasília, and two interns came from each of Recife, Salvador, Curitiba, Florianópolis and Belo Horizonte. *Id.*

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 government and the private sector. Eighteen interns have been accepted from other government ministries since the program's inception to enhance departmental knowledge and inter-ministerial coordination.⁹⁷ 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.⁹⁸

The Geneva program's success spurred the Dispute Settlement Unit within the Foreign Affairs Ministry to create its own internship program in Brasília in 2004.⁹⁹ 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.¹⁰⁰ The Brazilian Embassy in Washington, D.C. created an analogous program in 2003 to develop capacity in international trade matters, and in particular in relation to U.S. anti-dumping law, and thus to help ensure access to the U.S. market for Brazilian products. The embassy also sponsors the ABCI Institute, 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."¹⁰¹ By the end of 2007, the Brasília program had hosted eight interns and the embassy in Washington, D.C. twenty.¹⁰²

The WTO has triggered not only the legalization of international trade relations, but also the legalization of national 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

⁹⁷ 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.*

⁹⁸ FIESP and CNI are discussed in Part III.B.4.

⁹⁹ Some interns in Geneva also worked as interns in Brasília for an additional four-month period.

¹⁰⁰ The development of public-private study groups is presented further in Part III.B.3.

¹⁰¹ See Analistas Brasileiros de Comércio Internacional (ABCI) or Brazilian Analysts on International Trade, <http://www.abciinstitute.org/> (last visited Mar. 20, 2008); see also Barral (2007:17), above note 46. Mr. Aluisio Campos, a Brazilian diplomat at the Washington DC Embassy who created the internship program, was also responsible for the creation of ABCI.

¹⁰² The latest intern left the Dispute Settlement Unit in Brasília in 2006. Information obtained by Barbara Rosenberg from member of the Dispute Settlement Unit (Mar. 4, 2008). In contrast, the internship program expanded in Washington D.C., likely because of the interest of Brazilian graduate law students who were in programs at the law schools at Georgetown University, George Washington University, and American University in developing practical knowledge of U.S. antidumping law and procedures, and to extend their stay in Washington.

expertise, especially since Brazil's use of antidumping measures has increased following the trade liberalization of the 1990s.¹⁰³ 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 since lawyers can work both sides of an anti-dumping case.¹⁰⁴ Brazilian law firms asked for an internship program to be created within the Brazilian entity responsible for antidumping investigations, a division within the Department of Foreign Trade in the Ministry of Development.¹⁰⁵ 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 2008.¹⁰⁶ Although the anti-dumping work of Brazilian law firms has remained relatively limited, there is clearly much more work than under the non-legalized mechanisms for import relief of the former CACEX system discussed in Part I.¹⁰⁷

Some Brazilian attorneys, on their own initiative, have worked 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 areas, 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 got to know representatives of Brazilian companies and trade associations, leading to her WTO work for the poultry trade association (ABEF). Her first case with ABEF involved an Argentine anti-dumping measure.

The internship programs generally have been a success for the Brazilian government and the lawyers involved. Some interns continued to work on WTO cases

¹⁰³ Barral (2005:25), above note 76.

¹⁰⁴ Caetano Interview, above note 81. 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.*

¹⁰⁵ Interview by Gregory C. Shaffer with Vera Sterman Kanas, Attorney, Tozzini Freire, in São Paulo, Braz. (Apr. 25, 2004) ("Kanas Interview") (on file with author). Within SECEX, the Brazilian Trade Remedies Department (DECOM) is the investigating authority, and it was created in 1995. It follows developments in WTO anti-dumping jurisprudence. Brazil's antidumping law was modified in 1995 to incorporate WTO requirements.

¹⁰⁶ It also created a summer internship program for graduate students, granting internships to three individuals in 2007. Email from Welber Barral, Secretaria de Comércio Exterior, to Gregory C. Shaffer (Mar. 10, 2008) (on file with author).

¹⁰⁷ *Id.*; Interview by Gregory C. Shaffer with Jose Diaz, former Demarest & Almeida Intern, in São Paulo, Braz (April 22, 2004) ("Diaz Interview") (on file with author); 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) ("Dantas Interview") (on file with author). 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." See biography of Adriana Dantas at Current IIEL Fellows, Georgetown Institute of International Economic Law, <http://www.law.georgetown.edu/iie/fellows/currentfellows.html> (last visited Mar. 14, 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*. Economic consulting firms are also available for anti-dumping and safeguard cases, but it appears that law firms have become relatively more involved in Brazil over the last years, on account of the legalization of trade matters.

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 the *Brazil-Tyres* case.¹⁰⁸ 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.¹⁰⁹ Although Brazilian law firms funded the interns, and although 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.¹¹⁰ 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.¹¹¹ Brazilian law firms, including the former interns 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 implicated by WTO law, and internal antidumping cases in Brazil.¹¹² 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.¹¹³

In sum, Brazilian public officials and private lawyers have overlapping interests in WTO dispute settlement. The government can benefit from the diffusion of WTO legal expertise in Brazil, so that qualified Brazilian lawyers are now locally available. Through the internship program, Brazilian practitioners have learned in Geneva about

¹⁰⁸ Interview by Gregory C. Shaffer with Diplomat from Dispute Settlement Unit [name withheld], Brazil Foreign Ministry, in São Paulo, Brazil (Feb. 2006) (on file with author). *Brazil—Measures Affecting Imports of Retreaded Tyres* (2007); see also discussion in Part IV.B regarding this case.

¹⁰⁹ Kanas Interview, *supra* note 105 (noting she returned for the second hearing of the *EC—Sugar* case and was providing free services for the government; and that a former intern at Pinheiro Neto was also flying back for the *EC—Sugar* hearing).

¹¹⁰ Brazilian law firms complained that the bid process organized by the Ministry of Foreign Affairs to hire a law firm to assist it with WTO dispute matters (including the upcoming *Brazil—Tyres* case) only allowed for the participation of law firms based in the United States and in Europe. See *infra* note 209 and accompanying text. However, the Brazilian Ministry of Foreign Affairs responded that the bid was organized to take into account the position of the Brazilian General Attorneys Office (*Advocacia Geral da União* or AGU) that under Brazilian law the AGU must be the ministry's counterpart on trade law-related issues. In addition, the Ministry of Foreign Affairs stated that it would need support from a law firm in the U.S. and in Europe regarding legal and factual issues arising there. Some Brazilian law firms nonetheless challenged the legality of the bidding procedures before Brazilian courts.

¹¹¹ 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 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.

¹¹² Interview by Gregory C. Shaffer with Carolina Saldanha, Attorney, Felsberg, Pedretti, Mannrich e Aidar Advogados, in São Paulo, Brazil (Apr. 23, 2004) (on file with author) (concerning work for the Brazilian shrimp industry regarding U.S. antidumping duties on shrimp imports in which Brazil was a third party in complaints brought by Ecuador and Thailand); Diaz Interview, *supra* note 107 (noting research for one of Brazil's largest exporters of cashews on market access issues); Caetano Interview, *supra* note 81 (regarding advice to clients on Doha Round negotiating positions and emails from U.S. law firms regarding potential partnerships in challenging import relief decisions); Dantas Interview, *supra* note 107. Barbara Rosenberg of Barbosa, Müssnich & Aragão Advogados has assisted ABEF regarding the EUs implementation of an agreement (under GATT article XXVIII) following the adopted Appellate Body decision in the poultry case (*Brazil—Poultry*, DS/269).

¹¹³ One can 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 portfolio. They are now part of an elite network of individuals who have participated in Brazil's Geneva internship program. On investing in the "international" as a means to build domestic social capital, see Dezalay and Garth (2002), above note 13.

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.¹¹⁴ Moreover, since most trade disputes are settled, the perception by other WTO members of greater Brazilian capacity in WTO law can be of use in settlement negotiations conducted in the shadow of a potential WTO proceeding.

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 that has been 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 academics engage with Brazilian trade officials, private lawyers (in particular those returned from the internship programs) and specialists hired by trade associations. Together they form part of the 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,¹¹⁵ 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

¹¹⁴ A member of the Dispute Settlement Unit confirms that the Brazilian private sector is now "engaged in bringing its proposals." He states that the private sector "identifies claims and brings memos, including from law offices in Brazil." Interview by Gregory C. Shaffer with Member of Dispute Settlement Unit [name withheld], Brazil Foreign Ministry, in São Paulo, Braz. (June 22, 2006) (on file with author).

¹¹⁵ Miyamoto (1999:83-98). 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.

specialized in this area so that 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*, *US-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.¹¹⁶ 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.¹¹⁷ 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 government and the private sector.¹¹⁸

In 2002, the Fundação Getulio Vargas (FGV) in São Paulo founded a new private law school (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.”¹¹⁹ 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, discussed below), 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 ABEF, discussed below), and

¹¹⁶ 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 Mar. 14, 2008).

¹¹⁷ See list of courses at the University of São Paulo Law School website, <http://www.direito.usp.br/> (Departamentos, Internacional, Disciplinas links).

¹¹⁸ According to public data, around thirty doctorate and masters theses have been written on trade-related matters at the University of São Paulo Law School since 1999. See <http://dedalus.usp.br>.

¹¹⁹ See Fundação Getulio Vargas (FGV) *Direito GV* (Escola de Direito de São Paulo), Mission, <http://www.direitogv.com.br/english> (Mission link) (providing the FGV Law School statement).

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.¹²⁰ 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*).¹²¹ In July 2004, the law school also helped UNCTAD organize a workshop at FGV on WTO dispute settlement with a focus on trade remedy laws.¹²²

Other universities in a number of different Brazilian cities likewise began integrating trade-related courses into their curricula, including specific courses on the WTO, trade and development, and international economic relations.¹²³ 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.¹²⁴

Professors also created research institutes and centers for international trade law and policy, such as the Institute on International Trade Law and Development

¹²⁰ Michelle Ratton 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.

¹²¹ See Ratton Sanchez et al. (2004).

¹²² See U.N. Conference on Trade & Development (2004). 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.

¹²³ 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.

¹²⁴ Email from Welber Barral, head of SECEX, to Gregory C. Shaffer (Mar. 6, 2008) (on file with author). Barral founded the program before he became head of the Foreign Trade Department (SECEX) of the Ministry of 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. IDCID was created in 2003 by professors and researchers at the law school who aimed 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.¹²⁵ CAENI is a multidisciplinary research centre that is linked to the university's political science department and which aims to bring together researchers and government and private sector representatives to advance study and assess developments in international negotiations.¹²⁶ 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.¹²⁷

In 2003, academics and professionals created a research group specifically to assess developments in international trade negotiations, the Trade Negotiations Group (*Grupo de Negociações Comerciais*, GNC). Vera Thorstensen from the Brazilian mission in Geneva helped to coordinate the group with Marcos Jank from the agribusiness-funded think tank ICONE. Economic consultants, academics, trade specialists from business associations, and legal practitioners, again including former interns at Brazil's WTO mission in Geneva, composed the team. 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 2005.¹²⁸

¹²⁵ To view IDCID's webpage, see Instituto de Direito do Comércio Internacional e Desenvolvimento <http://www.idcid.org.br/> (last visited Mar. 20, 2008). Gregory Shaffer presented at the event and contributed to the resulting edited volume. See generally Shaffer (2007).

¹²⁶ 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 Mar. 14, 2008); and for NUPRI see Núcleo de Pesquisa em Relações Internacionais da Universidade de São Paulo, UPRI, <http://www.usp.br/cartainternacional/modx/> (last visited Mar. 14, 2008).

¹²⁷ See Institute for the Integration of Latin America and the Caribbean (INTAL), Inter-American Development Bank, <http://www.iadb.org/intal/index.asp?idioma=eng> (last visited Mar. 14, 2008).

¹²⁸ Thorstensen and Jank (2005).

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* (NESC, or Dispute Settlement Study Group).¹²⁹ The study group aimed to deepen, spread and deploy the knowledge developed by the interns from their stay in Geneva after they returned to Brazil, where they rejoined their law practice and worked to complete their dissertations.¹³⁰ 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.¹³¹ Former interns at the 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.¹³² The government officials in Brasília, in particular, suggested topics for research which could help Brazil in current and potential WTO cases.

In short, there was a boom of academic-related activities in Brazil from 2002-2004 concerning international trade law, which we believe were 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

¹²⁹ 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 Chef de Cabinet of the Director General Pascal Lamy in 2005. See Biography of Victor do Prado, World Trade Institute, http://wti.nccr-trade.org/index.php?option=com_content&task=view&id=741&Itemid=390 (last visited Mar. 14, 2008).

¹³⁰ Other participants in the study group also had recently obtained (or were pursuing) a masters or doctoral degree in trade law.

¹³¹ The group also hoped to create an academic think tank specialized in trade-related issues based at FGV. Barbara and Maria Lucia Pádua Lima (at FGV Direito São Paulo) are the editors of a forthcoming book concerning Brazil's experience in WTO dispute settlement, to be published in 2008. Many former interns at the Geneva mission are contributors to the volume, which takes into account the work of the NESC study group.

¹³² 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 a particularly 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) or Federal Industry Confederation), some economic consultants, and officials from government agencies such as the Brazilian Development Bank, the Institute of Applied Economic Research (IPEA), and the standards agency 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 Economica Aplicada and is part of the Ministry of Planning.

specialists, and the predominant use by the Brazilian private sector and government of non-Brazilian law firms for WTO dispute settlement.¹³³

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. 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.¹³⁴ Brazilian academics continue to play an important role for the country in following trade agendas, in mobilizing responses to developments in trade fora, and in offering a contact point for professionals for the organization of courses, meetings, and conferences. 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 FTAA negotiations, and high profile WTO trade disputes mobilized Brazilian business 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. They 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 FTAA 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

¹³³ 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.

¹³⁴ Dezalay and Garth found that economics became the leading expertise in South American states in the 1990s, replacing law to some extent, although they also noted the rise of business law. Dezalay and Garth (2002:30, 47-51), above note 13. We likewise find a rise of interest in business law, but here, for the first time, in terms of international trade law.

business' 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.¹³⁵ The FTAA meetings helped to trigger the creation of an official partnership between Brazil's industrial and agricultural sectors under a new encompassing Brazilian Business Coalition (*Coalizão Empresarial Brasileira*, CEB). 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."¹³⁶ The Coalition brought together 166 Brazilian business associations and enterprises under a single umbrella, including the Brazilian Confederation of Industries (*Confederação Nacional da Indústria*, CNI), 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*, FIESP), unions of employers (such as *Força Sindical*), and sector-specific associations.¹³⁷ The Confederation of Industries (CNI) assumed the leadership within the Coalition.

Created at a time when the industrial sector was extremely 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.¹³⁸ It organized working groups on trade topics and prepared position

¹³⁵ The Belo Horizonte Summit was the third trade ministerial meeting launched by the Summit of the Americas process in Miami in 1994. Paragraph 14 of the Joint Declaration of the meeting provides, "We received with interest the contributions for the Third Business Forum of the Americas relating to the preparatory process for the FTAA negotiations, which we consider may be relevant to our future deliberations. We acknowledge and appreciate the importance of the private sector's role and its participation in the FTAA process." See Belo Horizonte Summit (1997); see also Hirst (2005:35), above note 21 (noting that "the demands of Brazilian business sectors and labor organizations became part of the FTAA negotiating process").

¹³⁶ Veiga (2007:158), above note 22.

¹³⁷ See *Confederação Nacional da Indústria* [National Confederation of Industry], *A Alca na visão da Coalizão Empresarial Brasileira* (Aug. 2003),

http://www.fiec.org.br/palestras/negocios_internacionais/alca190803/alcaCNI_arquivos/frame.htm.

¹³⁸ The meetings' frequency varied with the intensity of negotiations. The Coalition also created a trade negotiations website and stressed that its website permitted on-line consultation and virtual participation in the debates. See

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.”¹³⁹ As Veiga and Ventura-Diaz write, “[t]he 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 based on a different rationale.”¹⁴⁰

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 (CNI) and the State of São Paulo Industry Federation (FIESP), have had departments on foreign trade policy since the 1950s, but they dealt primarily with tariff and other customs matters (including internal anti-dumping matters in the 1990s).¹⁴¹ By the end of the 1990s, the associations developed specialized branches which 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*),¹⁴² and 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)¹⁴³ and Embraer, likewise created specialized international trade departments, hiring top trade specialists in a new competition for

http://www.negociacoesinternacionais.cni.org.br/negocia/fp-negi.htm?URL=/negocia.nsf/web_negocia_html?openform.

Veiga notes the tensions between the export-oriented agribusiness sectors and the import-competing industrial sectors. Veiga (2007:160-61), above note 22. He also notes that small-scale farmers took a defensive position, as did the Brazil's Landless Worker's Movement (*Movimento dos Trabalhadores Rurais Sem Terra*, MST), 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).

¹³⁹ Veiga (2007:179), above note 22.

¹⁴⁰ See Veiga and Ventura-Diaz (2004).

¹⁴¹ Telephone interviews and emails with FIESP and CNI, June 2006.

¹⁴² Interview by Gregory C. Shaffer with Christian Lohbauer, former Director, International Relations Department, State of São Paulo Industry Federation (FIESP), in São Paulo, Braz. (Apr. 23, 2004) (on file with author) (“Lohbauer Interview”). Lohbauer noted that until around 2002, 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, “there was no systematic following of negotiations” within FIESP. *Id.*

¹⁴³ Companhia Vale do Rio Doce is the second largest mining company in the world and the world's largest exporter of iron ore. It was privatized in 1997. *Economist* (May 10, 1997, p. 64).

expertise. By the time of the 2003 FTAA negotiations in Miami, Brazilian business associations came with specific proposals that they distributed. Their organization and preparation were noted as “extraordinary” by other Latin American business associations.¹⁴⁴

Many trade associations and companies hired former government officials for their knowledge and access to government trade policy networks.¹⁴⁵ For example, in 2005, Mario Marconini, who worked at the GATT and the WTO from 1988 to 1996, and was 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.¹⁴⁶ 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 agribusiness’ 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. Ms. Serodio had served as the manager of a government export program for sugar and alcohol in 2000 within the Ministry of Development.¹⁴⁷ 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 against U.S. cotton and EU sugar support policies, working with Serodio and UNICA in the *EC-Sugar* case, and the cotton trade association (ABRAPA) in the *US-Cotton* case.¹⁴⁸ These individuals’ prior experience in government helped them to coordinate Brazilian public–private partnerships for these WTO cases. Complementing these initiatives, the State of São Paulo Industry

¹⁴⁴ Lohbauer Interview, above note 142.

¹⁴⁵ These practices parallel what one sees in the United States. See Shaffer (2003:122-34) (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 the foundation’s website, available at http://www.fas-amazonas.org/pagina_interna.php?cod=4. 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 FGV website, available at <http://www.eesp.fgv.br/gvagro>.

¹⁴⁶ Manatt Jones (2006).

¹⁴⁷ Confirmed in Email from Ministry Official, to Gregory C. Shaffer (Mar. 31, 2008) (on file with author).

¹⁴⁸ See below Part IVA below for further discussion of these cases.

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.¹⁴⁹

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 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*, ICONE), DATAGRO and Prospectiva Consulting Firm on International Affairs (*Consultoria Brasileira de Assuntos Internacionais*) are leading examples of Brazilian consultancies for international trade.

ICONE 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.¹⁵⁰ It was founded by Professor Marcos Jank after he taught and conducted research in the United States at Georgetown University and the University of Missouri-Columbia, and worked for a year at the Inter-American Development Bank.¹⁵¹ 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.”¹⁵² 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.”¹⁵³ Jank participated in numerous Brazilian public-private trade research networks and helped catalyze the creation of the Trade Negotiations Study Group examined above.¹⁵⁴ 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.¹⁵⁵

¹⁴⁹ See Daniel (2004).

¹⁵⁰ See Jank and Nassar (2007). ICONE also receives funding from foreign development agencies and foundations for specific projects. See *id.*; see also ICONE Sponsors, <http://www.iconebrasil.org.br/en/?actA=3&arealD=4&secaoID=12> (last visited Mar. 14, 2008).

¹⁵¹ See Jank (2001). In June 2007, Jank left ICONE to become President and CEO of UNICA, the sugar cane trade association. Scaramuzzo (2007:1).

¹⁵² See Jank and Nassar (2007:5), above note 150.

¹⁵³ *Id.*

¹⁵⁴ See above note 150 and accompanying text.

¹⁵⁵ Jank and Nassar (2007), above note 150. ICONE’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.* It further states that “ICONE 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.* The report notes that “172 different national and international media outlets published reports mentioning ICONE.” *Id.* (translation by author).

ICONE, 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. ICONE generated key econometric simulation analyses of the impact on Brazil of different methodologies for tariff and subsidy reductions. These analyses were instrumental for 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, European Union, and India which played the key role in setting the framework for the Doha Round agricultural negotiations.¹⁵⁶

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.¹⁵⁷ It has become particularly active in international consulting for the global biofuels market, which represents significant export potential for Brazilian sugar producers. Like ICONE, DATAGRO has provided analysis for the government and private sector for the WTO Doha Round negotiations.¹⁵⁸ DATAGRO also 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.¹⁵⁹ It also has helped to coordinate Brazilian ethanol companies' defenses in U.S. anti-dumping and countervailing duty investigations.¹⁶⁰ 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 to the globalized business environment.¹⁶¹ Prospectiva has since become one of the leading Brazilian

¹⁵⁶ For example, Brazil was central to creating the "July Framework" for agricultural trade negotiations in 2004. See Zedillo (2007:31); see also Wolfe (2008:192), above note 4; Wolfe (2006) (discussing the Doha Round and the Five Interested Parties, which consisted of the G-4 plus Australia).

¹⁵⁷ See Benson (2004:W1); DATAGRO, <http://www.datagro.com/>. Plinio Nastari, who received his PhD. in agricultural economics from Iowa State in 1983, was the President of DATAGRO and team leader.

¹⁵⁸ See Feller (2008:1).

¹⁵⁹ Interviews by Gregory C. Shaffer with Brazilian Officials, Ministry of Foreign Affairs [names withheld] (April 20, 2004) (on file with author) (confirming that DATAGRO provided key technical support in the *EC-Sugar* case); see also DATAGRO, above note 157.

¹⁶⁰ See *id.*

¹⁶¹ See Prospectiva, Prospectiva—Consultoria Barsileira 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

business consultants for trade and investment-related matters, specializing in the services sectors.¹⁶² 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 for 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.¹⁶³ 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, businessmen, 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.¹⁶⁴ CEBRI sponsors research programs and commissions studies on a broad range of international issues, including trade issues involving the WTO, FTAA, and Mercosur.¹⁶⁵ It also organizes roundtables, symposia and debates, with partner institutions such as ICONE, regarding trade negotiations.¹⁶⁶ 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).¹⁶⁷

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

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).

¹⁶² Interview by Gregory C. Shaffer with Ricardo Camargo Mendes, Executive Director, Prospectiva, in São Paulo, Braz. (Apr. 22, 2004) (on file with author).

¹⁶³ Examples of important Brazilian think tanks covered earlier in this Part III.B include IDCID and CAENI at the University of São Paulo, IBRAC (which hosted the “Appellate Body at 10” meeting), and ICONE.

¹⁶⁴ 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. Interview by Gregory C. Shaffer with [name withheld], Leading Representative of the Brazilian Private Sector, in São Paulo, Brazil (April 2004) (on file with author).

¹⁶⁵ See Centro Brasileiro de Relacoes Internacionais (CEBRI), <http://www.cebri.org.br/> (last visited Mar. 20, 2008).

¹⁶⁶ See e.g., 4^o Curso sobre comércio e negociações internacionais para jornalistas (2007), http://www.cebri.org.br/pdf/401_PDF.pdf.

¹⁶⁷ See Centro Brasileiro de Relacoes Internacionais (CEBRI), <http://www.cebri.org.br/> (last visited Mar. 20, 2008).

mechanisms for consultation and dialogue between State and civil society, a process pioneered by the business sector, followed by NGOs.”¹⁶⁸ 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.”¹⁶⁹

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 around thirty-five NGOs that include major Brazilian trade unions and social movement organizations.¹⁷⁰ 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 representatives were included in Brazil’s delegation to the FTAA negotiations in Miami.¹⁷¹

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 which has “focused essentially on trade negotiations.”¹⁷² Although REBRIP’s members generally have opposed trade liberalization initiatives, there are divisions within REBRIP which the institution aims to resolve in order to form coordinated, common positions so that civil

¹⁶⁸ Veiga (2007:173), above note 22. The FTAA negotiations resulted in greater politicization of trade policy within Brazil. See Hirst (2005:30), above note 21; Hurrell (2005:103), above note 21 (noting that “there has been considerable grassroots opposition (including within and around the Workers Party)” to the FTAA).

¹⁶⁹ *Id.* The only formal institutionalization of consultation with civil society organizations nonetheless is under Mercosur where the member governments created a Social-Economic Consultative Forum (*Fóro 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*, SENALCA) 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 (last visited Mar. 20, 2008).

¹⁷⁰ REBRIP was formalized as an organization under Brazilian law in 2001, although the NGOs first informally agreed to coordinate their positions through it in 1998. See Rede Brasileira pela Integração dos Povos (REBRIP), Apresentação, <http://www.rebrip.org.br/rebrip/pagina.php?id=616> (last visited Mar. 20, 2008; Veiga (2007:165), above note 22. Veiga notes how Brazilian labor follows trade negotiations largely through REBRIP. *Id.* at 164 (noting how the biggest trade union confederation, CUT (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”).

¹⁷¹ Veiga (2005:167), above note 22.

¹⁷² *Id.* at 164-166, 172.

society organizations can be proactive instead of purely defensive.¹⁷³ 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, together with a coalition of Brazilian environmental groups, in the *Brazil-Tyres* case, discussed in Part IV.B.¹⁷⁴

As WTO negotiations and litigation intensified in the early 2000s, and as 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, and of 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.¹⁷⁵ These groups, as a result, often co-sponsor and attend each other's events, facilitating group interaction. Over time, individuals develop careers in trade policy and trade law as they move

¹⁷³ Veiga (2007:167), above note 22.

¹⁷⁴ 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> (last visited Mar. 20, 2008). This Declaration includes the signatures of the NGOs who signed an amicus curiae brief to the WTO panel; and the letter to Peter Mandelson, EU Commissioner for External Trade, Sept. 20, 2007, signed by the Executive Secretaries of REBRIP and FBOMS (*Fórum Brasileiro de ONGs e Movimentos Sociais para o meio Ambiente e o Desenvolvimento*, or the Brazilian Forum of NGOs and Social Movements for the Environment and Development), opposing the EU's appeal of the panel decision in the *Brazil-Tyres* case. *Id.* FBOMS was also created to respond to an international development. It was formed in 1990 "in order to facilitate the participation of civil society in the process of the United Nations Conference on Environment and Development (UNCED), the Earth Summit (Rio-92)." See *Fórum Brasileiro de ONGs e Movimentos Sociais para o meio Ambiente e o Desenvolvimento* (FBOMS), <http://www.fboms.org.br/> (last visited Mar. 20, 2008).

¹⁷⁵ Initiatives outside of São Paulo are less developed, although Dispute Settlement Study Groups were formed in Rio de Janeiro, Brasília, and Belo Horizonte.

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, DC, 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.¹⁷⁶ 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 DC-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

¹⁷⁶ As noted above, Jank has now become President of UNICA, the Brazilian sugar trade association. Gonçalves was a “board founder” of CEBRI (in Portuguese, a “Conselheiro Fundador” do CEBRI).

international network connections, they are better able to inform themselves of developments at home and abroad, which in turn 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.¹⁷⁷ 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 norms (in their case, bankruptcy norms) into national environments. In contrast, this paper 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 interests (national, corporate or otherwise) at the international level. In terms of loyalty, Brazilian individuals who develop the relevant expertise can work for the Brazilian government, Brazilian industries or for foreign governments or foreign industries, be it 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. BRAZILIAN NETWORKS IN WTO DISPUTE SETTLEMENT

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 and respondent in 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.¹⁷⁸ 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

¹⁷⁷ See Carruthers and Halliday (2006:529-32).

¹⁷⁸ 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 author). 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.*

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.

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.¹⁷⁹ Yet it took a while 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, the *US –Reformulated Gasoline* case (WT/DS4) filed in 1995, involved different U.S. regulatory requirements for foreign and domestic reformulated gasoline.¹⁸⁰ 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.¹⁸¹ Therefore, Brazil's WTO filing was easy to justify. Petrobras hired a Washington DC-based law 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.¹⁸² Even though Petrobras funded the preparation of

¹⁷⁹ See, e.g., Davey (2005), above note 1.

¹⁸⁰ See *United States—Standards for Reformulated and Conventional Gasoline* (2006).

¹⁸¹ 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 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. *US—Standards for Reformulated and Conventional Gasoline* (1996: para. 2.5-2.8). 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.

¹⁸² Interviews by Gregory C. Shaffer with Brazilian Diplomats in Brasília, Braz. (Apr. 2006) (on file with author) ("Brazilian Diplomats Interview"); Interviews by Gregory C. Shaffer with Brazilian Diplomats, Brazil Mission to the WTO in Geneva, Switz. (June 2006) (on file with author). These Brazilian diplomats worked in the Brazilian Embassy at the time on the case.

the case, the amount of preparation more closely resembled that used in late GATT cases than what was to come.¹⁸³

The *Canada-Aircraft* and *Brazil-Aircraft* cases (involving Embraer and Bombardier) were landmark cases in terms of the intensity with which Brazilian officials worked with law firms hired by Embraer 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-Meat Hormone* cases, intensifying the demands for and on lawyers.¹⁸⁴ 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.¹⁸⁵ 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; and so 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.¹⁸⁶ Embraer had the financial capacity to hire U.S. legal counsel to respond to Canada’s legal challenge against Brazil. Embraer engaged David Palmetier 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 subsidization of Embraer’s rival Bombardier, for which Embraer also hired Canadian consultants.¹⁸⁷

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

¹⁸³ Telephone Interview by Gregory C. Shaffer with Washington legal counsel [name withheld], at Washington, D.C. (Feb. 19, 2008) (“Washington Counsel Interview”) (noting the statement of a former USTR official who found, in terms of legal practice, that *US—Reformulated Gasoline* was “the last GATT case”).

¹⁸⁴ The term “scorched earth” was used by a trade law attorney in a discussion with Gregory C. Shaffer in February 2008.

¹⁸⁵ Telephone interview with counsel in Washington, Feb. 19, 2008, above note 184. 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.” Telephone Interview by Gregory C. Shaffer with Gary Horlick, Partner at Wilmer, Cutler, Pickering, Hale & Dorr LLP (Feb. 27, 2007) (on file with author).

¹⁸⁶ Embraer, Annual Report 2001, http://www.embraer.com/ri/english/content/informacoes_financeiras/relatorios_anuais.asp. 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.*

¹⁸⁷ Washington Counsel Interview, above note 183. 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.*

Azevêdo, a diplomat, who in turn was supervised by the Ambassador at the Geneva Mission, Celso Lafer.¹⁸⁸ Lafer had been a professor of law at the University of São Paulo, Brazil's flagship university. 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.B.

By the time Brazil brought the cotton and sugar complaints in September 2002, respectively against the United States and European Union, it had developed significant dispute settlement experience. These two cases, however, were considerably more factually intensive than in 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 *US—Cotton* case was to gather the factual evidence and economic and legal expertise required.¹⁸⁹ 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, after he left the government.¹⁹⁰ Private attorneys assured the producers and the government of the legal merits of the case, and together they collected the financial resources required.¹⁹¹

¹⁸⁸ Interviews by Michelle Ratton Sanchez and Barbara Rosenberg with Brazilian officials [names withheld], in *Brasília* (from January until September 2005) (on file with author).

¹⁸⁹ For an excellent overview of the case, see Goldberg et al. (2006).

¹⁹⁰ See *id.* Goldberg, Lawrence, and Milligan 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 US soybean subsidies before turning to a challenge of cotton subsidies after prices in the world soy market rose so that US soy farmers were no longer eligible for large subsidies, and “the soybean case disappeared.” *Id.* at 240-241. 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.

¹⁹¹ 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 author) (noting a figure of \$2 million). See also Becker (2004:C1, C7) (“the litigation has already cost \$1 million”). A major Brazilian newspaper reported, at one point, that funding of the law firm

With this funding, the producers hired the U.S. law firm Sidley Austin to provide support to the government for the litigation.¹⁹² In particular, the law firm would help prepare the legal submissions, attend the hearings and help the government respond to questions posed by the panel and the Appellate Body. 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.¹⁹³ Although the case was costly, the public-private coordination worked. The bulk of the work was done by the U.S. law firm and Mr. Sumner, this time overseen by the Dispute Settlement Unit in Brasília, now that Brazil had a dedicated group in its capital.¹⁹⁴

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.¹⁹⁵ 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 Mr. de Camargo Neto, and 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

was collected from: (i) the cotton producers, in the amount of R\$300 000 (US\$130,000); (ii) the Export Promotion Agency (Agência de Promoção de Exportações), in the amount of R\$200 000 (US\$ 86,000); and (iii) amounts collected from a lottery sale, in the amount of R\$1.2 million (US\$520,000). *Estado de São Paulo* (Sep. 18, 2003).

¹⁹² Sidley's team had come from Powell Goldstein which had helped to litigate the Embraer case.

¹⁹³ See generally Goldberg et al. (2006:7), above note 189. Sumner's study showed that without the subsidies, the US "would have shipped about 41 percent less cotton abroad; [which] would have raised the world price about 12.6 percent." See Blustein (2004: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, "there 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, was quoted as saying, "[i]f this was governmental or military related, it might be called treason and court martial proceedings would be in order," Earl P. Williams, president of the California Cotton Growers Association." *Id.*

¹⁹⁴ 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, above note 182. On the internship program, see Part III.B.2.

¹⁹⁵ Brazilian Diplomats Interview, above note 182. For more on DATAGRO, see above Part III.B.4.

DATAGRO's team of economic consultants.¹⁹⁶ 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, examined below.

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. 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, respectively brought against Argentina (WT/DS241) and the EC (WT/DS269).¹⁹⁷ In these cases, the Brazilian Poultry Association (*Associação Brasileira dos Produtores e Exportadores de Frango*, or ABEF) funded Veirano & Advogados (in São Paulo) to help the Ministry of Foreign Affairs defend its and Brazil's interests.¹⁹⁸ 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 LLM 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.¹⁹⁹ 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.²⁰⁰ The case was funded by ABICS, Brazil's soluble coffee industry association, on account of the impact of the EU measures on its exports. Brazil settled the case successfully for ABICS just 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.²⁰¹ 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.²⁰² These examples show how

¹⁹⁶ 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.

¹⁹⁷ *Argentina—Definitive Anti-Dumping Duties on Poultry from Brazil* (2003); *EC—Customs Classification of Frozen Boneless Chicken* (2005).

¹⁹⁸ ABEF issued a call for bids from Brazilian law firms and selected Veirano Advogados. Caetano Interview, above note 81.

¹⁹⁹ *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.* See also *OMC distante das bancas brasileiras*, COMEXNET, August 9, 2002.

²⁰⁰ *EC—Measures Affecting Soluble Coffee* (2000). The 2000 complaint followed an earlier one also brought by Brazil against the European Union's system of preferences program. Caetano had worked with the lead lawyer at O'Melveny & Myers in this complaint brought by Brazil against the European Union. *EC—Measures Affecting Differential and Favourable Treatment of Coffee* (1998).

²⁰¹ See Alter (2000) (concerning the 2000 soluble coffee case); Caetano Interview, above note 81. The case anticipated India's later challenge of the EU's enhanced preferences program for selected countries engaged in combating drug production. See *EC—Conditions for the Granting of Tariff Preferences to Developing Countries* (2004). For an overview of the case, see Shaffer and Apea (2005).

²⁰² The 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

Brazil has broadened its internal 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.²⁰³

Brazil, as many other WTO members, has also challenged U.S. and EU countervailing duty and antidumping 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 U.S. countervailing duties and safeguards on steel products, and against the U.S. Continued Dumping and Subsidy Offset Act of 2000. As these cases all affected the steel sector, the outside law firm was in each case funded by the Brazilian Steel Institute, the trade association for Brazilian steel companies, most of which were privatized in the early 1990s.²⁰⁴ Since 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.²⁰⁵

Civil society organizations can also help a country as a complainant, although 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 *US-Cotton* case, especially in terms of the subsidies' impact on West African cotton farmers.²⁰⁶ Brazil attached a statement from Oxfam to its legal submissions in the *US-Cotton* case regarding the impact of the subsidies on West African producers, which the panel referenced.²⁰⁷ Oxfam also

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 Pruzin (2005a;2005b;2005c;2005d) and Lam(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 *EC Regime for the Importation, Sale and Distribution of Bananas* (2008).

²⁰³ 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 (April 2004) in São Paulo, Braz. (on file with author).

²⁰⁴ Telephone interview by Michelle Rattón Sanchez with Officials from the Dispute Settlement Unit of the Brazilian Ministry of Foreign Affairs, in Brasília (Aug. 16, 2007) (on file with author) [hereinafter Rattón 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 Mar. 20, 2008).

²⁰⁵ Telephone interview by Michelle Rattón Sanchez with Officials from the Dispute Settlement Unit of the Brazilian Ministry of Foreign Affairs, in Brasília (Aug. 16, 2007) (on file with author).

²⁰⁶ See discussion in Goldberg et al. (2006:7), above note 181.

²⁰⁷ See *United States—Subsidies on Upland Cotton* (2004: para. 7.54) ("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

assisted Benin and Chad as third parties in the case, which referred to OXFAM studies in their third party submissions, and which the panel cited in its decision.²⁰⁸

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 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.²⁰⁹ 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)*.²¹⁰ Brazil identified the case as 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.²¹¹

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, although law firms advised the affected private sector and government in some of them.

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").

²⁰⁸ See *id.*, par.7.1211, fn. 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.").

²⁰⁹ Barbara Rosenberg discussion with Brazilian official [name withheld], March 2007. The call for bids was, to a large extent, triggered by a case in which Brazil was a respondent (the *Brazil—Tyres* case).

²¹⁰ See *United States—Domestic Support and Export Credit Guarantees for Agricultural Products* (2007).

²¹¹ See *Inside U.S. Trade* (July 20, 2007, p. 25) ("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").

B. Brazil as a Respondent

Two aspects stand out when Brazil is a respondent. First, if the complaint raises social concerns, the government may be indirectly assisted by civil society activists 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 – the early desiccated coconut case, the Embraer aircraft case and the retreaded tires case.²¹² The Brazilian government worked with private law firms in each of the three cases in which a panel was formed, although it had to pay the outside counsel fees in the tires 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.²¹³ 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.²¹⁴ The Ministry of Foreign Affairs, maintaining that Brazil's intellectual property law was TRIPs-compliant, devised and implemented a strategic response.²¹⁵ 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.²¹⁶ This NGO pressure was complemented by prodding from international health and human rights organizations.²¹⁷ In June 2001, the Bush

²¹² 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. *Brazil—Measures Affecting Desiccated Coconut* (1996); *Brazil—Export Financing Programme for Aircraft* (1999); *Brazil—Measures Affecting Imports of Retreaded Tyres* (2007) ("Brazil—Tyres").

²¹³ See Aaronson and Zimmerman (2008:107-10).

²¹⁴ A Brazilian official alleged that the United States also brought the case to pressure Brazil not to challenge U.S. subsidization of soybean producers. Interview by Gregory C. Shaffer with Brazilian Official (name withheld), at Geneva (June 19, 2002). Brazil eventually did not bring the case because the world price for soybeans increased, reducing the amount of U.S. subsidies. See Goldberg et al. (2006), above note 181.

²¹⁵ 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. Barbara Rosenberg Interview with ministry official [name withheld], 2005.

²¹⁶ The point is further developed in Shaffer (2006).

²¹⁷ 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

administration withdrew the U.S. complaint.²¹⁸ The international response spurred by the case helped shift the terms of debate over the protection of pharmaceutical patents, strengthening Brazil's and other developing countries' negotiating position that intellectual property rules must be interpreted and applied and, where necessary, modified in order to grant developing countries "flexibility" to address public health issues.²¹⁹ 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, which is currently awaiting ratification.²²⁰

Brazil's response to the EU's 2005 complaint against a Brazilian ban on the importation of retreaded tires (*Brazil-Tyres*, WT/DS332) provides another example where NGOs supported Brazil in its defense, yet this time where the case was fully litigated.²²¹ 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.²²² 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,²²³ and by meeting with civil society organizations concerning the case.²²⁴ 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.²²⁵ The NGOs helped to

UN Rights Body Backs Brazil on AIDS Drugs, NEWS24.COM, Apr. 24, 2001, available at http://www.news24.com/contentDisplay/level4Article/0,1113,2-1134_1014970.00.html.

²¹⁸ See discussion in Shaffer (2006), above note 216; Notification of Mutually Agreed Solution, *Brazil—Measures Affecting Patent Protection* (2001).

²¹⁹ World Trade Organization (2001).

²²⁰ World Trade Organization (2005b).

²²¹ See Panel Report, *Brazil—Tyres*, above note 212; Appellate Body Report, *Brazil—Tyres*, above note 34.

²²² See Panel Report, *Brazil—Tyres*, at paras. 4.15-4.19.

²²³ See *Brazil Tyres Update*, BRIDGES MONTHLY REV. 8 (Sept.-Oct. 2006), available at <http://www.icstsd.org/monthly/bridges/BRIDGES10-6.pdf>. This reflects steps 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. Interview by Gregory C. Shaffer with Member of Dispute Settlement Unit [name withheld], Brazil Foreign Ministry, (Apr. 19, 2004) (on file with author).

²²⁴ See *Bridges Weekly Trade News Digest* (July 11, 2006, p. 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.

²²⁵ 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 at 12, Appellate Body Report, *Brazil—Tyres*, WT/DS332/AB/R (Dec. 3, 2007) [hereinafter ACPO Brief], available at http://www.ciel.org/Publications/Brazil_Tires_Amicus110ct07.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

spur media coverage of the case from an environmental and health perspective, in support of the government's position.²²⁶ Most developing countries have, in contrast, generally been wary of enhancing transparency of the WTO "intergovernmental" dispute settlement system.²²⁷

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.²²⁸ The Appellate Body further indicated that WTO panels must consider a developing country's regulatory capacity constraints in determining whether its regulatory measure is justifiable.²²⁹ Brazil only lost the case 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.²³⁰ The Brazilian government responded that the "court orders were being challenged" and would "be reviewed by Brazil's Supreme Court," and that the Mercosur policy was being renegotiated.²³¹

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 2003.²³² 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.²³³ Since the private sector did not

Respondent, Panel Report, *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.

²²⁶ See, e.g., Kweitel (2006); see also Mattos (2006); Rede Brasileira de Justiça Ambiental, UE Quer Transformar o Brasil na OMC (Sept. 27, 2006), 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 Mar. 12, 2008).

²²⁷ See Shaffer (2001).

²²⁸ 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." Appellate Body Report, *Brazil—Tyres*, ¶258(a)(i), WT/DS332/AB/R (Dec. 3, 2007). 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.

²²⁹ The Appellate Body maintained, "the 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.* at ¶171.

²³⁰ 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.* at ¶258(b).

²³¹ See Pruzin (2007b); see also Kepp (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").

²³² 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 (BIPAVER), 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. *Commission Decision of 2 May 2005*, 2005 O.J. (L 128) 71.

²³³ See discussion of the internship program in Part III.B.2.

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.²³⁴ The U.S. law firm could support the Foreign Affairs Ministry with its defense in the case, as well as others in the future, as determined by the government.

In sum, Brazil has been an active and successful user of the WTO dispute settlement system. What lies behind these cases are public-private partnerships involving Brazilian government officials, Brazilian companies and trade associations, and U.S. and Brazilian lawyers and economic consultants. U.S. expertise has often played a critical role in these networks, whether directly involving U.S. law firms and consultants, or Brazilians who are U.S.-trained. Working together, they have advanced Brazilian government and private sector interests at the international level, including against the world's economic powers.

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 thus 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. The 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.²³⁵ The more that parties use them, the more that this expertise will be required.

²³⁴ 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, since it implicated environmental and health concerns, and thus the defense should not be based on the partial, commercial points of view of affected industries. Ratton Sanchez Ministry Interview, above note 326. See also Appellate Body Report, *Brazil—Tyres* at ¶57-58.

²³⁵ See e.g., World Trade Organization (2005c) ("World Trade Report 2005") (discussing the use of quantitative methods in WTO dispute settlement).

CONCLUSION: OUR FINDINGS

There has been considerable analysis of the WTO system within law, political science and economics. Yet there has been a dearth of empirical work that probes beneath the surface to examine the impact of the WTO system within a state and the processes through which that state engages it, 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. Yet until this study, there was little knowledge of what Brazil actually did to enable it to use the system, reflecting a general lack of empirical work at the micro- and meso-levels in the field.

In this paper'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 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 policymaking 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 regarding the need to take into account the reciprocal interaction of the domestic and international spheres to understand the operation of international legal orders.

(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 to 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.²³⁶ Their involvement has reduced the Ministry of Foreign Affairs' former monopoly position within the government over foreign trade policy.²³⁷ The Ministry of Foreign Affairs now receives instructions from 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 Brasilia (the "first pillar"), complemented by ministry personnel in Geneva dedicated to dispute settlement (the "second pillar"), who together work directly with the private sector and 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.²³⁸ 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.²³⁹ 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

²³⁶ See *supra* Part III.A.

²³⁷ Veiga (2007:176), above note 22. 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 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 (2005:86), above note 21.

²³⁸ See above Part III.B.3.

²³⁹ See above Part III.B.4.

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.²⁴⁰ 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.²⁴¹ 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.

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, "[t]he 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."²⁴² Government officials not only participated in a number of these initiatives, such as the trade negotiations and dispute settlement study groups; they invested in facilitating the creation of this expertise through offering competitive internship programs in the mission in Geneva, the embassy in Washington, D.C., and in 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.²⁴³

(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

²⁴⁰ See above Part III.B.2.

²⁴¹ See above Part III.B.4.

²⁴² Barral (2007:14), above note 46.

²⁴³ This second "shadow of the law" effect has been addressed to a greater extent by socio-legal scholars. See e.g., Mnookin and Kornhauser (1979). See Parts II.B and IV regarding documented Brazilian settlements in the shadow of potential litigation.

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.²⁴⁴ 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 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 *US-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, European Union, Brazil, and India) in the Doha Round.²⁴⁵ 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.²⁴⁶ Brazilian individuals and groups certainly challenge the Brazilian government, but in doing so, they also provide it with essential resources to

²⁴⁴ See above Part II.B and Part III.B.1, and in particular above notes 128 and 193 and accompanying text.

²⁴⁵ See above Part IV.A, and in particular *supra* notes 309-316 and accompanying text. The former "Quad" consisted of the United States, European Union, Canada, and Japan. See Wolfe (2008), above note 4; Deese (2007), above note 5.

²⁴⁶ Cf. Shaffer and Apea (2005:977-1008), above note 201. This earlier article points to the need for greater engagement of developing countries' academics at the international level, and noting, regarding an important WTO case involving the EU's preferential tariff system, how "[t]he 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." *Id.*

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 cheap.

(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, and especially elite actors, within Brazil to advance neoliberal agendas within Brazilian politics and 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,²⁴⁷ within business and civil society groups, and among all of them. For the first time, the Brazilian legislature has begun to pay greater attention to the WTO trade negotiation agenda.²⁴⁸ As we have seen, the WTO has also helped to open up Brazilian trade policy from a closed state bureaucracy that goes back to 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 policymaking, 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

²⁴⁷ See Goldberg et al. (2006), above note 181 (noting the ministerial differences within CAMEX regarding the launching of the *US—Cotton* case); and Interview of Gregory C. Shaffer with Welber Barral, *supra* note Veiga thus notes the erosion of "the Ministry of Foreign Affairs monopoly in trade negotiations." Veiga (2007:176), above note 22. There are also differences within the Ministry of Foreign Affairs regarding whether to focus on Mercosur or trade agreements with the EU, for example. Ratton Sanchez interviews with officials in the Ministry of Foreign Affairs.

²⁴⁸ The Brazilian legislature (the Congress) has the power to approve or reject, in whole or part, the international commitments undertaken. CONST. FED. art. 49 § I (Brazil). In the case of WTO dispute settlement, the Congress plays no formal role. Veiga (2007:176), above note 22. 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.*

putting together the State and import-competing business sectors.”²⁴⁹ 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), Brazilian trade policymaking “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.”²⁵⁰ He finds that the Brazilian Business Coalition has lost some influence in the Lula administration to labor and civil society organizations who have gained greater access to policymakers.²⁵¹ Veiga concludes that the “recent history of trade policymaking in Brazil reveals the growing participation of civil society in this area of policy.”²⁵²

In sum, we see a country that is moving toward a more pluralist model of interest group representation in trade policy.²⁵³ 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 thus 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, although we remain agnostic on this point.²⁵⁴ Whatever be 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-

²⁴⁹ Veiga (2007:176-77), above note 22. See also above Part I.

²⁵⁰ Veiga (2007), above note 22. (an excellent work on civil society participation in the formation of Brazilian trade negotiating positions over time). Veiga notes 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, which then grant it legitimacy. *Id.* He writes, “[s]ince 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.

²⁵¹ *Id.* at 161.

²⁵² *Id.* at 179.

²⁵³ For work regarding a general shift toward a pluralist approach of business-government relations in Brazil, see Diniz and Boschi (2004).

²⁵⁴ *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. We note, in addition, the growth of “cause lawyering” and the “judicialization of politics” in Brazil. See Engelman (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, although we again remain agnostic for purposes of this paper.

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 which 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 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,"²⁵⁵ 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. Fourth, Brazil has well-educated, hard-working, transnationally-networked elites. 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. Brazil has developed and deployed its domestic factors to attempt to shape the international field.

(6) *Lessons for Other Developing Countries.* This paper should be of great interest to developing countries generally, since 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 posed by the WTO system. Yet there are limits of the Brazilian approach for Brazil and, even more so, for smaller developing countries.²⁵⁶ The market for expertise spurred by WTO legalization and judicialization 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. By documenting the extent of Brazilian public and private investment in trade law and policy, this paper 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

²⁵⁵ Biersteker (1995). For a discussion of general shifts in Latin America, see Varas (1992:284); see also Juan de Onis(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").

²⁵⁶ We develop this point in Shaffer et al. (2008), Parts II.A and V.

contexts, there is no single strategy that fits all of them. Exporting legal strategies across cultures regardless of context has never worked.²⁵⁷ 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 foreign with the local.”²⁵⁸ This paper 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, and debate and experimentation with, strategies that countries at varying levels of development and their constituencies may adopt to better defend themselves in the international trading system.

(7) *What Lies Behind Brazil’s Success.* To conclude, we maintain that the best interpretation of what lies behind Brazil’s successful engagement with the WTO legal order 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.

²⁵⁷ See, e.g., Trubek and Galanter (1974:1068-69, 1080-85).

²⁵⁸ Unger (2007:111), above note 45.

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