DEVELOPMENTAL RESPONSES TO THE INTERNATIONAL TRADE LEGAL GAME

Examples of intellectual property and export credit law reforms in Brazil

Michelle Ratton Sanchez Badin
Professor at FGV São Paulo School of Law (Direito GV)
Research collaborator at the Brazilian Center for Analysis and Planning (CEBRAP)

ABSTRACT

The paper departs from two cases dealing with the impacts of the global trade regime rules, implemented with the creation of the World Trade Organization (WTO) and its assembled agreements, in domestic regulation in Brazil, and the succeeding alternative development strategies undertaken by the country either at the national or the international levels.

The selected examples are about intellectual property regulation and public health, and public institutional arrangements on trade finance to the civil aircraft sector. The WTO rules applied in these fields – trade related intellectual property rights and subsidies rules – have been condemned as the most restrictive ones to developing countries’ policy spaces. The concerned agreements impose high standards of regulation focusing on the level playing field for world exporters, limiting governments’ intervention in those areas. Flexibilities, however, were also admitted by the WTO system, although most of them were not self-evident. The two stories reported in this paper account for the public and private struggle in Brazil that led to modifications in the Brazilian legal system as a reaction to WTO restrictions.

The purpose of the paper is to go beyond the argument that the WTO trade regime limits developmental policies by demonstrating how the changes in the international regulation has provoked new creative arrangements inside a country like Brazil, and how it has changed the strategies of Brazil before other international fora. Brazilian legal reforms and development policies better not be taken solely as “models” to be replicated, but examples that may provide with legal ideas and tools to international legal constraints to developing countries in the trade game.

Key-words: international trade; law and development; intellectual property rights; right to health; subsidies; export credit; civil aircraft sector.
DEVELOPMENTAL RESPONSES TO THE INTERNATIONAL TRADE LEGAL GAME
Examples of intellectual property and export credit law reforms in Brazil

Michelle Ratton Sanchez Badin
Professor at FGV São Paulo School of Law (Direito GV)
Research collaborator at the Brazilian Center for Analysis and Planning (CEBRAP)

A. INTRODUCTION _______________________________________________________________ 3

1. What is at stake? ____________________________________________________________ 3

2. The law and development perspective over Brazilian trade policy ______________ 6

B. KEY REFORMS ON THE TRADE FIELD IN BRAZIL ____________________________ 9

C. “FAIR” TALES? ABOUT INTELLECTUAL PROPERTY RIGHTS & PUBLIC HEALTH AND PUBLIC TRADE FINANCE TO THE CIVIL AIRCRAFT SECTOR __ 16

3. Intellectual property: top-down alignment versus bottom-up resistance __________ 16

3.a The particularities of intellectual property rights in the pharmaceutical market in Brazil _____________________________________________________________ 17

3.b International standards on IP protection for the pharmaceutical sector incorporated into the Brazilian legal system ____________________________________________ 18

3.c The resistance catalyzed by the HIV movements __________________________________ 21

3.d Brazilian foreign policy review and spillovers at the international level _______ 27

3.e Are there development lessons to be taken from this case? ______________________ 33

4. Trade finance facing national and international challenges _______________________ 35

4.a The particularities of trade finance to the civil aircraft industry in a developing market ________________________________ 35

4.b Embraer elected as the national champion in a period of no industrial policy _____ 39

4.c The Embraer case in the WTO and the hidden limits to the multilateral trade system and developing countries ___________________________ 44

4.d Are there development lessons to be taken from this case? ______________________ 52

D. FINAL REMARKS ____________________________________________________________ 53
DEVELOPMENTAL RESPONSES TO THE INTERNATIONAL TRADE LEGAL GAME
Examples of intellectual property and export credit law reforms in Brazil

Michelle Ratton Sanchez Badin

A. INTRODUCTION

1. What is at stake?

(i) In 1990, Brazil had one of the highest reported numbers of infected individuals with HIV/AIDS in the world, and the World Bank projected that 1.2 million people would become infected by 2000 in the country. However, in 2004, data from UNAIDS estimated that half of the World Bank suggested number – approximately 600,000 – were living with HIV/AIDS in Brazil. Such decline on the epidemic was a result of a national response: Brazil was the first developing country to implement a universal antiretroviral distribution programme. The program was initiated in early 1990s, and by 2010 it provided free antiretroviral medication to about 187,000 patients.

The success of the Brazilian health policy is attributed to a concerted and early government response, the foundations for which were laid on political and professional changes in the 1980s, a balance between prevention and treatment, an efficient system of collection of data, and distribution of drugs. However, the main challenge for the implementation of such social policy is the drugs cost, as the monopoly granted by intellectual property rights reduces the

---

1 This paper was only possible with the comprehensive support of David Trubek, who ever made me believe I could make it during a challenging period of changes in my life as professional, wife and mother, as well as of all LANDS research team supportive words even when there was a lack of response from my side. I owe gratefulness to Arthur and Antonio for comprehending the intervals. I am also indebted to all persons who promptly answer to my request for interviews, and to IPEA/DINT researchers, whose comments to a preliminary version of this paper helped me with valuable insights to the concept of the paper and the specific cases here analyzed. Most of these names are anonymous here, but carefully acknowledged in my files.

2 Further information and data may be found in the WHO Annual Report, 2004, 66, and at the official website of the Department on HIV/AIDS of the Ministry of Health in Brazil, http://www.aids.gov.br (Last access: December 2010).
competitiveness for prices. In order to provoke the decline of drugs costs and to increase the number of beneficiaries, the Brazilian government has invested in national production of generic drugs and promoted an aggressive strategy of negotiation of prices of drugs traded under patent rights protection. In January 2010, the Ministry of Health announced that the prices on the agreements with national and international producers had successfully declined in 12%³.

That government response has been reinforced by strong and effective participation of civil society groups, based on a systematic advocacy of human rights in a variegated set of strategies and actions, as well as by the mobilization of the international public opinion and legal strategies before selected international organizations.

(ii) According to the first measurement of emerging country risk by J.P. Morgan Chase, in 1995, Brazil was evaluated with around 1,700 points⁴. This meant that there was a high rate of risk with respect to Brazil not to comply with financial commitments; such evaluation had a serious impact on the financing terms for Brazilian exporters taking credits in the international financial market.

In 1994, one of the largest Brazilian companies seriously affected by the 1980s financial crisis, Embraer, was privatized. The new major investor, Bozano-Simonsen group, took the decision to focus on the commercial regional jet market, and Embraer recovered from the black days launching the ERJ-145 jet model. Positive numbers come out four years later: if in 1996, Embraer had US$1,227 million revenue on sales, in 1999 this number was more than five times higher and the number of employees had doubled. By 1999, the ERJ-145 corresponded to more the 50% of Embraer’s operation, responding to almost US$2 bi on exports (about 95% of the companies’ sales are to foreign markets)⁵.

The foundations for such recovery and success were not systematic industrial policies, but a well developed business plan (centered on a pragmatic approach on quality and financial results instead of the pure technical idealism that prevailed in Embraer years as a state company) and a coordinated public-private partnership on specific topics, in particular the

³ Such negotiation as reported refers to 32 medicines, thirteen of them are produced in Brazil and nineteen are imported. See http://www.aids.gov.br (Last access: December 2010)


financing programs of PROEX for the equalization of interest rate on exports and related concerns. The need for a competitive financial structure for Embraer sales became evident in the first time that the Brazilian company disputed an offer with Bombardier to ASA and COMER, in which buyers disregarded the best prices and technical superiority of ERJ-415 on behalf of the CRJ-500 Bombardier model, due to Bombardier best conditions for financing and the exchange rates applicable to it. This provoked a domestic response in Brazil for the redesign of the domestic financing programs in order to, while supporting Embraer, set off the national project to increase the country participation in international trade of high technology products.

PROEX rules and conditions were questioned by Canada before the World Trade Organization (WTO) dispute settlement system, though. Consultations started in 1996, and the establishment of a panel was requested in 1998, putting in action one of the lengthiest cases in the WTO. This experience strengthened the public-private partnership of Embraer renewed executive staff and the elite bureaucracy in Brazil, associated with two of the most traditional ministries in the country – the Ministry of Foreign Affairs and the Ministry of Finance – that afterwards kept working together in any other relevant issue for the sector at the international level.

What these two cases have in common? They are examples of the challenges imposed by international regulation over domestic developmental policies. In both cases, Brazilian policies faced its limits in the multilateral trade regulation by the WTO agreements, namely the Trade-Related Intellectual Property Rights (TRIPS) and the Agreement on Subsidies and Countervailing Measures (ASCM). These two agreements are appointed by the literature as

6 PROEX was created by Law No. 8187, June 1st, 1991; but until 1995 it was not fully operating due to economic difficulties of the public agencies involved and the high costs that the program could involve. The equalization of interest rate program corresponds to the grant by the Brazilian National Treasury, through its financial operator, Banco do Brasil, to cover, at most, the difference between the interest charges contracted with the buyer and the cost to the financing party of raising the required funds. See Pedro da Motta Veiga and Roberto Iglesias, ‘A Política de Financiamento à Exportação no Brasil’ in Temas de Economia Internacional (Brasília: REDIPEA/BID, 2000), vol. 2.


the most restrictive commitments undertaken during the Uruguay Round of multilateral negotiations (1986-1994). This article works in these two very different cases – one mostly connected to social policy concerns and the other to the development of a high-technology industrial sector – with the purpose of enlighten how the challenged posed at the international level favored new legal developments in Brazil, provoking the change on legal tools used by both government institutions and the concerned stakeholders (business and civil society groups).

2. The law and development perspective over Brazilian trade policy

During the 1990s, Latin America experienced a noticeable change in trade and development policies, shifting from the “import substitution industrialization” policies built in the 1960s and 1970s to more “export-oriented” trade-liberalizing alternatives. The movement in Brazil toward a more liberalized trade policy was based on a combination of internal and external structural and ideological factors involving changes in the economic and the geopolitical contexts, as well as the proliferation of answers to the debt crisis of the 1980s, promulgated by the Washington Consensus.

At the international level, those changes were stimulated by the World Bank and International Monetary Fund structural adjustment policies, that strongly advocated trade and investment liberalization while Brazil and other developing countries negotiated new and restructured loans, as well as by the proliferation of trade regimes at different levels.

---


(bilateral, regional and multilateral), including the institutionalization of the World Trade Organization (WTO). The WTO, created in 1994, expanded the scope of the General Agreement on Tariffs and Trade (GATT) to include nineteen agreements under a single multilateral framework. Such agreements targeted both market access – tariff reduction – and, more importantly, a greater delineation of standards for trade regulation. The later comprises a whole set of baselines for the protection of rights affecting trade transactions and the adoption of common administrative procedures on trade policies. Although supported by those advocating for economic growth and financial stability, the WTO regime has been severely questioned by development thinkers. The concerns of the later group are mostly related with the magnitude of WTO rules and its restrictive impact on the space left for the development of economic and social policies at the domestic level.

significantly revamped”). About the conditionalities, see Anne Krueger (ed.), The WTO as an international organization. (Chicago/London: The University of Chicago Press, 2000).


13 Sylvia Ostry. What are the necessary ingredients for the world trading order? The Kiel Institute of World Economics, 2002. Available at http://www.utoronto.ca/cis/ostry/ (Last access June 2010): "Even the term ‘trading system’ is an anachronism today since the WTO is less and less centred on trade rather than domestic regulation and legal systems". See also Gabrielle Marceau and Joel Trachtman, ‘The technical barriers to trade agreement, the sanitary and phytosanitary measures agreement, and the General Agreement on Tariffs and Trade: a map of the World Trade Organization Law of domestic regulation of goods’ (2002) 36 Journal of World Trade, 811-81, who questions how far WTO goes beyond its “core” trade issues.


15 See José Luís Fiori ‘O cosmopolitismo de cócoras’ (2000) 14 Estudos Avançados, 39.

16 Ha-Joon Chang is an important reference on this conception. Ha-Joon Chang, Kicking Away the Ladder – Development Strategy in Historical Perspective (London: Anthem Press, 2002). Ha-Joon Chang, “The Future for Trade” (2003), 46 Challenge, 6-15. For a meta-analysis of the structural limits to state action, see the review by Drezner on structural and agent-centered theories for globalization, Daniel W. Drezner, “Globalization and Policy Convergence”, 3 International Studies Review, 2001, 53-78. Drezner states “The different theories that connect globalization to policy convergence fit into a simple 2X2 schema. The first dimension is whether the
This article applies the analytic framework of the law and development debate, investigating the role law played in social and economic change in the two aforementioned cases. The purpose of the paper is to contrast the commitments with WTO rules and the interplay of Brazil’s trade policy both in the domestic level and the international arena. The analysis takes into account how legal institutions, ideas (associated to the concerned stakeholders) and regulation have been articulated in order to promote policies aligned to Brazil’s developmental interests.

Considering the developmental policies undertaken in the 1990s, tuned with the Washington Consensus recommendations, Brazil put into operation the liberal conception of trade regulation by a mere adoption of the WTO agreements as domestic rules. Such measures presumed a reduced participation of the state in the economy, as well as in formulating alternative policies that could affect trade.

As part of the “Law and the Governance of Economic Development in Latin America”, the article entails an analysis of new developmental strategies that may evidence a move on the direction of the third movement of development policies. Trubek and Santos delineate a couple of characteristics defining this third movement on law and development:

“This new ‘paradigm’ contains a mix of different ideas for development policy. These include the idea that markets can fail and compensatory intervention is necessary, as well as the idea of ‘development’ means more than economic growth and must be redefined to include ‘human freedom’”.

theory emphasizes the primacy of structural forces or the power of autonomous agents. Structural approaches stress the environmental conditions affecting political units. The pressures for convergence are external to states, determining their course of action by tightly constraining national policy responses. Agent-centered approaches do not dismiss the power of transnational structures but argue that states can at least choose from among multiple policies that are sustainable outcomes over time” (at 52).


18 The Marrakech Agreement was internalized in Brazil by the Decree 1,355, dated as of December 31, 1994.

The two short stories opening this paper appoint to a shift from an acquiescent posture in adopting international trade standards to a conscious reaction with respect to deficient regulation to promote development needs in Brazil. Both cases coincide on the approaches taken by the Brazilian government after the conclusion of the Uruguay Round and the coordination of actions in order to make room for the domestic interests before the international trade regulation. Basic principles of how to organize the economic activity are the point of departure of the debates. In the case of intellectual property (IP) rights, the regulation of property rights and its importance for the strengthening of capitalist structures are at the core of the debate. On the other hand, the level of state involvement in the economic activity is on the essentials of trade finance analysis – whether it promotes or defy fair competition among different markets. Both are positive stories of how Brazil – the state administrative and domestic private agents – learned to think and to mobilize action globally, making use of national and several international fora to push policies closer to the country’s social and economic needs. The questions provoked by the paper are: what are the main elements of the cases that support the definition of a new development posture by Brazil? Do these elements constitute new legal tools and arrangements favoring the replication of similar strategic policies in other sectors?

The paper is divided into three more sections besides this introduction. Section B intends to provide the reader with context information about the impacts of the 1980s debts crisis and the neoliberal discourse in the domestic political arrangements and legal reforms in Brazil. Section C portrays into details the two stories, enlightening the socio legal features that favored key alternative policies defining a more active role of the state and a revision of the definition of its priorities in a democratic and more exposed economy environment. Finally, Section D draws on a couple of concluding remarks.

**B. KEY REFORMS ON THE TRADE FIELD IN BRAZIL**

This section encompasses a brief description of the main political, economic and ideological forces behind the reforms on the trade field in Brazil, focusing mainly at the domestic level. It intends to provide with context information in order to better understand the evolution of legal reforms in each of the cases analyzed in the paper.

---


The changes of policies in Brazil in the beginning of the 1990s, after the election of Fernando Collor de Mello in 1989, towards monetary stability, fiscal restraint, trade and capital liberalization, and privatization, aligned the country’s domestic policies to international standards promising the increase of investment and trade (and therefore of wealth)\(^\text{22}\). This movement has its foundations in the exhaustion of the import substitution developmental potential – including its costs – as well as in the opportune pressure for the adoption of neoliberal policies in the country. The combination of these two forces resulted in a mix of policies, not necessarily synchronized, aiming at (i) the reform of the national trade system (its institutions and rules)\(^\text{23}\); and (ii) the harmonization of national economic regulation towards an open economy. Both had in common the need for a retreat of the Brazilian state from the economic activities\(^\text{24}\).

On that sense foreign trade assumed a different role in the Brazilian domestic context: it shifted from an industrial policy tool to primarily an adjustment tool on behalf of the balance of payments. A large part of the institutional apparatus for the coordination of trade policy was either dismantled or reframed\(^\text{25}\). This endorsed the uncoordinated works for domestic and international legal reforms by Brazilian institutions, in the apex of Uruguay Round negotiations. According to Castelar Pinheiro, Bonelli and Schneider, in contrast to other countries of Latin America, in the reforms along the 1990s in Brazil the pragmatic approach


\(^{23}\) Part of the reformist perspective was associated to an authentic critical evaluation by local actors, mostly people connected to CEPAL works. See Baumann, ‘Brasil’.

\(^{24}\) The reformists were convinced of the high level of dependence of the industrial sectors on state protection and its limits in the announced globalized world as from the 1970s. See Tavares, ‘Auge e declínio’.

\(^{25}\) A key example was the Ministry of Industry and Foreign Trade, a central body in the Brazilian administration catalyzing domestic productive interests and data. In 1990, the Ministry of Industry Development and Trade was dismantled, and CACEX the specialized agency inside the Ministry on foreign trade issues was extinguished. The Ministry agenda was retaken in 1992, and finally in 1999 it was restructured as the Ministry of Development, Industry and Commerce (Law 8,028/1990; Law 8,490/1992; and Provisional Measure 1,911-8/1999 converted in Law 10,683/2003). About the reforms see: http://www.desenvolvimento.gov.br/sitio/interna/interna.php?area=1&menu=1662 (Last access: September 2010).
prevailed. As a consequence the reforms were not enacted as a coherent, overall change in development strategy, but as flexible and mostly disconnected process.26

On that sense, from the domestic perspective, the ongoing multilateral trade negotiations were a mere replication of past negotiations with limited burden to the country. The fact that Brazil was living one of the most important moments of its recent history with the political redemocratization as from the middle of the 1980s simply aggravated the misconception of multilateral trade negotiations outcomes. The political change mobilized civil society groups and especially the legal community in the country to concerned reforms of the domestic legal system and the public administration institutional design, including the approval of a new Constitution (1988).27

Taking that into account, the forefront of international negotiations was predominantly undertaken by the Brazilian Ministry of Foreign Affairs (MFA, also known as Itamaraty) diplomats. The MFA is known in Brazil to have a 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.28 And, since the 1960, the diplomats assumed increasingly a planning role of the foreign policy.29 Given that the foreign policy actions was extremely concentrated on an insulated body of the Brazilian government, Itamaraty, few groups from the civil society and from the private sector had the chance to access of information and of dialogue channels.30

26 Pinheiro, Bonelli and Schneider, ‘Pragmatic Policy’, 5.
30 Maria Regina Soares Lima, ‘Instituições democráticas e política exterior’ (2000) 22 Contexto Internacional 265-303, claims that the encapsulated policy during the ISI was one of the reasons for such distance from interest groups, at 293. See also Veiga, ‘Formulação de políticas comerciais’ about the selective and non-structured channels of participation inside the Ministry.
The Brazilian foreign trade policy in the 1990s focused in attaching Brazil to relevant negotiations for the liberalization of trade. Examples of such efforts are the engagement in the Uruguay Round, from 1986-1994, for the settlement of a multilateral trade system of rules, the negotiations for the establishment of a regional trade area in 1991 (the Mercosur project)\(^\text{31}\), as well as the negotiations for an enlarged regional trade area, under the negotiations for the Free Trade Area of the Americas (FTAA) in 1994, and those with European Union. The Uruguay Round was the only that promoted a genuine reform in the Brazilian domestic regulation; Mercosur, besides its volatility on political efforts and engagement by the parts, is in most of its parts a mimesis of WTO rules; FTAA negotiations failed by the beginning of 2000s, and those with the Euopene Union had stagnated for almost four year and have been relaunched on slow motion since 2008.

Although Brazil was engaged in the multilateral trade system since its creation in 1947, the country had participated in very occasional moments during the GATT years\(^\text{32}\). Brazil is appointed as one of the most active developing countries during the negotiations of the Uruguay Round, but this does not mean too much. A couple of reasons have been appointed to justify the unsuccessful role of developing countries in such negotiation: (i) the fact that important countries leaders of the “Third World” and “North-South” debate were living a serious economic crisis (such as the Latin Americans, especially Brazil, Mexico and Argentina); (ii) liberal legal reforms conditioned by other international organizations to financial aid; (iii) lack of alternative developmental discourse and ideals beyond the neoliberal reforms (the fact that the state should reduce its role on the economy was mostly understood that there was no need for further strategy by the state); (iv) the unclear effects of the signature of single package of commitments; (v) limited human resources and technical capacity for so detailed and multifaceted negotiation; (vi) the limited legal features of the

\(^{31}\) The bloc was created by the Assunción Treaty, signed in 1991, agreeing on best efforts by the parties (Argentina, Brazil, Paraguay and Uruguay) to create a common regional market. Later in 1994, the Ouro Preto Protocol ruled on the institutional structure for the bloc. All agreements are available at <www.mercosur.int> (August 2010).

\(^{32}\) Renato Baumann, Otaviano Canuto and Reinaldo Gonçalves, *Economia internacional: teoria e experiencia brasileira* (Rio de Janeiro: Elsevier, 2004), p. 17, argue that Brazil had promoted its self-exclusion of the GATT system in the first years of the organization, considering that the products of main interest for the country were not part of the schedule under negotiation for tariff-reduction. According to the authors, Brazil starts being more active during the Kennedy Round (1964-1967) and the Tokyo Round (1973-1979) based on developing countries claims for a special economic agenda and special and differential treatment. And, later with the end of the “import substitution policies” Brazil focused on the increase and diversification of its exports, becoming more interested in the bargain for market access.
“Third World” and “North-South” resistance, focused on exceptions and longer term periods for implementation (on the sense that developing countries position was classified as essentially reactive)\(^{33}\).

The Uruguay Round closed in 1994 and its single pack of commitments came into force by January 1\(^{st}\), 1995 in Brazil, in the same day that the new elected president, Fernando Henrique Cardoso, took office. Cardoso administration main objective was the macroeconomic stability of the country, and a series of economic and legal reforms took place in Brazil by the middle of the 1990s. Although mostly concerned with internal adjustments, Cardoso period opened the space for new developmental policies facing the post-Uruguay Round international trade regime\(^{34}\). Firstly, the success of export-oriented policies in East Asian countries became a reference to Brazil, and institutional reforms took place to favor the implementation of policies on that direction\(^{35}\). Secondly, it became increasingly clear that in a regulated global economy national policies – being they economic or predominantly with a social character – were tied to international systems. This also motivated not only legal revisions and institutional reforms at the domestic level, but a comprehension that they are dependent upon international legal mobilization as well.

New agencies and bodies were created and old ones reformed to deal with foreign trade; attention shall be added to the Chamber on Foreign Trade (CAMEX), an interministerial Council with deliberative power, created in 1995 to assist the Presidency on relevant decisions concerning international strategies on trade\(^{36}\). In 1999, in the second term of Cardoso government, the Ministry of Industry, Development and Trade itself was reformed, and the Ministry of Foreign Affairs also adjusted its internal structures (comprehending

---

\(^{33}\) Footnotes to be added.

\(^{34}\) Vigevani, Oliveira and Cintra, “Política externa no período FHC”.

\(^{35}\) Renato Sucupira, Mauricio Moreira, “Exports and Trade Finance: Brazil’s recent experience” in Gary Hufbauer, Rita Rodriguez, *The Ex-Im Bank in the 21st century: a new approach?* (Washington: Institute for International Economics, 2001), pp. 81-96, at p. 95: “The East Asian experience conveys two important lessons for developing countries: Exports matter because they promote macroeconomic stability and boost productivity; and governmental-led trade finance matters because of imperfections in the capital market. Despite an impressive export performance in the 1960s and 1970s, and notwithstanding the government’s early efforts to promote trade finance, Brazil only took full advantage of the Asian lessons in the 1990s, after the Brazilian economy was opened up.”

\(^{36}\) CAMEX is composed by representatives of the following organs today: Ministry of Trade that presides its works; the MFA; the Civil House; the Ministry of Agriculture; the Ministry of Planning, Budget and Management; the Ministry of Agricultural Development.
embassies and missions based in the relevant trade centers, such as Washington, Brussels and Geneva).\(^{37}\)

According to Soares Lima, the main contribution of the political reforms towards democracy and of the economic liberalization process was definitely to change the foreign policy scenery that from then on had to encompass collective interests at the global level.\(^{38}\) On this sense, Veiga stresses the forms of mobilization of civil society, especially the associations representing the productive and work forces, requesting mechanisms for participation and dialogue on trade and trade-related issues concessions and regulation. The backlash was aggravated by the impetus of liberalization by the end of the Uruguay Round by the government to join new negotiations, such as the Free Trade Area of Americas - FTAA (including USA) and the Mercosur-European Union.

In order to attend the claims by civil society groups for more information and the possibility of influence in the main trade negotiations undertaken by the Brazilian government, inter-departmental groups inside the MFA and inter-ministerial groups, created by the end of the 1990s and beginning of the 2000s, started to open their meetings to invited organizations. These were the cases of the National Section for the Coordination of FTAA issues (SENALCA) and that for the coordination of Mercosur-European Union issues (SENEUROPA), as well as of the inter-ministerial groups working on trade issues (GICI) and

---


38 Soares Lima, “Instituições democráticas”, at 295. The author attributes the change to the fact that the globalization of the economy and the form it was rules promoted distributive impacts at the domestic level, challenging domestic actors to mobilize their interests comprehending international negotiations and regulation. Celso Lafer, who was Minister of Foreign Relations (1992, 2001-2002) and took relevant post on representing Brazil before and at international organizations, states about the period analyzed that: “The world that Brazil used to administer as an ‘externality’ became internalized, thus putting an end to the effectiveness of the repertory of solutions that shaped the country in the twentieth century”, in Celso Lafer, “Brazilian international identity and foreign policy: past, present and future” (2000) 129 Daedalus 207-38.
on intellectual property (GIPI). Several critics remained though from the side of civil society organizations, mainly with respect to the organization of the meetings, the lack of agenda and opportunity for effective dialogue.

At that time, the MFA had re-structured its internal dynamic of work. Itamaraty since the beginning of the XXth century organizes its works around into two paths: divisions working on geographic or regional issues (such as Africa, Europe and so on); and divisions focusing on relevant issues and organizations (such as human rights, environment and international economic organizations). Due to the fact that the regional negotiations that were pushing the trade agenda by the end of the 1990s were criss-crossing many of the issues that different kinds of division were dealing, such as FTAA negotiations – focused on Americas – comprehended rules, environment, intellectual property rights and so on, the same applied to the ongoing negotiations with EU and, to a certain extent, in the WTO. Celso Lafer, after his experience with WTO issues and negotiations, as Minister in charge from 2001 until 2002, promoted a couple of reforms inside the MFA in order to adapt the trade agenda, both for negotiation and dispute settlement. As a consequence the divisions has to work together on several issues. In addition to that, in the 2000s the coordination with civil society groups was given to horizontal and multi-sectoral associations (such as the Coalizão Empresarial for the private sector and REBRIP for the NGOs), as opposed to the previous sector or company model of dialogue. From thereon it starts the move in the foreign policy nominated by analysts as “autonomy by integration”, meaning that the Brazilian government believed that the country would increase its autonomy by an active participation in the elaboration of norms and the agenda at the international level. The legal “integration”, however, first took

39 All these groups were coordinated by the MFA, except for the GIPI, coordinated by CAMEX. According to the Decrees for the creation of the interministerial and inter-departmental groups, the coordinators could decide upon the invitation of civil society organizations if convenient. Therefore, the invitations were ad hoc and based on an arbitrary list prepared by the organs. Interview with a representative of the MFA, coordinator of the GICI, in 2004, for further details Michelle Ratton Sanchez Badin, “Mudanças nos paradigmas de participação direta de atores não-estatais na OMC e sua influência na formulação da política comercial pelo Estado e sociedade brasileiros” 2007 3 Revista Direito GV, 77-110.


41 Shaffer, Sanchez Badin, Rosenberg, “The trials of winning”.

42 Tullo Vigevani, Marcelo F. de Oliveira and Rodrigo Cintra, ‘Política externa no periodo FHC’. The authors argue that Cardoso’s government went beyond the reactive agenda on foreign relations which prevailed during...
place in legislative level and later in the institutional structure of the Executive organs, as it will be further explored by the case analysis in Section C below.

Despite the severe critics to changes on the discourse of the foreign relations policy and the tendencies of reforms in the last years of Cardoso administration, there are supporters of the view that Lula’s foreign policy is about changes that secure the continuity of previous main lines of the foreign policy. According to them the focus of the Brazilian foreign policy still remain the economic development and the strengthening of the country’s political autonomy. Vigevani and Cepaluni nominate the changes in the politics as “autonomy by diversification strategy”, arguing that the strategy is almost the same although some of the tools have changed.

The two cases described in this paper evidences the main economic and political challenges imposed by the WTO regulation in the beginning of the 1990s, but the cases also detail the built-in strategy to combine specific needs identified in the Brazilian social and economic realities and how did the administration pursued them at the national and international levels (with or without private partnerships).

C. “FAIR” TALES? ABOUT INTELLECTUAL PROPERTY RIGHTS & PUBLIC HEALTH AND PUBLIC TRADE FINANCE TO THE CIVIL AIRCRAFT SECTOR

3. Intellectual property: top-down alignment versus bottom-up resistance

the import substitution policy years – determined by the logic of the “autonomy by the distance” (meaning reservation and policy space).


45 Vigevani and Cepaluni, ‘A política externa de Lula’, table 1 at 322 and ff. appoint the similarities and differences among Cardoso’s and Lula’s administration on foreign policy.
3.a The particularities of intellectual property rights in the pharmaceutical market in Brazil

According to recent data from the World Intellectual Property Organization (WIPO), the pharmaceutical sector is amongst the top-ten sectors that register more patents in the world, and these numbers has grown about three times in the last twenty years\(^{46}\). Brazil’s numbers on residents’ patents filling in comparison to its GDP is very low (at the rate of 2.32 per US$ billion). After TRIPS and the new intellectual property law came into force in 1997 the number of fillings for patents almost doubled in Brazil, however Brazilian residents respond for the short number of 9% of the fillings, in contrast to the average in developed countries that is about 50% by residents to 50% by non-residents\(^{47}\).

Those numbers impact in the pharmaceutical market operation in Brazil. According to Reis, Bermudez and Oliveira, “(P)atents are generally regarded as the most effective mean of appropriating the benefits from innovation in the pharmaceutical industry”\(^{48}\). Although Brazil issued its first Statute on intellectual property in 1945, it was in 1969 that discriminated pharmaceutical products as not eligible to be protected under patent rights (Law 1,005, dated as of October 21, 1969, Article 8.c). Law 9,279, promulgated in 1996 and in force as from 1997, however eliminated that discrimination, in accordance with the TRIPS agreement’s provisions (Articles 27 and 70.8).

---


\(^{48}\) André Luis de Almeida do Reis, Jorge Bermudez and Maria Auxiliadora Oliveira, ‘Effects of the TRIPS Agreement on the Access to Medicines: Considerations for Monitoring Drug Prices’, in Jorge Bermudez and Maria Auxiliadora Oliveira, *Intellectual property in the context of the WTO TRIPS agreement: challenges for public health* (Rio de Janeiro, ENSP/WHO – FIOCRUZ, 2004), p. 100. Ewin Mansfield, ‘Patents and innovation: an empirical study’ (1986), 32 *Management Science*, 173-81, lists the sectors with more impact on the products that would not be introduced and products that would not be developed due to the lack of patents, and the author concludes that the pharmaceutical sector would be the most severely affected (about 60 products would neither be developed nor commercialized, having chemicals occupying the second position with about 30 products), at 175.
Many interest groups pushed for that change in the Brazilian legal system – as described into more details below –, and the Brazilian state main concern was devoted to its position as a large consumer\textsuperscript{49}. This is mainly due to the fact that according to the Brazilian Constitution’s precepts the state has to guarantee full access to health care\textsuperscript{50}.

Patent rights in the pharmaceutical sector tend to favor short scale of competition due to the monopoly granted to each producer. In addition to this, other aspects increment the imperfect functioning of this market, such as: restricted access to information amongst the different players, consumer preferences to traditional trademarks, and the segmentation of the market\textsuperscript{51}. In order to overcome the distortions caused by such limits Bermudez et al. appoint to the importance of: (i) the state regulatory role, controlling price and regulating anti-monopoly; (ii) the adoption of a flexible system of patents, combined with an efficient system of compulsory licenses; (iii) stimulus to the local production and to technology transfer by transnational companies; (iv) R&D incentives focused on certain product; (v) parallel import strategic policy; and (vi) investment by the state on R&D\textsuperscript{52}. The changes in the domestic law for the protection of IP rights to the pharmaceutical sector urged important changes in Brazil with respect to the state’s role and regulatory structure.

3.b International standards on IP protection for the pharmaceutical sector incorporated into the Brazilian legal system

As previously mentioned, the current Brazilian regulation on IP dates of 1996. Such regulation reproduces the TRIPS agreement but it also incorporates more than a decade of debate and pressures at the domestic level for the reform of the IP statute – with emphasis to the informatics and pharmaceutical sectors.

\textsuperscript{49} “Brasil e India precisam fortalecer parcerias”, Gazeta Mercantil, 19 May 2009, stated that Brazil is known to be the eighth largest pharmaceutical market in the world with 2008 sales estimated at US$19.5 billion, and the number of units sold in 2008 estimated at US$1.8 billion.

\textsuperscript{50} Brazilian Federal Constitution promulgated on October 5, 1988, Articles 6 and 195-200.


\textsuperscript{52} See Jorge Bermudez, Ruth Epsztejn, Maria Auxiliadora Oliveira and Lia Hasenclever, \textit{O Acordo TRIPS da OMC e a proteção patantária no Brasil: mudanças recentes e implicações para a produção local e o acesso da população aos medicamentos} (Rio de Janeiro: ENSP, 2000).
At the peak of the Uruguay Round, intellectual property and the regulation of the pharmaceutical sector were amongst few issues of the trade negotiations under legal discussion at the domestic level as well. The international pressure for the reform of the Brazilian IP statute dates back to the 1980s, and it is personified in the United States and its measures against Brazil. According to Tachinardi the United States followed a multitrack trade policy towards Brazil, combining both bilateral and multilateral actions in the GATT\textsuperscript{53}.

One of the main outcomes for the United States of that aggressive strategy towards Brazil was the proposal by president Fernando Collor of a project for the reform of the intellectual property statute, including the possibility of granting patent rights to pharmaceutical goods and processes\textsuperscript{54}. Although Brazil together with India had leaded the resistance to the incorporation of IP rules into the trade system, in the first years of the Uruguay Round, the step back in 1991 was part of a larger strategy of adjusting domestic politics and regulation in accordance to the contents proposed for a multilateral system for the protection of IP rights attached to the trade legal system\textsuperscript{55}.

\textsuperscript{53} Maria Helena Tachinardi, \textit{A guerra das patentes: o conflito Brasil x EUA sobre propriedade intelectual} (São Paulo: Paz e Terra, 1993), 34. The author associates those actions by the United States to the Global Technology Revolution, after which innovation and R&D investments assumed a protagonist role determining the competitiveness level. In what concerns the pharmaceutical industry specifically, in 1986, bilateral consultations were requested by the United States about the lack of patent protection to the pharmaceutical industry, declaring this exclusion as “unreasonable” (as defined by Section 301 of the U.S. Trade Act). As a response in 1988 an interministerial group was created to examine Brazil’s industrial policy, although their reasons were not sufficient to avoid the retaliation by the United States. Brazil’s then requested a panel before the GATT to examine the legality of the retaliation. The case was settled having the Brazilian government proposed amendments to the national legislation and the United States withdraw the retaliation measures. More about the United States strategies and the changing patterns of competitiveness in Peter Drahos and John Braithwaite, \textit{Information feudalism: who own the knowledge economy?} (London: Earthscan, 2002); Michael Ryan, \textit{Knowledge diplomacy: global competition and the politics of intellectual property} (Washington: Brookings Institution Press, 1998).

\textsuperscript{54} Project of Law N. 824/91. For more details about the political scenario for the settlement of the controversy, see Maria Helena Tachinardi, \textit{A guerra das patentes}, p. 111 and ff.

\textsuperscript{55} There is a large number of publications about the process of incorporation of intellectual property rights rules into the multilateral trade system, the resistance of developing countries and the aggressive strategies undertaken by the developed economies, chaired by the United States. For a good overview about such process, see Drahos and Braithwaite, \textit{Information feudalism}; and Terence Stewart (ed.), \textit{The GATT Uruguay Round: a negotiating history (1986-1994), IV: the end of the game (part I)} (The Hague: Kluwer Law International, 1999), pp. 495 and ff.
The Pharmaceutical Manufacturers Association based in the United State (PMA) was a key actor in this game, pressuring for very restrictive measures on the protection of IP rights both in the bilateral and the multilateral negotiations. PMA could also count with the alignment of lawyers working as IP agents before the Brazilian National IP Office (known by the acronym in Portuguese INPI) who had as their main clients foreign companies and individuals.\(^{56}\)

The TRIPS agreement established a homogeneous and standardized legal regime in IP regulation for a large number of countries, consolidating and specifying WIPO agreements. Critics complain that the agreement left no space for the diversity of national patent regimes according to countries’ level of development\(^ {57}\). Despite developing countries resistance, few were the flexibilities they could reach on negotiations\(^ {58}\).

The implementation of the TRIPS agreement in Brazil cannot be detached from the context of the debate on IP in the country as from the 1980s. Brazil adopted a new statute on IP by May 1996, Law N. 9,279, although the country was eligible for the five years of transitional period. The domestic legislation granted an even more strict system of right protection than those requested by TRIPS – a notorious example was the case of the pipeline system.\(^ {59}\)

\(^{56}\) This is evidenced by the number of non-residents applications before the INPI, see footnote 47. The most traditional law offices that have worked on the IP field are Dannemann, Siemsen, Biegler & Ipanema Moreira advogados and Momsen, Leonardos & Cia, both based in Rio de Janeiro where the INPI has its headquarters. The partners of these law firms are the founders of the Brazilian National Association on IP (acronym ABPI) and the Interamerican Association on IP (acronym ASIPI), in the 1960s. Further information on their history at www.abpi.org.br and www.asipi.org (Last accesses: December 2010).


\(^{58}\) In the case of TRIPS, flexibilities are the exceptions or limitations to the general rules of the TRIPS agreement, which are basically the transitional period of five years for developing countries for the entry into force of the TRIPS agreement (Article 65.2) and of ten years for the least-developed countries, and the flexibilities, such as the compulsory license (Article 31) and the requirements for patentability (Article 27). In addition to these provisions, general statement for capacity building and transfer of technology are also part of the agreement. On all these provisions, see Constantine Michalopoulos, *Special and differential treatment of developing countries in TRIPS* (Geneva: Quaker United Nations Office, 2003), and about how Brazil implemented such flexibilities, see Pedro Paranaguá, *Patentes e criadores industriais* (Rio de Janeiro: Fundação Getulio Vargas, 2009). About the details of the negotiation and the main groups of interest, see Stewart, *The GATT Uruguay Round*, p. 519 and ff.

\(^{59}\) According to Kenneth C. Shadlen, “The politics of patents and drugs in Brazil and Mexico: the industrial
The implementation process of the new IP statute in Brazil had the first years of getting acquaintance by the main agents, public and private ones\textsuperscript{60}. In 1999, an implementation crisis became evident though. In that year, the central government announced the difficulties to sustain crucial health programs due to the high prices on medicines. According to a Brazilian diplomat the implementation crisis of the TRIPS in developing countries began in a very sensitive policy area for the public commotion: the public health system\textsuperscript{61}.

3.c The resistance catalyzed by the HIV movements

Since its discovery in 1981, the HIV/AIDS epidemic is known as a dynamic unstable global phenomenon, constituting a veritable mosaic of regional sub-epidemics, with different groups of risk, and several economic and social limits to control the epidemic. The numbers of affected people was astounding in Brazil by the 1980s. And, as a consequence of the deep inequalities in Brazil, the spread of HIV infection has revealed an epidemic of multiple dimensions, increasing the risk for the less favored groups, such as the poorest, women, and those living in the countryside\textsuperscript{62}.

\textsuperscript{60} According to experts working with IP the Brazilian Law N. 9,279 has several technical errors, as at that time there was no capacity in the country mobilized to critically review the amendments made by the new statute. Information provided by a Brazilian diplomat on 3 December 2010 (documents on file with the author).

\textsuperscript{61} Interview with a Brazilian diplomat on 3 December 2010 (documents on file with the author).

\textsuperscript{62} For the data on HIV epidemics, see footnote 2. For an updated analysis of the social aspects of HIV/AIDS in Brazil, see Ana Maria de Brito, Euclides Ayres de Castilho e Célia Landmann Szwarcwald, ‘AIDS e infecção pelo HIV no Brasil: uma epidemia multifacetada’ (2000) 34 Revista da Sociedade Brasileira de Medicina Tropical 207-17.
Considering the quick spread of the epidemic in Brazil, many grassroots movements came to the scene. In 1985, the Brazilian Interdisciplinary HIV Association (acronym ABIA) was founded as a result of a joint initiative by the medical doctor Walter Almeida and the anthropologist Herbert de Souza, the later popularly known as “Betinho” had been an important political leader against the dictatorship in Brazil. Until today, the HIV movement acknowledges that the leadership of Betinho differentiated ABIA’s strategy from other HIV/AIDS NGOs and movements. Instead of taking care of the first needs and direct assistance to those infected by the virus, ABIA worked on an agenda about governmental omission, lack of information about the epidemic and the violation of civil rights of those living with the virus – adding the AIDS epidemic a political facet in the civil society movements. As such, ABIA added to the scene a simultaneous irritation to the three branches in the central government – Executive, Legislative and Judiciary – sophisticating civil society strategies.

Civil society movements’ claims had been empowered by the Constitution approval in 1988, entitled as the Citizenship Constitution. Amongst several social rights associated to revival of the democratic pact, the new Charter assured the right to health to all Brazilian citizens, granting the access to essential medicines through the national health care system (SUS) as a universal right. Not different of any other democracy, in case the Executive or the Legislative does not rule or act towards citizens’ rights, individual and collective claims may be filed before the Judiciary. As a consequence, health issues became the living proof of a new phenomenon for Brazil after re-democratization: the judicialization of the politics. As a consequence, civil society movements as well as many individuals focused on the Judiciary their immediate claims for health assistance; and the HIV drugs requests became emblematic in this debate.

63 The history of ABIA and other details about the mobilization of political and intellectual capacity around ABIA is described by Richard Parker e Veriano Terto Jr. (ed.), Solidariedade: a ABIA na virada do milênio (Rio de Janeiro: ABIA, 2001).

64 The right to health is defined by the Brazilian Federal Constitution on its Article 6. Further details about the citizenship idea in the 1988 Constitution and the new political and institutional pact reflected on it are described by Marcos Paulo Veríssimo, ‘A constituição de 1988, vinte anos depois: Suprema Corte e ativismo judicial “à brasileira”’ (2008) 8 Revista Direito GV 407-40, at 408-10. Specifically about the constitutional provision and the conflicting responses by the Executive, the Legislative and the Judiciary, see Tatiana Wargas de Faria Baptista, Cristiani Vieira Machado, Luciana Dias de Lima. ‘Responsabilidade do Estado e direito à saúde no Brasil: um balanço da atuação dos Poderes’ (2009) 14 Ciência & saúde coletiva, 829-39. And, about the recourse to the Judiciary as a strategy by the HIV movements, see Gabriela Costa Chaves, Marcela Fogaça
Intellectual property and access to medicines became then a policy issue, having the Judiciary as the pivot on the implementation stage.\textsuperscript{65} The increasing demand for medicines and the high costs for purchasing them finally mobilized the government administration on the search for alternative in the regulatory field in order to make the policy economically viable.\textsuperscript{66}

Therefore, in 1999, Brazil, for the first time, looked back to TRIPS flexibilities in order to reduce the financial impact on the government’s budget. The Ministry of Health, under José Serra coordination at the time, acknowledged the possibility of recourse to the compulsory license mechanism.\textsuperscript{67} This announcement resulted in a successful trajectory of negotiations, opening the space for an incremental criticism over the limits of IP rights regulation in Brazil (and to the TRIPS to a certain extent), as well as claims for reform of the IP national system in force.

\textsuperscript{65} For a description of the different moments on the execution of policies granting access to health as from the approval of 1988 Constitution, and the interplay between the three branches of the central government, see Baptista, Machado, Lima, ‘Responsabilidade do Estado e direito à saúde no Brasil’.

\textsuperscript{66} As evidence a preliminary survey of the National Council of Justice in 2010 that estimates 80 million cases brought to the Judiciary on issues concerning access to health. The survey assesses that the financial impact to government’s budget might be exponential. Cf. Marina Ito, ‘Judicialização da saúde exige nova forma de atuação’, \textit{Consultor Jurídico}, 18 de dezembro de 2010.

\textsuperscript{67} Amy S. Nunn, Elize M. Fonseca, Francisco I. Bastos, Sofia Gruskin and Joshua A. Salomon, ‘Evolution of Antiretroviral Drug Costs in Brazil in the Context of Free and Universal Access to AIDS Treatment’ (2007) 4 \textit{PLoS Medicine} 1–13. The authors suggest that Brazilian officials learned from Thailand’s example on how to use IP regulations to challenge transnational pharmaceutical firms’ pricing practices. At mainly after the combat of the multinational companies against certain measures to reduce the costs of the medicines in South Africa Ref. to the Case n. 4183/98, Pharmaceutical Manufacturer’s Association of South Africa et. Al. vs. The President of the Republic of South Africa, the Honorable Mr. N. R. Mandela N. O. et. Al.. Available at www.cptech.org (last access: November 2010). Comments on the case, see Katharina Gamharter, \textit{Access to affordable medicines: developing countries responses under the TRIPS} (Wien, Sprinfver-Verlag, 2004), pp.111 and ff.; James Love, \textit{Compulsory Licensing: Models For State Practice In Developing Countries, Access to Medicine and Compliance with the WTO TRIPS Accord}. Mimeo, Prepared for the United Nations Development Programme, January 21, 2001 (available at www.cptech.org; last access: November 2010).

The HIV movement anchored in the Judiciary favored important legal reforms at the executive power level: (i) the review of the Brazilian IP regulation (laws and administrative regulation) towards the use of flexibilities (or policy spaces) admitted under the TRIPS\textsuperscript{69}; (ii) the legal empowerment of the health organs to perform a role on IP rights concession\textsuperscript{70}; and (iii) the creation of mechanisms to favor policy implementation and to increase the credibility of governmental actions\textsuperscript{71}.

If at the occasion of discussion and approval of 1996 IP law in Brazil the protagonists were

\textsuperscript{69} On this sense, two important revisions of Law N. 9,279/1996 were made: (i) the Bolar exception (article 43); and the (ii) the regulation of compulsory license in order to make it easier to use, including in this case the possibility of parallel imports (article 71). The Bolar exception, an exception to patent rights allowing local researchers to use a patented invention for research, in order to understand the invention more fully (especially when the patent term is close to its end), was regulated by a Presidential directive in 1999 (Provisional Measure N. 2,014-1, December 30, 1999), re-edited fourteen times until its conversion into law (Law N. 10,196, February 14, 2001). The compulsory license concerns a license granted by the government for a third party to exploit a patented invention, in order to remedy an abuse of rights by the patentee, and it was regulated by Presidential Decree N. 3,201, October 6, 1999, amended by Presidential Decree No. 4,830, September 4, 2003.

In addition to those two IP reforms, Law N. 9,787, dated as of February 10, 1999, regulated the expedite post-patent generic drugs entry. The fact that the IP reforms were made by Presidential acts evidences that the executive power was leading the process.

\textsuperscript{70} According to Provisional Measure N. 2,014-1, December 30, 1999, converted into Law N. 10,196/2001 (article 229-C), any pharmaceutical patent may be granted only after IP officials in the Ministry of Health Surveillance Agency (ANVISA) issue its “prior consent.” This reform aimed at providing the Ministry of Health with an important instrument to influence the patent examination process. This provision has been associated to the principle of TRIPS announced in it Article 8: “Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.”

\textsuperscript{71} The enforcing mechanisms are closely related to the existence of official laboratories able to produce the drugs under compulsory license, as well a map of possible foreign sellers in the case of parallel import. A second mechanism is related to the post-patent production that is related to the strengthening of the generic local industry and the imports from different foreign sources. A national program on generics was edited in 1999, with the Law N. 9,787, February 10, 1999, and ANVISA Resolution N. 391/1999. The alternative sources for the production of drugs is what gave force to the negotiation tool, according to Shadlen (who compared the Brazilian program with the Mexican one), in Shadlen, ‘The politics of patents and drugs’, at 48; Salama and Benoliel, ‘Patent bargains in NICs’, explore a couple of other reasons that also empowered such bargaining capacity of the Brazilian government.
the pharmaceutical multinational companies mobilized through Interfarma, congressmen and their respective parties, and the IP lawyers and IP agents – as well as their associations, mainly ABPI\textsuperscript{72} – working with national agency for the registry of intellectual property rights (INPI)\textsuperscript{73}, in this second stage of the debate new actors had been incorporated into the debate. Social movements, NGOs, civil society networks\textsuperscript{74}, as well as public and private laboratories of generics drugs\textsuperscript{75}, their associations and the chemical suppliers for such local industry were

\textsuperscript{72} The Brazilian Intellectual Property Association (acronym ABPI, in Portuguese) was created in 1963 under the name Brazilian Association for the Protection of Industrial Property, having as associated industries, law offices, IP agents and specialist. The association was the main promoter of the debate on IP issues in Brazil as from the 1960s, but according to certain NGOs, “although they are in the system”, they have not been relevant players in the IP and public health debate (phone interview on August 20, 2010, on file with author). Further information may be found at www.abpi.org.br (August 2010).

\textsuperscript{73} INPI was created by Law N. 5,648, dated of December 11, 1970, as the successor of the National Department of Industrial Property, of the Ministry of Industry and Commerce. Recently, in 2004, INPI launched a Restructuring Program linked to the Brazilian Industrial, Technological and Foreign Trade Policy. The Program aimed at renewing the institutional organization of the Institute, including capacity building and transparency of its processes and channels of participation and dialogue with different groups in order to guarantee its autonomy; its current planning keeps the same sprit. For further information, see INPI Strategic Planning 2007-2011, available at www.inpi.gov.br (September 2010). Although INPI has promoted important reforms in the last decade, declaring as its mission: “to promote a system of intellectual property based on innovation, competitiveness, as well as technical, economic and social development” (see www.inpi.org.br, September 2010), due to its long exclusive relation with IP firms and agents based in Rio de Janeiro, it has still been condemned of capture by such group (interview with NGOs representatives on August 2010, on file with the author). Efforts to promote the change of this image has been made, according to an INPI servant, the agency is not only a registry and it cannot only refer to lawyers but to the whole civil society; and taking this into account, a Public Affairs Department (Diretoria de Articulação) was created in 2004 (phone interview with civil servant on September 10, 2010, on file with the author).

\textsuperscript{74} ABIA, Conectas and Rebrip are today the leading organizations and movement dealing with trade and health issues. ABIA and Rebrip are also composed by the alliance of several groups of NGOs, being that ABIA focuses on HIV and public health issues and Rebrip is a coalition of NGOs for research and advocacy on trade topics; Conectas, differently, is an advocacy NGOs working on human rights topics. ABIA and Conectas work closely together with other national and foreign NGOs through Rebrip working group on intellectual property. Further information about their activities and membership are available at <http://www.abiaids.org.br>; <http://www.conectas.org>; <http://www.rebrip.org.br> (last access on February 2011).

\textsuperscript{75} There is one laboratory and three associations of local producers that mobilize relevant part of the debate. Firstly, Oswaldo Cruz Foundation (Fiocruz, also know as Farmanguinhos), that is the main public laboratory developing research and technology on essential drugs and giving assistance to the Ministry of Health on its
part of the new movement supporting a governance alliance around the Ministry of Health’s and ANVISA policies\textsuperscript{76}.

The Judiciary kept been an important ally of the movements claiming for the effective access to medicines, though. If the strategy on a first moment was only the request for medicines deliver, and on a second moment claims for the implementation of TRIPS flexibilities by the executive branch\textsuperscript{77}, as from 2006, civil society organizations, in \textit{ad hoc} partnership with the local industry, also got involved with the patent concession process\textsuperscript{78}. This last movement has finally reached the Legislative branch that has in its current agenda proposals to eliminate the previous analysis of patents registries by ANVISA. Although this is a topic under intensive pressure at the moment, it is only one amongst many proposals for more protective measures of intellectual property rights – popularly known as “TRIPS plus”\textsuperscript{79}. The intensity of this


\textsuperscript{77} According to the Supreme Court of Justice (STJ) notice published on December 5, 2010, ‘Indústrias de medicamentos buscam no STJ extensão para suas patentes’ there is more than 33 claims before this court only on the pipeline issue, and according to INPI data more than a hundred claims are ongoing in other instances of the Judiciary (see www.stj.gov.br, December 2010). In November 2007, Rebrip and Fenafar, in made a representation before the Federal Attorney Office to question the unconstitutionality of the pipeline system that was filed by the Federal Attorney in 2009 before the Supreme Court, see ADIN N. 4,234, still under analysis by the court (available at www.stf.jus.br, September 2010).

\textsuperscript{78} In 2006, seven NGOs members of Rebrip filed, for the first time, inputs for patent examination in two ongoing processes before the INPI, questioning the legality of the request for patent rights. The input for patent examination is a provision contained in Brazilian intellectual property law that permits any interested parties to submit documents and information to assist in the examination of patent applications being analyzed by the INPI (article 31). The patent requests in question were Viread® produced by Gilead; and Kaletra ® produced by Abbott. Further information at GTPI/REBRIP, \textit{Patentes}, 2006.

\textsuperscript{79} Interviews with two NGO leaders (August 20, 2010 and August 23, 2010), on file with the author. See also Gabriela Costa Chaves, Marcela Fogaça Vieira and Renata Reis, ‘Access to medicines’, 2009. An INPI agent declared the Congress as the most difficult instance to deal with IP issues, mainly due to the technicality of the issue that leaves unclear the political strategies and interests behind the regulation (interview on September 9,
debate might amplify the democratic character of access to medicines issue, as the three state branches will have been provoked to react.

The history as from 2000s take one step further the interaction of the different actors reinforcing and contesting health policies at the domestic level\textsuperscript{80}, and it also comprises the spillover to the international level negotiations, mainly the WTO and the WIPO fora.

3.d Brazilian foreign policy review and spillovers at the international level

New policy orientations at the national level and the amendments of the Brazilian legal system on behalf of health policies provoked aggressive responses by large multinational pharmaceutical groups and pressures – at the diplomatic level – from the most important economic partners of Brazil: the United States and the European Union.

The first international reaction was the request of consultation, in 2000, by US before the WTO dispute settlement system (WT/DS199 – Brazil – Patent Protection). US complained about the new compulsory license regime requirements\textsuperscript{81}, but a rising alliance of sympathetic developing countries, including South Africa and India, supported by NGO groups and specialized IGOs working on HIV/AIDS and health concerns, turn out to be essential to strengthen the development dimension of the Brazilian reforms\textsuperscript{82}. Although Brazil and US skip the DSB procedures agreeing on bilateral commission to address the issue, at the end, specific situations of the US – such as its own regulation on compulsory license and the

\textsuperscript{80} This is the reason for the move on analysis about Brazil from the restrictive state-led and production apparatus of the state to undertake negotiations to the importance of the social network supporting the government (civil society role). Shadlen and Eimer are important examples of this new reading of the successful history of Brazil.

\textsuperscript{81} Cf. WT/DS199 – Brazil- Measures Affecting Patent Protection. US claimed that “local working” requirement in the Brazilian legislation was inconsistent with Brazil’s obligations under Articles 27 and 28 of the TRIPS Agreement. Further information about the case is available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds199_e.htm.

\textsuperscript{82} About the relevance of such alliances and international governmental and non-governmental support to the Brazilian achievements in the DS199 case, see Marcelo Fernandes de Oliveira, Fernanda Venceslau Moreno. ‘Negociações comerciais internacionais e democracia: o contencioso Brasil x EUA das patentes farmacêuticas na OMC’ (2007), 50 Dados, 189-220. A Brazilian negotiator emphasized the relevance to this international alliance of multiple actors on behalf of public health and access to medicine of the over-aggressive reaction, in 1998, of the pharmaceutical companies against the South African government’s policies (interview on December 3, 2010, on file with the author). For further information on the South Africa case, see footnote 67.
negotiations for drugs to combat the anthrax after the September 11th – softened its international discourse against compulsory license and public health concerns, favoring US support to the TRIPS and public health declaration by November 2001, as part of development concerns appointed at the Doha Ministerial Conference83.

The Ministerial Declaration in 2001 consolidated a formal space for the debate of TRIPS flexibilities and their implementation in the WTO. However, a new conservative trend was taking place at the international level in the beginning of the 2000s inside WIPO Committees towards a TRIPS plus agenda84. Together with Argentina, in 2004, Brazil called for a “WIPO Development Agenda”. A movement that, even though, was mostly reactive in a first moment, it benefited from the legal technical capacity gained at the WTO and from the sympathetic global public opinion.

If the WIPO Development Agenda had, when launched, the primarily objective of blocking new advancements on the protection of IP rights, it progressively incorporated substantive proposals about how to combine public policy concerns (especially the developing countries

83 Doha Declaration was mostly based on developing countries pressure and joint proposals before the TRIPS council on behalf of public health flexibilities of the TRIPS. During the meetings of TRIPS Council on April 2001, several developing countries provoked the formal insertion of the debate in the WTO Council’s agenda, having been stressed by the Brazilian delegation that: “The WTO was engaging sadly late to discuss the issue. Other international organizations, within their own mandates and in light of their own policy objectives, had given far more attention to the implications of the TRIPS Agreement on access to drugs than the WTO itself.”, cf. IP/C/M/30 – Council for Trade-related Aspects of Intellectual Property Rights, Minutes of the meeting held 2-5 April 2001, par. 236. Finally, Doha Ministerial Declaration, adopted on November 14, 2001, stated: “We stress the importance we attach to implementation and interpretation of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) in a manner supportive of public health, by promoting both access to existing medicines and research and development into new medicines and, in this connection, are adopting a separate declaration.” See also the Declaration on the TRIPS agreement and public health, adopted on 14 November 2001. All documents available at <http://www.wto.org>.

84 WIPO committees were advancing on relevant topics of the IP agenda, as from late 1990s, such as: (i) the Standing Committee on the Law of Patents was working on a draft of a Substantive Patent Law Treaty aiming at common requirements for patent applications in different countries; (ii) the Standing Committee on Copyright and related Rights was discussing IP rights of broadcasting organizations, as well as on voluntary copyright registration systems; (iii) the Standing Committee on Trademarks, Industrial designs and Geographical Indications on a revision of the trademark treaty; and (iv) the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore on forms of protection of such cultural and intellectual traditions. Cf. WIPO, Annual Reports, 2004, 2005.
constraints) with private sector role on innovation and rights of protection, attracting other developing countries support and enthusiasm. And, after a series of inter-governmental discussions the Agenda was formally incorporated in WIPO working programs in 2007, with 45 Recommendations approved, and the establishment of a Committee on Development and Intellectual Property. Brazilian diplomacy declares that the main efforts have been concentrated on having the WIPO/DA as a transversal issue covering all topics and ongoing negotiations at WIPO that should never be confined in one sole committee.

For Brazil, the shift from the WTO to the WIPO, according to negotiators’ statements, provoked a twofold learning process to its diplomacy: (i) on how to play the forum shift at the international level and (ii) on how to combine the achievements at the national level with the structures and agendas at the international level. As a consequence, institutional changes inside the Brazilian state were required in order to strengthen the diplomatic strategy of Brazil on IP.

The first institutional change was the creation of an IP division inside the MFA (known as “DIPI”). As part of a large reform inside the MFA, promoted by the Minister Celso Lafer, in 2001, aiming at having separate divisions to work with specific WTO agreements, DIPI has benefited of an uncommon virtuous circle of capacity building inside the MFA on the highly technical approach requested by the WTO issues. Although most of the other 22 ministries

---

85 According to WIPO: “The first proposal for the establishment of a development agenda for WIPO (document WO/GA/31/11) was submitted by Argentina and Brazil at the 2004 General Assembly, and subsequently supported by 12 other developing countries. After discussions, Member States agreed to hold a series of intersessional intergovernmental meetings (IIM) to examine proposals originally submitted by Brazil and Argentina as well as additional proposals of other member states.” See http://www.wipo.int/ip-development/en/agenda/background.html (December 2010).

86 Interviews with diplomats on file with the author (Brasilia, September 10, 2010; over the telephone, December 3, 2010).

87 Brazilian diplomacy identifies as a consequential linear process the national measures on implementing TRIPS flexibilities, the WTO works resulting in the Doha Development Agenda, and the later IP developments at WIPO Development Agenda level. About the forum shift as a strategy for developing countries, see Lawrence Helfer, ‘Regime shifting: The TRIPS Agreement and new dynamics of international intellectual property lawmaking’ (2004), 29 The Yale Journal of International Law, 1-83. The author reports the achievements by the forum shifting strategy in the public health field as the predominant rationale having the integration of principles, norms and rules into the WTO and the WIPO, and as a subsidiary rationale, the generation of a counter-regime norms to the TRIPS-plus proposals at WIPO and other plurilateral and bilateral treaties (at 62).

88 The IP unit inside the Brazilian MFA, since its creation, has from three to five diplomats working on the
at the Executive level created by the beginning of 2000s a unit dealing with IP issues, DIPI centralized the task of representing Brazil internationally in any IP negotiation process.\textsuperscript{89}

As a consequence of such proliferation of IP departments inside different ministries, the establishment of an inter-ministerial group on IP (called GIPI) was essential for the coordination of the works and deliberation about the main strategies on IP at the Executive level.\textsuperscript{90} Carolyn Deere compares developing countries domestic institutions and highlight GIPI as a major achievement of Brazilian policy-making structure: “among developing countries, Brazil stands out for having a deliberate and strategic approach to IP decision-making based on a broad policy framework for development and industrial policies, and an interministerial approach to decision-making. Most countries lack such a broad public policy framework.”\textsuperscript{91} The dynamics between the GIPI and DIPI works, according to Brazilian negotiators, seems to be functional and clear today to members of the government, however civil society organizations have still been critic about their working procedures and the lack of transparency.\textsuperscript{92}

\textsuperscript{89} Carolyn Deere, ‘The Politics of Intellectual Property Reform in Developing Countries’, in Ricardo Melendez-Ortiz and Pedro Roffe ed., Intellectual Property and Sustainable Development: Development Agendas in a Changing World (Oxford: Edward Elgar Press, 2011) [forthcoming], analyzing the relevance of domestic structures to the performance of developing countries in implementing IP rights and its flexibilities, observes this particularity of Brazil: “In most developing countries, ministries of foreign affairs do not usually play a significant substantive role in IP issues. In Brazil, however, the Foreign Affairs Ministry has the monopoly on representation of Brazil in international forums and on negotiations, including in the presentation of Brazilian positions on matters related to IP.”

\textsuperscript{90} GIPI was created by a Decree dated as of August 2001, having as the chair of its work the President of the Foreign Trade Chamber of the Ministry of Development, Industry and Foreign Trade (known by the acronym in Portuguese, CAMEX). The following ministries are also part of GIPI: Ministry of Agriculture; Ministry of Science and Technology; Ministry of Health; Ministry of Culture; Ministry of Justice; Ministry of Foreign Affairs; Ministry of Environment; Ministry and Chief of Staff to the President; Ministry of Finance; and the Ministry of Strategic Affairs. The last four were added to the group later by amendments to the Decree in 2005 ad 2008. Further information may be found at www.mdic.gov.br (September 2010).

\textsuperscript{91} Carolyn Deere, ‘The Politics of Intellectual Property Reform’.

\textsuperscript{92} Pursuant to Article 1.VII of the founding Decree of GIPI, dated as of August 2001, one of the objectives of
As a result, contributions of civil society movements based in Brazil to the Brazilian foreign policy on IP have been limited. Very few groups, such as the Center on Technology and Society at Getulio Vargas Foundation, have been able to mobilize human and financial resources to participate directly in international conferences and meetings. Therefore, international development think tanks and large international NGOs have been those providing inputs for the development agenda strategy at the WIPO agenda notably and the major disseminators of information for Brazilian civil society groups.

The recent case brought by Brazil and India, on May 2010, before the WTO about the detention of generic drugs in transit in the EU evidences that although there is a lack of formal arrangements between the government and civil society groups on the definition of foreign policy strategies in Brazil, it has been possible to develop mutual reinforcing actions. Civil society movements argue that the strategy towards the dispute settlement

93 The most recognized think tanks influencing in the IP agenda are the International Trade Center on Trade and Sustainable Development (ICTSD), South Centre, and Third World Network; and on patents and access to medicine, amongst the leading ones, are Doctors without Borders and Oxfam. It was the momentum that civil society groups started to actively follow the WIPO agenda and to participate in its meetings – this changed the traditional mode of operation of WIPO that was dominated by the profit groups’ agenda and with a strong attachment to the private sector. WIPO besides being a forum for developing IP law and standards, it delivers IP protection services. Accordingly, for 2008-2009 period, for example, WIPO had 90% of its budget based on private contribution or the fees charged for IP rights services opposed to 6% of contribution from Member states (see WIPO key financial indicators 2002-2009, available at www.wipo.org, December 2010). That participation of private sector also included Brazilian groups of IP agents and lawyers representing a private view. According to a Brazilian diplomat they also resisted to the Development Agenda proposal, although very respectfully (interview on December 3, 2010, on file with the author).

94 WT/DS408 European Union and a Member State — Seizure of Generic Drugs in Transit (Complainant: India); WT/DS409 European Union and a Member State — Seizure of Generic Drugs in Transit (Complainant: Brazil). Both cases question the content and application of EU Regulation N. 1,383/2003 on IP rights protection that favored the detention of generic drugs in transit by border officials at Dutch harbors or airports.

95 Gregory Shaffer argues that: “Much of the struggle over interpretation of the TRIPS Agreement will be discursive. It will be a struggle over competing principles that involve competing conceptions and priorities over
system undertaken by the government (over GIPI and DIPI) was completely opaque, but they have opted to strengthen the human rights discourse filing a complaint in alliance with other Southern organizations on May 14, 2010, in Madrid, before the Permanent People’s Tribunal (PPC) – a nongovernmental international opinion tribunal – against the European Union (EU) for the seizures\textsuperscript{96}.

As part of such forum or regime shifting strategy, Brazil and other developing countries have also worked before organizations emphasizing a more technical aspect of its works, such as WHO and UNAIDS\textsuperscript{97}. WHO has favored joint actions between countries in order to evaluate effective actions against HIV, monitoring the spread of the virus and the challenges for combating it. WHO also integrates the UNAIDS initiative\textsuperscript{98}, and it is committed with the goal of universal access to comprehensive prevention programs, treatment, care and supportability to monitor progress and results\textsuperscript{99}. This was very important on the sense that HIV programs

the public goods at stake. These principles and conceptions will be advanced by competing coalitions of public and private actors”. Cf. Gregory Shaffer, ‘Recognizing public goods in WTO dispute settlement: who participates? Who decides? The case of TRIPS and pharmaceutical patent protection’ (2004), \textit{7 Journal of International Economic Law}, 459-482, at 476. Helfer also considers such informal systems like the Permanent People’s Tribunal in Madrid as part of the regime shift strategy: “.. the boundaries between regimes have become less rigid as international governance efforts have expanded their reach and become more interdependent. Such interdependence promotes the formation of networks among formerly disparate state, intergovernmental, and non-state actors and linkages among formerly discrete issue areas. The result is a ‘conglomerate type of regime’ or a ‘regime complex; - a multi-issue, multi-venue mega-regime in which states and NGOs shift negotiations from one venue to another within the conglomerate, ‘selecting the forum that best suit[s] their interests.” (footnotes omitted). Cf. Helfer, ‘Regime shifting’, at 16-7.

\textsuperscript{96} See the public statement “Seizure of legitimate generic medicines is condemned for violating right to health”, published at www.unesco.org.uy (August 2010). Interviews with civil society organization’s representatives on August 20 and 23, 2010, and with a Brazilian diplomat working on the case on December 3, 2010. All interviews are on file with the author.

\textsuperscript{97} Helfer calls this multiple stakes before different fora as an “integrationist strategy”. The author states that “these states [developing states] have used different ‘entry points’ in the WTO and WIPO to leverage proposals in the two organizations that they had helped to create in other international regimes”. Helfer, ‘Regime shifting’, at 63.

\textsuperscript{98} UNAIDS, created in 1996, is a joint initiative for the combat of HIV/AIDS of the following organizations and programs of and affiliated bodies to the United Nations system: UNHCR, UNICEF, WFP, UNDP, UNFPA, UNODC, ILO, UNESCO, WHO, World Bank. Further details of its objectives and modes of operation is available at www.unaids.org (December 2010).

\textsuperscript{99} As an example, an international center for technical cooperation in HIV/AIDS and regional South-South
started to move beyond traditional public health methods in order to contain the epidemic.\textsuperscript{100}

The works at WHO and associated international organizations have been important to put on evidence the importance of TRIPS flexibilities and to assure the generic drugs policy implemented in Brazil, as well as the alternative proposals on research and technology, and connected IP rights.\textsuperscript{101}

3. Are there development lessons to be taken from this case?

The challenges posed by public health policy issues to the intellectual property rights regime have been astounding, and it has definitely opened a new field of work for academics and a new agenda for policy-making agencies and organizations. The relevance of this crusade to and the contribution that developing countries have made to the expansion of such debate since the integration of IP rights in the trade agenda is out of question, but the concerns today are about the general rules we may take from such specific debate (public health).\textsuperscript{102} This partial conclusion highlights legal changes that favored the revision of IP regulation and the implementation of the new policies in Brazil.

The implementation process of TRIPS in Brazil and the progressive adoption of the flexibilities endured by the agreement, as well as the creation of institutions and policy cooperation initiatives in AIDS are means for addressing key thematic areas; as well as treatment research, including the efforts to develop a vaccine against the virus. To that end, several scientific and technological partnership agreements with national and international, public and private organizations like universities, research institutes, corporations and non governmental organizations were set up and/or reinforced. See Brazilian Ministry of Health- Health Surveillance Secretariat - STD, AIDS and Viral Hepatitis Department, Targets and Commitments made by Member States at the United Nations General Assembly Special Session on HIV/AIDS, Brazilian Response 2008-2009 Country Progress Report, Brasília, March 2010.

\textsuperscript{100} Marco Antonio Vieira, ‘The securitization of the HIV/aids epidemic as a norm: contribution to constructivistic scholarship on the emergence and diffusion of international norms’ (2007), 1 Brazilian Political Science Review, 137-81; Thaïsa Góis Farias de Moura Santos Lima and Rodrigo Pires de Campos, ‘Profile of the Brazilian projects for technical cooperation on Aids in the world: a look into potential study hypotheses’ (2010), 4 Revista Eletrônica de Comunicação, Informação e Inovação em Saúde, 111-25.

\textsuperscript{101} Further details on the role of WHO and UNAIDS are described by Helfer as part of the forum shifting strategy. Cf. Helfer, ‘Regime shifting’, at 42.

\textsuperscript{102} I thank Tony Taubman for provoking this question, commenting on the paper at the Society of International Economic Law 2\textsuperscript{nd} Biannual Meeting, in July 2010. Part of the conclusions here tries to extract from the public health debate on IP and the Brazilian experience conclusions possible to be generalized having such comments in mind.
strategies to enhance the scale of influence, illustrate a developing country trajectory in the economic liberalization process after the 1980s. TRIPS agreement was designed and negotiated during a turbulent political and economic period in Brazil when governmental and private institutions, as well as their intelligence, were severely damaged, but since their recovery the implementation process of that agreement had to be aligned to the new policy orientations. Although TRIPS limited states’ policy space, flexibilities were allowed and required intelligence to be explored in different set of policies.

Besides the identification and implementation of TRIPS flexibilities by the revision of domestic law, the governmental responsiveness to social claims and the strengthening of governmental agencies dealing with the counter-hegemonic discourse of intellectual property as an individual right was crucial to built a successful legal apparatus implementing the new policy orientation. From the economic perspective, the delineation of economically and technically viable alternative policies was fundamental to give credibility to the capacity of the Brazilian government to negotiate with the patent holder groups. On this sense the creation of ANVISA, and the allocation of resources to Fiocruz and its laboratories. Such policies were fortunate in being coordinated with new units and agencies at the Executive level defining foreign relations and international strategies. This closed the cycle of influence between the domestic and the international levels, on the sense that TRIPS first defined national regulation and policies and, later on, their revision promoted the consideration of new forms of implementing the TRIPS and its flexibilities. On that sense, the deliberate option to articulate the agenda in a way that could promote the country as a player in the IP debate at the international level favored the contribution to the international debate and the promotion of international alliances amongst developing countries with similar concerns. On this sense, the Brazilian government strategy toward the WTO, the WIPO and other UN agencies, as well as the enforcement of such strategies by private groups, have been essential to keep public opinion connected to the country’s main developmental concerns. Advocacy groups, key actors to the process, beyond being activists therefore also played the role of resonance boxes of Brazilian health policy developmental concerns at the international level.

Brazil together with other developing countries redirected then the IP debate in the context of public goods, recognizing the conflict of competing conceptions and priorities at stake – beyond the idea of property and the focus on innovation. Such revision favored other areas of the IP debate, evidencing the clash of interests and agents involved in the policy and law making processes. This revision stands the copyright law debates today domestically in Brazil, as well as other area of regulation in the WIPO.
The case also shows other potentialities to be explored, such as the improvement of the coordination among the three state branches, mainly the involvement of the Legislative power in the current strategies defined by the Executive, and the Legislative and the Judiciary in the context of foreign policy. Besides, there is also a space to increase the engagement of Brazilian civil society groups in the strategy of forum/ regime shifting at the international level, and compose such engagement with state’s strategies.

4. Trade finance facing national and international challenges

4.a The particularities of trade finance to the civil aircraft industry in a developing market

Civil aircraft industry has a particular economic structure due to the characteristics of production and consumption of its main product: that is high technology intensive requiring huge levels of investment on research and development; and a so costly good that relevant selling normally requires financing. The market also operates with few companies or groups around the world, with an important impact in the balance of payments of the countries where they are based. Therefore due such economic particularities specific forms of public-private partnerships are established between the industry and their states of origin, and specific rules have been developed to regulate international trade of civil aircrafts.

103 According to Bluestone, “The enormous capital requirements, and increasingly the crucial race to get into the market first with a new product, explain both the oligopolistic nature of the industry and the intensive rivalry between the limited number of agents”. (p. 8)

104 In the case of Brazil, the aircraft sector significantly contributes to exports and to the domestic GDP: Embraer, e.g., was appointed as Brazil’s largest exporter from 1999 to 2001 and the second largest from 2002 to 2004; its annual revenues are around US$3 billion, and the company employs more than 16,853 people. Although the company has expanded its investments and activities to other countries, 94.7% of its employees are based in Brazil. Cf. Embraer Annual Report 2009, at 13. This may be replicated to the countries where the main aircraft industries are based. In this sense, see Bluente (1981), indicating the aircraft industry as the second largest manufacturing in US in the early1980s.

105 It is worth noting that normally the aircraft industry combines the production of both defense and the commercial goods. About this relationship in Brazil, see Alex Sanchez, “Embraer: Is the Brazilian Military Industry Becoming a Global Arms Merchant?”, The cutting edge, September 14th 2009 (available at http://www.thecuttingedgenews.com). The author states that the military division of Embraer is pretty small compared to the civilian one, but, as well as the civilian products, the military division is largely export-based.
Civil aircraft market only gained impulse for commercial purposes, during the 1980s and 1990s. From there on, there has been an increasing dispute for market share among the few producers around the world. The struggle among countries to strengthen the competitiveness of their industries may be one of the reasons why aircraft firms have been competing more in price and payment terms than in quantity and quality (as per the Embraer situation in ASA and COMER, in 1996). According to an European official report, “(A)lmost no aircraft deals are cash deals”.

The civil aircraft industry is, therefore, highly dependent on the finest financial structures especially for long term transactions, normally counting on governmental support. Many complex financing structures are available to aircraft transactions, but two basic structures can be distinguished: (i) financing by a direct loan in favor of the airline by a financing institution; and (ii) the lease of the aircraft under a financing or operating lease with a purchase option or obligation at the end of the lease term, offered by the aircraft manufacturer or an independent leasing company, which purchases the aircraft from the manufacturer and leases it to the

---

106 According to Kanatsu this industry can support only a few producers due to the fact that economy of scale if one of the three technological requirements for the success of a commercial manufacturing of aircrafts.” Cf. Takashi Kanatsu, “Choice of national strategy and industrial organization comparing airframe production between Brazil and Japan” (2006), 2 International Journal of Asia-Pacific Studies 1-27, at 3. The author complements that “R&D costs are so immense that only a few models of aircraft in aviation history have actually recovered their costs and generated profits. (...) Of 29 jet transporters that took to the skies since 1945, only 3, all Boeing jets returned profits.”, at 4.


108 See footnote 7 above.

109 European Commission, Directorate General for Trade, Report to the Committee establishes under article 7 of Council regulation (EC) N. 3,286/94 (Trade Barriers Regulation) – Examination procedure regarding the Brazilian export financing programme “PROEX” as applied in the regional aircraft sector, 21 October 1999. The report also states that: “Airlines which acquire aircraft are usually unable to finance this acquisition with their own resources, especially where fleet deals of 10, 20, 50 or even more aircraft are concerned.”

110 The aircraft industry tends to play a very relevant role in the economy of the country where the plants are based. This relevance is not only related to the capacity of innovation and to the number of employees, but also to the fact that this industry is very dependent on external trade (impacting on the international trade balance of the exporters). See Oliver Stehmann, “Export subsidies in the regional aircraft sector: the impact of two WTO panel rulings against Canada and Brazil”, Journal of World Trade, v. 33, n. 6, pp. 97-120, 1999.
operator. The later has been the most common option to the point that a representative of the sector in Brazil stated: “Embraer does not only sell airjets, but also financing”\(^{111}\).

Besides the particularities of the global civil aircraft market and its dependence upon financing, there are certain characteristics of Brazil as a developing economy that impact in that first dimension and, consequently, in the operation of the aircraft industry based in the country and its performance in the global market. Trade finance has always been a challenge to developing countries, firstly because of the difficulties to access the sophisticated global financial system, and secondly because of the intricate institutional arrangement granting financial support at the domestic level\(^{112}\).

In a report issued by the WTO Secretariat in 1999, Finger and Shukrecht explain the importance of export credit agencies in trade financing, with special emphasis to developing economies: “…well-functioning ECAs are probably even more important for developing country exporters [than for industrial country exporters in developed countries]. The latter [developing country exporters] (and their banks) are often relatively small and, therefore, less able to generate their own information on commercial and political risk abroad. They are also likely to obtain less favourable financing terms because of mistrust by importers from other countries”\(^{113}\).

The action of the government through ECAs, however, is severely determined today by the standards defined in the WTO Agreement on Subsidies and Countervailing Measures (ASCM). The ASCM intends to limit states’ intervention in contributing financially to the domestic industry, and the agreement defines as prohibited any contribution that may grant a “benefit” to the exporter (Article 1 of ASCM). The concept of “benefit” though has been delimited by the WTO dispute settlement rulings taking into account the marketplace

\(^{111}\) Interview on November 2009.

\(^{112}\) Finger and Shukrecht statement corroborates the conclusion of Mario Shapiro’s chapter in this book (“Rediscovering the developmental path? Development bank, law and innovation finance in the Brazilian economy”) discussing the administrative type of financial governance: “The central actor of this second type of governance is the state-owned banks and development banks. In this alternative framework [administrative governance], State takes over the responsibility for overcoming both flaws widely detected in the financial segment of less developed countries: (i) poor funding capacity of long term operations and (ii) aversion to projects that, despite the higher risk, presented relevant external effects on the economy” (footnote omitted).

standards. But, if developing countries do not have or barely have a domestic marketplace for export financing, and the international market attributes prohibited risk evaluation for their operations, there is a risk that the references will not be an appropriate basis for comparison for ECAs or other public agents granting export financing in such countries.

ASCM is the first multilateral regulation on subsidies, a result of Uruguay Round negotiations aiming at reviewing the Articles VI and XVI of the GATT, as well as the Subsidies Code signed by few parties to the GATT during the Tokyo Round (Brazil was not part of it). The previous regulation consolidated by the Subsidies Code during the GATT period, as well as the ASCM, is a receptor of ideas first delineated in the Organization for Economic Cooperation and Development (OECD) arena. In the WTO a clear example is the Illustrative List on Prohibited Subsidies (Annex 1 to the ASCM), which content was

---

114 Pursuant to the interpretation of WTO Appellate Body about the term “benefit”, in the WT/DS70 – Canada measures affecting the export of civilian aircraft, par. 157: “We also believe that the word ‘benefit’, as used in Article 1.1(b), implies some kind of comparison. This must be so, for there can be no ‘benefit’ to the recipient unless the ‘financial contribution’ makes the recipient ‘better off’ than it would otherwise have been, absent that contribution. In our view, the marketplace provides an appropriate basis for comparison in determining whether a ‘benefit’ has been ‘conferred’, because the trade-distorting potential of a ‘financial contribution’ can be identified by determining whether the recipient has received a ‘financial contribution/ on terms more favourable than those available to the recipient in the market.” (italics added)

115 For a compilation of the documents and proposals during the Uruguay Round concerning the ASCM negotiation, check: http://www.worldtradelaw.net/history/urscm/urscm.htm (database available upon subscription) (February 2008).

116 General Agreement on Tariffs and Trade (Sept. 20, 1986). Multilateral Trade Negotiations - The Uruguay Round - Ministerial Declaration on the Uruguay Round (Punta Del Este Declaration), MIN.DEC. ”Negotiations on subsidies and countervailing measures shall be based on a review of Articles VI and XVI and the MTN Agreement on subsidies and countervailing measures with the objective of improving GATT disciplines relating to all subsidies and countervailing measures that affect international trade. A negotiating group will be established to deal with these issues.”

117 The history of international negotiations in the area of export credits date back to the 1950s. The forum in which it took place was the Organization for European Economic Co-operation – the OECD predecessor until 1961. At that point started the GATT-OECD marriage on the regulation of export credits. See for further details on this relationship, Michelle Ratton Sanchez Badin, ‘The WTO and the OECD rules on export credits: a virtuous circle? The example of the Embraer case and the 2007 civil aircraft understanding’ (2008), Direito GV Working Paper n. 29 (Available at <http://www.direitogv.com.br>).

118 Notwithstanding GATT rules lack even the definition of a subsidy at the time it was negotiated, Article XVI.4 established the commitment of eliminating export subsidies by 1958. The first step on that direction was
under decisive litigation in the Embraer case. OECD has, for example, assumed a central role in the process of creation of new rules, specifying the technicality of new terms and arrangements on export credits (one of the modalities of subsidies)\textsuperscript{119}. OECD also supervises a Sector Understanding on Export Credits for Civil Aircraft (acronym ASU) that establish specific rules and standards for trade finance to both the medium and the large jets industries. ASU was first negotiated in 1986, but revised and amplified in 2007, among OECD members and a couple of other invited state parties. Brazil joined ASU commitments in 2007 for the reasons discussed in section 4.C below. A similar initiate restricted to a bilateral ruling on “level playing field” of financing terms is the EU-US Agreement on Trade in Large Civil Aircraft, dated 1992.

The fact that those regulations on governments’ financial support open multiple entries for negotiation and analysis of compliance at the international level has a strong impact in the operation of the civil aircraft market, as well as in government relations with the private actors, and in any public arrangement by the main producer states concerning the sector. The decision-making fora and the criteria applied to the export financing established in the multilateral, the plurilateral and the bilateral levels are increasingly key elements for the civil aircraft producers in defining their strategy towards the global market. Brazil has strengthened its relationship with such legal frameworks as from the Embraer case brought by Canada in the WTO in 1996, this may be considered the landmark of Embraer being recognized as a global player in the civil aircraft market.

4.b Embraer elected as the national champion in a period of no industrial policy

One of the main arguments for the unusual success of Brazil as a developing country in a reduced group of players for the production of a high technology product is attributed to the

\footnote{119 In 1978, OECD Members signed the first version of the OECD Arrangement– a set of rules aiming to secure the level playing field among its signatories on export credits Rolf Geberth explains the origin of the OECD Arrangement and the club format of the negotiation taking into account the historical context of the time: “In the beginning of the 1970s there was increasing competition in export financing, mainly between the Member States of the European Community, the United States and Japan. For the exporting countries, the situation deteriorated seriously after the beginning of the first oil crisis in 1973.” Rolf Geberth, 'The Genesis of the Consensus', in OECD, \textit{The Export Credit Arrangement: achievements and challenges 1978-1998} (OECD: Paris, 1998), 27-31, at 27.}
industrial organization of the sector in Brazil restricted to one sole company as the national champion, namely Embraer\textsuperscript{120}.

Embraer – Empresa Brasileira de Aeronáutica S.A. was created in 1969 as a Brazilian state-controlled company\textsuperscript{121}. After years of proficient operation, the 1980s debt crisis seriously affected the company results. In the beginning of the 1990s, Embraer had to reduce its workforce and to rearrange its production process, postponing and canceling significant projects, as well as any new venture. After the breakdown years, by the end of 1994, Embraer was finally privatized. Kanatsu concludes that the ownership structure of Embraer is a positive differential for the company, as it took “advantage of both private and public enterprise”, and “(b)y making Embraer semi-private, the government was able to avoid legally binding bureaucratic control procedures of wholly government owned enterprise like Petrobras and Electrobras”\textsuperscript{122}.

The changes did not remained at the ownership level, but they also took place at the managerial culture of the company. According to the Embraer’s public statement, after the privatization: “Embraer embarked on a sweeping cultural and business transformation which culminated in its recovery and return to growth, spurred by the EMB-145 project, later renamed ERJ-145”\textsuperscript{123}. Roberto Bernardes describes such change from a technology-oriented management towards a more financially-oriented management\textsuperscript{124}.

ERJ-145, a regional jet, helped Embraer to take off from such critical scenario, moving the focus of the company’s production to executive aircrafts, a specific market segment with high growth potential. In the beginning of the 1990s, Embraer ERJ-145 disputed with Bombardier CRJ-500 the selling of 150 jets for two regional air transport companies in the United States, ASA and COMER. ERJ-145 at that time was appointed the best airjet due to its technical performance and best price. However, Embraer could not succeed, as it could not offer good conditions for the financing of the operation. According to Bernardes, this episode brought

\textsuperscript{120} Kanatsu, “Choice of national strategy”.

\textsuperscript{121} The aircraft industry is highly dependent on state financial support, either having the state as a shareholder (if not the case of fully state-owned companies), or being base on programs of support. In most cases, considering the international market, the aircraft industry is identified with the concept of national champions for special public policies of support and regulation. See for further details Bluenote (1981) and Nina Pavnik, “Trade disputes in the commercial aircraft industry” (2002), 25 \textit{The World Economy}, 733-51.

\textsuperscript{122} Kanatsu, “Choice of national strategy”, at 14.

\textsuperscript{123} Cf. Embraer \textit{Annual Report 2009}, at 8 (Available at <www.embraer.com>. Last access: June, 2010).

\textsuperscript{124} Bernardes, \textit{O caso Embraer}, at 13 and ff.
important lessons for the company and the Brazilian government, including the policy makers\textsuperscript{125}. At that time, Embraer and the Brazilian National Bank for Economic and Social Development (acronym in Portuguese BNDES) started their partnership towards the foreign market, on the support of Embraer foreign sales\textsuperscript{126}.

Following the example of other counties – such as the United States, Canada and a couple of European countries – the BNDES and the Brazilian government revised and renewed their export credit programs, as well as the architecture for the guarantee of export credits\textsuperscript{127}. In 1990 BNDES first revised the FINEX for pre-shipment export credits, and in 1991 post-shipment programs, although all focused on capital goods. Additionally, Banco do Brasil, a Brazilian mixed capital bank that works both as commercial and development bank on behalf of the National Treasury, launched two other programs on export credit: the PROEX export credits; and the PROEX equalization of interest rate\textsuperscript{128}. Both systems had operated under FINEX during the 1970s, and they were renewed for the new era. Interesting to note that Banco do Brasil, as well as BNDES, performs export credit support like the export credit agencies in other countries\textsuperscript{129}.

\textsuperscript{125} Bernardes, \textit{O caso Embraer}, at 61.

\textsuperscript{126} The credit lines available to the aircraft sector up to that moment were much more related to technological development than to sales. This strategy was also related to the business model of Embraer, see footnote 92 above.

\textsuperscript{127} See Pedro da Motta Veiga and Roberto Magno Iglesias. “Políticas de Incentivo às Exportações no Brasil entre 1964 e 2002: resenha de estudos selecionados”, \textit{Temas de economia internacional}, Brasília, SEAIN/Ministério da Fazenda, December 2003. According to the authors it was considered at the time the possibility of entrusting such activities to a private EximBank, however the alternative was completely abandoned by the 1990s (at 16).

\textsuperscript{128} PROEX export credits provides direct financing to the industry and the government lends a portion of the funds required for the transaction. PROEX interest equalization grants to the financing party an equalization payment to cover, at most, the difference between the interest charges contracted with the buyer and the cost to the financing party of raising the required funds. PROEX equalization of interest rate PROEX is today regulated by Law N. 10,184, dated as of 12 February 2001 (replacing Law N. 8,187, dated 1 June 1991. According to the Brazilian Constitution, Art. 52, V and VII, the Senate is in charge of approving any external financial operation undertaken by the Union; and of settling the limits and conditions on foreign credit. However, although PROEX may involve this kind of operation, it was excluded from the Senate competence by the Resolution of the Senate N. 50/1993 (Article 1.2).

\textsuperscript{129} BNDES recently re-organized its internal structure in order to consolidate all its operations towards export promotion under the BNDES ExIm programs. This is also part of an initiative to reform the whole system, merging the programs with Banco do Brasil together with the National Treasury, under the Ministry of Finance,
Such reforms in the financial public system were part of a larger revision of government’s bureaucracy and programs as from mid-1990s. After a period of unilateral liberalization and attachment to policy space restricting commitments at the multilateral level, that changed the macroeconomic domestic policy and the provoked the dismantlement of many institutions at instances of coordination and implementation of trade policy, the trade system bureaucracy started to be redesigned as of 1995 with the creation of the CAMEX (the Foreign Agency)\textsuperscript{130}. According to Veiga and Inglesias, such reforms were motivated by the increasing deficits in the commercial balance (related to the implementation of the Real Plan based on an overvaluated currency) and the decrease of credits available in the international market. In addition to the export credit programs, involving both the BNDES and the Banco do Brasil, a private company was created in 1997 to guarantee the operations of export credits: the Brazilian Export Credit Insurance Company (acronym in Portuguese SBCE)\textsuperscript{131}. As a result, by the end of the 1990s, Brazil had re-activated its system of export credits based on three main pillars: the BNDES-Exim, Banco do Brasil-PROEX and its equalization program, and the insurance system on export credits.

\textsuperscript{130} CAMEX, a multi-ministerial agency dealing with foreign trade issues, in a centralized way affiliated to the Presidency at the time, assumed the role of CACEX that operated until the 1980s. CACEX was linked to Banco do Brasil, and it was in charge of promotion, financing and other forms of support of the foreign trade. Along the 1970s, CACEX implemented a series of financing programs taking advantages of a favorable exchange rate. See Pedro da Motta Veiga, Roberto Magno Iglesias, ‘Políticas de Incentivo às Exportações’, at 9.

\textsuperscript{131} SBCE was implemented by Decree N. 3,937 (September 25, 2001) as a private company, having as its main shareholders Compagnie Française d’Assurance pour le Commerce Extérieur (COFACE) and Brazilian banks (including the public development ones, Banco do Brasil and BNDES). Although SBCE became a key agent in the insurance for export credits, its activities are limited to non-political risks and to assure the acquisition of capital goods from 180 days up to two years. Political risks and commercial risks above two years remained under the responsibility of the Brazilian government, through the Export Guarantee Fund, created by Law N. 9,818 (August,1999) linked to the Ministry of Economy.
Embraer restructuring process coincided with the public financing reorganization, and the company became one of the main beneficiaries of Banco do Brasil programs of export credits. From 1996 to 1997 the finance programs, including the Proex-equalization, grew significantly both in available economic resources and operational capacity. The restructured system was though condemned for being very bureaucratic and unclear for most of the Brazilian exporters, resulting in the fact that few large exporters had access to the system – Embraer was part of this restricted group.

The main program that benefited Embraer was the interest equalization program (PROEX-equalization), by which the National Treasury grants to the financing party an equalization payment to cover, at most, the difference between the interest charges contracted with the buyer and the cost to the financing party of raising the required funds. According to Moreira, Tomich and Rodrigues this program aims at impairing the difference of interest rates applied to the contracted finance relation and the costs of hiring the finance for the sale, in order to let the financing costs closer to those practiced in the international market. Therefore, the beneficiary of Banco do Brasil Proex-equalization payments is the commercial bank, either public or private, that grants the credit line for the operation. Due to the political and economic characteristics of Brazil at that period (early 1990s), the risks for a Brazilian to get money were very high, increasing the risk and therefore the applied interest rate – named as sovereign risk or as “custo Brasil”.

---

132 See Heloiza Camargos Moreira and Marcos Paraniello. Os incentivos às exportações brasileiras: 1990 a 2004. Brasília, Cepal/Ipea, Nov. 2005. The authors describe that the allowances to the aircraft sector in Brazil (mainly if not exclusively represented by Embraer) in the second half of the 1990s were concentrated in the equalization program of Banco do Brazil, being the conditions defined by COFIG (the Commission on Export Credits and Guarantee). They calculate that Proex/Equalization program financed US$ 49 billion of exports from 1994 to 2006, responding to 5.5% of Brazilian exports during that period. A positive evaluation of Banco do Brasil PROEX system for the support of exports mainly in sectors of high technology is stated by Sérvulo Vicente Morreira, Adelaide Figueiredo dos Santos, Políticas Públicas de Exportação: o caso do PROEX, IPEA Texto para discussão, Brasília, outubro de 2001.

133 It is true that Embraer in a certain sense did not benefit from those reforms, as the operational advancements were implemented in accordance with the horizontal industrial policy that prevailed in Cardoso’s administration. About such reforms in the credit finance system, see Veiga and Iglesias, Políticas de Incentivo às Exportações, at 16.


The PROEX-equalization helped Embraer become one of the largest aircraft manufacturers in the world. According to Kanatsu, “(w)ithout this commitment by the government of Brazil [to finance Embraer’s sales] so that long-term loans become available to airlines buyer, it would have been impossible for Embraer to sell its aircrafts.” Embraer successful results in certain bids made the presence of Embraer in the global market for small and medium jets notable, disarranging previous structures of the market. This was a reason to call the attention of Bombardier, the largest producer and seller of medium jets at the time, to question the reasons for such a good performance before the WTO dispute settlement system.

4.c The Embraer case in the WTO and the hidden limits to the multilateral trade system and developing countries

In 19 June 1996, Canada formally requested consultations with Brazil under the WTO dispute settlement mechanism, and, in 13 July 1998, after a sequence of unsuccessful negotiations from 1996 to 1998, Canada requested the establishment of a WTO Panel.

Canada complained that PROEX interest equalization payments were made in the form of installments or lump sums, and it had benefited, mainly, the sales of Brasilia 120 model to Skywest, Great Lakes Airlines, Rio Sul, as well as of ERJ-145 model to American Eagle; British Regional; Portugalia; Regional; Rio Sul; Siv Am; Wexford; Continental Express; Trans States; Luxair; City Airlines. Canada was also reticent with the commitment of phasing out subsidies by 31 December 2002 (Article 27 of the ASCM), as the level of PROEX and BEFIEX expenditures had increased since 1 January 1995, the date of entry into force of all WTO agreements. According to the information delivered by the Brazilian authorities to the

137 Kanatsu, “Choice of national strategy”, at 13. The author explains that: “In Brazil, Embraer, as a company from a developing country, could be expected to face problems in financing sales. Aircrafts are expensive to buy and private financing would favour better known aircraft models from tested aircrafts rather than a new aircraft producer without prior success. Brazil’s Embraer have had thus to rely on Bank of Brazil’s subsidy to finance its sales”, at 13 (bibliographic references omitted).
138 Interview with Embraer employee, June 2009.
139 See WT/DS46 – Brazil – Export Financing Programme for Aircraft. Documents and detailed information available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds46_e.htm (last visit: January 2011)
panel proceedings the total expenditure of PROEX and BEFIEX for the period in question was the following:

<table>
<thead>
<tr>
<th>Year</th>
<th>Total Expenditures* (current US$)</th>
<th>Total Expenditures (1994 constant US$)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1994</td>
<td>339.6</td>
<td>340</td>
</tr>
<tr>
<td>1995</td>
<td>269.5</td>
<td>263</td>
</tr>
<tr>
<td>1996</td>
<td>286.7</td>
<td>275</td>
</tr>
<tr>
<td>1997</td>
<td><strong>412.5</strong></td>
<td><strong>389</strong></td>
</tr>
<tr>
<td>1998 **</td>
<td><strong>537.8</strong></td>
<td><strong>502</strong></td>
</tr>
</tbody>
</table>


* PROEX payments appear as expenditures in the year the bonds are issued.

** PROEX expenditures January-October.

Based on that, Canada challenged PROEX interest equalization qualifying the payments as prohibited subsidies, pursuant to Article 3 of the ASCM\textsuperscript{141}. The case interestingly brought into light two exceptions to the ASCM general rules: Article 27 provisions for developing countries, and item (k) of the Illustrative list in Annex I to the ASCM.

According to Article 27.1 of the ASCM “subsidies may play an important role in economic development programs of developing country Members”. In that sense, the paragraphs of Article 27 established three categories of exceptions to Article 3 prohibition on export subsidies: (i) least-developed countries listed in item (a) of Annex VII of the ASCM; (ii) some other low-income countries recited in item (b) of the same Annex VII until their GNP per capita has reached $1,000 per annum; (iii) other developing countries. The latter group should phase out their export subsidies within the eight-year period, as per Article 27.4, preferably in a progressive manner. An eventual extension of such term could be admitted if approved by the Subsidies and Countervailing Measures Committee\textsuperscript{142}.

Canada advocated three relevant conditions for the application of the exception of Article 27.4; (i) export subsidies must be phased out within the eight-year period; (ii) the level of export


\textsuperscript{142} The latest decision in this sense was issued in 2007, when the Committee approved a list of nineteen countries to which the extension was granted until December 2013. This extension may be renewed for no more than two years. See WT/L/691 - General Council - Article 27.4 of the Agreement on Subsidies and Countervailing Measures, July 31, 2007.
subsidies must not increase during that period; and (iii) export subsidies must be eliminated within a period shorter than eight years when the use of these subsidies is not consistent with the Member's development needs. The Panel concluded that as per the evidences Brazil had planned to continue to issue bonds, and thus to grant PROEX interest rate equalization subsidies, beyond 31 December 2002. Moreover, the Panel assumed that such commitment had had an effect on the marketplace by “allowing EMBRAER to conclude export contracts for deliveries of regional aircraft to occur, and for subsidies to be granted, after the end of that period”. The Panel then concluded that Brazil failed to comply with certain conditions of Article 27.4 of the ASCM and the prohibition of Article 3.1(a) of the ASCM should therefore be applicable to Brazil. Instead of taking Article 27 of the ASCM as a guiding principle for the whole agreement, according to Howse, Smith and Smith, the Panel ruled on the sense of whether “a special and differential treatment exists in a WTO Agreement the other provisions should be interpreted in a manner that is blind as to the equities as between developed and developing country members”. Such interpretation not only had dramatic consequences to the case, but it was a serious nuisance to Brazil, one of the leaders of developing countries movement as from the 1960s, enlightening the limits for the application of special and differential treatment in the WTO agreements as from its first years.

If Article 27 of ASCM is considered a special and differential treatment for developing countries, another safe haven exempting from the application of Article 3 was revealed by the Embraer case: the paragraph 2 of item (k) in the Illustrative list of export credits, which implicitly refers to the OECD Arrangement on Officially Supported Export Credits (OECD Arrangement). Canada, the European Communities and – to a certain extent – the United

---

143 WT/DS46/R – Report of the Panel, par. 7.42.
146 Item (k) provision is an evolvement of the first negotiations for a list of prohibited exported subsidies, and it has kept a close relation with the contents of the negotiations undertaken by OECD members since the 1960s. Article XVI.4 of the GATT had established the commitment of eliminating export subsidies by 1958, but the first step in that direction was taken by a French proposal, in November 1960, to prohibit the Parties to grant export subsidies to non-primary products. France also suggested a list with a certain number of practices that should be prohibited by consensus – this is known to be the origin of Item (k) of the ASCM Illustrative List. In a previous work, I have described in detail the historical negotiations on subsidies in the multilateral trade system
States – all OECD Members, advocate in favor of an interpretation that could take the allusion to the OECD Arrangement as the core part of Item (k), claiming for an equitable application to all WTO members of the reasoning, be they developed or developing countries. Brazil unsuccessfully argued in favor of developing countries, aiming at flexibilities for developing countries in Item (k) and limits on the acceptance of OECD benchmarks.\footnote{According to Brazil, besides the implicit exception to Article 3 to the OECD standards in the second paragraph of Item (k), an \textit{a contrario} interpretation of the two paragraphs of Item (k) should favor developing countries (non-OECD members). In addition to this, Brazil tried to assure how OECD standards – if taken into account to all members – should be taken into incorporated in the interpretation of the ASCM, limiting to the OECD agreement as of 1979. Cf. WT/DS46/R – \textit{Report of the Panel}, par. 7.15.}

Howse, Smith and Smith qualify the rejection of Brazil’s claims as: “(t)he panel curtly and almost scornfully rejected Brazil’s approach.”\footnote{Howse, Smith and Smith, “Pursuing sustainable development strategies”, at 203.}

As a result, the Embraer case rulings in the WTO dispute settlement system had the following outcomes: (i) named the undertaking of the second paragraph of Item (k) as the OECD Arrangement; (ii) decided on the extent that the standards of such Arrangement should be incorporated in interpreting Item (k) – i.e. the whole content of the Arrangement and its annexes; (iii) decided on the extension of the OECD Arrangement rationale to the first paragraph of Item (k) – including its connection to the “material advantage” issue; and (iv) confirmed that the allusion to the OECD Arrangement is to be understood according to its dynamic negotiation, i.e., any new arrangement in the OECD replacing the 1979 undertaking is to be considered by the WTO (as well as the annexes in force).

The question about developing countries needs’ was, therefore, understood in the following terms: developing countries, as any other WTO member, may use the exception allowed by the second paragraph of Item (k) – applying the OECD standards.\footnote{WT/DS46/R – \textit{Report of the Panel}, footnote, par. 7.29 - 7.32. Panel report (art. 21.5), footnote, § (v).} Howse, Smith and Smith challenged such conclusions: “The benchmarks in paragraph (j) and (k) for deciding whether or not a trade financing measure should be classified as an export subsidy presuppose the mature capital markets and sophisticated risk spreading and allocation vehicles typical of fully developed economies. Whether they are also appropriate for developing countries, especially ones that have had access to private capital severely limited due to debt and/or other financial crises is questionable.”\footnote{Howse, Smith and Smith, “Pursuing sustainable development strategies”, at 203. On the same sense, Brazil’s}

Reactions to the rulings by the dispute settlement system were also put across by a limited group of WTO Members during the meetings of both the DSS and the Committee on Subsidies and Countervailing Measures. Members discussed the issue not only on specific elements of the export credit regulation but also on the systemic impacts of the evidenced link between OCDE and WTO. These manifestations have even given rise to proposals of amendment of the ASCM in the Doha Development Round, under the leadership of Brazil.

At the level of the WTO, Embraer case is considered as one of the unresolved cases. After the implementation panel and appellate body review, Canada obtained the right to retaliate in a maximum amount of C$344.2 million per year (equivalent to US$233.5 million at the time), considered as the largest compensation package the WTO authorized until then. Andreas Goldstein quote the following Brazilian administration statement about the threat of sanctions: it “could make it difficult or even impossible for Brazil to seek alternatives which would prevent an irrational escalation of the dispute, with the capacity to set off counter-retaliations or other measures that would damage the economic and commercial relationship in different areas”.

The revised versions of PROEX were still questioned by Canada, under article 21.5 of the DSU concerning the implementation process. In 26 July 2001, the original panel ruled that

---


153 The Members that have presented formal proposals are Brazil, India and the European Communities.

the third revision of PROEX was duly justified under the second paragraph of item (k) of the
Illustrative List of Export Subsidies of Annex I of the SCM Agreement, as it adopts the CIRR
as the reference for the applied interest rate to each financing operation. During the
approval of this decision, at the DSB meeting, Brazil stressed the concern that OECD
standards had to be adopted by Brazilian authorities in the revision of the program, what
meant that “the WTO had completely delegated the authority to make the export credit rules”
to the OECD. Canada kept suspicious about Brazil’s commitment to implement the new
revised version PROEX, and closely followed the financial operations of Embraer.

Coincidence or not, in 2004 a new process of revision of the OECD Export Credit
Arrangement started, and, in 2005, the revision of ASU. By the end of 2004, Brazil was
formally invited to be part of the ASU review and in February 2005 together with the other
participants it started the joint work. The ASU as one of the annexes to the OECD
Arrangement, to a certain extent, assumes the same rationality of the latter: it is negotiated
by a restricted club of invited participants; it attaches a great importance to predictability and
confidence; it is highly technical; it depends on co-operation of participants and the

155 WT/DS46/RW2 – Brazil - Export Financing Programme for Aircraft - Second Recourse by Canada to
156 WT/DSB/M/108 - Dispute Settlement Body - Minutes of Meeting - Held in the Centre William Rappard on
157 WT/DSB/M/108, par. 60.
158 As per information published by the OECD about the 19th meeting of the Group on Sector Understanding on
Export Credits for Civil Aircraft, held 22-23 February 2005. Available at: http://www.oecd.org (November
2007). Brazil accepted to be part of the negotiations upon the condition that it would have access to all meetings
and information available, and that it could leave the negotiations at any time.
159 According to the WTO panel, ASU is considered as a constitutive part of the OECD Arrangement for the
purposes of Item (k), second paragraph exception: “We note that several ‘Sector Understandings’ (relating to
ships, nuclear power plants, and civil aircraft) are annexed to the Arrangement, and that for some products – not
including regional aircraft – a minimum interest rate different from the CIRR applies. We assume – but need
not here decide – that an export credit practice in conformity with the interest rate provisions of these Sector
Understandings would also be entitled to the safe harbour of the second paragraph of item (k).” Cf WT/DS46/R
– Report of the Panel, par. 6.51 (footnote 51).
160 According to Janet Levit: “The Arrangement is the handiwork of an ad hoc institution, the Participants
Group, composed of government technocrats associated with their home export credit agency. The lawmakers,
one again, are practitioners, and once again, the rules are anchored largely in their practical experiences.” Cf.
Janet Levit, "A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance
containing system amongst participants and, finally, as part of its essence, it is a continuous and very dynamic regulation.

Goldstein commented on the impact that such new forms of regulations – on a club model basis – could favor a country like Brazil and its strategies: “a more immediate lesson from the Brazil-Canada WTO saga, albeit perhaps one devoid of normative value, is that non-OECD countries are probably more easily caught out when practicing strategic trade policies — possibly because they do not sit at the table where the negotiations to regulate export subsidies take place”\textsuperscript{161}.

Negotiations were closed by 2007, and Brazil was described as a very much active participant in the process\textsuperscript{162}. The previous experience of Brazil in the WTO/DSS sustained its capacity of negotiation and articulation of technical expertise from the private sector during ASU negotiations. Embraer case was the most relevant challenge for Brazilian diplomacy after the Uruguay Round, and it was the embryo of the three-pillar strategy developed by Brazil before the WTO dispute settlement system, benefiting by trained diplomats on trade issues base in the MFA in Brazil, other diplomats based in Geneva working directly with the WTO, and the private sector expertise and economic support\textsuperscript{163}. The same articulation with the private sector was fundamental to support the diplomatic negotiations of the ASU at the OECD level.

At the moment the ASU negotiation started, Roberto Azevedo, the main diplomat in charge of Embraer defense since the beginning of the case before the WTO, was the chief of the Economic Division in the MFA. He coordinated the negotiations with the same group inside Embraer, together with SBCE and an enlarged group of government agencies involved on the financial schemes of export credits, such as the Ministry of Economy, the National Treasury, line

\begin{flushright}
\textsuperscript{161} Andreas Golstein, \textit{Embraer}, p. 114. Canada queria impor um mecanismo de supervisão conjunta com base no 19.1 do ESC - Canada requests that we suggest, pursuant to Article 19.1 of the DSU, that the parties develop mechanisms that would allow Canada to verify compliance with the original recommendation of the DSB. Canada notes that Brazil has a reciprocal interest in verifying Canada's compliance in a parallel dispute, Canada – Aircraft. Canada emphasises that it is not seeking a continuing role for the Panel in proposing such verification procedures, nor is it requesting that we impose such procedures. Brazil responds that, although it does not in principle oppose an agreement with Canada on reciprocal transparency, it does not consider that it is an appropriate matter for a suggestion under Article 19.1 of the DSU, but is better left to be agreed by the parties. Brazil notes that any such agreement would have to involve balanced and truly reciprocal offers of transparency (par. 7.2, WT/DS46/RW – May 2000).
\end{flushright}

\begin{flushright}
\textsuperscript{162} Interview with a servant of the OECD Secretariat on February 2008, on file with the author.
\end{flushright}

\begin{flushright}
\textsuperscript{163} Shaffer, Sanchez Badin and Rosenberg, “The trials of winning at the WTO”.
\end{flushright}
BNDES and the Ministry of Development, Industry and Trade. ASU negotiations had a specific structure that included an Expert Group mainly composed by private agents, such as aircraft industries, banks and other financial institutions. This group contributed with the technical details about the markets involved and the projections of a feasible agreement, as a relevant input for the diplomatic representatives negotiating inside the secret rooms. Private agents have also gotten more familiarized with diplomatic negotiations dynamic, being more comprehensive to the bargaining process involved.

There was also a very clever dynamic inside of the MFA in dealing with the forum shift. If in a first moment the same group that worked in the WTO case conducted the negotiations, increasingly the agenda migrated to the Division of Rules in the MFA and the group of diplomats working in the Embassy in Paris before the OECD. The staff of these two instances (Division of Rules and Embassy in Paris) was also increased in order to attend the new demands before the OECD, including the ASU negotiation.

ASU became then a new forum for Brazil to pursue its policies together with the main agents of the global civil aircraft financing market. And, being in a more informal and technical space, ASU negotiations is able to closely follow the dynamics of the market. Although the last agreement was signed in 2007, as from 2009 the parties are discussing the new terms for the classification of the market due to new products that are in between the classification of medium and large aircraft, under development by Bombardier and Embraer.164

The enlargement of negotiating space is evident in the open process in the OECD since 2009. Besides the structural change in the market (medium and large aircrafts), the financial crises seriously affected the civil aircraft business.165 The largest consumers of commercial jets are

---

164 ASU regulates differently two markets; regional jets and large civil aircraft. Following Bombardier, Embraer is also developing new larger models and it might be interesting for the company to be ready for the new negotiations and rules to be settled. For more details about those two markets, the companies and governments engaged in it, see Michelle Ratton Sanchez Badin, Public and private actors redefining the WTO adjudicatory system role in the global arena: examples from the civil aircraft business, paper discussed at Workshop on Socio-Legal Aspects of Adjudication of International Economic Disputes – IISL, July 15-16, 2010 and ASIL-subgroup meeting in November 2010.

165 According to the OECD note, Sector Understanding on Export Credits for Civil Aircraft: 7th Consultation with the Aviation Working Group (21 November 2008), “the AWG and the Participants to the Sector Understanding on Export Credits for Civil Aircraft (the ASU) met to exchange views on the implementation of the ASU which has been in force since July 2007. The discussions focused on: 1. AWG proposals for a uniform risk-pricing model in the ASU, 2. the procedure for classifying a new aircraft model under the ASU, and 3. the
based in the United States, the main economy affected by the crises. E.g. in the case of Embraer, the North American market responded to 43% of its revenues in 2008, having had a decline to 13% in 2009\(^{166}\). In order to reduce the risk of canceling and suspension of sales agreed by Embraer before the crises, BNDES and Fundo de Garantia às Exportações (FGE) made available credit lines to civil aircraft buyers. The financial crises severely changed the financing of Embraer sales in the last three years: if in 2008 Embraer was proud of its independence from Brazilian public finance that answered to almost 10% of the company total sales\(^{167}\), the amount of BNDES and FGE contribution has escalated from 30% and 35% in 2009 to 60% in 2010\(^{168}\). Such scenario was even more delicate for the companies based in the central economies, such as US, Europe and Canada. The issue has been addressed in the meetings of the OECD club group, together with the Aviation Working Group that is composed by public and private agents involved in financing operations for the civil aircraft sector.

4.d Are there development lessons to be taken from this case?

The case highlights the particularities of developing countries financial structure, its impact for a new player in the global market and the importance of the state leading the first stages of connecting the industry to the global market. Even though in this case, besides the well-known economic costs, there was a high political cost for Brazil when confronting its policy with the WTO obligations.

If in a first moment, Brazil attempted to advocate the exception of special and differential treatment, under article 27 of ASCM, to PROEX financing conditions to Embraer, finally it was subsumed to the mysterious exception of item (k) of the Illustrative List by the interpretation of the WTO panel. This interpretation challenged Brazilian diplomacy towards international economic fora since the 1960s with the creation of UNCTAD and other developing countries alliances, claiming for special conditions in international regulation.

The long process in the WTO dispute settlement system qualified Brazil and Embraer as


\[^{167}\] An Embraer director estimates that more than 90% or certainly the majority of its financial operations today are with the private financial institutions (interview in 2009).

\[^{168}\] Exame, BNDES deve financiar 60% dos jatos da Embraer em 2010, December 9, 2009.
relevant actors in the civil aircraft market, not only due to its economic and technological capacities, but also for the financing conditions and legal abilities in dealing with the international system. As a result, it opened the possibility to Brazil to be engaged in the OECD privileged forum. Such opportunity (i) granted Brazil the access to the negotiating process for defining export credit to the aircraft sector conditions; (ii) increased Brazil’s capacity to control its main competing player of Embraer, that is Bombardier, assuring fairer access to consumer markets; (ii) enlarged the negotiating space to solve the dispute at stake with Canada in the dispute settlement system, as other potential ones; and (iv) opened a second door for the discussion and supervision of export credit conditions to the sector, enabling forum shifting strategies.

D. FINAL REMARKS

The paper analyses the main legal achievements in two cases that comprehend distinct concerns for a developing country in the global trade system. If the intellectual property policy was devoted to social development concerns, the financing of Embraer aimed at economic development primarily. However, both cases confronted legal constraints for the implementation of their respective policies in the WTO set of regulation, and focused on flexibilities admitted by the system.

Flexibilities to WTO obligations – understood as exceptions and limitations to general rules or special and differential clauses – in the intellectual property and the export credit fields proven to be today more complex than the “not applicable” to X or Y country, under X or Y conditions, logic. Instead, flexibilities invoked in the cases analyzed and incorporated in the respective legal reforms in Brazil required substantial analysis of their conditions, and, in the case of intellectual property rights, the formulation of alternative concepts about the content and aims of such protection. An inference from the cases is that development claims in the WTO system need to move from a reactive agenda to policy proposals, both at the negotiation and the implementation processes.

Additionally, in the two cases under analysis, the process of implementation of flexibilities was based in both domestic and international legal tracks. Firstly, the processes were successful due to the legal capacity of public and private agents and the adequate apparatus of Brazilian state. The specialization of negotiators and creation of institutional structures inside the Ministry of Foreign Affairs to deal with specific WTO regulation, as well as their coordination with the relevant private agents, are examples of crucial elements in the implementation process of strategic developmental policy in both cases. On the other hand, at
the international level, forum shifting opportunities were vital to reinforce the discourses and to add institutional options for negotiation and bargain. Such structures are today part of the WTO governance system in each issue-area: e.g. intellectual property rights related to trade debates being addressed inside the WTO, WIPO and other UN specialized agencies, in complementary and supplementary ways.

Finally, one disclaimer: the impression on the optimism\textsuperscript{169} shall not spoil a romantic view about the cases and Brazilian policies. This is small portion of a vast complex reality, that evidences innovations and the role of law pushing new developmental policies in successful cases involving Brazil. Both cases benefited of a stable circle of relations and partnerships, but challenges still remain for their survival. To keep legal innovation attached to the economic and social changes in the concerned fields today might be amongst the most relevant one.