Developmental Responses to the International Trade Legal Regime

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DEVELOPMENTAL RESPONSES TO THE INTERNATIONAL TRADE LEGAL GAME

Examples of intellectual property and export credit law reforms in Brazil

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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 the HIV policy, 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 leveling the playing field for world exporters, which limits the 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 should not be understood solely as “models” to be replicated, but examples that may provide 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.
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A. INTRODUCTION

1. From a passive to an active role in two decades

The paper examines two cases dealing with the impacts of the global trade regime rules, implemented with the creation of the World Trade Organization (WTO) and its related agreements, on domestic regulation in Brazil, during the 1990s, and the succeeding alternative development strategies undertaken by the country. The examples are about intellectual property regulation and HIV policy and public arrangements for trade finance for the civil aircraft sector.

The two decade period from 1990 to 2010 saw a significant shift for the Brazilian economy and its policy space. If Brazil, in 1990, was among the largest external debtors in the international community, and still considered an immature democracy – the prototype of an untrustworthy economy for the world community –, today Brazil is one of the leading stars of the emerging economies and is playing an active role in international governance. Therefore, it is important to keep in mind this contrast – which may be not evident for the international community as it is not even for Brazilians, especially for its young generation - while reading the paper. Difficulties in the past, a result of the huge economic and political crisis that assaulted the country in the 1980s, basically explain the limits for legal and economic

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1 This paper was only possible with the comprehensive support of David Trubek, who made me believe that I could be successful during a challenging period of my life as a professional, a wife and a mother. I would also like to thank the rest of the LANDS research team for their supportive words even when there was a lack of response from my side. I owe gratitude to Arthur and Antonio for comprehending the intervals. I am also indebted to Flavio Prol for a preliminary research support, to Nathalie Sato and Paul Boroway for editing assistance, to Joanne Scott, David Trubek, Monica Guise, and IPEA/DINT researchers for enlightening comments, as well as to all the persons who promptly answered my requests for interviews. Most of these names are not mentioned here, but they are carefully acknowledged in my files. All errors are of my own fault.
alternatives to Brazil in the 1990s. These could only be overcome later along with the political and economic stabilization of the country.

The development policies analyzed in this paper are about intellectual property regulation and HIV policy, and public institutional arrangements for trade finance in 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 for developing countries’ policy spaces. The agreements impose high standards of regulation focusing on leveling the playing field for world exporters and thus limiting possibilities for, government intervention in those areas. However, 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. The two stories reported in this paper recount the public and private struggle in Brazil that led to modifications in the Brazilian legal system as a reaction to WTO restrictions.

2. The two examples: 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 only half of the World Bank’s projected number – approximately 600,000 – were living with HIV/AIDS in Brazil. Such decline in the epidemic was a result of a national response: Brazil was the first developing country to implement a universal antiretroviral distribution program. The program was initiated in early 1990s, and by 2010 it provided free antiretroviral medication to about 187,000 patients.

The success of Brazil’s health policy is attributed to a concerted and early government response, the foundations for which were laid by political and professional changes in the 1980s, a balance between prevention and treatment, an efficient system to collect data, and distribution of drugs. However, the main challenge for the implementation of that social policy was the cost of drugs, due to, among other, the monopoly granted by intellectual

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3 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).
property rights which reduces price competition. In order to reduce the cost of drugs and to increase the number of beneficiaries, the Brazilian government has invested in national production of drugs and promoted an aggressive strategy of negotiating the prices of drugs that are 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 declined by 12%.

The government policy was a response to a strong and effective participation of civil society groups based on a systematic advocacy of human rights in a variegated set of strategies and actions. The Brazilian policy was challenged at the World Trade Organization (WTO) dispute settlement system, provoking a new articulation by the country at the international level that mobilized international public opinion and legal strategies by the Brazilian government before selected international organizations.

(ii) According to the first measurement of emerging country risk by J.P. Morgan Chase, in 1995, Brazil was evaluated at around 1,700 points. This meant that there was a high rate of risk that Brazil might not to comply with financial commitments. Such evaluation had a serious impact on the financing terms for Brazilian exporters seeking 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, decided to focus on the commercial regional jet market, and Embraer recovered from the black days launching the ERJ-145 jet model. Four years later the company was displaying positive numbers: in 1996, Embraer had US$1,227 million in revenue, and 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, resulting in almost US$2 billion

4 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)

5 See BACEN, 2010, Risco-País – atualizado em junho de 2010 com dados até abril de 2010. Available at http://www.bcb.gov.br (Last access: December 2010). Country risk measurement became an important reference for world traders, lenders and investors by the 1980s-1990s. The rate mechanism was developed by private agencies such as Moody’s, Standard and Poor’s, Fitch and J.P. Morgan. Such indexes described the risk of credit in each country. In the case of Brazil, Moody’s was the first to evaluate the economy in 1986, in a dark moment of the country’s financial history. About ratings and the context of the Brazilian economy in the beginning of the 1990s, see Guilherme Binato Villela Pedras, ‘História da dívida pública no Brasil: de 1964 até os dias atuais’, in Anderson C. Silva et al., Dívida pública: a experiência brasileira (Brasília: Secretaria do Tesouro Nacional, Banco Mundial, 2009), at 76-77.
in exports (about 95% of the companies’ sales are to foreign markets)\(^6\).

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 during the years that it was a state-owned company) and a coordinated public-private partnership on specific topics, in particular the financing programs of PROEX for the equalization of interest rate on exports\(^7\) and related concerns. The need for a competitive financial structure for Embraer sales became evident when the Brazilian company lost a bid to Bombardier in which the buyers disregarded the best prices and technical superiority of ERJ-415 on behalf of the CRJ-500 Bombardier model, due to Bombardier’s better financing conditions and the exchange rates applicable to it\(^8\). This provoked a domestic demand in Brazil for the redesign of the domestic financing programs in order to support Embraer and support the more general national project to increase the country’s participation in international trade of high technology products.

The rest was PROEX whose rules and conditions were questioned by Canada before the WTO dispute settlement system. Consultations started in 1996, and the establishment of a panel was requested in 1998, putting into action one of the lengthiest cases in the WTO\(^9\). This experience strengthened the public-private partnership between Embraer’s executive staff and the elite bureaucracy in Brazil from two of the most traditional ministries in the country – the Ministry of Foreign Affairs and the Ministry of Finance. This partnership continued to work in other relevant issues for the sector at the international level. While the case involved actions by the WTO dispute settlement mechanism and the amendment of the Brazilian law,

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\(^7\) PROEX was created by Law No. 8187, June 1\(^{st}\), 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 *Temos de Economia Internacional* (Brasília: REDIPEA/BID, 2000), vol. 2.


one of the most significant outcomes was the invitation to Brazil to join a selective center of norm-setting and decision making on export credit programs to the civil aircraft industry.

What do these two cases have in common? They are examples of the challenges imposed by international regulation to domestic developmental policies. In both cases, Brazilian policies ran into restrictions imposed by WTO agreements, namely the Trade-Related Intellectual Property Rights (TRIPS) and the Agreement on Subsidies and Countervailing Measures (ASCM). This article discusses 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 showing how the challenge posed at the international level favored new legal developments in Brazil, provoking the change of legal tools used by both government institutions and the concerned stakeholders (business and civil society groups), nationally and internationally.

3. The law and development perspective on 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 dissemination of answers to the debt crisis of the 1980s promulgated by the International Financial Institutions and dubbed the “Washington Consensus”10.

At the international level, those changes were stimulated by the World Bank and the International Monetary Fund’s structural adjustment policies which imposed trade and investment liberalization as conditions for their financial support,11 as well as by the

11 See Robert Gilpin, Global Political Economy: Understanding the International Economic Order (Princeton:
proliferation of trade regimes at different levels (bilateral, regional and multilateral), including the institutionalization of the WTO.\textsuperscript{12}

Created in 1994, the WTO 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.\textsuperscript{13} 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.\textsuperscript{14} Although supported by those advocating for economic growth and financial stability, the WTO regime has been severely questioned by development thinkers.\textsuperscript{15} The concerns of the latter group are mostly related to the magnitude of WTO rules and their restrictions on the space left for the development of economic and social policies at the domestic level.\textsuperscript{16}

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\textsuperscript{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 centered; 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.


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

This article applies the analytic framework of the law and development debate\textsuperscript{17}, investigating the role law played in social and economic change. The purpose of the paper is to contrast the commitments to 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 with the concerned stakeholders and regulation have been articulated in order to promote policies aligned to Brazil’s developmental interests.

In the 1990s, affected by Washington Consensus recommendations, Brazil put into operation a neo-liberal conception of trade regulation by simply adopting all the WTO agreements as domestic law\textsuperscript{18}. Such measures presumed a reduced participation of the state in the economy and limited government ability to make policies that might affect trade. This chapter explores the moves that followed wholesale incorporation of WTO norms into Brazilian law showing the extent to which resistance to these norms signals a new stage of development policy and thus of the use of law. Trubek and Santos delineate a couple of characteristics defining this third moment in 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’”\textsuperscript{19}.

The two short stories opening this paper point to a shift in Brazil from an acquiescent posture in adopting international trade standards to a conscious reaction with respect to strictures thought to deter adoption of regulation deemed necessary to promote development in Brazil.


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

Both cases explore approaches taken by the Brazilian government after the conclusion of the Uruguay Round and the coordination of actions in order to make room for domestic processes affecting and affected by international trade regulation.

Basic principles of how to organize economic activity are the points 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 economic activity is one the essentials of trade finance analysis – whether it promotes or inhibits fair competition among different markets.

Both cases are positive stories of how in Brazil the state and domestic private agents learned to think and to mobilize globally, making use of national and several international fora to push policies closer to the country’s social and economic needs. The questions raised 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 and can they be replicated in other sectors?

The paper is divided into three sections besides this introduction. Section B provides the reader with contextual information about the impacts of the 1980s debts crisis and the neoliberal discourse on the domestic political arrangements and legal reforms in Brazil. Section C details the two stories, highlighting the socio-legal features that favored key alternative policies including a more active role of the state and a revision of the definition of its priorities in a democratic and more exposed economic environment. Finally, Section D contains a brief conclusion.

B. KEY REFORMS ON THE TRADE FIELD IN BRAZIL

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22 In that sense, the methodology applied in this paper establishes a dialogue with Alvaro Santo’s concept of “pragmatic developmentalists”. According to Santos, this group of scholars closely looks “at the rules in operation and at how strategic actors help to shape and transform these rules over time”. See his chapter in this book, Alvaro Santos, ‘Carving out policy autonomy for developing countries in the WTO’. 
This section sets out the main political, economic and ideological forces behind the reforms of the trade field in Brazil starting in the 1990s and focusing mainly at the domestic level. This context is necessary to understand the evolution of legal reforms in each of the cases analyzed in the chapter.

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 with international standards that promised to increase of investment and trade (and therefore of wealth). This movement had its foundation in the exhaustion of the import substitution developmental potential – including its costs – as well as pressure for the adoption of neoliberal policies from within and without 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); and (ii) the harmonization of national economic regulation towards an open economy. Both shared the need for a retreat of the Brazilian state from economic activities.

In 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 as either dismantled or reframed and number of legal reforms were undertaken. Largely as a pragmatic response to pressures from IFIs and the obligation to incorporate WTO norms, the

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24 Part of the reformist perspective was associated to an authentic critical evaluation by local actors, mostly people connected to CEPAL works. See Baumann, ‘Brasil’.

25 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’.

26 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).
reforms were not enacted as a coherent, overall change in development strategy, but as a flexible and mostly disconnected process.\textsuperscript{27}

While one might have expected that the trade law measures taken in the 1990s would have taken account of the need to maintain maximum policy space, this did not really happen at that time. The impact of the WTO agreements and the legal reforms they required reforms were not well understood by key actors whose attention was diverted to other tasks. The fact that Brazil was undergoing one of its most important transformations in recent history, with the political redemocratization starting in the middle of the 1980s, simply aggravated failure fully to grasp the outcome and the significance of the multilateral trade negotiations. Civil social groups were focused on political reforms and Brazil’s legal community was concerned about general reforms of the domestic legal system and public administration including the approval of a new Constitution (1988)\textsuperscript{28}.

Taking that into account, the lead in international negotiations was predominantly undertaken by diplomats at the Brazilian Ministry of Foreign Affairs (MFA, also known as Itamaraty). 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\textsuperscript{29}. And, since 1960, the diplomats have assumed an increasingly important role in planning Brazil’s foreign policy\textsuperscript{30}. Given that the foreign policy actions were extremely concentrated in Itamaraty, an insulated body of the Brazilian government, few groups from civil society and the private sector had the chance to access information or participate in the formulation of policy\textsuperscript{31}.

\textsuperscript{27} Pinheiro, Bonelli and Schneider, 'Pragmatic Policy', 5.
\textsuperscript{28} Tullo Vigevani, Marcelo F. de Oliveira and Rodrigo Cintra, ‘Política externa no período FHC: a busca de autonomia pela integração’ (2003) 2 \textit{Tempo social}.
\textsuperscript{30} Vigevani, de Oliveira and Cintra, ‘Política Externa’, 31-61.
\textsuperscript{31} Maria Regina Soares Lima, ‘Instituições democráticas e política exterior’ (2000) 22 \textit{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 on 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)\(^\text{32}\), 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 the European Union. The Uruguay Round was the only one that promoted a genuine reform in Brazilian domestic regulation; for the most part, besides its volatility on political efforts and engagement by the parties, Mercosur is a mimesis of the WTO rules, FTAA negotiations failed by the beginning of 2000s, and those with the European Union had stagnated for almost four years and have been relaunched in slow motion since 2008.

Although Brazil was engaged in the multilateral trade system since its creation in 1947, the country had participated only occasionally during the GATT years\(^\text{33}\). Brazil was 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 pointed out to justify the unsuccessful role of developing countries in such negotiations: (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 were a conditioned of financial aid from the IFIs; (iii) there was a lack of alternative developmental discourse and ideals beyond the neoliberal reforms (it was mostly understood that the state should reduce its role on the economy and there was no need for further strategy by the state); (iv) the effects of the signature of single package commitments were unclear; (v) there were limited human resources and technical capacity for so detailed and multifaceted a negotiation; (vi) the limited legal features of the “Third World” and “North-South” resistance, focused on exceptions and longer term periods for implementation

\(^{32}\) 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 \(<www.mercosur.int>(August 2010)\).

\(^{33}\) Renato Baumann, Otaviano Canuto and Reinaldo Gonçalves, *Economia internacional: teoria e experiência 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 started 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.
(on the sense that developing countries’ position was classified as essentially reactive) instead of proposing alternative regulating frameworks.

The Uruguay Round closed in 1994 and its single package of commitments were to be implemented by January 1st, 1995 in Brazil, on the same day that the new elected president, Fernando Henrique Cardoso, took office. The Cardoso administration’s 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, the Cardoso period opened the space for new developmental policies facing the post-Uruguay Round international trade regime. 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 in that direction. Secondly, it became increasingly clear that in a regulated global economy, national policies – whether economic or with a predominantly social character – were affected by international systems. This also motivated not only legal revisions and institutional reforms at the domestic level, but an understanding that they are dependent upon international legal mobilization as well.

New agencies and bodies were created and old ones were reformed to deal with foreign trade; attention should be given to the Chamber on Foreign Trade (CAMEX), an interministerial Council with deliberative power, which was created in 1995 to assist the Presidency on relevant decisions concerning international strategies on trade. In 1999, in the second term of the Cardoso government, the Ministry of Industry, Development and Trade was reformed, and the Ministry of Foreign Affairs also adjusted its internal structures (including beefing up

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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.
the capacities of embassies and missions based in the relevant trade centers, such as Washington, Brussels and Geneva)\textsuperscript{37}.

According to Soares Lima, the main contribution of the political reforms towards democracy and of economic liberalization was definitely to change the foreign policy scenery that from thereon had to encompass collective interests at the global level\textsuperscript{38}. In this regard, 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 including concessions and regulation\textsuperscript{39}. The backlash was aggravated by the impetus of liberalization by the end of the Uruguay Round and the pressure on 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 respond to the claims made 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), the coordination of Mercosur-European Union issues (SENEUROPA), as well as of the inter-ministerial groups working on trade issues (GICI) and on intellectual

\textsuperscript{37} See footnote 29 Cardoso administration benefited from the fact that the heads of the foreign affairs ministry during both mandates (1995-1998; 1999-2002), Luiz Felipe Lampreia and Celso Lafer, had previously been in that position, as well as Ambassadors in Geneva. Luiz Felipe Lampreia served as Foreign Minister from 1995 to 2001, Celso Lafer from 2001 to 2002, and Celso Amorim from 2002 through today, in each case after previously serving as Brazil’s GATT or WTO ambassador. See Ministério das Relações Exteriores, Galeria de Ministros, \url{http://www.mre.gov.br/index.php?option=com_content&task=view&id=1390} (last visited Mar. 14, 2008). Moreover, Amorim was also Foreign Minister from 1993 to 1995, preceded by Fernando Henrique Cardoso (from 1992 to 1993, and who became President in 1994), and Celso Lafer (in 1992). \textit{Id.}

\textsuperscript{38} Soares Lima, “Instituições democráticas”, at 295. The author attributes the change to the globalization of the economy and the rules promoted a distributive impact 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 in international organizations, comments 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 \textit{Daedalus} 207-38.

\textsuperscript{39} Veiga, “Formulação de políticas comerciais”. 
property (GIPI). Several critiques remained though from the side of civil society organizations, mainly with respect to the organization of the meetings, the lack of agenda and the opportunity for an effective dialogue.

At that time, the MFA had re-structured its internal work dynamic. Since the beginning of the XXth century, Itamaraty organized its work 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). Because the regional negotiations that were pushing the trade agenda by the end of the 1990s were crisscrossing many of the issues with which different kinds of division were dealing, such as FTAA negotiations – focusing on the Americas – comprehended rules, environment, intellectual property rights and so on. The same applied to the ongoing negotiations with the EU and, to a certain extent, in the WTO. After his experience with WTO issues and negotiations, Celso Lafer, 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 had to work together on several issues. 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 private sector or the company model of dialogue that prevailed in the ISI policy era. From thereon starts the move in foreign policy nominated by analysts as “autonomy by integration”, which means 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.

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[^40]: 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.


[^42]: Shaffer, Sanchez Badin, Rosenberg, “The trials of winning”.

[^43]: Tullo Vigevani, Marcelo F. de Oliveira and Rodrigo Cintra, ‘Política externa no período FHC’. The authors argue that Cardoso’s government went beyond the reactive agenda on foreign relations which prevailed during
The legal “integration”, however, first took place in the legislative level – concerning amendments to domestic regulation required by WTO commitments. This occurred without time for comprehensive debate or the development of the technical capacity to assess their impact on domestic policies. While citizens and businesses would soon learn about these effects, it was only after experiencing the new limits on policy space that Executive agencies started to think about alternative policies and regulations that might be needed to harmonize the free trade regime with national development strategies – favoring the mobilization of human and institutional resources towards policies that would carve out spaces for developmental policies.

Despite the severe critiques to changes in the discourse of the foreign relations policy and the tendencies of reforms implemented in the last years of the Cardoso administration (1999-2002), there are supporters of the view that Lula’s foreign policy (2003-2010) secured the continuity of previous main lines of the previous foreign policy. According to Vigevani and Cepaluni, the focus of Brazilian foreign policy remained economic development and the strengthening of the country’s political autonomy. The authors 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 evidence the main economic and political challenges imposed by the WTO regulation. Still, the cases also detail the built-in strategy to combine specific needs identified in the Brazilian social and economic realities and how the administration pursed them at the national and international levels (with or without public-private partnerships).

C. “FAIR” TALES? ABOUT HIV/AIDS POLICY ON INTELLECTUAL PROPERTY RIGHTS AND PUBLIC TRADE FINANCE TO THE CIVIL AIRCRAFT SECTOR

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


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

4.a International standards on intellectual property protection for the pharmaceutical sector incorporated into the Brazilian legal system

Although Brazil issued its first Statute on intellectual property in 1945, it was in 1969 that it discriminated against pharmaceutical products making them ineligible 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, eliminated that discrimination in accordance with the TRIPS agreement’s provisions (Articles 27 and 70.8). The new statute reproduces the TRIPS agreement but also incorporates more than a decade of debate and pressures for the reform of the IP statute – with emphasis on the informatics and pharmaceutical sectors.

At the peak of the Uruguay Round, intellectual property and the regulation of the pharmaceutical sector were among the few issues of the trade negotiations under legal discussion at the domestic level. The international pressure for the reform of the Brazilian IP statute dates back to the 1980s, and it is personified by the United States and the measures it...
has taken against Brazil. According to Tachinardi, the United States followed a multi-track trade policy towards Brazil, combining both bilateral and multilateral actions in the GATT.

One of the main outcomes for the United States of their 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. Although Brazil together with India had led the resistance to the incorporation of IP rules into the trade system during the first years of the Uruguay Round, in 1991, according to the reports, the Brazilian government surrendered to developed countries’ pressure.

Maria Helena Tachinardi, 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. What concerns the pharmaceutical industry specifically is that in 1986 bilateral consultations were requested by the United States about the lack of patent protection in the pharmaceutical industry, declaring the 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 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.


Specifically about Section 301 and its effects to Brazilian policy, Regis P. Arslanian, O recurso à seção 301 da legislação de comércio norte-americana e a aplicação de seus dispositivos contra o Brasil (Brasília: Instituto Rio Branco, 1994). This author also analysis the application of Section 301 and the impact to the IP policy applied to the pharmaceutical sector in Brazil, p. 55 and ff.

Project of Law N. 824/91. For more details about the political scenario for the settlement of the controversy, see Maria Helena Tachinardi, A guerra das patentes, p. 111 and ff.
pressures\textsuperscript{48}. Such change in the Brazilian foreign policy was in line with the adjustment of domestic macroeconomic policies and their regulation in accordance with the contents proposed by the international financial institutions. Therefore, at the international level, not only the US bilaterally pressured Brazil, but also multilateral organizations pushed in the same direction.

The Pharmaceutical Research and Manufacturers Association based in the United States (known as PMA at the time, PhRMA today) was a key actor in this game. PMA pushed for very restrictive measures on the protection of IP rights both in the bilateral and the multilateral negotiations. PMA could also count on the support of lawyers working as IP agents before the Brazilian National IP Office (known by the acronym in Portuguese INPI\textsuperscript{49}) who had as their main clients foreign companies and individuals\textsuperscript{50}.

\textsuperscript{48} There is a large number of publications about the process of incorporating 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, Information feudalism; and Terence Stewart (ed.), 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.

\textsuperscript{49} INPI image is very controversial in Brazil. The institute 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. Along its history, it has had very close connection with the IP agents and their clients – the rights holders. 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{50} This is evidenced by the number of non-resident applications before the INPI: 91%, in contrast to the average in developed countries that is about 50% by residents and 50% by non-residents. Cf. WIPO, Statistics on patents (Last update: January 2011). Available at www.wipo.int/ipstats/en/statistics/patents (last access: January 2011). The most traditional law offices that have worked on the IP field are Dannemann, Siemsen, Biegler & Ipanema Moreira advogados and Momsen, Leonardo & 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).
The TRIPS agreement established a homogeneous and standardized legal regime in IP regulation for a large number of countries (128 countries by 1994), consolidating and expanding the obligations of WIPO agreements, in addition to attaching it to the WTO dispute settlement system. Critics complain that the agreement left no space for the diversity of national patent regimes according to countries’ level of development. Despite developing countries resistance, few were the “flexibilities” they could secure in the negotiations.

The implementation of the TRIPS agreement in Brazil cannot be detached from the context of the debate on IP in the country that occurred during the 1980s. Brazil adopted a new statute on IP by May 1996, Law N. 9,279, that entered into force a year after in May 1997, although the country was eligible for a full five year transitional period. Besides, the domestic legislation granted an even stricter system of rights protection than those requested by TRIPS – a notorious example was the case of the pipeline mechanism.

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52 In the case of TRIPS, “flexibilities” are the exceptions or limitations to the general rules of the TRIPS agreement. In this group, there are general exceptions (flexibilities stricto sensu) and special and differential treatment (SDT) rules for developing countries. As an example of the former, the agreement provide WTO members with mechanisms of compulsory license (Article 31) and requirements for patentability (Article 27). An SDT rule in the TRIPS was 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. In addition to these provisions, general statement for capacity building and transfer of technology on behalf of developing countries are also part of the agreement, but these two are not compulsory. 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.

53 The pipeline mechanism (Articles 230 and 231 of Law 9,279/96) authorizes the patent owner to retroactively patent, in Brazil, its products previously patented in other countries, assuming the patent right without any additional assessment by Brazilian authorities. According to Kenneth C. Shadlen, “The politics of patents and drugs in Brazil and Mexico: the industrial bases of health policies” (2009) 42 Comparative politics 41-58, “(F)rom a public health perspective, both countries’ [Brazil and Mexico] patent regimes were worrisome (…) both countries offered pipeline patents, neither allowed parallel imports, both had only rudimentary mechanisms for compulsory licenses to deal with health concerns, and neither had early working provisions”, at 46. On the same sense Paranaguá, Patentes; Monica Steffen Guise Rosina, Daniel Wang and Thana Cristina de Campos, “Access to medicines: pharmaceutical patents and the right to health”, in Lea Shaver (ed.) Access to knowledge in Brazil (New Haven: Information Society Project, 2008), 165-213. Stewart, The GATT Uruguay Round traces though the roots for such protective inclination in the Brazilian and Mexican legislation as both were under
The implementation of the new IP statute in Brazil started slowly as the main agents, public and private ones gained familiarity with the new rules\textsuperscript{54}. However, in 1999, an implementation crisis occurred. In that year, the central government announced difficulties in sustaining crucial health programs due to the high prices of 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 concern: the public health system\textsuperscript{55}.

4.b 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 in the world that most register patents, and these numbers have grown about three times since the TRIPS agreement signature\textsuperscript{56}. According to Reis, Bermudez and Oliveira, “(P)atents are generally regarded as the most effective means of appropriating the benefits from innovation in the pharmaceutical industry\textsuperscript{57}. Patent rights, however, tend to favor short range competition because of the monopoly granted to each producer with respect to the invention, during a limited period of time. Such protection of rights tends to aggravate the economic structure of the pharmaceutical sector, classified as a “qualified oligopoly based on science”: eleven

\begin{footnotes}
\footnote{According to experts working in IP, the Brazilian Law N. 9,279 reflects the technical deficit in the country at the time of its approval, as there was no capacity mobilized to critically review the amendments made by the new statute nor an evaluation of their impact to social and economic relations. Information provided by a Brazilian diplomat on 3 December 2010 (documents on file with the author).}
\footnote{Interview with a Brazilian diplomat on 3 December 2010 (documents on file with the author).}
\footnote{Pharmaceuticals companies filed 24,801 applications for patents in 1990, and 69,638 in 2007 (the last register by sector published). See WIPO, Statistics on patents (Last update: January 2011). Available at www.wipo.int/ipstats/en/statistics/patents (last access: January 2011).}
\footnote{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, \textit{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 \textit{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. 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.}
\end{footnotes}
companies responding to about 50% of the global market. In addition to this, other aspects have contribute to the imperfect functioning of this market, they are: restricted access to information amongst the different players, consumer preferences to traditional trademarks, and the segmentation of the market.

In the case of Brazil, the dependence upon foreign capital and imported technology magnify those aspects of market imperfection. Since 1970s, 80% of the sector in Brazil is owned by foreign capital, and the balance of foreign trade on medicines has a large and increasing deficit (medicines and pharmaceutical together accounted for US$2 billion of Brazil’s trade deficit). As a consequence the recognition of IP rights to this sector, since 1997, has had a major impact on the implementation of the government’s public health policy.

Brazil is ranked amongst the ten largest markets of the pharmaceutical industry in the world. The Brazilian Federal Constitution specifies that the state has to guarantee full access to health care, and implementation of the health policy programs includes the duty of the government to provide drugs at no cost to all patients who need them. The result is that

58 Barbara Rosenberg in her work about competition and IP rights in the pharmaceutical sector concludes that, in that sense, the TRIPS agreement increased the social costs of public health policies. Patent rights, according to the author, reinforced the current imperfect operation of the pharmaceutical market. See Barbara Rosenberg, ‘Patentes de Medicamentos e comércio internacional: os parâmetros do TRIPS e o direito concorrencial para a outorga de licenças compulsórias’, PhD Thesis, University of São Paulo School of Law (2004), p. 214. About the concept of “qualified oligopoly based on science” and the market share of the largest groups see Carlos Augusto G. Gadelha, Cristiane Quental, and Beatriz C. Fialho, ‘Saúde e inovação: uma abordagem sistêmica das indústrias da saúde’ (2003) 19 Cadernos de Saúde Pública 1, 47-59, at 50.


61 ‘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. See also Gadelha et al., ‘Saúde e inovação’, at 51.

62 Brazilian Federal Constitution promulgated on October 5, 1988, Articles 6 and 195-200. Article 6 regulates the right to health as a fundamental right, attributing automatic implementation status – with no need for further regulation. Article 196 of the Constitution, one of the most well-known on right to health, specifies that health is a right of all citizens and a duty of the state, that shall be granted through universal and equal access to actions and services. The Unified Health System is the public system in charge of providing such services (Article 198 of the Constitution, Law 8,080, 19 September 1990, and Law 8,142, 28 December 1990).
the Brazilian state is a large consumer of drugs\textsuperscript{63} and this has severely impacted the allocation of resources in the Ministry of Health’s budget\textsuperscript{64}.

As a consequence, the changes in the domestic law for the protection of IP rights to the pharmaceutical sector after 1997 created the need for important changes in Brazil with respect to the state’s role and regulatory structure. In order to overcome the distortions caused by the limits of the pharmaceutical market Bermudez et al. points 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) the stimulus to the local production and to technology transfer by transnational companies; (iv) R&D incentives focused on a certain product; (v) parallel import strategic policy; and (vi) investment by the state on R&D\textsuperscript{65}. In the last years, Brazilian state, confronted with limits to implement its health policy and provoked by civil society movements, has worked on such alternative policies in order to combine patent protection and access to health.

4.c The resistance catalyzed by the HIV/AIDS movements: mobilizing legal knowledge

The policy of health in Brazil has received widespread attention from the international community, in the last years. The leading light is the HIV/AIDS program that has implemented a successful universal antiretroviral distribution program\textsuperscript{66}.

Since 1980s, the quick spread of the epidemic in Brazil\textsuperscript{67} favored the mobilization of many

\textsuperscript{63} See footnote 61.

\textsuperscript{64} Either if buying medicines and pharmaceutical products produced locally but with imported technology or if importing the medicines and pharmaceutical products from abroad the expenses of the government were severely affected. Cf. Fabiola S. Viera and Andréa Cristina R. Mendes, \textit{Evolução dos gastos do Ministério da Saúde com medicamentos} (Brasília: Ministério da Saúde, 2007). Available at <http://portal.saude.gov.br/portal/arquivos/pdf/estudo_gasto_medicamentos.pdf> (last access in 12 June 2011). The authors state that, e.g., from 2002 until 2006, the expenses of the Ministry of Health buying drugs increased 123,9\%, compared to the total increase of the Ministry’s expenses that accounted for 9,6\% during the same period, at p. 9.

\textsuperscript{65} See Jorge Bermudez, Ruth Epsztejn, Maria Auxiliadora Oliveira and Lia Hasenclever, \textit{O Acordo TRIPS da OMC e a proteção patentária no Brasil: mudanças recentes e implicações para a produção local e o acesso da população aos medicamentos} (Rio de Janeiro: ENSP, 2000).

\textsuperscript{66} About the numbers, see footnote 3.

\textsuperscript{67} Since its discovery in 1981, the HIV/AIDS epidemic is known as a dynamic and unstable global phenomenon, constituting a veritable mosaic of regional sub-epidemics, with different groups of risk, and several economic
grassroots movements. In the mid-eighties, local HIV/AIDS NGOs were established in Brazil, the first being the HIV Prevention Action Group (known by the acronym GAPA). GAPA and its several local working groups focused mostly on prevention campaigns and on the provision of information about the epidemic. In 1985, the Brazilian Interdisciplinary HIV Association (acronym ABIA) was founded, and, instead of taking care of the first needs and direct assistance to those infected by the virus, ABIA worked on an agenda concerning governmental omission, lack of information about the epidemic and the violation of civil rights for those living with the virus. From this standpoint, ABIA added to the HIV/AIDS epidemic a political facet in the civil society movements in Brazil, provoking a simultaneous irritation to the three branches in the central government – Executive, Legislative and Judiciary.

Civil society movements increased in numbers during the 1990s– by the beginning of the 2000s authors estimate there were about 600 organizations –, and they professionalized their discourse and strategies of action on IP rights and access to health. In 2001, a group of NGOs created the Working Group on Intellectual Property (GTPI), as part of the Brazilian Network for the Integration of People (REBRIP), articulating its main positions as one sole voice.

and social limits to control the epidemic. 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. For the data on HIV epidemics, see footnote 3. 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 Szwarckwald, ‘AIDS e infecção pelo HIV no Brasil: uma epidemia multifacetada’ (2000) 34 Revista da Sociedade Brasileira de Medicina Tropical 207-17.

HIV/AIDS movements had their roots in the health care movement that advocated on behalf of access to health and the reform of the health public system in Brazil, since the 1960s. The health movements were named “sanitary” movements. About such movements and their connection with the HIV/AIDS agenda, see André de Mello e Souza, ‘The power of the weak: advocacy networks, ideational change and the global politics of pharmaceutical patent rights’, Ph.D thesis, Stanford University, 2005 (published by the collection IPEA Teses, and available for download at www.ipea.gov.br), pp. 177-82.

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. 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).

International NGOs also played an important role in the mobilization of GTPI, and they were vital for connecting their work to international public opinion. The main references are Doctors without borders and
HIV/AIDS movements, slowly and significantly, changed the political scene on IP in Brazil. During the discussion and approval of 1996 IP statute, the pharmaceutical multinational companies were still the protagonists. They were mobilized through powerful institutions, such as: their own private association (Interfarma), congressmen’s agendas and certain government bureaucracies, as well as through IP lawyers and agents and their associations. This later group particularly benefits from a historical relationship with the national agency for the registry of intellectual property rights (INPI). But, the increasing mobilization of HIV/AIDS groups launched a new era on the IP debate in Brazil. The most relevant actors who have been incorporated into the debate are the social movements, NGOs, and civil society networks. Conversely, their main allies are the public and private agents of the new public health policy: public and private laboratories of generics drugs, their associations and Oxfam. Today, GTPI articulates today the most relevant actions about access to medicines and the public health system. About its initiatives, see www.deolhonaspatentes.org.br (last access: June 2011).

Attention is given to the Brazilian Intellectual Property Association (acronym ABPI, in Portuguese). ABPI was created in 1963 under the name Brazilian Association for the Protection of Industrial Property, having as associated industries of law offices, IP agents and specialists. The association was the main promoter of the debate on IP issues in Brazil as from the 1960s.

See footnotes 49 and 50. INPI is today, though with difficulties, revising its structure and technical capacity in order to enlarge its constituencies and to strengthen its role in the IP debate in Brazil. E.g., 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).

For a historical analysis of the creation and articulation of these movement, see André de Mello e Souza, 'The power of the weak: advocacy networks, ideational change and the global politics of pharmaceutical patent rights’, Ph.D thesis, Stanford University, 2005 (published by the collection IPEA Teses, and available for download at www.ipea.gov.br), pp. 177 and ff. ABIA, Conectas and Rebrip are today the leading organizations and movement dealing with trade and health issues. ABIA and Rebrp are also composed by the alliance of several groups of NGOs, being that ABIA focuses on HIV and public health issues and Rebrp is a coalition of NGOs for research and advocacy on trade topics; Conectas, differently, is an advocacy NGO working on human rights topics. ABIA and Conectas work closely together with other national and foreign NGOs through Rebrp 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).

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
the chemical suppliers for such local industry, as well as the Ministry of Health and the National Agency of Sanitary Vigilance (acronym ANVISA).75

HIV/AIDS movements’ actions about IP regulation have been threefold. A first step was a process of echoing their voices and claims, through the Judiciary. In the second stage, after being recognized as a legitimate actor in the domestic policy arena, they focused in the executive branch, either to support its policy or to challenge it before the Judiciary. At present, HIV/AIDS movements are caring about the TRIPS plus agenda of the Congress, as well as about ways to strengthen their international action and network.

Civil society movements’ claims were empowered by the Constitution approved in 1988. Amongst several social rights associated to revival of the democratic pact, the new Constitution assured the right to health for all Brazilian citizens, granting access to essential medicines through the national health care system (SUS) as a universal right. As is the case in most democracies, in Brazil when 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 politics. Civil society movements as well as many individuals focused on the Judiciary as their immediate claims for health assistance; the HIV drugs requests became emblematic in this debate.76

developing research and technology on essential drugs and giving assistance to the Ministry of Health on its policy planning. The associations are: Fenafar, the association of Brazilian pharmaceutical companies (<http://www.fenafar.org.br>); Progenéricos one of the associations of the national producers of generic drugs (<http://progenericos.org.br>); and ABIFINA, the association of national producers of chemicals (<http://www.abifina.org.br>). Last access to their websites on January 2011.


76 The right to health is defined by the Brazilian Federal Constitution in 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 Vieira and Renata Reis, ‘Access to medicines and intellectual property in Brazil: reflections and strategies of
Intellectual property and access to medicines became the focus of a policy debate, with the Judiciary as the pivot of the implementation stage\textsuperscript{77}. The result of that action was the approval of a new statute – Law N. 9,313, November 13, 1996 – obliging the government to provide anti-AIDS drugs at no cost to all patients. Although considered redundant in view of the rights fixed in the Constitution, the statute reinforced the civil society movements’ actions, and it promoted the implementation by government public agencies of a full-scale distribution of antiretroviral drugs (ARVs). Oddly, it was in May 1996 that the new IP statute had been approved.

As a result of the new health policy the number of deaths declined in 50%, from 1996 until 2002\textsuperscript{78}. But, the increasing number of patients receiving ARV therapies, and the rising prices of the ARVs at government expenses imposed a substantial burden on the Brazilian health system’s budget. In order to support the success of HIV/AIDS policy on access to therapies, the Brazilian government has had to deal with the drug costs and their impact on the Ministry of Health budget. Still in 1996 and right after, the government benefited from the possibility of the lack of patent protection to any drug commercialized before the entry into force of its new IP statute (1997) making use of generic equivalents of such drugs\textsuperscript{79}. Brazilian public laboratories, such as Farmanguinhos, were key for the development of this policy, applying reverse engineering methods\textsuperscript{80}. In 2002, Brazil was producing half of the types of drugs used

\textsuperscript{77} 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{79} According to André de Mello e Souza, ‘Defying globalization: effective self-reliance in Brazil’, in Paul Harris and Patricia Siplon, The global politics of AIDS (Boulder: Lynne Rienner Publishers, 2007), “since the Ministry of Health began substituting expensive imports with local generic equivalents the prices of unpatented antiretroviral drugs have fallen by an average of 80.9 percent in Brazil”, at 8.

\textsuperscript{80} Farmanguinhos was the first laboratory to be mobilized by the Ministry of Health for the production of HIV drugs, in 1997. The work of the public labs delineated what Maurice Cassier and Marilena Correa defined as a learning process initiated through copying is thus combined with a research policy: “The challenge is therefore not only to rediscover basic knowledge on molecules created elsewhere, but also to create new knowledge on new pharmaceutical products”, in Maurice Cassier and Marilena Correa, ‘Patents, innovation and public health: Brazilian public-sector laboratories’ experience in copying AIDS drugs’, in Benjamin Coriat et al., Economics
in HIV/AIDS treatment, and these generic equivalents were up to 80% less expensive than the patented ones. For the other half of the types of drugs, the Ministry of Health developed a bargaining strategy towards the main producers, being able to reduce up to 65% of the prices from 1996 until 2002.

In 1999, the acquisition of ARVs reached 3% of the Ministry of Health budget (compared to an average of 2% in the previous years), due to the insertion of only two new patented drugs in the market. According to Cassier and Correa, civil society groups and national laboratories, considering the expertise gained with the reverse engineering, started to claim for the application of compulsory license in Brazil. The idea was to have the national laboratories also producing ARV patented drugs too.

For the first time, the Brazilian government looked to possible TRIPS flexibilities in order to reduce the financial impact on the government’s budget. The Ministry of Health, under José Serra’s coordination (1998-2002), acknowledged the possibility of recourse to the compulsory license mechanism. This announcement resulted in a new successful trajectory of AIDS and access to HIV/AIDS care in developing countries: issues and challenges (Paris: ANRS editions, 2003), at 91.

82 Coordenação Geral de DST/AIDS, Política brasileira de AIDS, at 9; and Grangeiro et al., ‘Sustentabilidade’, at 64.
83 According to Alexandre Grangeiro et al., ‘Sustentabilidade’, at 63, the evolution of costs of the therapy per patient was R$7,781, an increase of 64% from 1998.
84 This was both a domestic and an international request by NGOs and civil society networks, from all over the world. They advocate that Brazil should be the first country to resort to the compulsory license flexibility, due to its international protagonism, and the increasing attention that the Brazilian AIDS program had received as a model to be replicated. See Cassier and Correa, ‘Patents, innovation and public health’, at 92. Brazilian government approved the first compulsory license only in 2007, with the approval of the Presidential Decree 6,108, in May 4.
85 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 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. After combating 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
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 and its TRIPS plus provisions.

The Judiciary was an important ally and strong proponent of the movement’s call for an effective health policy on HIV/AIDS treatment. If the strategy at first was only the request for medicines to be delivered; secondly, particularly from 1999, it assumed a policy making shape (opening the space for the aforementioned second stage of HIV movements’ actions). In this sense, there were claims for the implementation of TRIPS flexibilities by the executive branch, such as the Bolar exception and the compulsory license mechanism, and for the removal of the pipeline mechanism from the Brazilian law. The Executive promptly replied

Such policies were effective due to the existence of official laboratories able to produce the drugs under compulsory license, as well as a map of possible foreign sellers in the case of parallel imports. A second mechanism is related to the post-patent production. This 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 added credibility 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; Bruno Meyerhof Salama and Daniel Benoliel, ‘Patent bargains in NICs: the case of Brazil’, Direito GV Working Paper N. 19, May 2008, explore a couple of other reasons that also empowered such bargaining capacity of the Brazilian government.

The Bolar exception is 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). 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.

For the definition of the pipeline mechanism, see footnote 53. Such mechanism is still accepted by Brazilian law, but it is under the Supreme Court scrutiny at the moment. This is a result of several judicial actions from civil society organizations questioning the constitutionality of the mechanism under Brazilian law. 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 made a representation to the Federal Attorney Office about the unconstitutionality of the pipeline system that was filed by the Federal Attorney in
for those actions, except for the pipeline mechanism that remains under the judicial scrutiny\(^9^9\).

In addition to such legal reforms, certain institutional reforms in the health system also bolstered the implementation of policies in the sector\(^9^0\). This is the case of ANVISA created by Provisional Measure N. 2,014-1, in 1999, (December 30, 1999), and converted into Law N. 10,196, in 2001. This regulation made the patent concession process more sophisticated. The new statute required, after INPI analysis, prior consent by ANVISA, although this opinion should not bind the INPI\(^9^1\). ANVISA naturally strengthened the drug and health policies aspects during its examination process\(^9^2\). Therefore, there is sympathy of civil society movement towards ANVISA’s role.

The maturity of the HIV/AIDS movement has also favored its articulation beyond the Judiciary, and ANVISA became the favorable locus for new actions. As from 2006, civil

\(^{89}\) 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 mechanism was, for the first time, regulated by a Presidential directive in 1999 (Provisional Measure N. 2,014-1, December 30, 1999), but it had to be re-edited fourteen times by the Executive until its conversion into law by the Legislative (Law N. 10,196, February 14, 2001). The compulsory license was first regulated by Presidential Decree N. 3,201, October 6, 1999, and later 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.

\(^{90}\) Gadelha, ‘O complexo industrial da saúde’, at 527.

\(^{91}\) According to Article 229-C incorporated t Law 9,279 any pharmaceutical patent may be granted only after IP officials in the Ministry of Health Surveillance Agency (ANVISA) issue its “prior consent”. 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.”

\(^{92}\) ANVISA reports that, from June 2001 until July 2010, 1,480 patent applications were examined by the agency, out of which 1,100 were given prior consent, 143 were not given prior consent, 79 were denied by INPI after ANVISA’s participation in the process and 158 are still ongoing processes. The main reasons for ANVISA’s denial of prior consent has been the lack of novelty. Cf ANVISA/COOPI, Relatório sobre a atuação da Anvisa no exame de prévia anuência a pedidos de patente na área farmacêutica, Período: junho de 2001 a julho de 2010 (Brasília: Ministério da Saúde, 2010).
society organizations, in *ad hoc* partnership with the local industry, also got involved with the patent concession process[^3]. NGOs took the chance to put into question the effective qualification of the process for a new patent right. Such participation automatically received a negative response from INPI that, according to representatives of the GTPI-REBRIP movement, does not qualify them as relevant actors in the patent process, and if it does, it restricts NGOs’ participation doubting about their technical capacity in the field[^4]. The fact that ANVISA’s authority in the patent process is under debate at the moment, however, has deteriorated this channel of articulation for civil society movements[^5].

As a response, recently, civil society organizations mobilized around GTPI/REBRIP to closely follow the works in the Legislative branch. The action comprehended, first, a map of all projects proposing amendments to the IP regulation in Brazil[^6], and the pressure for the regulation of ANVISA authority in the patent granting process.

[^3]: 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 of Law 9,279). In 2006, seven NGOs members of Rebrrip 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 patent requests in question were Viread® produced by Gilead; and Kaletra® produced by Abbott. Further information at GTPI/REB RIP, *Patentes*, 2006.

[^4]: Speech by the representative on June 1st, 2011, at Direito GV (São Paulo, Brazil).


Such changes in the domestic legislation did not take place without reverberations in international fora and the Brazilian foreign policy, being to a certain extent empowered by the HIV/AIDS movement.

4.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.

“Public interest” as the driver of IP policies was Brazil’s leitmotiv in justifying the changes in the domestic regulation and its new policy orientation. Although there was no novelty invoking such principle, Brazil was facing a new challenge in the twenty-first century at the international level: to combine the access to knowledge with a regulatory framework protecting administratively and judicially IP rights. Therefore, differently from the 1970s when the protection of “public interest” meant the lack of IP protection to certain sectors, the use of the “public interest” motto should be now revisited. Such revision should deal with the commitments in force, making use of the exceptions and flexibilities incorporated into the intellectual property agreements, including a systemic comprehension of the TRIPS on the benefit of policy space. The resort by Brazil to such discourse was anchored on the need for a public health policy space, and this issue brought a new face to the debate at the international level.

The first international reaction was the request of consultation in 2000 by the US before the WTO dispute settlement system (WT/DS199 – Brazil – Patent Protection). The US complained about the new compulsory license regime requirements. At the time, a rising

97 “Public interest” has been a common point of concern of developing countries upon the recognition of IP rights. During the 1970s such principle was devoted to the purpose of transfer of technology in order to diminish the asymmetry of access to technology and knowledge. Although “public interest” was invoked on the beginning of the Uruguay Round for the multilateral trade negotiations, it lost the political support by the beginning of the 1990s. See footnote 48.

98 Interesting proposals on combining “public interest” with the TRIPS agreement commitments are elaborated by Henning Grosse Ruse-Khan. ‘Policy space for domestic public interest public measures under TRIPS’, 22 South Centre Research Papers, 2009. Available at http://www.southcentre.org (June 2011).

99 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
alliance of sympathetic developing countries – composed by South Africa and India, among others – turned out to be essential to strengthen the development dimension of the Brazilian reforms\textsuperscript{100}. Although Brazil and the US skipped the DSB procedures, they agreed on a bilateral commission to address the issue; and at the end, specific situations of the US – such as its own regulation on compulsory licenses and the negotiations for drugs to combat anthrax attacks after September 11\textsuperscript{th} – softened its international discourse against compulsory licenses and public health concerns. Such change favored US support to the TRIPS and public health declaration by November 2001 as part of development concerns appointed at the Doha Ministerial Conference\textsuperscript{101}.

The Ministerial Declaration in 2001 consolidated a formal space for the debate of TRIPS flexibilities and their implementation in the WTO arena\textsuperscript{102}. However, at odds with these

http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds199_e.htm (Last access: May 2011).

\textsuperscript{100} The support by NGO groups and specialized international organizations working on HIV/AIDS and health concerns was crucial for the empowerment of such movement. 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 85.

\textsuperscript{101} 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, \textit{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 \textit{Declaration on the TRIPS agreement and public health} (WT/MIN(01)/DEC/2), adopted on 14 November 2001. All documents available at http://www.wto.org (last access: June 2011).

\textsuperscript{102} The \textit{Declaration on the TRIPS Agreement and Public Health} favored the instruction of the Ministerial Conference to the Council for TRIPS to find a solution to the difficulties of WTO Members in making effective
WTO developments, a new conservative trend was taking place at the international level in the beginning of the 2000s. WIPO Committees works were moving towards a TRIPS plus agenda, focusing on more strict obligations for IP protections beyond WTO commitments\textsuperscript{103}. Together with Argentina, in 2004, Brazil called then for a “WIPO Development Agenda” (WIPO/DA). A movement that, even though, was mostly reactive at first, it benefited from the legal technical capacity gained at the WTO and from the sympathetic global public opinion, already mobilized by access to health concerns\textsuperscript{104}.

If the WIPO/DA 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’ constraints) with a private sector role on innovation and rights of protection, which attracted other developing countries’ support and enthusiasm\textsuperscript{105}. And, after a series of inter-governmental discussions, use of compulsory licensing in the pharmaceutical sector. In August 30, 2003, the General Council approved the decision on the Implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and public health, that simplifies the procedures to issue compulsory licenses to export pharmaceutical products to countries that cannot produce drugs for themselves. The General Council adopted a Decision in December 2005 that incorporated this solution into an amendment to the TRIPS Agreement that requires at least two-thirds of the WTO membership accept this amendment by the December 31, 2011 to be in force. Until then the August 2003 waiver will remain in place. See WT/MIN(01)/DEC/2, par. 6, and WT/L/540 and Corr.1, 1 September 2003. All documents available at http://www.wto.org (last access: June 2011).

\textsuperscript{103} 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.

\textsuperscript{104} The leading organizations at the time were Doctors without borders. All these organizations had had an important role in encouraging civil society movements in Brazil, providing them with knowledge and support for their articulation. See footnotes 70 and 113.

\textsuperscript{105} 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 inter-sessional 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).
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 shifting dynamic between the WTO to the WIPO, sustaining each other’s work, 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.

Most of the other 22 ministries at the Executive level created by the beginning of the 2000s a unit to deal with IP issues, but DIPI was in charge of centralizing the representation of Brazil on IP.

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

107 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 the 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).

108 The IP unit inside the Brazilian MFA, since its creation, has from three to five diplomats working on the division with exclusivity. Besides two other diplomats working at the Brazilian Mission in Geneva are in charge of WTO, WIPO and UN agencies’ agendas. This is known to be the second largest unit inside the MFA, after its dispute settlement unit (interview with diplomat in Brasilia, December 3, 2010m on file with the author). About a similar dynamic of institutional development and the expansion of technical capacity on trade issues at the government level, see Shaffer, Sanchez Badin, Rosenberg, “The trials of winning”.
internationally in any IP negotiation process\textsuperscript{109}. As a consequence of this 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{110}. Carolyn Deere compares developing countries domestic institutions and highlights GIPI as a major achievement for the Brazilian policy-making structure:

“(a)mong 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{111}.

The dynamics between the GIPI and DIPI, according to Brazilian negotiators, seems to be functional and clear today to members of the government, however civil society organizations have still been critical about their working procedures and the lack of transparency\textsuperscript{112}.

\textsuperscript{109} Carolyn Deere, ‘The Politics of Intellectual Property Reform in Developing Countries’, in Ricardo Melendez-Ortiz and Pedro Roffe ed., \textit{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{110} GIPI was created by a Decree dated 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{111} Carolyn Deere, ‘The Politics of Intellectual Property Reform’.

\textsuperscript{112} Pursuant to Article 1.VII of the founding Decree of GIPI, dated as of August 2001, one of the objectives of GIPI is to promote consultations with the private sector; and Article 2.2 opens the possibility for invitation of other organs from the Public Administration as well as of other notables. However, civil society movements argue that were never invited to participate. According to an active civil society organization’s representative GIPI’s working procedures is known as a black box by civil society movements in general (interview on August 20, 2010, on file with the author). They know it exists and that it holds the mandate for strategic planning and
As a result, contributions of civil society movements based in Brazil to the Brazilian foreign policy regarding 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 the main voice of Brazilian HIV/AIDS movements, particularly, providing inputs for the development agenda strategy at the WIPO agenda and the major disseminators of information for Brazilian civil society groups\textsuperscript{113}.

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\textsuperscript{114} 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\textsuperscript{115}. Civil society movements argue that the strategy towards the dispute settlement decisions on IP, but neither the agenda nor the decisions are ever publicized.

\textsuperscript{113} 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).

\textsuperscript{114} 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 from India to Brazil by border officials at Dutch harbors or airports.

\textsuperscript{115} 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 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), 7 Journal of
system undertaken by the government over GIPI and DIPI was completely opaque, so 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{116}.

As part of such forum or regime shifting strategy\textsuperscript{117}, Brazil and other developing countries have also worked before organizations emphasizing a more technical aspect of its works, such as WHO\textsuperscript{118} and UNAIDS\textsuperscript{119}. WHO has favored joint actions between countries in order

\textit{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{116}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{117}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{118}On May, 2003, at the Fifty-sixth World Health Assembly, the World Health Organization (WHO) adopted Resolution WHA56.27 creating the Commission on Intellectual Property Rights, Innovation and Public Health. The resolution requested that the WHO establish a body to collect data and proposals about intellectual property rights, innovation, and public health. After three years, the Commission issued its report, and an Intergovernmental Working Group on Public Health, Innovation and Intellectual Property (IGWG) was created by Resolution WHA59.24 to “draw up a global strategy and plan of action in order to provide a medium-term framework based on the recommendations of the Commission”. On May 3, 2008, finally the 61st World Health Assembly adopted the final version of the Global strategy and plan of action on public health, innovation and intellectual property (Resolution WHA61.21). This document names eight elements that will be implemented to ensure innovation, build capacity, improve access and mobilize resources. All documents available at http://www.who.int/phi/en/ (last access: June 2011).

\textsuperscript{119}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,
to evaluate effective actions against HIV, monitoring the spread of the virus and the challenges for combating it also integrates the UNAIDS initiative, and it is committed with the goal of universal access to comprehensive prevention programs, treatment, care and supportability to monitor progress and results. This was very important on the sense that HIV programs started to move beyond traditional public health methods in order to contain the epidemic. The works at WHO and associated international organizations have been important to highlight 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.

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

The challenges posed by the IP rights regime to public health policy issues 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 cannot be underscored, but the concerns today are about the lessons we may take from such specific debate regarding HIV/AIDS epidemic and access to medicines.


As an example, an international center for technical cooperation in HIV/AIDS and regional South-South 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.


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.

I thank Tony Taubman for provoking this question, commenting on the paper at the Society of International Economic Law 2nd Biannual Meeting, in July 2010. Part of the conclusions here tries to extract from the public
The example of success of the HIV/AIDS and access to medicine policies not only has a merit itself and it has also empowered other disease campaigns and public health, but also favor the critics of an exclusively private perspective on the implementation of IP rights. HIV/AIDS policies definitely motivated a wide-ranging debate on public health and IP, innovation and transfer of technology to developing countries. This partial conclusion highlights legal changes that favored the revision of IP rights role and the implementation of new developmental policies by Brazil.

The implementation process of TRIPS in Brazil and the progressive adoption of the flexibilities allowed by the agreement, as well as the creation of institutions and policy strategies to enhance the scale of influence, illustrate a developing country trajectory in the economic liberalization process after the 1980s. The 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. Since their recovery, however, the implementation process of that agreement had to be aligned to the new policy orientations. Although TRIPS limited states’ policy space, flexibilities allowed and required intelligence to be explored in different set of policies.

The legal developmental tools applied by Brazil, domestically, in order to implement the HIV/AIDS policy were fourfold: (i) reforms of the legal system in order to eliminate guarantees beyond the international agreements commitments (TRIPS plus provisions); (ii) the regulation of the flexibilities, an affirmative feature favoring the implementation of such flexibilities (the compulsory license regulations are an example); (iii) the approval of new mechanisms implicitly authorized by the international system favoring the access to technology (such as the Bolar exception); and (iv) the creation of institutions that could neutralize the political game in action (e.g. the creation of ANVISA and its authority in the prior consent to the patent granting process). The empowerment and reform of other institutions, such as Fiocruz and other state laboratories and INPI, also played a supporting role.

Such policies were fortunate to be coordinated with new units and agencies at the Executive level defining foreign relations and international strategies (DIPI and GIPI specifically). This closed the cycle of influence between the domestic and the international levels: 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.

In reinforcing its domestic policies and legal reforms internationally, the Brazilian government combined a multi-track strategy to its developmental concerns. Such strategy resulted in the following developmental legal tools: (i) the deliberate option by the Brazilian diplomacy to articulate the agenda in a way that could promote Brazil as a player in the IP debate (on this sense, the reform Itamaraty’s departments favored the actions); (ii) the promotion of international alliances among developing countries with similar concerns (such as the joint proposals to the WIPO/DA); (iii) the revival of the word “development” in legal instruments as a useful terminology to push for political changes and sympathy; (iv) the revision of IP hegemonic debate and its concepts, under the framework of public interest and public goods; (iv) the simultaneous action before the most relevant international organizations, playing with the forum shifting strategies; and (v) the approval of numerous legal acts in a set of relevant international organizations working on connected fields to IP and public health (such as the WTO, the WIPO, and the WHO).

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 also been essential to keep public opinion connected to the country’s main developmental concerns. Advocacy groups have been key actors to the process; beyond being activists, they have also played the role of resonance boxes of Brazilian health policy developmental concerns at the international level.

The HIV/AIDS successful policies in Brazil evidence how important the participation of civil society movements is to draw up alternative venues and to their implementation. Brazilian NGOs articulated with counterparts working at the international level mobilized public

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125 According to Vera Thorstensen, “the concept of development was killed by the GATT Secretariat and the diplomats during the Uruguay Round”. Speech at CEBRAP, São Paulo, on May 13th 2011. If the concept of development looked “dead” by the end of the Uruguay Round, in 2001 there was a revival of this ideal in the Doha Ministerial Conference. And, the Declaration on TRIPS Agreement and Public Health was the first to have a concrete – although temporary – result with the General Council 2003 decision, benefiting the development dimension.

126 Such revision favored other areas of the IP debate, evidencing the clash of interests and agents involved in the policy and law making processes. E.g. this revision stands the copyright law debates today domestically in Brazil, as well as other area of regulation in the WIPO.
opinion around the world about the importance of public health and access to medicines. At
the domestic level, the mobilization of public opinion back reforms proposed by certain
bodies of the Executive, softened the resistance in the Legislative to these reforms, and they
are also contesting the latest retreating move on the public health system reforms (such as
AGU legal opinion).

The HIV/AIDS example also shows other areas to be explored, such as the improvement in
the coordination among the three branches of the Brazilian state, mainly a greater
involvement of the Legislative power in the current strategies defined by the Executive, the
coordination of the Legislative and the Judiciary in consonance with foreign policy priorities.
Besides, there is also a space to increase the engagement of Brazilian civil society groups in
the strategy of forum and regime shifting at the international level, and compose such
engagement with state’s strategies. The example also evidences that the battle is not over:
ANVISA’s authority is under question at the moment, the WTO 2003 Decision is to be
regulated by the end of 2011, the WIPO/DA still need to advance and be more practical, and
the WHO risks to be captured by big pharma and private groups. Therefore, the “affirmative
regulation” reinforcing the flexibilities already established by the IP regimes shall keep being
an important strategy in this field.

5. Trade finance facing national and international challenges

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

The civil aircraft industry has a particular economic structure because of the characteristics of
production and consumption of its main product. It is high technology at its core, requiring
huge levels of investment on research and development and is so costly a good that sales
normally require financing\(^\text{127}\). 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\(^\text{128}\). Therefore, specific forms of public-private partnerships are established

\(^{127}\) 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).

\(^{128}\) 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 in 2011
(94.7% in Brazil). Cf. Embraer Annual Report 2009, at 13. This may be replicated in the countries where the
between the industry and their states of origin\textsuperscript{129}, and specific rules have been developed to regulate international trade of civil aircraft.

The civil aircraft market started to grow substantially during the 1980s and 1990s. From then on, there has been an increasing dispute for market share among the few producers around the world\textsuperscript{130}. 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 on quantity and quality\textsuperscript{131} (as per the Embraer situation in ASA and COMER, in 1996\textsuperscript{132}). According to an European official report, “(A)lmost no aircraft deals are cash deals”\textsuperscript{133}.

The civil aircraft industry is, therefore, highly dependent on the best financial structures, especially for long-term transactions, normally counting on governmental support\textsuperscript{134}. Many main aircraft industries are based. In this sense, see Bluenote (1981), who indicates that the aircraft industry is the second largest manufacturing in the US in the early1980s.\textsuperscript{129}

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.\textsuperscript{130}

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 \textit{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.\textsuperscript{131}

See Nina (2002), p. 738. The author states, though, that due to data hurdles, no empirical evidence exists on how government support affected firms’ strategic interactions and profits.\textsuperscript{132}

See footnote 8 above.\textsuperscript{133}

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.”\textsuperscript{134}

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
complex financing structures are available for 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 operator. The latter 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 conditions”\(^{135}\).

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\(^{136}\).

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 on 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

\(^{135}\) Interview on November 2009.

\(^{136}\) 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).
abroad. They are also likely to obtain less favourable financing terms because of mistrust by importers from other countries.\(^\text{137}\)

The action of the government through ECAs, however, is 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 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 in terms of a comparison with market conditions that would prevail absent the subsidy.\(^\text{138}\) 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 market based comparisons 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\(^\text{139}\), 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)\(^\text{140}\). The previous regulation consolidated by the Subsidies Code during the GATT


\(^\text{138}\) 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)

\(^\text{139}\) 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).

\(^\text{140}\) 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.”
period, as well as the ASCM, is a receptor of ideas first delineated in the Organization for Economic Cooperation and Development (OECD). In the WTO, a clear example is the Illustrative List on Prohibited Subsidies (Annex 1 to the ASCM), of which content was under litigation in the Embraer case. OECD has, for example, assumed a central role in the process of the creation of new rules, specifying the meaning of new terms and arrangements on export credits (one of the modalities of subsidies).

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. A similar initiative is the EU-US Agreement on Trade in Large Civil Aircraft, dated 1992.

The fact that those regulations of 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

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141 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, the GATT and the OECD started to coordinate their regulation on 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>).

142 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 in that direction was taken by a French proposal, in November 1960, to prohibit the Parties from granting export subsidies to non-primary products. France also suggested a list with a certain number of practices that should be prohibited by consensus.

143 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. He takes 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, The Export Credit Arrangement: achievements and challenges 1978-1998 (OECD: Paris, 1998), 27-31, at 27.
multilateral, the plurilateral and the bilateral levels are key elements for the civil aircraft producers in defining their strategy towards the global market. Brazil has strengthened its relationship with such legal frameworks. The Embraer case brought by Canada in the WTO in 1996 may be considered the landmark of Embraer being recognized as a global player in the civil aircraft market.

5.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 attributable to the industrial organization of the sector that Brazil has restricted to one sole company – Embraer –, and its election as a national champion.\textsuperscript{144}

The Empresa Brasileira de Aeronáutica S.A., known as Embraer – was created in 1969 as a Brazilian state-controlled company.\textsuperscript{145} After years of proficient operation, the 1980s debt crisis seriously affected the company’s results. In the beginning of the 1990s, Embraer had to reduce its workforce and to rearrange its production process, postponing and canceling significant existing projects, as well postponing as any new ventures. After the breakdown years, by the end of 1994, Embraer was finally privatized. Kanatsu concludes that the ownership structure of Embraer was 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 enterprises like Petrobras and Electrobras”\textsuperscript{146}.

The changes did not remain solely at the ownership level, but they also took place at the managerial culture of the company. According to 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

\textsuperscript{144} Kanatsu, “Choice of national strategy”.

\textsuperscript{145} 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 based 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{146} Kanatsu, “Choice of national strategy”, at 14.
renamed ERJ-145\textsuperscript{147}. Roberto Bernardes describes the change as one from a technology-oriented management towards a more financially-oriented management\textsuperscript{148}.

ERJ-145, a regional jet, helped Embraer take off from such a critical scenario and allowed the company also to move into production of executive aircraft, a specific market segment with high growth potential. In the beginning of the 1990s, Embraer ERJ-145 competed with Bombardier CRJ-500 for the sale of 150 jets for two regional air transport companies in the United States, ASA and COMER. At the time, ERJ-145 was considered the best plane because of its technical performance and price. Nevertheless, Embraer could not win the bid, as it could not offer good conditions for the financing of its operation. According to Bernardes, this episode brought important lessons for the company and the Brazilian government, including the policy makers\textsuperscript{149}. It was then that Embraer and the Brazilian National Bank for Economic and Social Development (BNDES) started their partnership towards the foreign market, on the support of Embraer’s foreign sales\textsuperscript{150}.

Following the example of other countries – 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{151}. 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 a commercial and a development bank on behalf of the National Treasury, launched two other programs on export credits: the PROEX export credits and the PROEX equalization of interest rate\textsuperscript{152}. Both systems had operated


\textsuperscript{148} Bernardes, O caso Embraer, at 13 and ff.

\textsuperscript{149} Bernardes, O caso Embraer, at 61.

\textsuperscript{150} The credit lines available to the aircraft sector up to that point 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{151} See Pedro da Motta Veiga and Roberto Magno Iglesias. “Políticas de Incentivo às Exportações no Brasil entre 1964 e 2002: resenha de estudos selecionados”, 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{152} 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.
under FINEX during the 1970s, and they were renewed for the new era. It is interesting to note that Banco do Brasil, as well as BNDES, performs export credit support like the export credit agencies in other countries.\(^{153}\)

Such reforms in the financial public system were part of a larger revision of the government’s bureaucracy and programs from the mid-1990s. After a period of unilateral liberalization and attachment to policy space restricting commitments at the multilateral level, the macroeconomic domestic policy changed and inevitably provoked the dismantlement of many institutions at the expense of the foreign trade policy. The trade system bureaucracy started to be redesigned as of 1995 with the creation of the CAMEX (the Foreign Agency).\(^{154}\) 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 that was based on an over valued 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)\(^{155}\). 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.

The 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 condemned for being very bureaucratic and it was confusing for most of the Brazilian exporters. This resulted in few large exporters having 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 overcoming the difference of interest rates applied to the contracted finance and the costs of securing finance for the sale, in order to have the financing costs closer to those practiced in the international market. Therefore, the

156 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 Moreira, Adelaide Figueiredo dos Santos, Políticas Públicas de Exportação: o caso do PROEX, IPEA Texto para discussão, Brasília, outubro de 2001.

157 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.

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 during 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”\textsuperscript{159}. This system meant that Embraer could provide financing on terms that were the same as those offered by competitors from advanced countries even though the cost of money in Brazil was much higher than was being paid by Bombadier and other competitors.

The PROEX-equalization helped Embraer become one of the largest aircraft manufacturers in the world\textsuperscript{160}. 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 airline buyer, it would have been impossible for Embraer to sell its aircraft”\textsuperscript{161}. Embraer’s 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\textsuperscript{162}. This was a reason to garner attention from 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.

5.c The Embraer case in the WTO and the hidden limits to the multilateral trade system

In 19 June 1996, Canada formally requested consultations with Brazil under the WTO dispute settlement mechanism\textsuperscript{163}, and, in 13 July 1998, after a sequence of unsuccessful


\textsuperscript{161} 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).

\textsuperscript{162} Interview with Embraer employee, June 2009.

\textsuperscript{163} 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)
negotiations from 1996 to 1998, Canada requested the establishment of a WTO Panel\textsuperscript{164}.

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 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>
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<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>412.5</td>
<td>389</td>
</tr>
<tr>
<td>1998**</td>
<td>537.8</td>
<td>502</td>
</tr>
</tbody>
</table>

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

Based on that, Canada claimed that PROEX interest equalization were prohibited subsidies, pursuant to Article 3 of the ASCM\textsuperscript{165}. 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)

\textsuperscript{164} Request for the Establishment of a Panel by Canada ((July 13, 1998)). Brazil - Export Financing Programme for Aircraft. WT/DS46/5.

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 terms could be admitted if approved by the Subsidies and Countervailing Measures Committee.  

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 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 evidence 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 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.

According to Howse, Smith and Smith, instead of taking Article 27 of the ASCM as a guiding principle for the whole agreement, the Panel suggested that “where 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, which had been one of the leaders of the developing countries movement reaching as far back as the 1960s and had raised questions about limits of special and differential treatment in the WTO agreements from its first years.

166 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.


If Article 27 of ASCM is considered a special and differential treatment for developing countries, another safe haven from the application of Article 3 was revealed by the Embraer case: 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 States, all OECD Members, advocated in favor of an interpretation that could take the allusion to the OECD Arrangement as the core part of Item (k). They claim 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. Howse, Smith and Smith qualify the rejection of Brazil’s claims as: “(t)he panel curtly and almost scornfully rejected Brazil’s approach.”

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.

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170 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 described in detail the historical negotiations on subsidies in the multilateral trade system and a co-relation of works, rulings and actors with those at the OECD for export credits regulation, cf. Sanchez Badín, “The WTO and the OECD rules”.

171 According to Brazil, besides the implicit exception to Article 3 of the OECD standards in the second paragraph of Item (k), an a contrario interpretation of the two paragraphs of Item (k) should favor developing countries (non-OECD members). But, if item (k) should be considered applicable to all members indistinctively, Brazil argued that the safe haven should be limited to the provisions of the OECD agreement as of 1979 – the agreement in force when the ASCM was signed by all WTO members. Cf. WT/DS46/R – Report of the Panel, par. 7.15.

172 Howse, Smith and Smith, “Pursuing sustainable development strategies”, at 203.
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, the same as any other WTO member, may use the exception allowed by the second paragraph of Item (k) – applying the OECD standards. 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.”

Reactions to the rulings by the dispute settlement system were also presented to 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. Under Brazil’s leadership, these manifestations have given rise to different proposals for amendments to the ASCM during the Doha Development Round.

At the WTO level, the Embraer case is considered to be one of the unresolved cases. After

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174 Howse, Smith and Smith, “Pursuing sustainable development strategies”, at 203. Accordingly, Brazil’s statement before the WTO panel: “Brazil's view that developing country Members cannot afford to use the safe haven of the second paragraph of item (k)'', cf. WT/DS46/R – Report of the Panel, par. 7.31.
177 The Members that have presented formal proposals are Brazil, India and the European Communities. Negotiating Group on Rules (Aug. 22, 2003). Note by the Chairman: Compilation of Issues and Proposals Identifies by Participants in the Negotiating Group on Rules. WT/RL/W/143.
the implementation panel and appellate body review, Canada obtained the right to retaliate in the maximum amount of C$344.2 million per year (equivalent to US$233.5 million at the time), which was considered to be the largest compensation package the WTO authorized until that point. 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”\textsuperscript{178}.

The revised versions of PROEX were still questioned by Canada under article 21.5 of the DSU concerning the implementation process. On July 26, 2001, the original panel ruled that 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 adopted the CIRR as the reference for the applied interest rate to each financing operation\textsuperscript{179}. At the DSB meeting during the approval of this decision, Brazil stressed the concern that OECD standards had to be adopted by Brazilian authorities in the revision of the program, which meant that “the WTO had completely delegated the authority to make the export credit rules” to the OECD\textsuperscript{180}. Canada stayed suspicious about Brazil’s commitment to implement the new revised version PROEX, and closely followed the financial operations of Embraer\textsuperscript{181}.

Coincidence or not, in 2004 a new process for revising 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\textsuperscript{182}. To a certain extent, the ASU, one of the annexes to the OECD Arrangement, assumes the same rationale of the latter\textsuperscript{183}: it is negotiated by a restricted club

\textsuperscript{178} Andreas Goldstein, “EMBRAER: from national champion to global player”, \textit{CEPAL Review}, n. 77, pp. 97-115, p. 111.


\textsuperscript{181} WT/DSB/M/108, par. 60.

\textsuperscript{182} 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 the invitation to be part of the negotiations with the condition that it would have access to all meetings and information available, and that it could leave the negotiations at any time.

\textsuperscript{183} According to the WTO panel, ASU is considered to be a constitutive part of the OECD Arrangement for the purposes of Item (k), second paragraph exception: “We note that several 'Sector Understandings' (relating to
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 containing system among participants and, finally, as part of its essence, it is a continuous and very dynamic regulation.

Goldstein commented on the impact on how 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”.

Negotiations were closed by 2007, and Brazil was described as a very active participant in the process. 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. The 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, which benefited 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. The same articulation with the private sector was fundamental to support the diplomatic negotiations of the ASU at the OECD level.

When the ASU negotiation started, Roberto Azevedo, the main diplomat in charge of Embraer’s defense since the beginning of the case before the WTO, was the chief of the

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).

184 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, once 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 Instruments.” (2005) 30 The Yale Journal of International Law, 125-209, at128.

185 Andreas Golstein, Embraer, p. 114.

186 Interview with a servant of the OECD Secretariat on February 2008, on file with the author.

187 Shaffer, Sanchez Badin and Rosenberg, “The trials of winning at the WTO”.

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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, BNDES and the Ministry of Development, Industry and Trade. ASU negotiations had a specific structure that included an Expert Group composed mainly of private agents, such as aircraft industries, banks and other financial institutions. This group provided the negotiators with technical details about the markets involved and the projections of feasible financial commitments in the sector. Private agents have also gotten more familiar with diplomatic negotiations dynamic, being more comprehensive to the bargaining process involved.

There was also a very clever dynamic inside of the Brazilian MFA to deal with the forum shift. The group of diplomats that conducted the OECD negotiations was the same that worked in the WTO case. The diplomats already knew the sector, its technical specificities and financial conditions of the market. They also benefited of years working together with the same relevant agents, including the private sector. At the implementation stage, the agenda migrated to the Division of Rules in the MFA and to the Embassy in Paris. Both had the number of civil servants increased in order to follow the OECD agenda and the ASU negotiations.

ASU became 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 have been able to closely follow the dynamics of the market. Although the last agreement was signed in 2007, in 2009 the parties began discussing the new terms for the classification of the market because new products under development by Bombardier and Embraer were in between the classification of medium and large aircrafts.

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

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188 ASU regulates two markets differently: regional jets and large civil aircraft. Following Bombardier, Embraer is also developing new larger models and it would 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 the governments engaged in them, 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.

189 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
based in the United States, the main economy affected by the crises. For example, in the case of Embraer, the North American market accounted for 43% of its revenues in 2008, having had a decline to 13% in 2009\(^\text{190}\). In order to reduce the risk of the cancellation and suspension of sales that were agreed to 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: in 2008 Embraer was proud of its independence from Brazilian public finance that accounted for only 10% of the company’s total sales\(^\text{191}\), the amount of BNDES and FGE contribution has escalated from 30% and 35% in 2009 to 60% in 2010\(^\text{192}\). Such a 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 coordination of the OECD club group, together with the Aviation Working Group that is composed of public and private agents involved in financing operations for the civil aircraft sector.

5.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. The first developmental lesson of this case is the awkward alternative to risk the violation of restrictive provisions of international agreements – such as the ASCM – in order to make viable unusual structures in developing countries. This was the choice in the Embraer case on behalf of a highly intensive technology sector, based on the financial support by the state. However, such choice comprised economic costs to the national treasury, and a high political cost for Brazil when confronting its policy with the WTO obligations, resulting in a court case.

Once involved in the WTO dispute settlement system, Brazil noted the importance to draw on a technical strategy to be a relevant player in such system. The training of diplomats and the


\(\text{191}\) 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).

\(\text{192}\) Exame, BNDES deve financiar 60% dos jatos da Embraer em 2010, December 9, 2009.
partnership with the private sector favored a fast learning process by Brazilian diplomats about the content of the agreements and the hybrid legal procedure of the WTO dispute settlement system. The lengthy process in the WTO dispute settlement system qualified Brazil and Embraer as relevant actors in the civil aircraft market, not only because of its economic and technological capacities, but also for the financing conditions and legal abilities in dealing with the international system. Therefore, their public-private partnership was decisive for the case.

The ASCM is condemned as a very restrictive agreement to the policy space of WTO members, but the panel and the Appellate Body interpretations of its provisions in the Embraer cases added even more authority to its wording. Dealing with the legal apparatus of WTO agreements, Brazil attempted to advocate for the exception that required special and differential treatment under article 27 of ASCM, to PROEX financing conditions to Embraer. But, at the end, it was subsumed to the exception of item (k) of the Illustrative List by the interpretation of the WTO panel. This interpretation challenged Brazilian foreign policy towards international economic fora since the 1960s, claiming for special conditions in international regulation. As a result, the financing programs for the civil aircraft sector had to be structured taking into account other exemption allowed by the ASCM, and Brazil took the chance to be part of the OECD selected group defining the parameters for such exemption.

The opportunity for Brazil to be engaged in the OECD privileged forum (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 between the WTO and the OECD.

**D. FINAL REMARKS TO TWO DISTINCT CASES**

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.
One first disclaimer: the impression on the optimism 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 among the most relevant ones.

In each case under analysis, Brazil faced different needs, and worked on different developmental strategies. However, both cases have a couple of common issues. Both cases confronted legal constraints for the implementation of their respective policies in the WTO set of regulations, and focused on flexibilities permitted 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 rationale. Instead, flexibilities invoked in the cases analyzed and incorporated in the respective legal reforms in Brazil required substantial analysis of their conditions. 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. On this sense, both cases exemplify the importance of a clear developmental policy behind each strategy, the evaluation of its risks and limits, as well as of its lines of reasoning and supporters.

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 the Brazilian state. The specialization of negotiators and the 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 negotiations and bargaining. 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; the ASCM rules are closely linked to OECD arrangements and so on. The identification of relevant forums for

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each issue area, and the appropriate strategy to be undertaken in each of them, seems to be of the essence of the global trade system today.

There are, however, significant differences in the developmental responses we may find in each of the cases examined in this paper. The table below draws on some them:

<table>
<thead>
<tr>
<th>Brazilian policy tools</th>
<th>HIV/ public health policy and IP</th>
<th>Trade finance to the civil aircraft sector</th>
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<tbody>
<tr>
<td>Elected policy</td>
<td>Social development concerns</td>
<td>Economic development concerns</td>
</tr>
<tr>
<td>Main agents</td>
<td>Public bodies and public opinion</td>
<td>Public bodies and private companies</td>
</tr>
<tr>
<td>Type of diplomacy</td>
<td>Public</td>
<td>Public-private</td>
</tr>
<tr>
<td>Perspective about WTO agreements</td>
<td>To review the TRIPS agreement.</td>
<td>To by-pass ASCM, ruling from the OECD.</td>
</tr>
<tr>
<td>Decision-making process for the flexibilities</td>
<td>All WTO members negotiate specific flexibilities applicable to a selected group of developing nations.</td>
<td>Few WTO members (part of the OECD arrangement) negotiate flexibilities applicable to all WTO members.</td>
</tr>
<tr>
<td>Forum shifting dynamic</td>
<td>To reinforce WTO decisions.</td>
<td>To go beyond WTO decisions.</td>
</tr>
<tr>
<td>Impact to the WTO system</td>
<td>Strengthens the WTO system on IP.</td>
<td>Weaken the WTO system on subsidies.</td>
</tr>
<tr>
<td>Development externality</td>
<td>Yes. Brazil as a champion of developing countries.</td>
<td>No. Brazil as a champion by itself.</td>
</tr>
</tbody>
</table>

Such differences are, to a certain extent, associated with the essence of each policy pursued. If the HIV/health policies confronting the IP legal regime calls the attention to human rights and social needs invoking public interest, the trade finance to the civil aircraft sector calls to the competition for the global market share. This statement suggests that developmental responses and the applicable legal tools may vary in consonance to the policy under debate.

The table also suggests that according to the policy – if more competitive or cooperative – the externalities to other developing countries and the development discourse in the international fora may vary. If cooperative and dependant upon developing counties’ alliances, the revision of the commitments may benefit all countries in similar situation. Differently, the case of Embraer appoints Brazil as a champion by itself, with no favorable externality to other countries that may experience similar development need.

The analyses undertaken in this paper are mere examples of successful policies in Brazil that
evidence the articulation of several legal tools to promote development. They are not examples to be necessarily copied, but their description may help to enlighten the propensity of certain facets in similar developmental policies. A next step should then evaluate the impact of such trends in the global system, placing the development concern at the center of the global governance debate.