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FACULTY OF SOCIAL SCIENCES

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Department of North American Studies

Master's Thesis

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WTO as a Negotiation Forum between the USA and Brazil

Master's thesis

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Declaration

1. I hereby declare that I have compiled this thesis using the listed literature and resources only.
2. I hereby declare that my thesis has not been used to gain any other academic title.
3. I fully agree to my work being used for study and scientific purposes.

In Prague on January 3, 2018 Julie Chmelíková

References

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Abstract

This master´s thesis is concerned with the settlement of particular WTO disputes between Brazil and the United States. The aim of the thesis is to explain the importance of the Dispute Settlement Mechanism (DSM) for Brazilian trade strategy. To demonstrate the use of the mechanism the focus is placed on two specific disputes involving the United States and Brazil. These disputes, regarding patent protection and cotton subsidies, are analyzed using case-study methodology. Moreover, quantitative research based on WTO disputes data is included in the introductory chapter. The study of the disputes shows that Brazil has been one of the most active users of the DSM and that it has initiated cases predominantly against developed countries, the United States being the most frequent target. This strategy enables Brazil to pursue cases that are likely to have systemic implications and thus could have an impact on the international trade order. The two case studies are examples of disputes of potential systemic importance. They further reveal the complexity of disputes in terms such as the increasing role of NGOs, the concept of retaliatory suits, and the significance of timing and political pressure. The exposed dynamics of the settlement of disputes is useful for understanding other WTO cases as well.

Abstrakt

Tato magisterská práce se zabývá urovnáváním obchodních sporů mezi Brazílií a USA v rámci Světové obchodní organizace. Cílem této práce je vysvětlit důležitost Mechanismu řešení sporů (DSM) pro strategii brazilské obchodní politiky. Důraz je kladen na dva konkrétní spory mezi USA a Brazílií s cílem analyzovat využití tohoto mechanismu. Tyto spory, které se týkají ochrany patentů a subvencování bavlny, jsou analyzovány za pomoci metodologie případové studie. Úvodní kapitola obsahuje mimo jiní kvantitativní výzkum vycházející z dat sporů při Světové obchodní organizaci. Tento výzkum ukazuje, že Brazílie je jedním z nejaktivnějších uživatelů Mechanismu řešení sporů a že iniciuje spory převážně proti vyspělým zemím, kdy je USA nejčastějším terčem. V rámci této strategie Brazílie iniciuje spory, které mají předpoklad systémových důsledků a které by tudíž mohly mít vliv na mezinárodní obchodní systém. Tyto dvě výše zmíněné případové studie jsou příkladem sporů, které by potenciálně mohly mít systémový dopad. Případové studie dále odhalují spletitost sporů z pohledu rostoucí důležitosti nevládních organizací, konceptu odvetných opatření i významu načasování a politického tlaku. Porozumění

dynamice urovnávání sporů je užitečné i pro pochopení ostatních sporů při Světové obchodní organizaci.

Keywords

Brazil, USA, WTO, TRIPS Agreement, Dispute Settlement Mechanism, cotton subsides

Klíčová slova

Brazílie, USA, WTO, Dohoda TRIPS, Mechanismus řešení sporů, subvencování bavlny

Název práce

WTO jako vyjednávací platforma mezi USA a Brazílií

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I would like to express my gratitude to my dear parents for their support throughout my studies. I would also like to thank my boyfriend not only for his tireless optimism and patience but also for editing my thesis.

Table of Contents

Introduction

Brazil has devoted substantial effort to becoming one the most active users of the WTO Dispute Settlement Mechanism (DSM) and, since most cases are won plaintiffs,[1] it is also one of the most successful users. In my thesis I try to answer why the DSM is so important for Brazilian trade strategy. In order to articulate a response to my research question I will elaborate on what countries and industries have been frequent objects of Brazil´s claims at the WTO and how Brazil has built its litigation capacity.

There has been a gradual shift in Brazil´s policy from negotiation to litigation. The development of litigation capacity entails extensive legal and technical expertise, as well as financial resources. Brazil has started to perceive trade rules as an advantage, not as a conspiracy. Furthermore, it has started to see the WTO as an opportunity to limit the economic power of the North Atlantic blocks, mainly the United States.[2] The United States has actually been the most frequent target of Brazil´s claims and Brazil has proved to be a very strong and skilled plaintiff. At the same time, the WTO has issued multiple rulings against the United States. The United States has in fact been accused of deliberately disregarding WTO rules. This noncompliance on the side of the US is significant in understanding much of Brazil´s efforts at the WTO.

I believe that the noncompliance of the United States may have far-reaching implications. According to the Theory of Hegemonic Stability (HST) developed by Robert Gilpin, a hegemon is essential for creating and maintaining a stable liberal international order through cooperation[3] and defection prevention.[4] The theory posits that the hegemon will encourage other countries to obey the rules.[5] It is assumed that international trade often presents strong incentives to cheat at the expense of other actors and a hegemon is needed for policing.[6] The

[1] Robert Lawrence, "The United States and the WTO Dispute Settlement," *Council on Foreign Relations* (Special Report, March 2017): 24, https://www.cfr.org/sites/default/files/pdf/2007/03/WTO_CSR25.pdf (accessed January 1, 2018).
[2] Richard Bourne*, Lula of Brazil: The Story so far* (Los Angeles: University of California Press, 2008), 175.
[3] Robert Gipin, *Global Political Economy: Understanding the International Economic Order* (Princeton: Princeton University Press, 2001), 93.
[4] Ibid., 97.
[5] Ibid., 100.
[6] Robert Gilpin, *The Political Economy of International Relations* (Princeton: Princeton University Press, 1987), 364.

question is what happens when the hegemon starts cheating and disobeying the rules governing international economic activity. According to Charles Kindleberger there has been a strong inclination for economic hegemony to undermine itself and the United States has not been an exception.[7] Some claim that the United States has been using the system increasingly more to benefit itself rather than being concerned with the larger good of the international economy.[8] Mancur Olson argues that there has been a resurgence of protectionist thinking since the mid-1970s due to the rise of new industrial powers and therefore new exporters of manufactured goods.[9] Moreover, according to Barry Eichengreen the increasing prominence of bilateral and regional trade agreements can be ascribed to the decline in American hegemony.[10]

In my opinion it is the disobedience of the United States at the WTO and its decline as a hegemon that has encouraged other countries, such as Brazil, to try to reshape the international order. The idea of Brazil´s effort to change rules of the international order has been raised by several academics. Monica Hirst describes Brazil as an emerging power trying to "advocate a reconfiguration of the international order based upon a more inclusive multilateral architecture."[11] David Mares and Harold Trinkunas characterize Brazil as an emerging power full of "aspirations to influence the way global governance works."[12] They further argue that Brazil is not strong enough to be a "rule maker" but no longer wishes to be a "rule taker" and that is why it seeks to become a "rule shaper."[13] The DSM can be therefore perceived as a platform for Brazil to reshape certain rules governing the international economy.

In my thesis I show the dynamics of specific WTO disputes regarding patent protection and cotton subsidies. These two case studies reveal aspects of the DSM that are not evident at first sight, yet are crucial for understanding the complexity and interconnectedness of WTO disputes. Among these aspects are the role of non-government organizations (NGOs), the concept of retaliatory suits, the significance of timing and political pressure, and the

[7] Ibid., 364.
[8] Ibid., 366.
[9] Gilpin, *Global Political Economy*, 97.
[10] Ibid., 96.
[11] Monica Hirst, "Emerging Brazil: The Challenges of Liberal Peace and Global Governance," *Global Society 29*, no. 3 (2015): 359, doi: 10.1080/13600826.2015.1008422.
[12] David Mares and Harold Trinkunas, *Aspirational Power: Brazil on the Long Road to Global Influence* (Washington, DC: Brookings Institution Press, 2016), 3.
[13] Ibid., 3-4.

compliance issue. It is also important to realize that these two cases are a part of a much bigger picture. In the case of patent protection and innovation, it is the pharmaceutical industry that is of a great importance to the United States and where the United States has a comparative advantage over Brazil. In the case of subsidies and protectionist measures, it is the agricultural industry that is very important to Brazil and where Brazil has a comparative advantage over the United States.

The thesis is divided into three chapters. The first chapter describes the interaction of Brazil and the United States at the WTO. It gives an overview of all of the disputes concerning these two countries and it also determines the most contentious trade issues. Brazil´s agricultural industry and the US pharmaceutical industry are put not only in the context of protectionist measures and innovation, but also in the context of the WTO. Furthermore, reasons for Brazil´s success at the WTO are elaborated on in this chapter.

The second chapter presents the first case study of the thesis which revolves around patent protection. It analyzes a dispute initiated by the United States against Brazil regarding Brazil´s industrial property law, a law which the United States deemed discriminatory. As a reaction, Brazil initiated a retaliatory case against the United States. The chapter describes the origin, the process and the implications of this case. The far-reaching importance of this dispute is further analyzed in the context of the TRIPS Agreement and global access to medicines.

The third chapter is dedicated to the second case study which focuses on subsidies on upland cotton. It presents a well-known dispute initiated by Brazil against the United States in which Brazil claimed that the US farm subsidies on cotton were in violation of the WTO Agreement. Much like the previous chapter, this chapter also reports on the origin, the process and the implications of the dispute. Furthermore, it includes the current debate regarding US policies on cotton subsidies.

Literature Review and Methodology

The tensions present between Brazil and the United States at the WTO are much like the history of politics of international trade and the extent of liberalization and concessions involved. Both of these countries are pulled in different directions based on the specific

industry. These two tendencies are to either maximize trade liberalization (liberal position) or to hinder trade liberalization (protectionist position). Using a specific industry as an example - US agricultural policies tend to be protectionist, whereas Brazil´s agricultural policies tend to be liberal. Yet the historical trend of international trade is a movement from substantial government intervention to free trade. This review traces the development of international trade and policy study from the early periods to the more recent theories involving trade groups such as GATT and then the WTO.

In her introduction to *The Political Economy of International Trade*[14] Lisa Martin, a professor of political science at the University of Wisconsin-Madison, describes periods of international trade. The first period concerns mercantilism, which defined the period between the 16th and the 18th century. This period is characterized by monopolized trade between European countries and their colonies. Under this system colonies could export commodities only to the colonial power for artificially low prices and could import manufactured goods only from the colonial power at high prices. The second period, referred to as Pax Britannica, started with the end of Napoleonic wars in 1815 and ended with the eruption of the First World War in 1914. Expanding economic exchange among European countries is characteristic of this period, referred to as the first era of globalization. The desire to export to other markets was encouraged by new technologies. The First World War hindered liberalizing efforts and the interwar period witnessed US retreat and isolationism. The nature of international trade after the Second World War became highly institutionalized and the General Agreement on Tariffs and Trade (GATT) oversaw the transformation of economic exchange towards free trade. Moreover, in the 1980s many developing countries, such as Brazil, which initially advocated import substitution industrialization, also opted for export-led policies due to the debt crises. In 1995 GATT was replaced by the WTO with the objective of further tariff reduction.

Martin places the concept of protectionism at the center of the politics of international trade.[15] She sheds light on the evolution of economic models trying to explain protectionist tendencies over time, across countries and among sectors. She introduces Adam Smith, the founder of classical economics, as the key figure to understanding economic interest of countries. Smith argued that trade enables countries to abandon self-sufficiency and instead specialize in

[14] Lisa Martin, Preface to *The Oxford Handbook of the Political Economy of International Trade*, edited by Lisa Martin (New York: Oxford University Press, 2015), 1-16.
[15] Ibid., 5.

sectors, where they have a comparative advantage and can produce goods more efficiently than other countries. Martin then discusses the Heckscher-Ohlin model, developed by Eli Heckscher and Bertil Ohlin in the 1920s, according to which it is the distribution of resources (land, labor, capital) that should determine which goods a country can produce the most efficiently based on its factor endowments. Based on the Heckscher-Ohlin approach Wolfgang Stolper and Paul Samuelson introduced their trade model in the 1940s. The Stolper-Samuelson model (HOSS) argues that increased exposure to trade creates losers and winners within each country. According to this model, abundant factors will benefit from increased trade and will become the drivers of free trade. On the other hand, scarce factors will suffer from increased trade and will be in support of protectionist measures.

Modern scholars challenge these models suggesting that they are not suitable for the globalized world. In the 1970s Paul Krugman and others developed the New Trade Theory which among others focuses on the concept of return to scale. He argues that since production becomes more efficient when performed on a large scale, it is rational for governments to protect new industries, so that they grow in scale to later become efficient exporters. Krugman, a professor of economics and international affairs at Princeton University and a recipient of the Nobel Memorial Prize in Economic Sciences for 2008, in *Making Sense of the Competitiveness Debate*[16] states that according to the new trade models it is possible that tools, such as export subsidies or temporary tariffs, may alter world specialization in a way convenient to the protecting country.[17] Unlike the traditional trade models which treat tariffs as an inherently bad thing hindering free trade, new trade models approach trade tariffs with a certain dose of ambiguity suggesting that protection can increase the scale of an industry. As a result, this model offers justification for government intervention. As asserted by Krugman, "conventional trade theory views world trade as taking place entirely in goods like wheat; new trade theory sees it as being largely in goods like aircraft."[18] Therefore, new trade theory offers a more complex view and adds more layers to the story.

[16] Paul Krugman, "Making Sense of the Competitiveness Debate," *Oxford Review of Economic Policy* 12, no. 3 (1996): 17-25, http://www.jstor.org/stable/23606438.
[17] Ibid., 22.
[18] Ibid.

In *Political Economy of International Trade*[19] Helen Milner, a professor of politics and international affairs at Princeton University, suggests that whereas economists agree that free trade is the best solution, political scientists see protectionism as eminently reasonable.[20] Since protectionism is deemed by political scientists to be a norm, Milner tries to explain the surge of free trade among countries since the 1980s. On the institutional level she observes that there is a correlation between liberalization and democratization, asserting that political regime change can be and often is accompanied by trade reforms. On the international level she claims that US hegemony has risen, not declined since 1980s.[21] She believes that the rush to free trade was caused by the United States putting pressure on developing countries to open their economies to trade. Milner acknowledges the influence of international institutions but regards the GATT and IMF as insufficient explanations for global change in international trade since the 1980s.[22]

However, there are scholars like Robert Gilpin, a professor of public and international affairs at Princeton University, who in *Global Political Economy: Understanding the International Economic Order*[23] argues that the United States as a hegemon has been on its decline. In contrast to Milner´s view, Gilpin asserts that since the end of the Cold War American leadership has waned and simultaneously formerly communist and Third World countries have opened their economies to trade.[24] Yet Gilpin is first and foremost known for his approach to political economy as a state-centric realist. He believes that the state is the principal actor with no superior authority and therefore, national policies and domestic economies are the main factors of economic affairs.[25]

Gilpin´s standpoint has to be put into context which is provided by Benjamin Cohen, a professor of international political economy at the University of California, in *International Political Economy: An Intellectual History*.[26] Cohen recounts the history of international political economy (IPE) as a study field, combining politics and economy, present only since

[19] Helen Milner, "The Political Economy of International Trade," *Annual Review of Political Science* 2, no. 1 (1999): 91-112, https://web.stanford.edu/class/polisci243c/readings/v0002017.pdf.
[20] Ibid., 92.
[21] Ibid., 105.
[22] Ibid., 107.
[23] Gipin, *Global Political Economy.*
[24] Ibid., 5.
[25] Ibid., 15.
[26] Benjamin Cohen, *International Political Economy: An Intellectual History* (Princeton: Princeton University Press, 2008).

the 1970s. Cohen distinguishes between the American and the British schools of thought. Since IPE was developed in the United States, the American tradition has been the dominant one. The American tradition is rooted in social science and scientific models are prioritized. The British approach includes other academic disciplines and touches on ethical and normative issues. Moreover, Cohen draws attention to the mystery of IPE, which he believes comes from the role of the state.[27] The US tradition is state-centric, meaning that the sovereign state is the most interesting and most important actor; it is also the basic unit of analysis. On the other hand, the British tradition is more inclusive, analyzing other actors as well. Cohen´s study is therefore very helpful for understanding Gilpin´s approach.

Gilpin further states in *Global Political Economy: Understanding the International Economic Order*[28] that the impact of economic globalization has been exaggerated and that the main competitors for American firms are other American firms. He is a proponent of free trade with one exception – protection of infant industries (much like Krugman). Gilpin acknowledges the decline in wages of many American workers after the 1970s but refutes that it was due to competition from low-wage countries; rather he ascribes it to technological development such as automation, lean production techniques and computerization.

Lawrence Edwards, a professor of economics at the University of Cape Town, and Robert Lawrence, a professor of trade and investment at Harvard University, in their *Rising Tide: Is Growth in Emerging Economies Good for the US,*[29] elaborate on the importance of developing countries for the United States, a current trend of scholarly attention. They come to the conclusion that growth in emerging-market economies is in the economic interest of the US. They point out that negative perception of global trade by the American public is due to the coincidence of slow income growth, increasing income inequality and declining manufacturing employment with a sharp increase in imports from developing countries. Moreover, developing countries were able to recover faster than the United States after the global financial crises. Edwards and Lawrence acknowledge adjustment costs associated with free trade but that those should be offset by overall gains. They address the issue of American debt arguing that the United States must borrow less from the rest of the world and also

[27] Ibid., 118.
[28] Gipin, *Global Political Economy.*
[29] Lawrence Edwards and Robert Lawrence, *Rising Tide: Is Growth in Emerging Economies Good for the United States?* (Washington, DC: Peterson Institute for International Economics, 2013).

increase the foreign demand for US goods and services.[30] Therefore, they see growth in developing countries as part of the solution to US economic problems.

Other scholars, such as Thomas Oatley, have reservations about the benefits of growth in developing countries. In *International Political Economy*[31] Oatley, a professor of political science at the University of North Carolina, focuses on three components of the WTO: the set of principles and rules, the intergovernmental bargaining process, and the DSM. He argues that the emergence of developing countries as a power coalition in the WTO has changed the bargaining process. He asserts that the United States, the European Union and Japan used to be the agenda-setters. These developed countries liberalized industries in which they were competitive, such as high-tech products.[32] In contrast to developed countries, Brazil, India and China (BIC countries) are competitive in labor-intense manufactured goods and agriculture. As a result, BIC countries were able to change the bargaining process and ultimately block the conclusion of the Doha Round since they were not able to reach satisfactory concessions regarding market access in agriculture.

There are scholars who take the argument of emerging powers affecting international order even further, such as Kristen Hopewell, a senior lecturer in international political economy at the University of Edinburgh, in her book *Breaking the WTO: How Emerging Powers Disrupted the Neoliberal Project*[33] published in 2016. Hopewell claims that the environment at the WTO has changed immensely since the Seattle Ministerial Conference of 1999. She attributes the change to the developing countries. She goes as far as to blame the developing countries for the death of the Doha Round. She claims that contrary to scholarly expectations, developing countries did not form a movement in opposition to neoliberalism but instead embraced the rules and the principles of the international trading system.[34] It is paradoxically not the opposition but the embrace of the neoliberal rules that has been the cause of the end of the WTO. Hopewell sees globalization as a US-led institution-building project and the change in distribution of power by developing countries disrupted this project of neoliberalism. Hopewell further claims that the WTO was created to serve as an instrument of US power;

[30] Ibid., 239.
[31] Thomas Oatley, *International Political Economy* (London: Longman, 2013).
[32] Ibid., 34.
[33] Kristen Hopewell, *Breaking the WTO: How Emerging Powers Disrupted the Neoliberal Project* (Stanford: Stanford University Press, 2016).
[34] Ibid., 3.

however, it ultimately provided the tools to challenge US domination.[35] She perceives the Uruguay Round as the last manifestation of American hegemony within the international trading system.[36]

Many of the aforementioned scholars lamented stalling the multilateral trade negotiations and failing to complete the Doha Round. They stress different aspects and suggest different alternatives. Edwards and Lawrence suggest that there should be core commitments shared by all WTO members and other commitments shared by only some WTO members.[37] Oatley stresses that regional trade agreements are a discriminatory alternative and present the greatest challenge to the WTO.[38] Martin, on the other hand, does not perceive regional trade agreements negatively. She asserts that they may either undermine the multilateral trade regime or they may enable integration among small groups which will eventually transform into even deeper global liberalization. She concludes by admitting that if there is no mutual agreement reached at the WTO, countries will have to find different platforms to pursue their interests.[39]

There are certain aspects that I believe the scholars above mentioned belittled, neglected or omitted in their scholarly work. I think that Milner belittled the importance of the oil crises in the 1979 and the debt crises in the 1980s, and that trade reforms were very often a condition for obtaining a loan from the IMF and World Bank, the carrot and stick approach. Edwards and Lawrence see growth in developing countries as complementary rather than competitive, since they tend to specialize in production of different goods. I do not agree with this observation; instead I think that developing countries produce goods that quite often overlap with goods produced by developed countries. Brazilian Embraer, as one of the largest global producers of civil aircraft, is one of the many examples of companies in developed countries producing highly sophisticated goods. Lawrence and Edwards further suggest that in order to revitalize the WTO individual issues could be pursued separately. Yet, I think that using this approach would not help solve the most contentious issues, therefore defeating the purpose of such negotiations. I also disagree with Hopewell´s assessment of the situation at the WTO. Even if the developing countries managed to change the bargaining process in their favor,

[35] Ibid., 17.
[36] Ibid., 76.
[37] Edwards and Lawrence, *Rising Tide*, 247.
[38] Oatley, *International Political Economy,* 37.
[39] Martin, Preface, 11.

they should not be blamed for the failure of the Doha Round. Assuming that the current system is biased and disadvantages developing countries because their bargaining power was not as prominent during the Uruguay Round, it should come as no surprise that they want to secure concessions on developed countries and reach a more balanced deal.

As demonstrated above, determining the impact of growth of developing countries on the United States and the WTO is currently a trend in international political economy. I argue that Brazil´s active role at the WTO, specifically with respect to its use of the DSM, has had a significant impact on the WTO. In my thesis I use case studies to analyze two particular disputes between Brazil and the United States as part of the DSM of the WTO. I think that there has been an abundance of scholarly work done on the WTO in general and also specifically on the DSM, however, there have been very few case studies done. Yet I believe that it is precisely case studies that can show the dynamics, the interconnectedness, and the intricacies present at the WTO. The case studies show that the DSM is neither straightforward, nor black and white. They also show that aspects analyzed in isolation do not reveal the bigger picture and their interpretation can as a result be misleading.

For my thesis I used sources that I was able to access through the Charles University, George Mason University in Washington D.C. and Freie Universität in Berlin. One of the most helpful sources was an extensive study entitled *The Trials of Winning at the WTO: What Lies behind Brazil´s Success* by Gregory Shaffer et al. which elaborates on Brazil´s gradual development of its litigation capacity at the WTO. Another very beneficial study regarding the DSM was *The United States and the WTO Dispute Settlement System* by Robert Lawrence.

Regarding intellectual property some of the most important sources were: *Conflicts in the Knowledge Society: The Contentious Politics of Intellectual Property* by Sebastian Haunss, *Implications of the TRIPS Agreement for Developing Countries: Pharmaceutical Patent Laws in Brazil and South Africa in the 21st Century* by Naomi Bass, *Contemporary Intellectual Property: Law and Policy* by Charlotte Waelde et al., and *Case Studies in US Trade Negotiation: Making the Rules* by Charan Devereaux et al.

In regard to cotton dispute the most pertinent sources for my thesis were: *Cotton Subsidies, the WTO, and the 'Cotton Problem'* by John Baffes, *Analysis of the Brazil-USA Cotton*

Dispute by William Ridley and Stephen Devadoss, and *Dispute Settlement at the WTO: Impacts of a No Deal in the US-Brazil Cotton Dispute* by Csilla Lakatos and Terrie Walmsley.

Moreover, I have obtained a biography of Luiz Inácio Lula da Silva and memoirs of Fernando Henrique Cardoso and Celso Luiz Nunes Amorim. Regarding primary sources I extensively used the WTO official website and also cables sent from various US embassies obtained by Knowledge Ecology International thanks to a Freedom of Information Act request.

In my thesis I apply case study methodology. Using case study as a research method enables me to capture the complexity of the DSM and its realistic picture. I think that this method is very valuable in the context of the DSM and should be used more abundantly to refute the perception of the DSM as a straightforward legal procedure. This research method allows for a detailed examination of the DSM and reveals domestic interests and political environment of WTO members. Moreover, the case studies expose dynamics present at the WTO that can be useful for understanding other WTO disputes. My research is based on a mix of quantitative and qualitative evidence. The quantitative evidence is present particularly in the introductory chapter where I present data connected to the WTO disputes.

1. Brazil and the USA at the WTO

Brazil is one of the most frequent users of the DSM under the WTO. Brazil has raised 31 dispute cases as a complainant, making it the fourth-most active WTO member after the United States, the European Union and Canada. Brazil has also participated in 113 cases as a third party, making it the eighth-most active WTO member overall. Even though other large developing countries, such as China or India, use the DSM, they participate mainly as third parties (Table 1).[40] The difference between initiating a dispute as a complainant and becoming involved as a third party is substantial because a different level of legal expertise is required. Therefore, only a WTO member that has extensive legal and technical expertise at its disposal can succesfully initiate disputes. It is remarkable that Brazil as a developing country has such capacity.

[40] "Disputes by agreement," WTO, accessed October 10, 2017, https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm.

Table 1 – WTO disputes by member

	as complainant	as respondent	as third party
Brazil	31	16	113
Canada	35	21	122
China	15	39	142
European Union	97	84	169
India	23	24	129
Japan	23	15	174
Korea	17	16	115
United States	115	130	142

Source: Author´s work based on the WTO official website

Brazil has initiated 31 cases in total, with 11 of them brought against the United States (Table 2). The United States has initiated 115 cases, just four of them against Brazil (Table 3).[41] The 11 cases brought by Brazil against the United States are the following: US - Standards for Reformulated and Conventional Gasoline, WTO/DS4; US - Continued Dumping and Subsidy Offset Act of 2000, WTO/DS217; US - Countervailing Duties on Certain Carbon Steel Products from Brazil, WTO/DS218; US - US Patents Code, WTO/DS224; US - Anti-Dumping Duties on Silicon Metal from Brazil, WTO/DS239; US - Equalizing Excise Tax Imposed by Florida on Processed Orange and Grapefruit Products, WTO/DS250; US - Definitive Safeguard Measures on Imports of Certain Steel Products, WTO/DS259; US - Subsidies on Upland Cotton, WTO/DS267; US - Domestic Support and Export Credit Guarantees for Agricultural Products, WTO/DS365; US - Anti-Dumping Administrative Reviews and Other Measures Related to Imports of Certain Orange Juice from Brazil, WTO/DS382 and US - Countervailing Measures on Cold- and Hot-Rolled Steel Flat Products from Brazil, WTO/DS514.

The four cases brought by the United States against Brazil are the following: Brazil - Certain Measures Affecting Trade and Investment in the Automotive Sector, WTO/DS52; Brazil - Certain Measures Affecting Trade and Investment in the Automotive Sector, WTO/DS65; Brazil - Measures on Minimum Import Prices, WTO/DS197: and Brazil - Measures Affecting Patent Protection, WTO/DS199.[42]

[41] "Map of disputes between WTO members," WTO, accessed October 5, 2017, https://www.wto.org/english/tratop_e/dispu_e/dispu_maps_e.htm.
[42] "Disputes by member," WTO, accessed October 10, 2017, https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm.

Not only has Brazil initiated many more cases than the United States, it has also proved to be quite successful. All four disputes brought by the United States against Brazil were settled during consultations. On the other hand, out of the 11 disputes brought by Brazil against the United States, five of them required panel decision, out of which four were appealed. The four appealed cases are: US - Subsidies on Upland Cotton, WTO/DS267; US - Definitive Safeguard Measures on Imports of Certain Steel Products, WTO/DS259; US - Continued Dumping and Subsidy Offset Act of 2000, WTO/DS217 and US - Standards for Reformulated and Conventional Gasoline, WTO/DS4. All 4 of the Appellate Panels were in Brazil´s favor.[43]

Yet it is important to acknowledge that it is very difficult to measure success, to determine who the "winner" is and to know to what extent the "loser" complied with the panel´s ruling. Robert Lawrence believes that a majority of WTO cases are in general won by complainants. He asserts that "The US record in WTO cases in which it has been a defendant suggests it has not always been scrupulous in adhering to its WTO obligations. Currently,[44] the United States is actually a defendant in almost twice as many cases as it is a plaintiff, and most WTO cases are won by the plaintiffs."[45] Lawrence further adds that "The United States has also been repeatedly judged to be in violation of its WTO commitments by the organization´s dispute settlement panels, and although some violations could be ascribed to uncertainties about the meaning of the rules, the United States is also guilty of disregarding the rules deliberately."[46] This statement implies that the United States intentionally disobeys and violates its WTO commitments despite repeatedly adverse rulings by the WTO panels. This is a rather interesting development since the United States was the main proponent of a stricter DSM due to its frustration by other Contraction Parties that were able to block multiple GATT decisions in the 1980s that were in favor of the United States.[47]

Another interesting aspect in regard to Brazil´s use of the DSM is what countries it targets. Gregory Shaffer and David Evans stated in *Dispute Settlement at the WTO: The Developing Country Experience* that "Nearly thirty percent of the cases initiated by South American

[43] Ibid.
[44] The study was written in 2007.
[45] Lawrence, "The United States and the WTO Dispute Settlement," 24.
[46] Ibid., 3.
[47] Paul Rosenthal and Robert Vermylen, "The WTO Antidumping and Subsidies Agreements: Did the United States Achieve its Objectives during the Uruguay Round?" *Law and Policy in International Business* 31, no. 3 (Spring 2000): 874, https://www.loc.gov/.

countries have been against other countries in the region."[48] Although this statement reflects the situation of many WTO members in South America, it does not apply to Brazil. Chile, the third-most active user of the DSM, has initiated 10 cases in total, five of them against countries in the region. Argentina, the second most active user of the DSM, has initiated 20 cases in total, eight of them against countries in the region. Brazil, the most active user of the DSM, has initiated 31 cases in total, only three of them against countries in the region.[49] There are in fact several geographical features that make Brazil´s use of the dispute settlement rather unique. Firstly, as mentioned above, Brazil has initiated very few cases in South America.[50] Secondly, Brazil has targeted many different WTO members, specifically 11, from various continents including Asia and Africa.[51] Thirdly, Brazil has targeted predominantly developed countries, 23 out of 31 disputes, the United States with 11 being the most frequent object (Table 2).

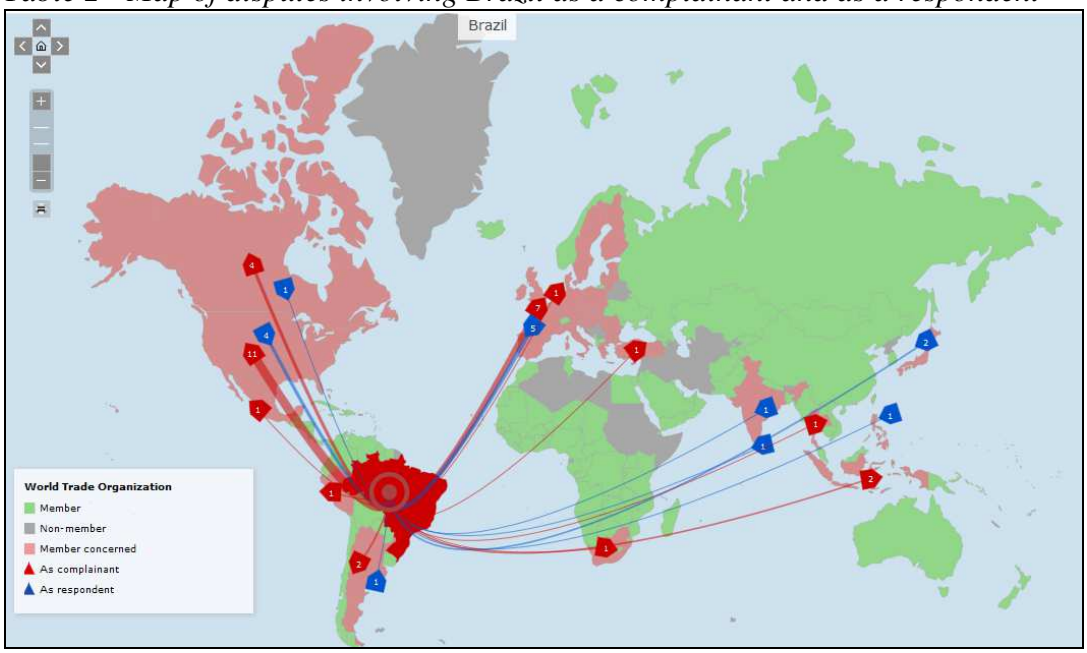
[48] Gregory Shaffer and David Evans, Preface to *Dispute Settlement at the WTO: The Developing Country Experience*, edited by Gregory Shaffer and Ricardo Meléndez-Ortiz (Cambridge: Cambridge University Press, 2010), 6.

[49] "Disputes by member," WTO, accessed October 10, 2017, https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm.

[50] Brazil has initiated one case against Peru and two against Argentina.

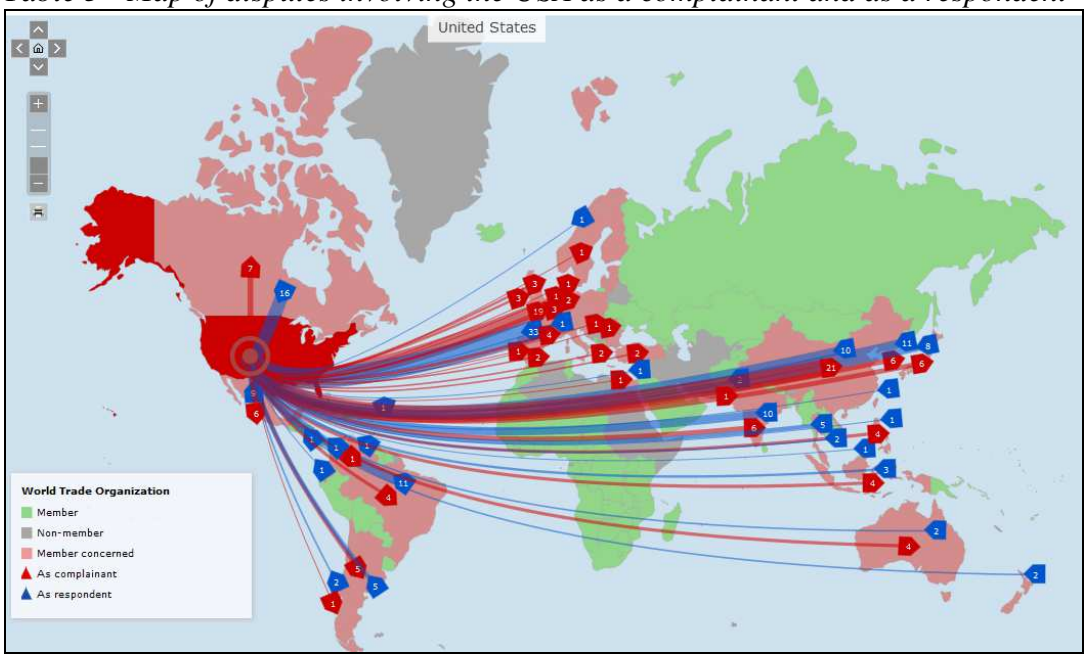
[51] Those 11 WTO members against which Brazil has initiated disputes are: Peru, Argentina, Mexico, USA, Canada, EU, Netherlands, Turkey, South Africa, Indonesia, and Thailand.

Table 2 - Map of disputes involving Brazil as a complainant and as a respondent



Source: WTO official website

Table 3 - Map of disputes involving the USA as a complainant and as a respondent



Source: WTO official website

Table 4 - Disputes by agreement (the years indicated correspond to requests for consultations, the countries indicated to complainants)

	DS4 Brazil 4/1995	DS52 USA 8/1996	DS65 USA 1/1997	DS197 USA 5/2000	DS199 USA 5/2000	DS217 Brazil 12/2000	DS218 Brazil 12/2000	DS224 Brazil 1/2001	DS239 Brazil 9/2001	DS250 Brazil 3/2002	DS259 Brazil 5/2002	DS267 Brazil 9/2002	DS365 Brazil 7/2007	DS382 Brazil 11/2008	DS514 Brazil 11/2016
Agreement Establishing the WTO						x					x			x	
Agriculture				x								x	x		
Anti-dumping									x					x	
Civil Aircraft															
Customs valuation				x											
Dispute Settlement Understanding															
GATT 1947															
GATT 1994	x	x	x	x	x	x		x		x	x	x		x	x
Government Procurement															
Import Licensing				x											
Intellectual Property					x			x							
Preshipment Inspection															
Rules of Origin															
Safeguards											x				
Sanitary and Phytosanitary Measures															
Services															
Subsidies and Countervailing Measures		x	x			x	x					x	x		x
Technical Barriers to Trade	x														
Textiles and Clothing				x											
Trade-Related Investment Measures		x	x					x							
Protocol of Accession															

Source: Author´s work based on the WTO official website

1.1 Reasons for Brazil´s Success at the WTO

It is evident that Brazil brought almost three times as many cases against the United States as the United States did against Brazil. Moreover, table 4 reveals that the United States was active only at first, between 1996 and 2000. The United States has not filed any complaints against Brazil since 2000. Brazil has, in contrast, filed 10 complaints during that time. The question is what lies behind Brazil´s success.

Shaffer et al. ask this question in *The Trials of Winning at the WTO: What Lies behind Brazil´s Success*. Based on their findings, Brazil is one of the most successful users of the WTO dispute settlement system due to the rise of pluralist interaction between the private sector, civil society, and the government on trade matters.[52] They claim that expertise on trade matters is no longer reserved exclusively to the Foreign Ministry (Itamaraty) but is distributed among law schools, policy institutes, law firms, consultancies, think tanks, business associations, and different government ministries.[53] Yet these broader public-private networks are a relatively recent phenomenon due to Brazil´s economic and political development.

It was only in the 1990s that Brazil, like many other countries in Latin America, changed its development model from the import-substitution industrialization (ISI) policies to more export-oriented, trade-liberalizing policies. This change can be attributed to the oil and interest rate crises of 1979 and the consequent debt crises of the 1980s. The opening of Brazil to the outside world was initiated in 1989 by President Fernando Collor de Mello and was expanded by his successor President Fernando Henrique Cardoso.[54] Cardoso as Minister of Finance designed a very successful economic strategy called Plano Real which greatly contributed to Brazil´s economic growth (mainly by curtailing hyperinflation). In the foreword to Cardoso´s memoir President Bill Clinton praises not only Cardoso´s domestic economic policy but also his pursuit of trade liberalization.[55]

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[52] Gregory Shaffer, Michelle Ratton Sanchez, and Barbara Rosenberg, "The Trials of Winning at the WTO: What Lies Behind Brazil´s Success," *Cornell International Law Journal* 41 (2008): 394, http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1726&context=cilj.

[53] Shaffer, Sanchez, and Rosenberg, "The Trials of Winning at the WTO," 398.

[54] Ibid., 394-397.

[55] Bill Clinton, Foreward to *The Accidental President of Brazil: A Memoir, by* Fernando Cardoso (New York: PublicAffairs, 2006), x-xi.

As observed by Jeffrey Cason and Timothy Power, the economic and political transformation led not only to the pluralization of actors but also to an increase in presidential diplomacy, which ultimately led to the decline of Itamaraty´s historical monopoly over foreign and trade policy.[56] During the ISI era, there was simply no need for presidentially-led diplomacy,[57] but after the economic transformation presidents needed legitimization by the private sector, a development which led to the incorporation of business elites into discussions of trade policy.[58]

Shaffer et al. stress the importance of cooperation between a professional government bureaucracy for international trade and a system of well-funded trade associations and large private companies. In the context of the WTO, the associations and companies can help the government collect information and provide resources for legal and economic expertise.[59] Brazil, as an active user of the GATT dispute settlement system, realized that it needed the help of the private sector to be able to successfully claim cases in accordance with the technically and legally demanding WTO procedures. Shaffer et al. provide an example of how technically demanding a case can be: "The 2006 WTO panel decision in the European Communities-Biotech case alone was 1,087 pages in text, contained 2,187 footnotes, and was over 2,400 pages including annexes."[60]

Brazil has dedicated a lot of effort to developing advanced legal and technical expertise. Apart from its highly professionalized Ministry of Foreign Affairs, Brazil has at its disposal a General Dispute Settlement Unit in Brasília that identifies potential cases and an inter-ministerial Chamber of Foreign Trade (CAMEX) that decides which cases should be pursued and a WTO mission in Geneva. The Fundação Getulio Vargas Law School in São Paulo launched a post-graduate WTO course in 2003 and there are highly competitive internship programs offered both in Geneva and Brasília. There are also multiple research institutes, think tanks, consultancies and NGOs that are concerned with international trade

[56] Jeffrey Cason and Timothy Power, "Presidentialization, Pluralization, and the Rollback of Itamaraty: Explaining Change in Brazilian Foreign Policy Making in the Cardoso-Lula Era," *International Political Science Review* 30, no. 2 (2009): 119, http://www.jstor.org/stable/25652895.
[57] Ibid., 125.
[58] Ibid., 128.
[59] Shaffer, Sanchez, and Rosenberg, "The Trials of Winning at the WTO," 399-403.
[60] Ibid., 407.

policy.[61] The fact that all Foreign Ministers between 1995 and 2010 had served as Brazil´s ambassadors to the GATT/WTO shows the importance of international trade for Brazil.[62] Moreover, Roberto Azevêdo, a Brazilian diplomat who had served as head of the General Dispute Settlement Unit in Brasília and chief litigator in many WTO disputes (including the cotton dispute), was named WTO Director-General in 2013 and reelected to his second term in 2017.[63]

Brazil has built its legal and technical capacity gradually. Brazil was initially forced to hire foreign law firms, typically US-based. As long as the case affected a major Brazilian company, such as Petrobras or Embraer, the company would hire legal counsel. Even in the US-Cotton case, US law firm Sidley Austin was hired with resources that cotton producers pooled. Yet there have been multiple WTO disputes where only Brazilian law firms were hired, which is unique among developing countries.[64] In addition to Brazil´s development of legal expertise and financial resources, its diversified economy and democratic government enables it to claim its cases more effectively.[65]

According to Shaffer et al. there are four major challenges for a developing country to effectively participate in the WTO dispute settlement system: legal expertise, financial resources, power to endure economic and political pressure exerted by the United States and the European Union, and its own integral governance system.[66] Brazil is one of the most successful users of the WTO dispute settlement system not only among developing countries, but overall. It is obvious that many developing countries neither possess the legal expertise nor the resources, however, many developed countries do. Is Brazil perhaps just more willing to endure economic and political pressure? Is Brazil perhaps more dedicated to take advantage of new opportunities that the WTO offers?

[61] Ibid., 423-454.
[62] Ibid., 426.
[63] "WTO Director-General: Roberto Azevêdo," WTO, accessed October 10, 2017, https://www.wto.org/english/thewto_e/dg_e/dg_e.htm.
[64] Shaffer, Sanchez, and Rosenberg, "The Trials of Winning at the WTO," 457-461.
[65] Ibid., 475.
[66] Ibid., 408.

1.2 Agricultural Industry and Protectionist Measures

Brazil is not only a frequent and successful user of the DSM, it is also the leader of the G-20, a coalition of developing countries trying to advance their interests which they deem to have been neglected. The G-20 was formed to pursue agricultural negotiations and to counterbalance the interests of the European Union and the United States. This issue-based coalition of developing countries was formed by countries that did not share the same position on agriculture; as a consequence, Brazil had to compromise its ambition in market access issues in order to obtain support from India and China regarding the reduction of domestic and export subsidies of developed countries. As asserted by Pedro da Motta Veiga in *Brazil and the G-20 Group of Developing Countries*:

> From the Brazilian point of view, the decision to form a coalition of developing countries with heterogeneous interests in the agriculture negotiations represented a significant shift in the country´s negotiation position in this issue; it was now driven by the offensive interests of a large exporter but also by the objective of breaking the North-South protectionist front in agricultural negotiations through the setting up of a new "southern agenda" on agriculture [115].

Cason and Power in *Presidentialization, Pluralization, and the Rollback of Itamaraty: Explaining Change in Brazilian Foreign Policy Making in the Cradoso-Lula Era* give cause for reflection on a speech given by former President of Brazil Luiz Inácio Lula da Silva in Brasília in 2003. In this speech Lula da Silva articulated Brazil´s vision concerning the G-20 in the following words:

> Endowed with legitimacy and representativeness, the G-20 is changing the dynamics of multilateral trade diplomacy. In view of the firmness of the actions of its members and its collective vision, the G-20 helps to prevent the parameters of the agriculture debate in the WTO from being imposed by the protectionist interests of a few members […]. The G-20 positions aim at putting an end to the current distortions of agricultural trade and, as a consequence, will bring better living conditions to billions of farmers in the world. We fight for the elimination of all forms of export subsidies, as well as substantial cuts to trade-distorting domestic support. (130)

Lula da Silva stresses the urgency of change in the multilateral trade diplomacy, so that it no longer conforms to the protectionist interests of a few members. He believes that all export subsidies should be eliminated. As table 4 reveals, subsidies and countervailing measures are indeed the most contentious topic in US-Brazil trade relations within the WTO. Brazil is a major exporter of agricultural products and therefore a strong proponent of liberalization of trade in agriculture. Brazil´s effort to eliminate export and domestic

support schemes is the result of its ambition in market access.[67] Riordan Roett adds that the failure of the Doha Round launched in 2001 was mainly due to the agricultural subsidies maintained by the United States and the European Union.[68]

The core of the issue is described by Eugénia da Conceição-Heldt "[…] emerging powers are not willing to open their markets for industrial products without having considerable concessions in classical protectionist sectors (e.g. textiles, clothing, footwear, iron, steel, consume electronics, and agriculture)."[69] Since Brazil is a significant steel and major agricultural producer, it is precisely agricultural products and steel that gave cause to many of Brazil´s WTO complaints against the United States. On the other hand, there are industrial sectors in Brazil that are highly protected and less competitive, such as automobiles, electronic equipment, rubber and textiles. It was automobiles and textiles that gave rise to many American WTO complaints against Brazil. Therefore, Brazil´s trade policy is twofold: to maximize agricultural trade liberalization (liberal position) and to minimally decrease tariff rates for industrial products (protectionist position).[70]

It is understandable that Brazil vehemently pursues agricultural trade liberalization since, as stated by Kym Anderson et al., "Agricultural protection and subsidies account for about two-thirds of the trade distortion caused by government policies."[71] The authors continue by adding that "Although developing countries have almost doubled their share of world trade in manufactures over the last two decades, their share in agricultural trade has remained about 30 percent."[72]

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[67] Pedro da Motta Veiga, "Brazil and the G-20 Group of Developing Countries," In *Managing the Challenges of WTO Participation: 45 Case Studies*, edited by Peter Gallagher et al. (Cambridge: Cambridge University Press, 2005): 112.
[68] Riordan Roett, *The New Brazil* (Washington, DC: Brookimgs Institution Press, 2011), 137.
[69] Eugénia Conceição-Heldt, "Emerging Powers in WTO Negotiations: The Domestic Sources of Trade Policy Preference," *The International Trade Journal* 27 (2013): 432, http://www.tandfonline.com/toc/uitj20/27/5?nav=tocList.
[70] Ibid., 435-436.
[71] Kym Anderson, Harry de Gorter, and Will Martin,"Market Access Barriers in Agriculture and Options for Reform," In *Trade, Doha, and Development: A Window into the Issues*, edited by Richard Newfarmer (Washington, DC: World Bank, 2006), 85.
[72] Ibid., 86.

1.3 Pharmaceutical Industry and Innovation

Brazil´s agricultural sector is large and competitive. On the other hand its industrial sector is highly protected and faces a lack of innovation. To improve this situation Brazil adopted the Innovation Act of 2003, which stipulates conditions and incentives for companies to increase their research and development (R&D) investments. In Brazil, two-thirds of R&D investments come from the government and only one-third from the private sector. The investment pattern in the United States is the exact opposite – two-thirds of R&D investments come from the private sector and one-third from the government. The GDP is another indicator of differences between the United States and Brazil regarding R&D. In Brazil, the annual investment reached 1.3% of GDP in 2013, whereas in the United States it was 3.5%, almost three times as much. The volume of patent applications is ever more striking – Brazil registered 25 patent applications per million inhabitants in 2013, the United States 910 during the same year.[73] It is without any doubt that the United States puts a great emphasis on innovation and research. Therefore, it should come as no surprise that the United States is very concerned with patent protection.

Patent protection, mainly in the pharmaceutical sector, has been a very contentious topic in US-Brazil relations. In *Brazilian Foreign Policy in Changing Times: The Quest for Autonomy from Sarney to Lula,* Tullo Vigevani and Gabriel Cepaluni point out Brazil´s unique role among developing countries concerning intellectual property:

> On September 14, 1987, Gerald Mossinghoff, then chairman of the PMA (Pharmaceutical Manufacturers Association, now Pharmaceutical Research and Manufacturers of America – PhRMA), stated that Brazil had been chosen as a target of actions by the pharmaceutical sector and the USTR, due to its status as a developing country economic and diplomatic leader. This statement confirms the belief of the USTR that changing the Brazilian position on intellectual property would make it easier to alter the same policy in other countries, using measures against Brazil as an example to other developing nations with patent laws seen as flexible. (21)

The US Trade Act of 1974 enabled the United States to pursue stricter international patent protection. The act authorized the Office of the United States Trade Representative (USTR) to initiate cases on its own, to take legal action under Section 301 in case of

[73] Ricardo Sennes,"US-Brazil Relations: A New Beginning? How to Strengthen the Bilateral Agenda," *Atlantic Council* (June 2015): 20, http://publications.atlanticcouncil.org/usbrazil/BrazilReportFINAL.pdf.

insufficient intellectual property protection, and to deny benefits that certain countries are given based on the US Generalized System of Preferences in case of insufficient intellectual property protection.[74] This policy resulted in several unilateral trade sanctions implemented by the United States against Brazil under Section 301. During the Uruguay Round negotiations, which took place between 1986 and 1994, the United States wanted the creation of an international institution for intellectual property and a stricter dispute settlement system that would enable enforcement of intellectual property rights (IPR) and thus enhance US competitiveness.[75] The Uruguay Round resulted in the creation of both the binding dispute settlement system and the Agreement on Trade Related Aspects of Intellectual Property Rights known as TRIPS. The fact that the United States ceased using Section 301 and instead pursues its cases through the WTO is seen as a major success of the Dispute Settlement Mechanism.[76]

The TRIPS Agreement has been a target of criticism. Charlotte Waelde et al. in *Contemporary Intellectual Property: Law and Policy* state that "the linking of obligations to protect intellectual property with the attractiveness of trade privileges available under GATT was a stroke of genius […]."[77] The authors assert that the motivation for TRIPS implementation was largely economic: "It was driven by the concerns of Western industrialized countries, and most notably the United States, which could not countenance the multi-billion dollar trade in unauthorized IP […]."[78] As pointed out by Sebastian Haunss in *Conflicts in the Knowledge Society: The Contentious Politics of Intellectual Property*, having control over knowledge is one of the oldest technologies of power. Indeed, intellectual property has been called the "the oil of the 21st century."[79]

[74] Tullo Vigevani and Gabriel Cepaluni, *Brazilian Foreign Policy in Changing Times: The Quest for Autonomy from Sarney to Lula*, trans. Leandro Moura (New York: Lexington Books, 2012), 21.
[75] Ibid., 23.
[76] Keisuke Iida, "Is WTO Dispute Settlement Effective?" *Global Governance* 10 (2004): 216, http://www.jstor.org/stable/27800522.
[77] Charlotte Waelde et al., eds., *Contemporary Intellectual Property: Law and Policy* (Oxford: Oxford University Press, 2014), 378.
[78] Ibid., 25.
[79] Sebastian Haunss, *Conflicts in the Knowledge Society: The Contentious Politics of Intellectual Property* (Cambridge: Cambridge University Press, 2013), 11.

The US-Brazil economic relationship is of great importance. Brazil is the second largest economy in the Western Hemisphere, and the seventh largest in the world.[80] Both Brazil and the United States are also among top three producers and exporters of agricultural products in the world. Brazil is the ninth-most important trading partner for the United States and the United States is the second most important trading partner for Brazil.[81] The US goods and services trade with Brazil totaled $88 billion in 2016. US exports were $55 billion; US imports were $33 billion. The US trade surplus with Brazil was therefore $22 billion. In 2016 the top categories of US export to Brazil were mineral fuels, aircraft, machinery, electrical machinery, and optical and medical instruments. The top categories of US import from Brazil were aircraft, mineral fuels, iron and steel and machinery. Moreover, Brazil is the sixth largest supplier of agricultural imports to the United States with the following leading categories: coffee, fruit and vegetable juices, tobacco, red meats, and raw beet and cane sugar.[82]

As shown above, intellectual property is of a great importance to the United States and agriculture is of a great importance to Brazil. Considering these preferences from the perspective of trade policy, it is more convenient for states to specialize in the products that they make more efficiently than other products, i.e. in the goods in which they have a comparative advantage. The Heckscher-Ohlin model tries to assess which products a country can produce the most efficiently. The model suggests that countries differ in their capital endowments which can be divided into three categories – land, labor, capital (in the sense of investment or human capital). The United States as a rich country is abundant in capital but fairly scarce in labor; therefore, it is more efficient for it to specialize in capital-intensive goods such as high-technology products. On the other hand, Brazil, apart from being abundant in land, is, as a developing country, abundant in cheap labor but lacks capital; therefore, it is more efficient for it to specialize in agriculture or consumer goods. For that reason, the distribution of resources has to be taken into account when looking at goods that countries are likely to export or import.[83]

[80] Sennes,"US-Brazil Relations: A New Beginning?" 1.
[81] Ibid., 6.
[82] "Brazil," Office of the US Trade Representative, accessed November 9, 2017, https://ustr.gov/countries-regions/americas/brazil.
[83] Martin, Preface, 5-6.

As stated by Shaffer et al., "Who participates in WTO dispute settlement affects WTO law´s application and interpretation over time."[84] Brazil has pursued many systematic, structurally important cases that would have far-reaching implications. Therefore, when analyzing various disputes between Brazil and the United States, it is important not to focus only on sectors but also on the structural importance of the cases involved. The following two chapters will focus on two cases between the United States and Brazil that are significant due to their systemic importance. The case concerning subsidies on cotton is an example of Brazil´s effort to increase liberalization in sectors in which Brazil has a comparative advantage. Brazil´s effort is to eliminate agricultural subsidies overall by drawing attention to protectionist and discriminatory measures imposed by developed countries. In the case of pharmaceutical patent protection, Brazil tries to hinder liberalization in sectors in which the United States has a comparative advantage. Brazil´s objective is to expand and reframe the debate, to generate a lot of attention and to eventually change the interpretation of WTO laws. Therefore, the concept of comparative advantage has to be kept in mind when approaching pharmaceutical and agricultural industry in the United States and Brazil.

2. Measures Affecting Patent Protection and US Patents Code

In May 2000 the United States requested consultations with Brazil at the WTO concerning Article 68 of Brazil´s 1996 industrial property law which the United States deemed to be in violation of the TRIPS Agreement. The core of the dispute, known as DS199 (Measures Affecting Patent Protection), was the so-called "local working" requirement. What it meant in practice was that companies either had to start manufacturing their inventions in Brazil within three years of acquiring the patent or they were subjected to compulsory licensing.[85] The DSB´s decision to establish a panel followed in February 2001.[86]

[84] Shaffer, Sanchez, and Rosenberg, "The Trials of Winning at the WTO," 391.
[85] Charan Devereaux, Robert Z. Lawrence, and Michael Watkins, *Case Studies in US Trade Negotiation: Making the rules* (Washington, DC: Institute for International Economics, 2006), 96.
[86] "S199: Brazil — Measures Affecting Patent Protection," WTO, accessed October 12, 2017, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds199_e.htm.

It is important to know that the so-called "local working" provision of Brazil´s law had never been enforced.[87] Not only did Brazil argue that its legislation was not discriminatory, it also claimed that Sections 204 and 209 of the US Patent Code contained similar provisions.[88] This belief led Brazil to initiate a "counter-case" at the WTO in January 2001, referred to as DS224 (US Patents Code).[89]

What might seem like a straightforward case is on the contrary one of the most controversial and debated TRIPS-related disputes. This case was part of a much larger discussion, specifically on the access to medicines and production of generic drugs in developing countries. The United States dropped the case in June 2001 in reaction to discussions opened by the UN General Assembly in New York on how to combat AIDS.[90]

1.4 Origin, Process, and Implications of the Dispute

The core of the dispute concerning patent protection - DS199 - is an allegation of a TRIPS Agreement violation committed by Brazil. To be more specific, the United States claimed that Brazil violated Article 27 of the TRIPS by discriminating against foreign manufacturers that export their pharmaceutical products to Brazil.[91] Article 27 mandates that "patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced".[92] However, the following paragraph allows for exclusion from patentability when it is necessary to protect the public health or environment.[93]

The TRIPS Agreement of 1995 requires WTO members to establish minimum standards of intellectual property protection, including pharmaceutical patent protection. Prior to the TRIPS Agreement, protection of pharmaceutical patents was basically nonexistent in developing countries, enabling such countries to either purchase or manufacture generic

[87] Devereaux, Lawrence, and Watkins, *Case Studies in US Trade Negotiation*, 96.
[88] "WTO Agreements & Public Health," A joint study by the WHO and the WTO Secretariat 2002, 105.
[89] "DS224: United States — US Patents Code," WTO, accessed October 15, 2017, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds224_e.htm.
[90] Devereaux, Lawrence, and Watkins, *Case Studies in US Trade Negotiation*, 97.
[91] Naomi Bass, "Implications of the TRIPS Agreement for Developing Countries: Pharmaceutical Patent Laws in Brazil and South Africa in the 21st Century," *The George Washington International Law Review* 31, no. 1 (2002): 208, https://www.loc.gov/.
[92] "Trade-Related Aspects of Intellectual Property Rights," WTO, Marrakesh, Morocco, April 15, 1994, accessed October 10, 2017, https://www.wto.org/English/docs_e/legal_e/27-trips_01_e.htm.
[93] Ibid.

drugs for a fraction of the market price. Brazil wanted to comply with TRIPS requirements by enacting the Industrial Property Law in 1997. However, it was this law that became criticized by the United States for discriminating against foreigners.[94] The so-called "local working" requirement stipulated that foreign manufacturers had to produce at least part of the product in Brazil within three years to receive patent protection. If a foreign manufacturer failed to fulfill this requirement, the patent could be subjected to compulsory licensing, allowing Brazil to produce generic copies of the patented drug.[95]

There are three aspects of the Brazil´s Industrial Property Law that should be mentioned in this context. Firstly, Brazil could have taken advantage of the 10-year-long grace period to implement the TRIPS Agreement into its legislation. Yet instead of postponing the implementation, like many other developing countries did, Brazil enacted the TRIPS Agreement eight years prior to the official deadline. Secondly, according to Article 68 of Brazil´s Industrial Property Law, if it was not economically viable to produce a certain product, the manufacturer was exempted from the "local working" requirement and import of the product was admitted. Thirdly, the provision in question had never been enforced.[96]

Brazil argued that its Industrial Property Law was compatible with the TRIPS Agreement. Moreover, Brazil claimed that the United States had similar provisions regarding the "local-working" requirement in its legislature, namely Section 204 and 209 of the US Patent Code. According to the Section 204, small firms and universities were required to "manufacture substantially" in the United States if they received federal funding for their inventions. Section 209 addresses "local-working" in connection to federally owned patents.[97] Brazil filed a request for consultations at the WTO in January 2001; the dispute is listed as DS224.[98]

[94] Bass, "Implications of the TRIPS Agreement for Developing Countries," 191-192.
[95] Ibid., 207.
[96] Mohan Nair, "Comprising TRIPS: Brazil´s Approach to Tackle the HIV/AIDS Imbroglio," *Journal of Intellectual Property Rights* 13 (September 2008): 458, http://docs.manupatra.in/newsline/articles/Upload/6DCA62EB-A5CC-4BF6-954D-BA6DEFFE1BE2.pdf.
[97] "WTO Agreements & Public Health," 105.
[98] "DS224: United States — US Patents Code," WTO, accessed October 15, 2017, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds224_e.htm.

The United States decided to drop its case in June 2001 but only after a lot of political pressure. There were two events that took place in June 2001 that greatly contributed to the acceleration of the process. Firstly, the TRIPS Council held a special discussion on intellectual property and access to medicines. According to Devereaux, Lawrence and Watkins, more than 100 NGOs attended the meeting and among other things asserted that "developing countries were being bullied by the pharmaceutical industry and threatened with trade sanctions by governments to discourage them from participating in parallel importing or compulsory licensing."[99] Furthermore, at the TRIPS Council Brazil presented a document defending its use of compulsory licensing, a document which was endorsed by 48 other developing countries.[100] Secondly, the UN General Assembly opened discussions on how to combat AIDS. Brazil´s ambassador to the WTO, Celso Amorim, was of the opinion that it may have been politically disastrous for the United States to pursue its complaint. The rationale behind his claim was that Brazil´s fight against AIDS was founded in locally-produced, inexpensive generic drugs.[101] As a result, the United States retracted its complaint against Brazil and Brazil in return agreed that if it ever decided to enforce Article 68 in order to issue a compulsory license on patents held by US companies, it would notify the United States in advance.[102]

The intricacies of this dispute make it a very valuable case study since it can be approached from various angles and analyzed on multiple levels. The dynamics of the dispute reveal many aspects about the WTO that are not evident at first sight, yet are crucial to understand in order to see the bigger picture. There are three aspects that should be mentioned, aspects characteristic of this dispute but also present in other WTO dispute settlement cases – timing and political pressure, the role of NGOs and the concept of retaliatory suit. Moreover, this dispute draws attention to a topic that due to its complexity and magnitude greatly exceeds the frame of this dispute – TRIPS and access to medicines.

Firstly, the settlement of this dispute was a result of a great deal of political pressure. It was simply not viable for the United States to pursue such a controversial complaint under

[99] Devereaux, Lawrence, and Watkins, *Case Studies in US Trade Negotiation*, 96.
[100] "Brasil obtém apoio de 48 países à proposta sobre patentes," BBC Brasil, accessed January 1, 2018, http://www.bbc.com/portuguese/noticias/2001/010618_omc1.shtml.
[101] Devereaux, Lawrence, and Watkins, *Case Studies in US Trade Negotiation*, 96.
[102] "WTO Agreements & Public Health," 105.

such circumstances. Since Brazil and the United States reached a mutually agreed solution rather than pursuing their complaints within the DSM, the accuracy of their arguments will never be known. Devereaux et al. concluded that retraction of the complaint by the United States "[…] reflected unwillingness on the part of USTR Robert Zoellick to give opponents of trade liberalization an issue that appeared to give credence to the idea of the WTO interfering with poor countries' health policies."[103]

Secondly, NGOs played, and continue to play, an increasingly important role in the WTO. As pointed out by Keisuke Iida, the participation of nongovernmental organizations constitutes one of the major changes from GATT to the WTO. He acknowledges that the WTO is an intergovernmental dispute resolution mechanism but he also adds there is an effort to make the processes more transparent and accessible, opening the door to the NGOs.[104]

Sebastian Haunss elaborates on the role and mobilization of NGOs in regard to access to medicines, which he considers to be the most prominent global conflict in respect to IPR.[105] One of the first NGOs concerned with the issue of patents and drug prices was founded by Ralph Nader, a defender of consumer rights and later a Green Party presidential candidate. The NGO currently operates under the name Knowledge Ecology International (KEI) and is headed by James Love. KEI started cooperation with Health Action International (HAI), a network of more than 150 health, development and consumer organizations and Médecins Sans Frontiéres (MSF), a Nobel Peace Prize winner. The NGO coalition turned out to be well-coordinated and gradually more successful.[106] There were 350 NGO representatives from fifty countries at a conference held in Amsterdam in 1999. One of the first palpable successes was the Executive Order 13155 by the US President Clinton stating that the United States should refrain from pressuring sub-Saharan African countries not to use the TRIPS flexibilities (referring mainly to compulsory licensing). Yet the biggest success was the Doha Declaration on TRIPS and Public Health.[107] The Doha

[103] Devereaux, Lawrence, and Watkins, *Case Studies in US Trade Negotiation*, 97.
[104] Iida, "Is WTO Dispute Settlement Effective?" 210, 218.
[105] Haunss, *Conflicts in the Knowledge Society,* 143.
[106] Ibid., 147-149.
[107] Ibid., 150-151.

Declaration is not only perceived as a triumph for developing countries but also as an exemplary case of a potent alliance between NGOs and developing countries.[108]

Thirdly, many WTO dispute settlement cases are intertwined and therefore have to be perceived in a broader context. DS224 (US Patents Code), as a so-called "counter-case", is a very good example of this claim. Brazil brought the retaliatory suit for tactical reasons; it asserted that the US legislation was just as inconsistent with the TRIPS Agreement regarding compulsory licensing as the Brazilian legislation. Retaliatory suits are not so uncommon. For example Keisuke Iida mentions that the case brought by the European Union against the United States over Foreign Sales Corporations after the United States imposed sanctions on the European Union over bananas and beef hormones in 1999 was one such significant retaliatory suit.[109]

1.5 TRIPS and Global Access to Medicines

Global access to medicines is considered to be one of the most contentious problems concerning IPR. It is a conflict where Brazil as a developing country and the United States as a developed country assume firmly opposing stances. The core of the issue is how to enable access to essential drugs in developing countries while satisfying strict IPR, two competing goals both stipulated by the TRIPS Agreement.

The TRIPS Agreement is not the first agreement concerning the protection of intellectual property, yet it is the most comprehensive one. The first multilateral treaty of a great importance was the Paris Convention for Protection of Industrial Property of 1883. However, under this Convention a member country did not have to grant protection to foreigners as long as it did not grant protection to its own nationals. Therefore, the Paris Convention could have been easily bypassed by not granting protection at all. The next important multinational treaty was the Berne Convention for the Protection of Literary and Artistic Works of 1887. This Convention was heavily criticized as well, mainly due to its inability to enforce the rights of intellectual property holders and to resolve disputes. Finally, the Stockholm Convention of 1967 established the World Intellectual Property

[108] Devereaux, Lawrence, and Watkins, *Case Studies in US Trade Negotiation,* 103.
[109] Iida, "Is WTO Dispute Settlement Effective?" 214.

Organization (WIPO). WIPO became an object of criticism due to its tendency to prioritize the objectives of developing countries and not sufficiently protecting and enforcing IPR. It was the incapability of the WIPO that led to the implementation of the TRIPS Agreement.[110]

The TRIPS Agreement was an outcome of long-term efforts by the United States and one of the main accomplishments of the Uruguay Round. The scope of the TRIPS Agreement is far-reaching, encompassing the protection of copyrights, trademarks, geographical indications, industrial designs, patents, layout-designs of integrated circuits, and undisclosed information including trade secrets and test dates.[111] The most important Articles of the TRIPS Agreement for the purpose of this analysis are Articles 8, 27, 30 and 31.[112] The significant clauses are in bold:

> Article 8 states that "Members may, in formulating or amending their laws and regulations, **adopt measures necessary to protect public health** and nutrition […] provided that such measures are consistent with the provisions of the TRIPS Agreement."
>
> Article 27 requires that "[…] patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced." The Article further stipulates that "Members may **exclude from patentability inventions [...] necessary to protect ordre public[113] or morality, including to protect human, animal or plant life or health** […]."
>
> Article 30 mandates that "Members may **provide limited exceptions to the exclusive rights conferred by a patent**, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties."
>
> Article 31 stipulates that the member states may use "the subject matter of a patent **without the authorization of the right holder**, including use by the government or third parties authorized by the government […]." There are multiple provisions that have to be respected, two of the most important being b) and h).

[110] Bass, "Implications of the TRIPS Agreement for Developing Countries," 194-196.
[111] Ibid., 196.
[112] "Trade-Related Aspects of Intellectual Property Rights," WTO, Marrakesh, Morocco, April 15, 1994, accessed October 10, 2017, https://www.wto.org/English/docs_e/legal_e/27-trips_01_e.htm.
[113] Ordre Public is a french term widely used synonymously for public policy. It is used to describe the set of principles that forms the critical basis of a given legal system and is often divided into procedural and substantive Ordre Public. http://konrad-partners.com/knowledge-base/glossary/ordre-public.html.

(b) "such use may only be permitted if, prior to such use, the proposed user has made efforts to obtain authorization from the right holder on reasonable commercial terms and conditions and that such efforts have not been successful within a reasonable period of time. This **requirement may be waived by a Member in the case of a national emergency** or other circumstances of extreme urgency or in cases of public non-commercial use"

(h) "the right holder shall be paid **adequate remuneration** in the circumstances of each case, taking into account the economic value of the authorization"

Article 8 gives member states flexibility in implementing TRIPS into their domestic legislation in respect to protection of public health. The following three articles can be perceived as articles enabling certain exceptions in regard to patents. Article 27 allows a government to exclude certain drugs from patentability if necessary to protect public health. Article 30 permits limited exceptions to the exclusive rights, which can for example mean a patent term reduction. Article 31 allows for a compulsory license if certain requirements are met, monetary compensation being one of them. Moreover, in the case of a national emergency, authorization from the patent owner is not necessary.[114] Even though compulsory licensing is viable under the TRIPS Agreement, it is only vaguely defined under which circumstances a member country may apply for a compulsory license and what constitutes adequate remuneration.

The Doha Declaration in TRIPS and Public Health of 2001 represents a significant milestone trying to reconcile the two competing goals of the WTO – access to medicaments and protection of intellectual property and to clarify the articles set forth under TRIPS. The declaration recognized the gravity of the public health problem afflicting developing countries. It states that the TRIPS Agreement "should not prevent members from taking measures to protect public health." Moreover, it mandates that a member country has "the right to grant compulsory licenses and the freedom to determine the grounds upon which such licenses are granted" and also "the right to determine what constitutes a national emergency or other circumstances of extreme urgency, it being understood that public health crises, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency or other circumstances of

[114] Bass, "Implications of the TRIPS Agreement for Developing Countries," 197-198.

extreme urgency."[115] As a result, many WTO members, including Brazil, perceive the declaration as a triumph for developing countries even though it is a political declaration rather than a legal change.[116]

The discussion about compulsory licensing and access to medicines is highly relevant because at the end of the 1990s one-third of the world´s population did not have access to essential medicines. One of the main reasons was, and remains, that medicines are simply unaffordable. It is estimated that in many developing countries, one year of HIV treatments would be an equivalent of 30 years´ income.[117] According to UNAIDS, 70 million patients will die from AIDS by 2022 unless some dramatic changes take place. From the countries in South America, Brazil, being the largest and most populous country, has the largest incidence rate and the fact that over 30% of the people live below the poverty threshold aggravates the situation.[118] Brazil´s approach is perceived by many as a model policy for combating AIDS because the government provides free drugs for patients who need them.[119] It should be mentioned that not only do other developing countries endorse Brazil´s health policy, but the World Health Organization also affirms that Brazil´s successful fight against AIDS is mainly due to cheap locally produced generic drugs.[120]

Universal access to healthcare is a central component of Brazil´s constitution. Moreover, patients are entitled to receive drugs free of charge for a number of diseases, such as AIDS, tuberculosis, blood diseases, diabetes and malaria.[121] Therefore, it is in Brazil´s self-interest to have access to cheap drugs to ensure distribution on such a large scale. According to the Brazil´s health ministry the price of AIDS drugs was reduced by 79% and the number of AIDS-related deaths reduced by half since 1997.[122] Brazil´s political commitment to combating AIDS is admirable. Regardless of the dramatic price reduction of AIDS drugs, such a policy represents a significant financial burden for Brazil. The cost

[115] "Declaration on the TRIPS agreement and public health," WTO, November 14, 2001, accessed October 10, 2017, https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm.
[116] Devereaux, Lawrence, and Watkins, *Case Studies in US Trade Negotiation,* 103-104.
[117] Haunss, *Conflicts in the Knowledge Society,* 144-145.
[118] Nair, "Comprising TRIPS: Brazil´s Approach to Tackle the HIV/AIDS Imbroglio," 457.
[119] Devereaux, Lawrence, and Watkins, *Case Studies in US Trade Negotiation,* 96.
[120] Deborah Berlinck, "OMS pode ajudar Brasil em disputa comercial sobre patentes," *BBC Brasil*, March 28, 2001.
[121] Nair, "Comprising TRIPS: Brazil´s Approach to Tackle the HIV/AIDS Imbroglio," 457.
[122] Devereaux, Lawrence, and Watkins, *Case Studies in US Trade Negotiation,* 96.

was estimated to have been $134 million in 1997 and $300 million in 2008.[123] Brazil rightfully has a leading role among developing countries regarding access to medicaments due to its "model policy" and due to being one of the biggest global producers of generic drugs. The key to affordable drugs is therefore twofold - local production of cheap generic drugs and threats of compulsory licensing used to negotiate lower prices with global pharmaceutical companies.[124] Fernando Henrique Cardoso, former President of Brazil, formulated Brazil´s strategy in his memoir in following way:

> We began encouraging Brazilian pharmaceutical companies to make cheaper, generic versions of foreign AIDS medicines that were not protected under local patents. For the drugs covered by patents, we intensely lobbied foreign pharmaceutical firms to slash their costs for the Brazilian market. If they refused, we threatened to break the patent and produce them as well […]. It was clear that the free-market system would not be able to provide a solution by itself, so the government was needed as a mediator. We tried to reach a compromise, offering to pay the foreign pharmaceutical companies what we could. It was less than they wanted, but it was better than nothing – which is what they would have received if there had been no program at all. In one sense, we were creating customers rather than taking them away. (216)

When discussing compulsory licensing, it is very important to draw the line between applying for compulsory licensing and using compulsory licensing as an instrument for price negotiations. Despite the fact that compulsory licensing is legal under the TRIPS Agreement, developed countries, with the United States in the lead, pressure developing countries not to take advantage of such flexibilities.[125] As noted by Naomi Bass, "The United States leads the crusade to inhibit the unitization of compulsory licensing, despite the legality of the practice under TRIPS."[126] The United States, as a vocal proponent of stricter IPR, claims that compulsory licensing would have a negative impact on research and innovation, therefore limiting the availability of new drugs. [127]

The US crusade against Brazil´s weak patent protection of pharmaceuticals started even before the TRIPS Agreement. In 1987 the United States imposed sanctions of a 100% tariff on $39 million worth of Brazilian imports to the United States under the "Special

[123] Nair, "Comprising TRIPS: Brazil´s Approach to Tackle the HIV/AIDS Imbroglio," 461.
[124] Devereaux, Lawrence, and Watkins, *Case Studies in US Trade Negotiation,* 96.
[125] Bass, "Implications of the TRIPS Agreement for Developing Countries," 193.
[126] Ibid., 200.
[127] Ibid.

301" action.[128] Brazil has been listed on the USTR´s Special 301 Report either under the Priority Watch List or the Watch List every year except for 1991, 1993, 1994 and 1998. The USTR´s Special 301 Report lists countries accused of inadequate and ineffective protection of American IPR.[129] It is a means of the US government to put pressure on other countries. As stated on the website of Knowledge Ecology International, "Wikileaks has published more than 970 cables mentioning "Special 301," sent from various U.S. embassies from February 28, 2002 to February 26, 2010."[130]

Cables sent from various US embassies, which the KEI managed to obtain thanks to a Freedom of Information Act (FOIA) request, indeed reveal interesting dynamics behind the protection of IPR. For example there is a cable from the American Consulate in Mumbai to Washington D.C. dated August 31, 2001 that is concerned with "the Indian pharmaceutical industry being encouraged by the US government´s decision to withdraw a WTO case against Brazil for its law allowing compulsory licensing of patents".[131] What happened was that India was in the process of amending its legislation to comply with TRIPS and was inspired by Brazil and its domestic legislation permitting compulsory licensing. However, as further stated in the same cable:

> American and multinational pharmaceutical firms, on the other hand, are trying to dissuade the government of India from emulating the Brazilian model, arguing that the WTO norms only allow compulsory licensing during a national emergency. To better argue their case in India, our American and multinational pharmaceutical contacts would like more insight into the reasoning behind USTR´s decision to withdraw its suit against Brazil in the WTO. (1)

This cable reveals the far-reaching effects of the US decision to withdraw its WTO case. It also shows that the United States did not want Brazil´s legislation to become a precedent for other developing countries that were in the process of amending their legislation concerning protection of IPR to meet the 2005 deadline.

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[128] Ibid., 207.
[129] "The USTR Special 301 Reports, 1989 to 2017," Knowledge Ecology International, accessed December 1, 2017, https://www.keionline.org/book/knowledge-governance-fora/unitedstatestraderepresentativeustr/the-ustr-special-301-reports-1989-to-2017/.
[130] Ibid.
[131] "Indian pharmaceuticals emboldened by US-Brazil patent dispute," US State Department, cable sent from American Consulate, Mumbai, August 31, 2001 (accessed July 10, 2017 at Knowledge Ecology International, Washington, DC).

These cables reveal another significant aspect connected to the process of the TRIPS implementation, which developed countries agreed to assist with. As suggested by Naomi Bass, "the developed world has arguably failed to fulfill these requirements, however, evading obligations to provide assistance to the developing world while conversely pressuring developing countries to accept U.S-style patent laws."[132] There are multiple cables that support this statement. For example a cable from the American Embassy in New Delhi dated April 6, 2004 concerning intellectual property training states that "there is a high sensitivity in India to being told how to do things by outsiders fueled by strong suspicions about ulterior motives or hidden agendas. Our objectives are better served if the training program is packaged as "best practice" sharing."[133] Another cable from the American Embassy in New Delhi dated November 12, 2003 discussing whether India will meet the deadline declares that "some local representatives believe that our best contribution is to keep the pressure on."[134]

There are several cables that comment on various projects and conferences whose objective was to provide participants with a better understanding of US international trade policy relating to IPR protection. For example a cable to the American Embassy in Buenos Aires evaluates a project whose itinerary included Washington D.C., Houston, Seattle, St. Louis, and New York and whose program included the US Customs Cyber-smuggling Center, the US Copyrights Office of the Library of Congress and the US Department of Justice.[135] These conferences and projects enabled the US to pressure developing countries into adopting US-style patent laws. One of the prominent figures was Jacques Gorlin, a Washington DC based IPR consultant and ex-USTR negotiator.[136] A statement from a cable addressing Argentina´s IPR protection very aptly describes the view of the United

[132] Bass, "Implications of the TRIPS Agreement for Developing Countries," 203.
[133] "Intellectual property training, needs and best practices in India," US State Department, cable sent from American Embassy, New Delhi, April 6, 2004 (accessed July 10, 2017 at Knowledge Ecology International, Washington, DC).
[134] "India´s patent law," US State Department, cable sent from American Embassy, New Delhi, November 12, 2003 (accessed July 10, 2017 at Knowledge Ecology International, Washington, DC).
[135] "Intellectual property rights protection in the United States," US State Department, cable sent to American Embassy, Buenos Aires, June 23, 2000 (accessed July 10, 2017 at Knowledge Ecology International, Washington, DC).
[136] "Regional economic policy," US State Department, cable sent to Western Hemispheric Affairs Diplomatic Posts, July 31, 2004 (accessed July 10, 2017 at Knowledge Ecology International, Washington, DC).

States "Patent protection is like a dam, it either holds water or it doesn´t – if it has a hole, all water gushes out, the Argentine patent regime is a sieve."[137]

The United States and other developed countries have good reasons to insist on strict IPR. They emphasize the importance of research and innovations and the need to guarantee a monopoly to patent holders, so that those patent holders would have a strong incentive to undergo a costly and lengthy process of developing a new drug. The United States fears that developing countries could exploit the vague language of the TRIPS Agreement and that they could stretch the meaning of various words. These fears are not irrelevant and unsupported. Many developing countries prolonged the implementation of the TRIPS Agreement or attempted to use compulsory licensing for dubious purposes.

It is important to keep in mind that developing countries are mainly IP importers whereas developed countries with the United States in their lead are IP exporters. Therefore, one group logically favors weak IPR protection and the other strong IPR protection. As pointed out by Dina Halajian, neither access to drugs nor IPR protection are revolutionary or new concepts, however, they represent two competing goals that were brought together for the first time under TRIPS.[138] Dina Halajian draws attention to the abuse of TRIPS flexibilities – parallel importing and compulsory licensing. Parallel importation is based on the concept of exhaustion, or the first sale doctrine. What it means is that once a product is sold, the previous possessor relinquishes all rights to the product and the product can be redistributed at will of the new possessor. It comes as no surprise that the United States fears that some corrupt governments of developing countries may sell drugs obtained for a low price to other countries in order to make profit in which case the citizens in need do not receive any medicaments.[139] The flexibility enabling compulsory licensing can be abused as well, as demonstrated on Egypt´s compulsory license for Viagra.[140] It can hardly be argued that erectile dysfunction constitutes a national emergency.

[137] "Argentina IPR," US State Department, cable sent to American Consulate Osaka-Kobe, November 14, 1995 (accessed July 10, 2017 at Knowledge Ecology International, Washington, DC).
[138] Dina Halajian, "Inadequacy of TRIPS & the Compulsory License: Why Broad Compulsory Licensing is not a Viable Solution to the Access to Medicine Problem," *Brooklyn Journal of International Law* 38, no. 3 (2013): 1193, https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=1050&context=bjil.
[139] Ibid., 1199.
[140] Ibid., 1208.

Understanding the intricacies of the TRIPS Agreement in respect to access to medicaments makes it possible to argue that its design is rather flawed because it inherently cannot balance its two competing goals. As seen in the pharmaceutical patent dispute between the United States and Brazil, the flexibilities granted under TRIPS are not a good way to reconcile interests that are basically contrary to each other. Developing countries use compulsory licenses only rarely (due to above mentioned reasons) and even when they do the drugs might still be too expensive and the process itself is lengthy, costly and legally demanding. Expanding the scope of compulsory licensing, on the other hand, might hurt pharmaceutical companies. Pharmaceutical companies must have an incentive to invest into research and innovation and the risk that they are undergoing has to be acknowledged and rewarded.

Therefore, this topic should not be concluded without alternative R&D systems being mentioned. What the world currently faces is a so-called "10/90 research gap", meaning that 10% of worldwide R&D is assigned to health issues that affect 90% of the world´s population.[141] The argument is that the R&D is flawed because the money is directed to medically unimportant drugs that are heavily marketed. According to a study by the FDA Center for Drug Evaluation and Research, only 22% of new drug approvals were for "priority" reviews, specified as a product that represents a "significant improvement compared to marketed products in the treatment, diagnosis, or prevention of a disease".[142] As a result, there are efforts to redesign the system, with one suggesting that there should be prize funds and patent pools instead, as asserted by James Love and Tim Hubbard. They propose "to divorce the incentive for innovation from the product´s price to consumers."[143] H.R. 417 titled "Medical Innovation Prize Fund Act" introduced in January 26, 2005 by Representative Bernie Sanders was based on Love and Hubbard´s proposals and should be understood as a specific and concrete alternative to the current R&D system.[144]

[141] Ibid., 1222.
[142] James Love and Tim Hubbard, "The Big Idea: Prizes to Stimulate R&D for New Medicines," *Kent Law Review* 82, no. 3 (November 2007): 1523, http://studentorgs.kentlaw.iit.edu/cklawreview/wp-content/uploads/sites/3/vol82no3/Love.pdf.
[143] Ibid., 1528.
[144] Ibid., 1532.

3. Subsidies on Upland Cotton

Brazil initiated a WTO dispute settlement case - DS 267 - regarding cotton subsidies in September 2002.[145] Brazil requested consultations with the United States, accusing the United States of overly trade-distorting policies and violation of the WTO Agreement on Agriculture and Agreement on Subsidies and Countervailing Measures. In 2004 the WTO Dispute Settlement Body ruled in favor of the Brazilian complaint. A failed US appeal followed in 2005. Between 2005 and 2009 there was a deadlock period. In 2009 the Dispute Settlement Panel granted Brazil the right to impose sanctions worth $829 million. Brazil threatened the United States with a suspension of intellectual property obligations under the TRIPS Agreement.[146] Brazil would have been the first country to infringe on American IPR in retaliation for unfair trade policies under the approval of the WTO.[147] The threat of retaliation led Brazil and the United States to negotiate a temporary mutual agreement.[148] The preliminary agreement was reached April 6, 2010, the day before Brazil was to start imposing retaliatory sanctions, and the Memorandum of Understanding was signed April 20, 2010. The final Framework Agreement obligated the United States to annually transfer $147 million of assistance to the Brazilian cotton industry. It was agreed that the fund would continue until the passage of the next Farm Bill or a mutually agreed solution.[149]

It took over a decade for this particular dispute to be settled. The Agricultural Act of 2014, or U.S. Farm Bill, was signed into law February 7, 2014 and changed subsidy policies. The passage of a new Farm Bill enabled the United States and Brazil to sign a final settlement October 1, 2014 ending the twelve year long dispute.[150]

[145] John Baffes, "Cotton Subsidies, the WTO, and the 'Cotton Problem'," *World Economy* 34, no. 7 (2011): 1534-1535, doi: 10.1111/j.1467-9701.2011.01396.x.
[146] Csilla Lakatos and Terrie Walmsley, "Dispute Settlement at the WTO: Impacts of a No Deal in the US-Brazil Cotton Dispute," *World Economy* 37, no. 2 (2014): 244, doi: 10.1111/twec.2014.37.issue-2.
[147] Chan Sewell, "U. S. and Brazil Reach Agreement on Cotton Dispute," *New York Times,* April 6, 2010, 2.
[148] Lakatos and Walmsley, "Dispute Settlement at the WTO," 245.
[149] Ibid., 256.
[150] Alonso Soto and Krista Hughes,"Exclusive: U.S. to pay $300 million to end Brazil cotton trade dispute – officials." *Reuters*, October 1, 2014.

1.6 Origin, Process, and Implications of the Dispute

It is crucial to understand the origin of the dispute to realize its complexity. One side of the story is Brazil´s expanding cotton industry and the other is US subsidy policy. Whereas the United States has traditionally been a major exporter of cotton, it was only recently that Brazil assumed its role as a prominent exporter. Cotton has long been a major crop in Brazil but it was only after 1995 that production increased dramatically. To be more specific, Brazilian production underwent a 493% increase between 1995 and 2010. Brazil produced 451,220 tons in 1995 and 2,227,360 tons in 2010. This production growth is in contrast to the United States, which produced 4,287,069 tons in 1995 and 4,335,927 tons in 2010, experiencing only a slight increase in its production (Table 5). Even more relevant for the purpose of this case study is the percentage share of world exports. Brazil exported 24,190 tons, less than 1% of world exports in 1995 and 479,002 tons, 7% of world exports in 2010. The United States exported 1,838,170 tons, 37% of world exports in 1995 and 3,472,765 tons, 48% of world exports in 2010 (Table 6).[151]

Table 5 – Major world cotton producers, 1980-2010 (tons)

	1980	**1985**	**1990**	**1995**	**2000**	**2005**	**2010**
USA	2,663,731	3,216,978	3,713,464	4,287,069	4,116,544	5,721,680	4,335,927
Brazil	653,359	872,263	788,677	451,220	1,032,728	1,125,655	2,227,360

Source: William Ridley and Stephen Devadoss: "Analysis of the Brazil-USA cotton dispute," Journal of International Trade Law & Policy 11, no.2 (2012): 154.

Table 6 – Leading cotton exporters and percentage share of world exports, 1995-2010 (tons)

	1995	**2000**	**2005**	**2010**
US exports	1,838,170	1,614,237	4,232,702	3,472,765
US % of world	37	32	47	48
Brazilian exports	24,190	75,443	472,296	479,002
Brazilian % of world	<1	1	5	7

Source: William Ridley and Stephen Devadoss: "Analysis of the Brazil-USA cotton dispute," Journal of International Trade Law & Policy 11, no.2 (2012): 154.

[151] William Ridley and Stephen Devadoss, "Analysis of the Brazil-USA cotton dispute," *Journal of International Trade Law & Policy* 11, no. 2 (2012): 153-154.

By no means is the quantity of US cotton export comparable to the Brazilian export. Moreover, US export is steadily growing due to a decline in domestic use.[152] However, it is the sharp increase in the Brazilian export that plays an important role. Another aspect that contributed to the escalation of the issue is that the United States and Brazil export cotton to the same countries, such as Pakistan, China, Indonesia, South Korea, Thailand and Turkey.[153] Since the United States and Brazil share importers of cotton, the effort of the United States to artificially lower world cotton prices represents a significant problem for Brazil. Cotton production is very labor intensive and it is the high labor cost that significantly decreases the competitiveness of US cotton producers.[154] To make up for this disadvantage, among others, US cotton producers received substantial financial support. As pointed out by William Ridley and Stephen Devadoss, "Over the period of 2000-2010, the average annual value of US cotton production was approximately $4.3 billion, while the average annual value of cotton program outlays was a massive $3.5 billion: US cotton producers received support equivalent to 80 per cent of the value of their production."[155] It has been suggested that the removal of US cotton subsidies in the first decade of the 21st century would have resulted in an approximately 10% increase in world cotton price.[156]

The US-Brazil dispute concerning cotton subsidies started in September 2002 with Brazil filing a formal complaint under the dispute settlement procedures of the WTO.[157] Brazil was supported by other major cotton exporters, including Australia and several African states, arguing that the United States violated the Agreement on Subsidies and Countervailing Measures – SCM. In 2005 the United States and the governments of Benin, Burkina Faso, Chad, Mali and Senegal founded a West African Cotton Improvement Program which provided technical assistance to West African cotton producers that suffered from US subsidies. The importance of this program is that it later became a precedent for the Brazil-US dispute.[158]

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[152] Ibid., 150.
[153] Ibid., 154-155.
[154] Michael Shumaker, "Tearing the Fabric of the World Trade Organization: United States-Subsidies on Upland Cotton," *North Carolina Journal of International Law & Commercial Regulation* 32, no. 3 (2007): 550-551, http://scholarship.law.unc.edu/cgi/viewcontent.cgi?article=1843&context=ncilj.
[155] Ridley and Devadoss, "Analysis of the Brazil-USA cotton dispute," 150.
[156] Ibid., 154.
[157] Shumaker, "Tearing the Fabric of the World Trade Organization," 579.
[158] Ridley and Devadoss, "Analysis of the Brazil-USA cotton dispute," 148-149.

It is important to know that there were four distinct WTO panels engaged in this dispute – panels of September 2004, July 2005, October 2007 and August 2009 - and all of them ruled in Brazil´s favor. After the WTO Dispute Settlement Panel ruled in Brazil´s favor and the United States appealed, the two sides agreed to suspend the arbitration hoping that they would be able to negotiate a deal on their own. However, since the two parties were not able to find a resolution, Brazil requested a compliance panel to be established in 2006. In 2007 the compliance panel determined that that the United States had failed to remove cotton subsidies. In August 2008 Brazil requested to resume the arbitration proceedings. Subsequently, the WTO ruled in 2009 that Brazil should be allowed to apply cross-sector countermeasures against the United States worth $829 million.[159] Brazil published a list of 102 US products subjected to retaliatory tariffs as well as a list of 21 proposed intellectual property sanctions.[160]

Celso Amorim, who served as the Minister of Foreign Affairs during Lula´s presidency, makes the following reference to the cotton dispute in his memoir:

> This episode illustrates how provisions desperately pursued by certain countries can sometimes backfire. Ironically, during the Uruguay Round it was developed countries – especially the United States – that had insisted on the possibility of this kind of "retaliation", as they wanted to give "teeth" to the provisions of the new agreement on TRIPS and services by being able to take punitive measures in the area of goods, which was much more sensitive for developing countries. (417)

Even though the decisions carried out by the WTO Dispute Settlement Panels are binding, the United States decided to maintain its subsidy policies. As mentioned above, the United States exports 80% of its cotton production and US cotton producers received support equivalent to 80% of the value of their cotton production.[161] Therefore, it is logical that there was a strong opposition from the cotton growers to limitations on subsidies. Thiago Lima supports this argument by saying that the political power of interest groups and politicians involved in this matter was strong enough to constrain compliance of the United States with the WTO ruling.[162]

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[159] Ibid., 157-158.
[160] Lakatos and Walmsley, "Dispute Settlement at the WTO," 244.
[161] Ridley and Devadoss, "Analysis of the Brazil-USA cotton dispute," 150.
[162] Thiago Lima, "O contencioso do algodão: cenários para mudança na política de subsídios dos EUA," *Revista Brasileira de Política Internacional* 49, no. 1 (2006): 140, doi: 10.1590/S0034-73292006000100008.

The Memorandum of Understanding was reached after Brazil threatened the United States by implementing IPR retaliation.[163] The Memorandum of Understanding was signed at Punta del Este, Uruguay. The preliminary agreement was reached April 6, 2010 after an exchange of official letters confirming the interest of parties involved in promoting agricultural trade and the Memorandum of Understanding was signed April 20, 2010. It was a bilateral agreement – without the presence of WTO arbitrators. The agreement was announced by the US trade representative Ron Kirk and the agriculture secretary Tom Vilsack.[164] For the government of the United States the Memorandum was signed by Islam A. Siddiqui, the Chief Agricultural Negotiator of the USTR and James W. Miller, the Under Secretary for Farm and Foreign Agricultural Services of the United States Department of Agriculture. And for the government of the Federative Republic of Brazil, the Memorandum was signed by Roberto C. de Azevêdo, the Permanent Representative of Brazil to the WTO and other international organizations in Geneva.[165] Azevêdo was a very experienced negotiator since he had served as the Brazil´s chief trade negotiator for the Doha Round and also as the representative of Brazil in the MERCOSUR negotiations.[166]

The final Framework Agreement required the United States to annually transfer $147 million to a fund for the Brazilian cotton industry. It was agreed that the assistance fund would continue until the passage of the next Farm Bill or a mutually agreed solution.[167] The agreement also indicated that a quarterly discussion between the United States and Brazil on potential limits of trade-distorting subsidies would be held.[168] However, it is important to realize that this agreement was only temporary.[169] Moreover, the Memorandum did not have support of the American public. The media coverage was rather negative saying that American taxpayers´ money was being used to subsidize a foreign

[163] Lakatos and Walmsley, "Dispute Settlement at the WTO," 249.
[164] Sewell, "U. S. and Brazil Reach Agreement on Cotton Dispute."
[165] "Referendum of Understanding between the Government of the United States of America and the Government of the Federative Republic of Brazil regarding a Fund for Technical Assistance and Capacity Building with Respect to the Cotton Dispute (wt/ds267) in the World Trade Organization," US State Department, Office of the US Trade Representative, Islam A. Siddiqui, Roberto de Avezedo, and James W. Miller, Punta del Este, April 20, 2010, accessed October 9, 2017, www.state.gov/documents/organization/143669.pdf.
[166] Dylan Matthews, "One of these 9 people will lead the World Trade Organization," *The Washington Post*, April 2, 2013.
[167] Lakatos and Walmsley, "Dispute Settlement at the WTO," 256.
[168] Ridley and Devadoss, "Analysis of the Brazil-USA cotton dispute," 158.
[169] Randy Schnepf, "Status of the WTO Brazil-US Cotton Case," *Congressional Research Service Report*, October 1, 2014, 3.

country. As noted by Ridley and Devadoss, the deal was viewed as "subsidy payments to Brazil´s cotton farmers needed to permit the continuation of subsidy payments to the US cotton farmers."[170]

The Agricultural Act of 2014 was signed into law February 7, 2014 and changed subsidy policies. This allowed the United States and Brazil to reach a final agreement on October 1, 201, ending the dispute which started in 2002. In the 2014 Memorandum of Understanding for Final Resolution it was agreed that the United States would make a one-time payment of $300 million to the Brazilian Cotton Institute. In return, Brazil would relinquish its rights to countermeasures against the United States and agreed to a temporary Peace Clause, meaning that Brazil would not question the cotton subsidies of the 2014 Farm Bill.[171]

This dispute, much like the pharmaceutical patent dispute, exposed many features of the DSM that are not obvious at first sight. Firstly, there was a great amount of political influence. As suggested by Anthony Boadle, the timing of the cotton dispute breakthrough is connected to the Brazilian general elections held October 5, 2014, just several days after the final settlement between the United States and Brazil was signed. Brazilian President Dilma Rousseff, a member of the Workers´ Party, favored policies of intervention into the economy that were criticized by foreign investors.[172] In contrast to Rousseff´s policies, Marina Silva and Aecio Neves, Rousseff´s main rivals, had promised to build closer economic ties with the United States.[173] Therefore, the signing of the final agreement with the United States could be perceived as Rousseff´s effort to please the segment of the electorate that preferred closer trade relations with the United States. As asserted by Alonso Soto and Krista Hughes, another explanation for the dispute being settled in 2014 is that the United States took measures to improve its relations with Brazil after the US espionage scandal.[174] In September 2013 Rousseff cancelled a state visit to Washington DC due to espionage allegations. Rousseff´s move was of great diplomatic importance

[170] Ridley and Devadoss, "Analysis of the Brazil-USA cotton dispute," 159.
[171] Schnepf, "Status of the WTO Brazil-US Cotton Case," 5.
[172] Anthony Boadle, "Brazil's Rousseff closes in on Silva ahead of October vote," *Reuters*, September 19, 2014.
[173] Ibid.
[174] Soto and Hughes, "Exclusive: U.S. to pay $300 million."

since the planned state visit, which should have taken place in October 2013, would have been the first visit by a Brazilian president in 18 years.[175]

Secondly, the DSM is considered to be effective yet the negotiation process between the United States and Brazil was very strenuous and complicated, lasting 12 years. The reason for this ambiguity is that even though the panels´ decisions are binding, the rulings are not automatically implemented and a member country may choose not to comply. A country can use its discretion and refuse to comply even though it may mean breaking the agreement and being a subject of retaliation. Furthermore, the winning parties are not compensated for damages inflicted during the period of noncompliance; therefore, the losing parties do not have reason to accelerate the process, which can lead to endless delays.[176] It is up to the losing party to change its laws that do not comply with the WTO agreement. To sum up, a losing country may decide not to comply with the ruling, preserve its discriminatory laws and tolerate retaliations.[177]

The theoretical scenario of noncompliance mentioned above is exactly what happened in the case of the cotton dispute. The WTO panels ruled multiple times in Brazil´s favor yet the United States decided not to comply and not to remove its discriminatory subsidies, deliberately disregarding the WTO agreement. And since there is no cost to endless postponing, the United States delayed the process. The breakthrough came only when the Dispute Settlement Panel granted Brazil the right to impose sanctions. However, if Brazil had not threatened to violate American IPR, it is very likely that the United States would have preserved its discriminatory laws greatly benefiting cotton farmers and would have lived with imposed retaliations.

It should be mentioned in this context that it would be incorrect to understand the term retaliation as synonymous to the term fine or penalty. In the WTO agreements the term retaliations is substituted by a neutral term, "the suspension of concessions." The idea behind this term is that the WTO is based on the concept of reciprocity. In other words, two countries agree on a reciprocal market access, a market-opening concession. Robert L. Lawrence elaborates on this by stating that "when the claimant retaliates against the United

[175] Wyre Davies, "Brazilian President Dilma Rousseff calls off US trip," *BBC*, September 17, 2013.
[176] Lawrence, "The United States and the WTO Dispute Settlement System," 11.
[177] Ibid., 14.

States, it is not imposing a fine but simply suspending concessions that are equal to the impairment of the benefits it originally granted. The disputants are basically going back to square one: the state of affairs prior to the agreement."[178] The system of reciprocity is an aspect of the DSM favoring powerful developed countries, such as the United States. Since the system operates on reciprocity, the United States is very influential due to its market size and the ability to grant concessions. And while the United States is able to endure retaliation, many developing countries are not.[179] Lawrence further argues that "nations appear to comply less because of retaliation, which has rarely been used, but rather because they believe it is in their interest to do so."[180] His explanation is that countries benefit from the rules, care about their reputations in a system characterized by ongoing negotiations and are concerned with their relationships with important trading partners.[181] Based on this interpretation and based on how the United States approached the cotton dispute, one could argue that the United States did not deem Brazil to be a very significant trading partner.

Thirdly, the WTO is considered to be an effective and powerful platform for less powerful developing countries to argue their cases. Yet it is important to realize that it was a credible threat of retaliation that prompted the United States to negotiate an agreement. Threatening to break US patent and IPR was a very potent negotiation tool and the United States must have been under a lot of pressure from various industries, the pharmaceutical most of all, considering the aforementioned dispute on compulsory licensing. Had Brazil imposed IPR cross-retaliation, it would have been the first country to do so under a WTO approval. However, there is a significant difference between successfully arguing a case and enforcing compliance thus achieving one´s ends.

Brazil´s WTO complaint targeted specific US subsidy programs[182] - direct payments (based on historic production) and countercyclical payments (based on profit lost due to low commodity prices).[183] The 2014 Farm Bill, which paved the path for the 2014

[178] Ibid., 15.
[179] Ibid.
[180] Ibid., 8.
[181] Ibid.
[182] Mike Lavender, "Will cotton subsidies ignite new trade dispute?" *Environmental Working Group*, January 24, 2014.
[183] John Baffes, "Cotton and the Developing Countries: Implications for Development," In *Trade, Doha, and Development: A Window into the Issues*, edited by Richard Newfarmer (Washington, DC: World Bank, 2006) 121-122.

Memorandum of Understanding for Final Resolution, abolished both of these payments. However, the Farm Bill maintained and even further expanded insurance programs. It introduced a new insurance policy called the "Stacked Income Protection Plan" (STAX). STAX is a revenue insurance policy and the payments apply when revenue shortfalls exceed 10% of expected revenue.[184] As observed by Renata Amaral, a Brazilian foreign trade expert, "In an extreme situation the insurance can cover up to 90% of the farmers´ losses. Even if they lose the entire harvest, they will be insured."[185] Moreover, to encourage farmers to partake in this program, the US government pays 80% of a farm´s insurance premium.[186] In the end the US farmers received an even better situation.

Conclusion

As demonstrated in my thesis, the DSM is very important for Brazilian trade strategy because it enables it to pursue disputes that it deems to have far-reaching implications. Brazil´s aim is to modify rules of the international system and for that purpose it uses a variety of tools. It relies on the rhetoric of justice and fairness. It builds various coalitions to push through its agenda. It frames issues so that they attract a lot of political as well as public attention, including the attention of NGOs. Moreover, Brazil has devoted a lot of effort to developing its legal and technical capacity to be able to claim its cases successfully. As a result, Brazil has a much stronger standing within the WTO.

In order to be able to reshape the rules of international trade, Brazil pursues cases that could have systemic implications. This argument is supported by my findings of what countries Brazil frequently targets under the DSM. Firstly, Brazil has initiated surprisingly few cases against countries in South America. Secondly, it has initiated cases against many different WTO members from different continents including Africa and Asia. Thirdly and most importantly, it has targeted predominantly developed countries, the United States being the most frequent respondent of Brazil´s claims.

[184] Scott Andersen et al., "How could the 2014 US Farm Bill affect the world market for cotton?" *International Centre for Trade and Sustainable Development*, October 4, 2015.
[185] Mariana Branco, "Para especialistas, nova lei agrícola dos EUA pode prejudicar algodão brasileiro," *Agência Brasil*, February, 9, 2014.
In original: "Em uma situação extrema, [o seguro] pode garantir até 90% [das perdas do agricultor]. Mesmo que ele perca toda a colheita do ano, terá garantia."
[186] Lavender, "Will cotton subsidies ignite new trade dispute?"

Brazil is in fact the fourth most frequent user of the DSM. In respect to the United States, Brazil has initiated almost three times as many cases against the United States as the United States did against Brazil. Furthermore, the United States has not initiated any cases against Brazil since 2000. The frequent use of the DSM is very important because most cases are won by plaintiffs. Indeed, all of the disputes that Brazil has initiated against the United States were either settled during negotiations or decided in Brazil´s favor. It should be noted that China and India, major emerging powers, have been active in the DSM as well but mainly as a third party. The legal and technical requirements for joining a dispute as a third party are substantially lower compared to requirements when initiating a case. Therefore, it can be assumed that China and India have not developed sufficient litigation capacity yet. Brazil benefits not only from its recently developed competitive litigation capacity, but also from having highly professionalized diplomats, sufficient financial resources, democratic government, diversified economy and most importantly pluralist interaction between the private sector, civil society, and the government on trade matters.

As mentioned above, Brazil pursues cases of likely systemic implications. The two case studies in my thesis support such a claim. In the case of cotton subsidies, Brazil´s effort and hope was to eliminate all agricultural protectionist measures imposed by the United States and the European Union. Brazil managed to draw substantial international attention to the US agricultural subsidies and the fact that the WTO granted Brazil the right to impose intellectual property sanctions was perceived as a great success even though the long-term implications are questionable. In the case of patent protection, Brazil hoped to reframe the debate, to attract attention to global access to drugs, to change the interpretation of WTO laws. The Doha Declaration on TRIPS and Public Health of 2001 can thus be seen as a big victory for Brazil because it in fact changed the interpretation of the TRIPS Agreement.

The two case studies further show the intricacies and concealed aspects of the DSM, such as the potent alliance between NGOs and Brazil as a developing country, the importance of timing and political pressure, the long duration of disputes, the problem of compliance and policy implementation, the interconnectedness of disputes, and the TRIPS Agreement and its competing goals. The case studies reveal how demanding it is to successfully claim

cases, how unpredictable the litigation process can be and how difficult it is to enforce compliance.

The case study regarding patent protection and more broadly the TRIPS Agreement and access to drugs demonstrates how the United States tries to discourage developing countries from taking advantage of the TRIPS flexibilities by imposing threats and applying political pressure. Yet it is important to realize that access to drugs is not an issue that only developing countries face. I would even suggest that what AIDS is to developing countries, cancer is to developed countries, since the majority of new and innovative drugs are either not available or not reimbursed due to their immense costs. Brazil´s claim that the free market cannot solve this issue can thus be seen as a valid observation. I personally perceive access to drugs to be one of the greatest challenges for the WTO in the future since the TRIPS Agreement has the ambition, and difficulty, of balancing access to drugs and innovation.

The case study regarding cotton subsidies shows how the United States tries to take advantage of the system to benefit itself at the expanse of Brazil. The United States not only disobeyed the WTO rules, it also delayed the duration of the dispute taking over a decade to be completed. Furthermore, when the United States finally changed its Farm Bill after a long period of non-compliance it introduced policies equally harmful to the Brazilian agriculture. The disobedience of WTO rules by the current hegemon is especially worrisome according to the Theory of Hegemonic Stability. If the United States does not perform the policing role in international trade, than who will. It seems that Brazil, though long considered a developing country, has taken the necessary strides to advocate and follow through on disputes and settlements that reshape elements of world trade through the DSM.

Summary

Brazil is currently the fourth most active user of the DSM, after the United States, the European Union and Canada. Being able to initiate disputes at the WTO requires advanced legal and technical expertise which Brazil has proved to have acquired. There are several geographical features that make Brazil´s use of the DSM remarkable. It has initiated cases

against many different WTO members but very few of these cases were against countries in South America. More importantly, developed countries, mainly the United Stated, have been frequent objects of Brazil´s claims.

The DSM is especially important for Brazilian trade strategy because it enables Brazil to pursue cases that could have systemic implications, thus resulting into modifications of rules governing the international trade order. Two of such disputes involving Brazil and the United States are analyzed in this thesis. The first case study elaborates on patent protection and implies that Brazil used this dispute to attract a lot of attention to a broader issue – access to drugs. The second case study analyzes a dispute concerning cotton subsidies and implies that Brazil wanted to achieve an overall elimination of agricultural subsidies imposed by developed countries. It is possible to argue that these two cases indeed had a far-reaching impact. The dispute regarding cotton subsidies can be seen as a victory for Brazil since the WTO granted Brazil the right to impose intellectual property sanctions. Such a threat eventually convinced the United States to reach an agreement with Brazil; however, the long-term implications of this dispute are questionable. The dispute regarding patent protection contributed to the debate about global access to drugs which subsequently led to the Doha Declaration on TRIPS and Public Health. The Doha Declaration can be seen as a big success not only for Brazil but also for other developing countries because it changed the interpretation of the TRIPS Agreement.

The two case studies further show the intricacies of the DSM, such as the potent alliance between NGOs and Brazil as a developing country, the importance of timing and political pressure, the long duration of disputes, the problem of compliance and policy implementation, the interconnectedness of disputes, and the TRIPS Agreement and its competing goals. The exposed dynamics present in these two disputes can be useful for understanding other WTO cases.

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