

IMPLEMENTING DSB REPORTS: AN ANALYSIS BASED ON BRAZIL'S RETREADED TIRES CASE

MARCELO DIAS VARELLA*

ABSTRACT

One of the least-studied aspects of World Trade Organization (WTO) law is the difficulty of implementing Dispute Settlement Body (DSB) reports. By using the case of retreaded tires sold in Brazil, this paper examines the difficulties associated with implementing WTO decisions. The retreaded tires case is one of the most interesting in the history of the WTO/DSB, as it involves sensitive topics including environmental and health protection, exports of toxic substances from a developed country to a developing country, national decisions regarding an acceptable level of risk, conflicts of jurisdiction between a regional and a multilateral system, and the application of the "most favored" clause to benefit private citizens and corporations rather than states. This article presents three scholarly contributions as original research. First, I discuss WTO law governing the implementation of reports, its creative aspects, and the challenges to the implementation process. Next, I introduce the retreaded tires case, and analyze aspects that are often not considered regarding implementation problems. This includes conflicts among domestic subjects, and disputes in national, regional, and multilateral courts. Ultimately, I find that there is no legal antagonism between multilateral and regional courts, but that a *de facto* hierarchy does exist between them. Finally, I will illuminate some aspects neglected by WTO law related to implementation, such as how domestic conflicts can contribute to implementation problems encountered at the national level. A discussion is also devoted to how the different conflicts of the legislative, executive, and judiciary branches impact the efficacy of the DSB report implementation.

* University Center of Brasilia. Email: marcelodvarella@gmail.com. The author thanks Steve Charnovitz (George Washington University) for his contributions to this paper and Ken Worthy for revisions.

Abstract	699
Introduction	700
I. Existing WTO Law and the Implementation of International	
Decisions.....	701
A. The Specificity of DSB	702
B. The Creativity of the DSB Enforcement Mechanism	704
C. Challenges to the Implementation Process	710
II. Retreaded Tires in Brazil	711
A. Context of the Case	711
B. National Initiatives Against the Import of Used Tires and the Responses of Interested Actors	712
C. The Dispute in National, Regional, and Multilateral Courts	713
III. Domestic Difficulties in Implementing the WTO Report	716
A. Internal Conflicts in the Executive Branch.....	718
B. Internal Conflicts in the Legislative Branch.....	719
C. The Last Resort: Dialogue Between the Brazilian Supreme Court and the DSB	720
D. Conflict with MERCOSUR Partners.....	722
Conclusion.....	723

INTRODUCTION

The implementation of the reports of the Dispute Settlement Body (DSB) of the World Trade Organization (WTO) has proven to be one of the most severe obstacles to the effectiveness of the world trade system. The main difficulties arise in the most important or complex cases: those with great political and economic importance or impacts at the national level, or those involving many actors. A rarely studied aspect of WTO law is the difficulty of implementing DSB reports.¹ In many cases, the resistance of states to implement reports comes not from the weaknesses of multilateral mechanisms, but from the difficulties of national politics and internal disputes among antagonist actors.

¹ There are few articles dealing with the implementation of WTO decisions, especially on sanitary and phytosanitary issues. Some papers analyze whether decisions have been implemented, but not the internal reasons for state compliance with WTO decisions. Cf. J. Pauwelyn, *The WTO Agreement on Sanitary and Phytosanitary (SPS) Measures as Applied in the First Three SPS Disputes*, 2 J. INT'L ECON. L. 641, 663 (1999). Others evaluate costs and the lack of remedies for non-implementation. See David Townsend & Steve Charnovitz, *Preventing unportunistic compliance by WTO members*, 14 (2) J. INT'L ECON. L. 437, 439 (2011).

Enhancing multilateral systems requires enhancing the sensitivity of national actors and the institutions involved in relation to international disputes.

This paper is grounded in a case study of retreaded tires, involving Brazil against Uruguay and Brazil against the European Union (EU). Using the perspective gained from this concrete case, the paper analyzes the difficulties that the WTO system has encountered in implementing its decisions. This case is one of the most interesting in the history of the WTO/DSB. It comprises different aspects of various sensitive subjects, such as environmental and sanitary protection, exports of toxic substances from a developed country to a developing country, national decisions regarding acceptable level of risk, conflicts between a regional and a multilateral system, and the application of the “most favored” clause to benefit private actors rather than states.

This article is divided into three parts. In the first part, I will provide an introduction to existing WTO law on implementation of reports and some creative aspects of the system as compared to traditional international law. In the second part, I will introduce the case and focus on aspects of it that are not often analyzed, with regard to implementation problems among domestic actors and national, regional, and multilateral courts. In the third part, I will highlight aspects of implementation that contribute to implementation problems encountered at the national level.

I. EXISTING WTO LAW AND THE IMPLEMENTATION OF INTERNATIONAL DECISIONS

The DSB of the WTO is built on a hybrid logic that comprises features of both civil law and common law; it uses statutes, but also places an important value on precedents. The WTO system has rendered possible distinct, detailed interpretations of diverse legal expressions, including common expressions like “according to the WTO law.”² WTO law is remarkably technical and dense, more so than that of other international tribunals.³ The results are particular rationales for decisions

² NICO KRISCH, *BEYOND CONSTITUTIONALISM: THE PLURALIST STRUCTURE OF POSTNATIONAL LAW* 227 (2010).

³ See generally JOHN JACKSON, *THE JURISPRUDENCE OF GATT AND THE WTO: INSIGHTS ON TREATY LAW AND ECONOMIC RELATIONS*, ch. 11 (2002).

and better content definition of statutes,⁴ which ensures stability in the legal trade system.

A. THE SPECIFICITY OF DSB

The DSB is a very peculiar forum.⁵ It incorporates general usage of certain norms of international law, mostly from the Vienna Convention on the Law of Treaties.⁶ The use of precedent from other international and national tribunals for the same legal questions is relatively rare, especially in comparison to the amount of self-references.⁷ References have been made, particularly in the first years after its creation in 1995, to decisions of the International Court of Justice,⁸ but such references have become rare over time.⁹ The WTO lacks formal material or jurisprudential relationships with other regional

⁴ See, as an example, the analytical index of the DSB. It is a useful tool, uncommon in other international dispute settlement systems., *WTO Analytical Index – Guide to Law and Practice*, WORLD TRADE ORGANIZATION available at http://www.wto.org/english/res_e/booksp_e/analytic_index_e/analytic_index_e.htm.

⁵ Anne Peters, *Membership in the Global Constitutional Community*, in *THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW* 12 (Jan Klabbers et al., eds., 2009).

⁶ See Understanding on Rules and Procedures Governing the Settlement of Disputes art. 3.2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU] (“The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The members recognize that it serves to preserve the rights and obligations of members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.”); see DSU, available at http://www.wto.org/english/docs_e/legal_e/ursum_e.htm#Understanding.

⁷ The Dispute Settlement Body cites its own jurisprudence much more than other courts; this is called “self-reference.” Anja Lindross & Michael Mehling, *Dispelling the Chimera of ‘Self-Contained Regimes’ International Law and the WTO*, 16 EUR. J. INT’L L. 857, 862-863 (2006).

⁸ A continuous process of dialogue and self-restraint builds a positive agenda that is not precipitated by norms, but rather emerges gradually. The DSB of the WTO offers many interesting examples. DSB reports have no effect on direct application of the body’s decisions in national territories, but members must comply with all measures ordered under penalty of trade retaliation by the winners. Although such retaliations have been applied in only four cases in the first fifteen years of the court, the effectiveness index of decisions is 83%—high for any national or international court, and even more pertinent in this situation due to major economic interests involving hundreds of millions and sometimes tens of billions of dollars. See Marcelo D. Varella, *The Effectiveness of the Dispute Settlement Body of the World Trade Organization*, 8 J INT’L TRADE L. & POL’Y 100, 112 (2009).

⁹ MARCELO DIAS VARELLA, *INTERNATIONALIZATION OF LAW: GLOBALIZATION, INTERNATIONAL LAW AND COMPLEXITY* (2014).

or international courts.¹⁰ WTO law is respected within the legal field, but unknown to lawyers and judges at most national levels.¹¹ The “specificities” of WTO law create obstacles during implementation of its decisions.¹²

Nevertheless, DSB is a highly effective system. During its first years, DSB has had more than 80 percent of its decisions implemented¹³—a higher figure than that of most other international tribunals, and even higher than that of some national courts.¹⁴ Practically every WTO treaty aligns itself with this system of conflict resolution, since there is a strong coherence among those treaties and DSB is the only entity that can interpret WTO treaties, following the principle of single understanding.¹⁵ Mechanisms intended to induce compliance help to achieve effectiveness. The WTO legal system increases the cost of noncompliance.¹⁶

¹⁰ The WTO is directly related to States. It does not address the State's internal organs, since the international responsibility of the State is the result of actions and omissions committed by any of your inner powers.

¹¹ Cf. Varella, *supra* note 8, at 110; VARELLA, *supra* note 9.

¹² DSB indicates that states can “induce others to conformity.” “Induction to conformity” requires the action of states and may mean changes in public policies and legal acts, besides domestic judicial decisions. It indirectly limits the margin of discretion of state judiciaries in choosing interpretations of concepts linked to WTO law. Disparate interpretations can serve as an argument for the DSB to consider state violations of an agreement. It is noteworthy that, from the perspective of international public law, decisions by domestic judiciaries are only legal facts, but they generate international state responsibility.

¹³ In these twelve years, the rate of compliance in all cases is of 83%, whereas the remaining 17% revolve around subjects of disputes that existed prior to the creation of the WTO, were already firmly grounded in the states themselves, and the new system was an attempt at reverting these already consolidated situations. One example is the disputes regarding the importation of bananas, involving dozens of members. It was already a subject of polemic debate in the 1970's, prior to the creation of the WTO. Another is the hormones case, rejected by the European Union, above all, in relation to sanitary crises like mad cow, which makes any imposition by the WTO difficult. Bruce Wilson, *Compliance by WTO Members with Adverse WTO Dispute Settlement Rulings: The Record to Date*, 10 (2) J. INT'L ECON. L. 397, 402 (2007).

¹⁴ See Alexandra Huneeus, *Courts resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights*, 11 WIS. INT'L L.J. 101, 118 (2011).

¹⁵ DSU, *supra* note 6, at art. 1.1 (“The rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding (referred to in this Understanding as the ‘covered agreements’). The rules and procedures of this Understanding shall also apply to consultations and the settlement of disputes between Members concerning their rights and obligations under the provisions of the Agreement Establishing the World Trade Organization (referred to in this Understanding as the ‘WTO Agreement’) and of this Understanding taken in isolation or in combination with any other covered agreement.”).

¹⁶ JOHN JACKSON, *SOVEREIGNTY, THE WTO, AND CHANGING FUNDAMENTALS OF INTERNATIONAL LAW*, 145 (2006).

As a result of the multiplication of regional systems of integration, states have created many bilateral and minilateral¹⁷ dispute settlement mechanisms.¹⁸ Almost 510 regional systems of integration are registered at the WTO, many of them with their own dispute settlement mechanisms.¹⁹ Every regional or bilateral treaty has its own rationale, with its own instruments to implement its decisions.²⁰ In fact, the relationship between regional bodies and the DSB is horizontal, not hierarchical.²¹ Distinct means of coordination and co-existence provide punctual solutions.

The WTO enforcement mechanisms reveal that international law, stimulated by globalization and the intensification of international relations, is highly specialized. Specialization generates new tools that increase the effectiveness of each legal subsystem.²² Various layers of norms and tribunals are manifest at national, regional, and international levels, involving public and private actors at the state, sub-state, and transnational levels, exercising numerous modes of interaction.²³

B. THE CREATIVITY OF THE DSB ENFORCEMENT MECHANISM

Numerous factors contribute to the effectiveness of the implementation of WTO decisions. The primary factors are: (1) the

¹⁷ Minilateralism means international negotiations and agreements among three or more countries, but without a significant number of states. See Moisés Naim, *Minilateralism: The Magic Number to Get Real International Action* Foreign Policy (Jun. 22, 2009), <http://www.foreignpolicy.com/articles/2009/06/18/minilateralism>.

¹⁸ Systems of integration can be either sectoral or regional. Sectoral integration happens when many states deliberate on a specific topic, such as human rights, trade, environment, or other themes. By contrast, regional integration is promoted by a smaller set of states simultaneously, on various topics. Between one model and another, there are countless variations.

¹⁹ Alice Rocha da Silva, *La Complexe Articulation entre Accords Commerciaux Régionaux et le Droit de l'OMC 322* (June 2012) (unpublished Ph.D. dissertation, Université Paul-Cézanne - Aix-Marseille III) available at <http://mdf.secrel.com.br/dmdocuments/ALICESILVA.pdf>.

²⁰ VARELLA, *supra* note 9.

²¹ KRISH, *supra* note 2, at 231.

²² VARELLA, *supra* note 9, at 185.

²³ There are multiple layers of regional and multilateral legal relationships, varying according to the theme, the space, and the time of legal integration. It is very difficult to understand and propose an interpretation of the international legal system because it is changing constantly and rapidly. Thus, the complexity of the interaction between the two processes occurs not only in layers determined by the origin of rules (national, regional, international), but also by theme (human rights, humanitarian, environmental, and so on). Instead of linear relationships, a network arises, which becomes even more complex with the multiplicity of actors responsible for its creation. MICHEL VAN DE KERCHOVE & FRANÇOIS OST, *LEGAL SYSTEM BETWEEN ORDER AND DISORDER* ix-x (Iain Stewart trans., 1994).

necessity to maintain and improve a reliable and legitimate system, as a whole, (2) the increase in costs of non-implementation, and (3) the consolidation of an image of efficiency and impartiality through technical-legal density.²⁴

Probably the most significant factor is a sense of trust and legitimacy within the multilateral trade system. Although it is neither measurable nor easily proven, this is the most common argument heard in international discussions on the subject among state officials.²⁵ If the dispute settlement mechanism of the WTO lost its legitimacy, prejudices would likely emerge in multilateral trade integration. This problem could be due to many reasons, such as selective implementation of decisions or a lack of compliance among powerful states. The evolution of the multilateral integration process depends on the existence of a stable and predictable legal framework, like that, which the WTO currently offers.²⁶ This framework is primarily responsible for the expectation that members respect and implement WTO decisions even when they diverge from the interests of the most economically powerful states.

In the last twenty years, multilateralism has consolidated, mainly in economic areas, with a major decentralization of the sources and destinations of goods and services. This scenario is more significant in developing countries, particularly in emergent countries. Less than twenty years ago, most developing countries concentrated their export and import markets on some specific economically powerful states, such as European states, the United States, or regional powers like Japan, China, or Russia.²⁷ Today, there is less concentration.²⁸ International politics has developed multilaterally, and the use of force as a response to economic asymmetries is less likely.²⁹

²⁴ Harold Koh, *Transnational Legal Process: The 1994 Roscoe Pound Lecture*, 75 NEB. L. REV. 181, 199-203 (1996).

²⁵ Rachel Brewster & Adam Chilton, *Supplying Compliance: Why and When The United States Complies with WTO Rulings*, 39 YALE J. INT'L L. 201 (2014).

²⁶ *Trade and Investment: Negotiate, or Continue to Study?*, DOHA WTO MINISTERIAL 2001: BRIEF NOTES, http://www.wto.org/english/thewto_e/minist_e/min01_e/brief_e/brief12_e.htm.

²⁷ See generally Alan Winters, *Regionalism versus Multilateralism* (World Bank Pol'y Res. Working Paper No. 1687, 1996), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=615007.

²⁸ See generally Bernard Hoekman & Peter Martin Holmes, *Competition Policy, Developing Countries, and WTO 1*, (FEEM Working Paper No. 66-99, 1999), available at <http://ssrn.com/abstract=200621>.

²⁹ See *supra* text accompanying note 12; see also P.F. MARCRORY, A. APPLETON, M.G. PLUMMER, *THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS* 1208 (2005).

On the other hand, multilateralism has generated greater internationalization of the entire global economy. International trade has accelerated, creating development opportunities for many countries, including the most marginalized. The current scenario is as favorable for developing countries as for developed countries. Ongoing multilateralism demands a predictable legal framework and limits the possibility of deviations from the WTO system in pursuit of the individual interests of powerful states. The legitimacy and effectiveness of the WTO legal system plays a central role in this process.³⁰

At the time of the WTO's creation, critics asserted that the United States would withdraw from the WTO after a few defeats. They believed the system would not be effective against the most powerful countries.³¹ The US Congress approved the resolution of ratification because the DSB was not presented as an international court.³² Not only has the United States remained in the WTO, but also it is hard to find serious arguments in favor of the United States abandoning the system today.

Another factor indicating the effectiveness of the WTO legal system is that it innovates when it allows winner states to induce compliance directly, by waiving international obligation on certain products of the country that must comply with the DSB's report.³³ This sometimes creates conflict among distinct economic groups within a

³⁰ Others suggest reforming the system, with a better transparency of the decision-making process or simplified mechanisms to create tools to provide dispute settlements of cases involving smaller amounts. Steve Charnovitz, *Rethinking WTO Trade Sanctions*, 95 AM. J. INT'L L. 792, 824-832 (2001); Chad Brown & Bernard Hoekman, *Developing Countries and Enforcement of Trade Agreements: Why Disputes Settlement is not Enough* 42 J. WORLD TRADE 177 (2008); and JACKSON, *supra* note 16, at 160.

³¹ S. A. AARONSON, *TRADE AND THE AMERICAN DREAM: A SOCIAL HISTORY OF POSTWAR TRADE POLICY*, 156 (1996).

³² J.H.H. Wieler, *The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement* 13 AM. REV. INT'L ARB. 177, 190 (2002).

³³ The case of tire imports to Brazil provides an apt example. The Appellate Body of WTO affirmed the decision of the Panel that the injunctions granted by the Brazilian courts hurt the principle of most favored nation. The time for judgment on the merits of cases in Brazil was, in this logic, incompatible with the time considered reasonable by international bodies. The DSB granted Brazil twelve months to revoke all injunctions under the penalty of accepting the importation of European tires. This decision had many interesting effects. It revealed differences between the logical and the reasonable time expectations for the process and between the national and international levels. It also forced Brazil to change its procedures, which are rooted in centuries of national legal culture. See Panel Report, *Brazil- Measures Affecting Imports of Retreaded Tires*, WT/DS332/R (June 12, 2007).

state, in particular those that have lost a particular case.³⁴ According to the DSB, a winning state may suspend the legal rights of the losing state in a specific sector to induce it to implement the report.³⁵ The commercial waiver shall occur in the same sector or in the same treaty violated by the other country.³⁶ This can happen, ultimately, in any sector or treaty.³⁷

The winning state may choose a politically strong economic sector in the losing state as the object of its retaliation.³⁸ Thus, potentially affected enterprises (i.e., enterprises in the losing state that oppose the politically strong economic sectors) are interested in pressuring their own governments to implement WTO decisions, even when another sector in the nation will feel negative effects. Therefore, a state has to defend itself internationally by protecting a politically strong sector of its national economy and cope with international disputes that affect the evolution of various economic sectors.³⁹ Thus, at the domestic level, it becomes difficult to resist the WTO's pressure.

The relative independence of the condemned state makes it possible for the WTO legal system to reach effective levels, even when the action may not be considered a wrongful act at the national level. An example occurs when a state changes its national legal framework sometime after 1995 (time of creation of the WTO), by introducing a new policy or creating benefits that contradict WTO requirements. At the international level, there is no doubt that this is a wrongful act.

Generally, at the national level, international trade treaties have the same status as national legal acts.⁴⁰ If a national law is more recent than the WTO, then the national statute will prevail, thereby suspending

³⁴ Andrew Mitchell & Constantinos Salonidis, *David's Sling: Cross-Agreement Retaliation in International Trade Disputes*, 45 J. WORLD TRADE 457, 459 (2011).

³⁵ DSU, *supra* note 6, at art. 22.3.

³⁶ *Id.* at art. 22.1. ("Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time. However, neither compensation, nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements. Compensation is voluntary and, if granted, shall be consistent with the covered agreements.").

³⁷ See DSU, *supra* note 6, at Annex 2, art. 22.

³⁸ See Panel Report, *supra* note 33; see also *The Process- Stages in a Typical WTO dispute settlement case*, DISPUTE SYSTEM TRAINING MODULE: CH. 6, http://www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/c6s10p1_e.htm.

³⁹ In any case, the state that imposes the retaliation could also suffer the damages of increased import prices at the national level. Cf. Ngangjoh H. Yenkont, *World Trade Organization Dispute Settlement Regime at the Tenth Anniversary of the Organization: Reshaping the "Last Resort" Against Non-Compliance*, 40 (2) Journal of World Trade 376, 377 (2006).

⁴⁰ MALCOLM N. SHAW, INTERNATIONAL LAW 97 (6th ed. 2011).

the validity of WTO legal norms. In dispute resolution mechanisms under bilateral or regional systems, such as NAFTA or Mercosur, the winner State would depend on national courts to internalize the international decision.⁴¹ Most national judges would block the decision after the allegation of its nullity.

Another factor in the effectiveness of the WTO legal system is its strict adherence to a rigid timetable⁴² and to its own precedents,⁴³ In other words, DSB is an efficient, stable, predicable court with high technical-legal density.⁴⁴ WTO cases follow a set calendar, and it is possible to count on two hands the number of decisions that exceeded the deadlines.⁴⁵ A fast process is crucial to avoid bankrupting enterprises with the suspension of sales for long periods. As the Brazilian tire retread case shows, in developing countries, cases involving millions or billions of dollars can take ten to twenty years to be adjudicated.⁴⁶ A solution

⁴¹ *Id.*

⁴² *What is the WTO, Settling Disputes*, WORLD TRADE ORGANIZATION, 55-56, available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/utw_chap3_e.pdf.

⁴³ "In order to make the procedures more efficient, the period in which the panel shall conduct its examination, from the date that the composition and terms of reference of the panel have been agreed upon until the date the final report is issued to the parties to the dispute, shall, as a general rule, not exceed six months. In cases of urgency, including those relating to perishable goods, the panel shall aim to issue its report to the parties to the dispute within three months. When the panel considers that it cannot issue its report within six months, or within three months in cases of urgency, it shall inform the DSB in writing of the reasons for the delay, together with an estimate of the period within which it will issue its report. In no case should the period from the establishment of the panel to the circulation of the report to the Members exceed nine months. The panel may suspend its work at any time at the request of the complaining party for a period not to exceed 12 months. In the event of such a suspension, the time frames set out in paragraphs 8 and 9 of this Article, paragraph 1 of Article 20, and paragraph 4 of Article 21 shall be extended by the amount of time that the work was suspended. If the work of the panel has been suspended for more than 12 months, the authority for establishment of the panel shall lapse." UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES ARTICLE 12, http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm#12.

⁴⁴ The Brazilian National Council of Justice is trying to reduce the timeline of the national process to an average of five to eight years. In cases with more complexity and evolving international economic aspects, this average is much higher. See *Metas Nacionais*, CNJ, <http://www.cnj.jus.br/gestao-e-planejamento/metas>.

⁴⁵ Petros Mavroids and Henrik Horn, *The WTO Dispute Settlement System 1995-2006: Some descriptive statistics* 27 (2008) available at http://siteresources.worldbank.org/INTRES/Resources/469232-1107449512766/DescriptiveStatistics_031408.pdf; Cf. Marcelo D. Varela, *The Effectiveness of the Dispute Settlement Body of the World Trade Organization: an Analysis of its First Twelve Years of Existence and Proposals for its Improvement*, 8 (2) J. INT'L L. & POL'Y 100, 104 (2009).

⁴⁶ *Duração média dos processos findos nos tribunais judiciais de 1ª instância*, MINISTÉRIO DA JUSTIÇA DO BRASIL, http://www.dgpj.mj.pt/sections/estatisticas-da-justica/destaques/duracao-media-dos/downloadFile/file/Duracao_media.pdf?nocache=1171374102.26. inistério da Justiça

would then come not from the national court, but from the fear of retaliation.

There has been substantive progress in the dispute settlement mechanisms of WTO compared with regional integration systems and bilateral trade agreements.⁴⁷ Except for the European Union, most regional integration systems do not have tribunals to settle trade disputes, as NAFTA, MERCOSUR or ASEAN. Recently, the Southern Common Market (MERCOSUR) created a Permanent Tribunal of Arbitral Review, but the South American system has only judged a few cases so far.⁴⁸ Its members prefer to resolve their cases through other mechanisms, such as the WTO or ICJ systems, rather than resolving problems internally.⁴⁹

Many bilateral treaties with arbitral mechanisms exist. Normally, however, they provide few possibilities for retaliation.⁵⁰ International decisions rely only on the national courts or the agreement of the executive branch to be effective, which acts without real fear of countermeasures from other states. When an international decision based on an earlier treaty runs contrary to a later domestic statute, with the same level in the hierarchy of laws, the arbitral decision should be considered invalid at a national level (*lex posterior* rule).⁵¹ Then, the chances of implementation depend on unpredictable factors, such as the interest of the legislative branch to change the national statute or a decision from domestic courts considering the statute invalid.⁵² The menace of countermeasures induces losing countries to comply with international standards, even when important domestic economic groups are against that. But the process of implementing WTO reports is not always easy. Many obstacles impede the implementation process.

do Brasil, http://www.dgpj.mj.pt/sections/estatisticas-da-justica/destaques/duracao-media-dos/downloadFile/file/Duracao_media.pdf?nocache=1171374102.26.

⁴⁷ Allan Rosas, *Implementation and Enforcement of WTO Dispute Settlement Findings: An EU Perspective*, 4 J. INT'L ECON. L. 131, 133 (2001).

⁴⁸ See Olivos Protocol for the Settlement of Disputes in MERCOSUR, Feb. 12, 2002, 42 I.L.M. 2 (2003); see also TRIBUNAL PERMANENTE DE REVISION, www.tprmercosur.org.

⁴⁹ The Tribunal ruled on only 10 cases between 1991 and 2012. Recently, some important cases were first proposed to the WTO and the ICJ, as between Brazil and Argentina and Argentina and Uruguay. See Communication from the Panel, *Argentina – Measures Affecting the Importation of Goods*, WT/DS/438 (May 5, 2014) (examining Anti-dumping duties on frozen meat of fowls from Brazil); see also *Pulp Mills on the River Uruguay* (Arg. v. Uru.), 2010 I.C.J. (Apr. 20).

⁵⁰ DISPUTE SYSTEM TRAINING MODULE, *supra* note 38.

⁵¹ H. Berman, *The Alien Tort Claims Act and the Law of Nations*, 19 (1) EMORY INT'L L. J. (2005).

⁵² See VARELLA, *supra* note 9.

C. CHALLENGES TO THE IMPLEMENTATION PROCESS

It is not always easy to accept a system that induces compliance based on its legitimacy and the use of political mechanisms. The WTO reports can request changes not only in executive acts, but also in legislative acts, and even judiciary decisions. The effectiveness of measures affecting the executive branch is greater than that of parties asking for legislative changes.⁵³ The executive power is more susceptible to the pressure of the other states and the political demands of economic groups affected by the possibility of retaliation. It is easier for the executive branch to change administrative acts because it has more flexibility and agility to provide a quick response to the DSB.⁵⁴

The legislative branch usually requires time to change norms; representatives must be convinced. Since some affected groups have been politically strong at the national level, approving any restrictive bill takes time. Many times, even when the executive power pressures the legislative branch to implement WTO reports, the legislative branch rejects the proposition or simply does not vote on it. One example is the hormones case involving the United States, Canada, and the European Communities.⁵⁵ In democratic countries, the scenario can be even worse because the nonfulfillment of an international decision might relate to a political mechanism used to weaken an administration.

Nevertheless, the hardest branch in which to implement decisions of international courts is the judiciary. In Brazil, there are three distinct scenarios, each with its own difficulties: (1) divergent decisions from individual judges in a tangled jurisprudence that ask for changes to previous positions or standardization of jurisprudence; (2) a decision at the Brazilian Supreme Court that does not object to contestation at the national level; and (3) a contradiction between WTO reports and the

⁵³ See DSU, *supra* note 6, at art. 19 ("Panel and Appellate Body Recommendations: 1. Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations. 2. In accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.").

⁵⁴ B. HOEKMAN & M. M. KOSKTECKI, *THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM: THE WTO AND BEYOND*, 639-41 (3rd ed. 2009).

⁵⁵ Alberto Alemanno, *Private parties and WTO Dispute Settlement System: Who Bears the Costs of Non-Compliance and Why Private Parties Should Not Bear Them*, CORNELL LAW SCHOOL L.L.M PAPERS SERIES, 7 (2004).

decision of another international court.⁵⁶ As discussed below, the reports on the retreaded tire case illustrate fundamental difficulties with the implementation of decisions at different levels.

II. RETREADED TIRES IN BRAZIL

The Brazil retreaded tires case involves measures affecting the importation of retreaded tires, the main purpose of which was to challenge Brazilian measures to block the importation of retreaded tires from the European Union.⁵⁷ Three European enterprises wished to export retreaded tires to Brazil in response to a European Union regulation that obliged European enterprises to provide a final destination for used tires.⁵⁸ The enterprises had to recycle the used tires, transform them into other materials, or simply export them to other countries.⁵⁹ Since it was expensive to recycle or transform used tires in Europe, the enterprises preferred to send used tires to other countries, even without profit.⁶⁰ The story of this case can be divided into two parts: MERCOSUR and the European Union, which are two poles that intersect at the WTO.

A. CONTEXT OF THE CASE

Brazil's economy has grown quickly.⁶¹ Some authors consider it a developed country,⁶² but Brazil experiences many problems typical of a developing country, particularly regarding sanitation. One of the worst problems is the profusion of used tires over the last twenty years.⁶³ National policies for recycling tires have been ineffective.⁶⁴ There is no

⁵⁶ The conflict between WTO and MEROSUR is an example. I will develop it below.

⁵⁷ Dispute Settlement, *Brazil- Measures Affecting Imports of Retreaded Tyres*, WT/DS332 (Sept. 25, 2009).

⁵⁸ Brasil – Medidas Relativas à Importação de Pneus Reformados, 25 WT/DS332 (June 8, 2006) available at <http://www.stf.jus.br/arquivo/cms/processoAudienciaPublicaAdpf101/anexo/PrimeiraPeticaoDoBrasilperanteaOrganizacaoMundialdoComercio.pdf>.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Brazil GDP Growth Rate*, TRADING ECONOMICS, <http://www.tradingeconomics.com/brazil/gdp-growth>.

⁶² Rodrigo Antonia de Paiva, *Many are Ignorant of Brazil's Status as a Developing Nation*, THE TECH, <http://tech.mit.edu/V109/N12/paiva.12o.html>.

⁶³ See WT/DS332, *supra* note 57.

⁶⁴ *Id.*

recycling structure in the Amazon region, for example.⁶⁵ People toss tires in rivers, abandon them in backyards, or just burn them.⁶⁶ Problems even developed around collecting tires for recycling, because it was necessary to transport the tires from one region to another that might be thousands of miles away.⁶⁷

Brazil's poor infrastructure for tire recycling has led to sanitary and environmental problems. Tires take thousands of years to decompose in rivers.⁶⁸ They contribute to pollution of waters. In São Paulo, a cleaning process meant to prevent floods at Tiete River removed more than 120,000 tires.⁶⁹ Tires disposed of in back yards or in wastelands create habitats for mosquitoes that spread dengue fever.⁷⁰ In a few years, dengue became an epidemic, with approximately half a million cases in 2011 alone.⁷¹ Burning tires releases a toxin that endangers fauna and flora.⁷² Transporting tires between regions transmits illnesses because of insect larvae that live in water inside the tires.⁷³

B. NATIONAL INITIATIVES AGAINST THE IMPORT OF USED TIRES AND THE RESPONSES OF INTERESTED ACTORS

The above scenario resulted in a political mobilization, driven by environmental and health movements, concerning the final destination of tires.⁷⁴ The National Council of the Environment (CONAMA, a pluralist government body with representatives from government, civil society, and industry, and with normative power) and the Department of Foreign Trade (DECEX) enacted infra-legal norms prohibiting tire imports.⁷⁵ Brazilian companies rejected restrictive rules against imports, however. Brazil has no national enterprises that produce tires, only subsidiaries of

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Story*, RIO TIETE, <http://www.riotiete.com.br/historia.html>.

⁷⁰ Second Petition of Brazil to the WTO, *Brazil- Measures Affecting Imports of Retreaded Tyres*, ¶119, WT/DS332 (Sept. 25, 2009).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ See Second Petition *supra* note 70, at ¶¶ 12, 81.

⁷⁵ The Department of Foreign Trade (Administrative Act: 8/91, Portaria 8/91) and the National Council for the Environment (CONAMA Resolution 23/96) prohibited imports of used tires. The panel found both norms to be in violation of art. XI: 1 of GATT by the panel.

European and American companies, such as Goodyear, Michelin, and Pirelli.⁷⁶ These enterprises and their subsidiaries positioned themselves in favor of imports.⁷⁷ Additionally, other Brazilian companies having the capacity of political mobilization favored tire imports because they were accustomed to profiting from the low costs of European imported tires. A new tire produced in Brazil costs, on average, ninety US dollars, depending on vehicle model.⁷⁸ The cost of an imported tire was initially US\$ 3 dollars, but it comes to forty cents per unit, on average, during the process.⁷⁹ Moreover, a European subvention created a vast profit margin for Brazilian retreaded-tire companies.⁸⁰

C. THE DISPUTE IN NATIONAL, REGIONAL, AND MULTILATERAL COURTS

To avoid the responses of CONAMA and DECEX to infra-legal norms, the economic actors and states representing their interests sought recourse at national, regional, and international courts. At the national level, they initiated actions in federal courts using the jurisdiction of each port receiving the tire imports. At the regional level, Uruguay initiated arbitration at MERCOSUR. At the multilateral level, the European Communities invoked the DSB.

In Brazilian courts, Brazilian and foreign companies alleged that CONAMA and DECEX did not have the legal authority to prohibit imports. In general, the cases found argument in the divergences between federal law and the infra-legal norms of these institutions.⁸¹ Importers requested, as an injunction, the liberalization of imports.⁸² In fact, dozens of judges issued injunctions permitting tire imports in various lawsuits.⁸³

⁷⁶ Various authors highlight the role of the private sector in support of developing and developed countries. It is noteworthy that, in certain cases, states have to be against the domestic private sector. See HOEKMAN & KOSKTECKI, *supra* note 54, at 878.

⁷⁷ Various authors highlight the role of the private sector in support of developing and developed countries. It is noteworthy that, in certain cases, states have to be against the domestic private sector. See *id.*

⁷⁸ Panel Report, *Brazil- Measures Affecting Imports of Retreaded Tyres*, Second Oral Statement ¶ 63, WT/DS332/R (June 12, 2007); see also the panel report (WT/DS/332/R), at ¶ 4.76.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Panel Report, *supra* note 78, ¶¶ 7.24-7.33.

⁸² *Id.* at ¶ 4.108.

⁸³ *Id.* at ¶ 7.140.

*Table 1. The Importation of Tires by Brazil Following Court Injunctions*⁸⁴

2000	1,407,618
2001	2,396,898
2002	2,659,704
2003	4,240,474
2004	7,564,360
2005	10,478,466

At the MERCOSUR Court, Uruguay filed a case against Brazil on August 27, 2001, on behalf of a state company that retreaded tires.⁸⁵ The volume of tires produced was small. However, there was political pressure from both the company's employees and the Uruguayan government, which sought to protect its enterprise. In its defense, Brazil did not argue environmental or sanitary questions.⁸⁶ Brazil lost the case and had to accept Uruguayan imports beginning on September 01, 2002.⁸⁷ Since the MERCOSUR decision was not self-enforcing in Brazil, it was necessary for a new legal act suspending the prohibitions of CONAMA and DECEX to implement it.

At the DSB of the WTO, judges evaluated all of these questions. Both panel and appellate bodies have contributed many interesting aspects to these reports. First, the DSB reinforced the idea of a national level of risk acceptance.⁸⁸ Second, a state can act at the WTO not only without any support from its private sector, but also against its own

⁸⁴ *Id.* at ¶ 7.299.

⁸⁵ S.T.J.I., *RekLaudo do Tribunal Arbitral Ad Hoc do MERCOSUL constituído para entender da controvérsia apresentada pela República Oriental do Uruguai à República Federativa do Brasil sobre "Proibição de Importação de Pneumáticos Remoldados (Remolded) Procedentes de Uruguai"*, 9.1.2002, available at <http://www.stf.jus.br/arquivo/cms/processoAudienciaPublicaAdpf101/anexo/LaudodoTribunalArbitralAdHocdoMERCOSUL.pdf>.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ See Appellate Body Report, *Brazil- Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, ¶140 (Dec. 3, 2007). The Panel failed to consider that the risks addressed by the Import Ban were not directly linked to retreaded tyres but to the waste they eventually turn into, and that the level of such risks depends on how waste tyres are managed and disposed of. Thus, the Panel failed to acknowledge the indirect, uncertain, and relative contribution of the Import Ban to its stated objective and, in turn, failed to limit the weight afforded to this element in the weighing and balancing process.

private sector.⁸⁹ Third, the most favored nation principle was violated based on court decisions favorable to enterprises from distinct nationalities, instead of an executive policy in favor of a state or group of states.⁹⁰ Fourth, the WTO did not consider the exception of a regional integration system (MERCOSUR).⁹¹

The DSB decided, in short, that Brazil could prohibit imports of European tires for the following reasons: Brazil prohibits the imports from Uruguay;⁹² and Brazil succeeded to revert all injunctions at National Courts.⁹³ The frame below clarifies the various processes:

⁸⁹ See Report of the Appellate Body, *Brazil- Measures Affecting Imports of Retreaded Tyres*, VI A and B, and VIII, WT/DS332/AB/R (Dec. 3, 2007).

⁹⁰ See G. Shaffer et al., *The Trials of Winning at the WTO: What Lies Behind Brazil's Success*, 41 CORNELL INT'L L. J. 383, 383- 501 (2008).

⁹¹ Other aspects could also be the subject of analysis. The fact that the President of the Appellate Body and the judge was a Brazilian, Luiz Olavo Baptista; the critics of the European Union to the defense of Brazil at the regional level, accusing that it lost the case to legitimize the exception at the multilateral level. On the panel report: "218. The European Communities argued before the Panel that Brazil was at least partially responsible for the ruling that resulted in the MERCOSUR exemption because it did not defend itself in the MERCOSUR proceedings on grounds related to human health and safety" WT/DS332/AB/R, *supra* note 89, ¶ 218.

⁹² In this case, the discrimination between MERCOSUR countries and other WTO Members in the application of the Import Ban was introduced as a consequence of a ruling by a MERCOSUR tribunal. The tribunal found against Brazil because the restriction on imports of remolded tires was inconsistent with the prohibition of new trade restrictions under MERCOSUR law. WT/DB332/AB/R *supra* note 89, ¶¶ 235-247. In our view, the ruling issued by the MERCOSUR arbitral tribunal is not an acceptable rationale for the discrimination, because it bears no relationship to the legitimate objectives pursued by the Import Ban that falls within the purview of Article XX(b), and even goes against this objective, to however small a degree. Accordingly, we are of the view that the MERCOSUR exemption has resulted in the Import Ban being applied in a manner that constitutes arbitrary or unjustifiable discrimination WT/DS332/AB/R, *supra* note 89, ¶ 228.

⁹³ Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, ¶¶ 7.306, 7.310, WT/DS332/AB/R (Dec. 3, 2007). (The Panel finds, therefore, that, since used tire imports have been taking place under the court injunctions in such amounts that the achievement of Brazil's declared objective is being significantly undermined, the measure at issue is being applied in a manner that constitutes a means of unjustifiable discrimination. Consequently, the Panel also concludes that since used tire imports have been taking place under court injunctions in such amounts that the achievement of Brazil's declared objective is being significantly undermined, the measure at issue is being applied in a manner that constitutes a means of unjustifiable discrimination where the same conditions prevail.).

Table 2. Contextualization of the Case in Time⁹⁴

National	1991	DECEX prohibits imports of used tires
	1996	CONAMA prohibits imports of used tires
	2000-2006	Companies succeed in obtaining injunctions at national courts, authorizing imports
Regional	8/27/2001	Case filed at the Arbitral Court of MERCOSUR, by Uruguay against Brazil
	1/9/2002	Arbitral Decision of MERCOSUR, condemning Brazil to accept imports from Uruguay
Multilateral	6/20/2005	European Communities initiates consultations against Brazil at the WTO
	6/12/2006	Panel Report
	12/3/2007	Appellate Body Report
	8/29/2008	Arbitral Decision

III. DOMESTIC DIFFICULTIES IN IMPLEMENTING THE WTO REPORT

As normally occurs, both Brazil and the European Communities considered themselves winners of the case. The Brazilian government, the European Communities, and the tire export companies announced their victories to the media.⁹⁵ Brazil considered it a victory that the DSB had accepted its argument that it could choose its own national policies to implement the report, rejecting the argument of the European Communities that a national policy of education could have the same effect of preventing environmental and sanitary problems without causing harm to trade.⁹⁶ In fact, the DSB followed its own tradition with

⁹⁴ See generally *Dispute Settlement, Brazil—Measures Affecting Imports of Retreaded Tires*, WT/DS332/AB/R (Sept. 25, 2009).

⁹⁵ Multiples newspapers announce divergent results in Brazil. See generally *Percepções e interesses no contencioso Brasil-UE sobre pneus reformados*, RELNET, available at <http://www.relnet.com.br/blog/?p=514>.

⁹⁶ See *supra* note 93, at ¶¶ 128, 131 (“In addition to the Import Ban, Brazil has adopted a variety of other measures which were also challenged or discussed before the Panel. Although none of these measures are directly at issue in this appeal, we consider it useful to identify them

respect to its more sensitive cases that involve health and the environment, in which it permits states to select their own level of risk and method of implementing the report.⁹⁷ The European Communities prevailed on the main points regarding Brazil's obligation to accept the import of retreaded tires because of the finding that Brazil has an inconsistent system of import selections.⁹⁸

The difficulty for the Brazilian government, however, lay in implementing the WTO report so that it could prohibit the importation of an excessive quantity of tires from the European Communities. To do so, Brazil also had to prohibit imports from Uruguay, in violation of the MERCOSUR arbitral decision, and suspend all judicial injunctions.⁹⁹

Implementation requires acts at the executive, legislative, and judiciary levels. It also requires convincing the main national political actors about the impact of the WTO reports. There was a rigid timeline imposed by the WTO to implement the decision. Brazil only succeeded in implementing all measures because it began to promote them at the beginning of the case, even during the consultations. The table below illustrates the implementation process at the national level.

briefly...The State of Paraná has adopted Paraná Rodando Limpo, a voluntary programme to collect, *inter alia*, all existing unusable tyres currently discarded throughout the territory of Paraná.")

⁹⁷ Yuka Fukunaga, *Securing Compliance Through the WTO Dispute Settlement System: Implementation of DSB Recommendations*, 9 J. INT'L ECON. L. 383, 400 (2006).

⁹⁸ See Dispute Settlement, *Brazil—Measure Affecting Imports of Retreaded Tires*, ¶ 258, WT/DS332/AB/R (Sept. 25, 2009).

⁹⁹ *Id.*

Table 3. Brazilian Measures to Comply with International Decisions:

Legislative	10/31/2005	Proposition of a bill to manage tire imports (National System of Tire Imports), to avoid a panel of the WTO
Judiciary	9/22/2006	Executive proposes action in the Supreme Court, to nullify all imports
	6/24/2009	Supreme Court Rules
MERCOSUR	7/3/2008	Quotas for tire imports in MERCOSUR Resolution n. 46
	11/17/2010	Reduction of the quotas on tires imports Resolution n. 81

A. INTERNAL CONFLICTS IN THE EXECUTIVE BRANCH

At the executive level in Brazil, the discussion on whether to implement the decision reached a double impasse. On one side, bureaucrats interested in the economic consequences of tire retread imports did not want to create tension with MERCOSUR and the European Communities, the main economic partners of Brazil.¹⁰⁰ They believed it would be better to accept the tire imports. On the other side, bureaucrats concerned about health and environmental matters organized themselves with the aim of convincing governmental actors to favor the prohibition of tire imports.

Facing internal conflict, Brazil's executive branch did not strongly commit to a single position. A decentralized reaction took place, with some institutions and individuals forming opposing groups. Also interesting is that the specialization in the Brazilian bureaucracy is shaped to implement victories but not defeats. There is no domestic statute for internalizing international decisions. Most importantly, most domestic players concerned with the implementation of changes to the DSB are not familiar with the WTO.¹⁰¹

¹⁰⁰ André Diniz, *MDIC passa a divulgar lista dos principais parceiros econômicos*, COMERCIO EXTERIOR (June 21, 2011), <http://www.mdic.gov.br/sitio/interna/noticia.php?area=5&noticia=10744> (Braz.).

¹⁰¹ See David Evans & Gregory C. Shaffer, *Introduction*, in *DISPUTE SETTLEMENT AT THE WTO: THE DEVELOPING COUNTRY EXPERIENCE* (Gregory Shaffer & Ricardo Meléndez-Ortiz eds., 2010), available at <http://ssrn.com/abstract=1743727>.

B. INTERNAL CONFLICTS IN THE LEGISLATIVE BRANCH

The first strategy option for implementing the report was to resolve the legal ambiguities. While evaluating the WTO case, the executive branch proposed a bill to create a National System of Sustainable Management of Tires.¹⁰² The Ministry of Health, the Ministry of Environment, and the executive mobilized to pressure Congress to approve the bill.¹⁰³

Interest groups favorable to imports lobbied against the bill and avoided debating the environmental impacts of the WTO decision.¹⁰⁴ Since there were already many bills undergoing congressional analysis, Congress attached the bill to other environmentally related bills, a common legislative strategy used to postpone debate.¹⁰⁵ The analysis would take years, longer than the WTO would allow. In other words, the solution would not come from Congress.¹⁰⁶

In November 2005, the executive branch tried to defeat this strategy. It expressly argued to Congress that the bill was an important tool for dealing with the WTO panel. The executive argued that the European Union was ready to propose measures against Brazil in the WTO.¹⁰⁷ A clear domestic legal act could have solved the conflict at the international level. However, Congress refused to adopt a specific analysis on the executive proposition and postponed the discussion.¹⁰⁸ Congress did not vote on the bill before the conflict was resolved.¹⁰⁹

¹⁰² Proposição Sujeita à Apreciação do Plenário, PL 6136/2005, de 31 de Outubro de 2005, CÂMARA DOS DEPUTADOS (Braz.) [hereinafter PL 6136/2005] available at <http://www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=305058>.

¹⁰³ Agência Estado, *Projecto de lei proibe importacao de pneu usado*, ULTIMA INSTANCIA (Nov. 2, 2005), <http://ultimainstancia.uol.com.br/conteudo/noticias/28585/projeto+de+lei+proibe+importacao+de+pneu+usado.shtml>.

¹⁰⁴ It is noteworthy the participation of BS Colway Pneus, a Brazilian company that used to import European tires to Brazil.

¹⁰⁵ PL 6136/2005, *supra* note 102.

¹⁰⁶ *Id*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ See WT/DS332 *supra* note 57, at 2.

C. THE LAST RESORT: DIALOGUE BETWEEN THE BRAZILIAN SUPREME COURT AND THE DSB

The last option used to try to solve the legal impasse was direct action by the judiciary. This initiative was taken during the discussion at the WTO, since Brazil knew that changing the judiciary's position was its weakest strategy and the hardest to implement. The executive took the initiative of convincing the judiciary during the panel at the WTO. There were distinct obstacles to implementing international law and the international decision. First, the majority of Brazilian judges do not even know what the WTO is. They could not understand that the Supreme Court *inter partes* decision, issued to solve one specific case, could have *erga omnes* effects, catalyzed by the indirect consequences of the DSB report. The executive branch concluded that it would be impossible to act on a case-by-case basis in every single court because there were thousands of cases and the importers could continue to initiate new lawsuits.

It is noteworthy to point out that the regular duration of a lawsuit in Brazil is more than five years, on average,¹¹⁰ but it varies depending on the state of federation in which it takes place and the modality of the court (federal or state court). The DSB report requests implementation within twelve months.¹¹¹ Therefore, the need was not merely to implement a decision or to ask Brazil's national courts to obey a rule, but to do so within a time frame to which judges were not accustomed to responding. The conception of a reasonable period of time, under international criteria, was at odds with the institutional culture of national actors, making it more difficult to implement an international decision.¹¹²

The executive branch chose to file an *Arguição de Descumprimento de Preceito Fundamental*,¹¹³ similar to a class-action lawsuit, directly with the Brazilian Supreme Court. Such an action resolves conflicts with relevant constitutional subjects.¹¹⁴ The main

¹¹⁰ COORDENADORIA DOS JUIZADOS ESPECIAIS FEDERAIS [COJEF], *Indicadores de Tempo Médio de Tramitação (ITMT)* (June, 2008), available at http://www2.trf4.jus.br/trf4/upload/editor/apg_ROGER_CANDEMIL.pdf.

¹¹¹ See *supra* Table 3.

¹¹² Ma Qian, *A Reasonable Period of Time in the WTO Dispute Settlement System*, 15(1) J. INT'L ECON. L. 257, 267 (2012) (explaining even though there is sometimes a lack of supervision, there is an internal pressure created by the fear of retaliations).

¹¹³ Luiz Inácio Lula da Silva, ARGUIÇÃO DE DESCUMPRIMENTO DE PRECEITO FUNDAMENTAL 101, (2006) [hereinafter ADPF 101].

¹¹⁴ CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 102 (Braz.) at 1.

purpose of the suit was to make the jurisprudence uniform, avoiding the possibility that individual judges would continue to order injunctions.¹¹⁵

The public lawyers held various meetings with the justices to discuss and explain the WTO, how it works, and the environmental and health consequences of tire imports. The purpose of the meetings was to clarify that if the Supreme Court decided to permit imports in the cases under discussion in the national courts, their decision would have international effects. Remarkably, arguments related to the environmental and health consequences of tire imports had more impact on the justices than those related to the economic effects of retaliation or arguments related to the negative impacts for the economic relationship with the European Communities or MERCOSUR.

Nonetheless, the Supreme Court decided to hear from diverse sectors of society before making a decision through a public hearing.¹¹⁶ This is an uncommon procedure in Brazil. Only three other such events have taken place.¹¹⁷ The public hearing, televised nationally, took an entire day. Representatives of enterprises for and against tire imports made statements. Both groups for and against the imports cited the WTO only a few times and only briefly.¹¹⁸ The main focus was on the creation of jobs in Brazil and the environmental and health effects of the imports.¹¹⁹

The process at the Supreme Court took three years to complete.¹²⁰ If the executive branch had waited to present the case immediately after the decision of the DSB, it would have been much harder to gain a favorable result during the time considered reasonable by the WTO.¹²¹ In the end, the Supreme Court decided to prohibit tire

¹¹⁵ *The author worked directly in the case, as a representative of the Brazilian state. Part of the opinions stated in this work reflect the author's personal experience.*

¹¹⁶ *Id.*

¹¹⁷ *Audiências Públicas: Importação de Pneus Usados de 27 de Junho de 2008*, SUPREMO TRIBUNAL FEDERAL (S.T.F.), <http://www.stf.jus.br/portal/audienciaPublica/audienciaPublica.asp?tipo=realizada> (Braz.).

¹¹⁸ Informativo No. 512, *Audiências Públicas [Public Hearings]* de 23 a 27 de Junho de 2008, DIÁRIO DE JUSTIÇA [D.J.] (Braz.) available at <http://www.stf.jus.br/arquivo/informativo/documento/informativo512.htm>.

¹¹⁹ *See supra* note 115.

¹²⁰ Dje nº 108 Divulgação, de 24 de Junho de 2009, S.T.F. *Arguição de Descrumpimento de Preceito Fundamental 101*, de 4 de Junho de 2012 (Braz.).

¹²¹ *See Understanding on Rules and Procedures Governing the Settlement of Disputes*, art. 21, ¶ 3(c), ANNEX 2 OF THE WTO AGREEMENT, available at http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm#21.

imports and suspended all injunctions, thereby avoiding violation of the most favored nation clause.¹²²

D. CONFLICT WITH MERCOSUR PARTNERS

Since the issue was solved at the national level, complying with the DSB panel meant it was still necessary to deal with the arbitral decision from MERCOSUR. If Brazil accepted retreaded tire imports from Uruguay, all efforts at the judiciary level would be lost. After the most difficult problem was solved—the Supreme Court decision—there was an inversion by domestic forces. The national companies who imported European retread tires did not support imports from Uruguay. The Uruguayan state company was almost isolated. The national actors in favor of restricting imports became both politically and legally stronger than those against it. The Chamber of Foreign Trade (a council of Secretaries of State) decided to suspend tire imports from MERCOSUR, in violation of the decision, and arranged a deal on compensations with Uruguay.¹²³

The DSB report did not mention the invalidity of the decision of the Court of MERCOSUR regional court decision or the non-recognition of the regional system of integration under GATT provisions.¹²⁴ In fact, the appellate body did not analyze the exception within articles I.1, XIII: 1 of GATT 1994 and XX (d) and XXIV of GATT 1974, which allows trade exceptions in name of environmental protection.¹²⁵ DSB stated that, according to the regional treaty, the MERCOSUR panel could have decided differently, taking into consideration environmental questions, and that the rationale used for ruling was not acceptable.¹²⁶ This DSB critique is noteworthy. According to DSB, the regional tribunal could have considered environmental arguments, even if not alleged by the

¹²² See *Dje n° 108 Divulgação*, *supra* note 120.

¹²³ Resolução No. 42, de 3 de Julho de 2008, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 4.07.2008 (revogada pela Resolução Camex No. 03, de 3 de Fevereiro) (Braz.).

¹²⁴ See also Jeanine Gama Sá Cabral and Gabriella Giovanna Lucarelli de Sálvio, *Considerations on the MERCOSUR Dispute Settlement Mechanism and the Impact of its Decisions in the WTO Dispute Resolution System*, 42(1) J. WORLD TRADE 1031 (2008).

¹²⁵ See WT/DS332/AB/R, *supra* note 88, ¶ 256

¹²⁶ *Id.* (“The tribunal found against Brazil because the restriction on imports of remoulded tires was inconsistent with the prohibition of new trade restrictions under MERCOSUR law. . .”); see *supra*, note 9.

parties.¹²⁷ Brazil could obey both decisions simultaneously, however, because it accepted tire imports from Europe and Uruguay. Thus, there were no explicit divergences between the multilateral and regional decisions. The DSB only asked for coherence.

CONCLUSION

States created an important tool to solve trade conflicts at the international level. The DSB became effective by increasing the costs of noncompliance with its reports. However, there are still obstacles on the national level to implementing the most important decisions, such as those related to sensitive subjects and those having major economic impacts.

The case of Brazil's retreaded tires reveals some of those conflicts. First, the implementation of the DSB decision occurred in opposition to domestic groups in Brazil, not only economic actors, but also environmentalists against tire enterprises. Associated with European enterprises, Brazilian tire companies favored imports and disfavored national laws protecting the environment. Second, this case was the first in which Brazil had to defend itself without the support of private law offices financed by the private sector. Brazil had to engage a domestic law firm to dispute the case at the international level against national enterprises, which were participating on the side of the European Union. Third, this case illustrates how difficult it can be to implement a DSB report. The DSB obliged Brazil to impose a different timeline on its judiciary branch and to disobey the MERCOSUR arbitral decision if it wished to prevent the import of European used tires. Since Brazilian authorities (judges and representatives) were not familiar with the DSB system, it was difficult to convince them that Brazil needed to obey the DSB report. In the end, they reached a solution, but the decision almost exclusively discussed domestic law; the judiciary almost completely ignored the DSB.

One conclusion that could be drawn from this study is that the DSB should have more flexibility in complex cases. It could, for example, order states to adopt provisional measures when there are clear signals that adopting a decision only after a report is issued or

¹²⁷ See Gregory C. Schaffer, *The World Trade Organization Under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and Environmental Matters*, 25 HARV. ENVTL. L. REV. 1 (2001) at 13 (regarding the WTO, environmental, and other organizations).

enforced would be exceedingly difficult. The DSB could also have more flexibility and request intermediary measures, rather than requiring implementation within eighteen months in all cases.