

Difficulties in Implementing DSB Reports: An Analysis Based on Brazil's Retreaded Tires Case

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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, we find that there is no legal antagonism between multilateral and regional courts, but there is a de facto hierarchy between them. This leads to questions clarifying. Finally, I 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 devoted to how the different conflicts of the legislative, executive and judiciary branches impact the efficacy of the DSB report implementation.

Keywords:

Implementation, WTO/DSB Reports, Legal Governance, Multilateralism and unilateralism, dispute settlement, Dialogue of judges.

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1. 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 more 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. Enhancing multilateral systems

1. There are few articles dealing with the implementation of WTO decisions. On SPS, where sometimes there are divergences in losing States, the studies are even harder to find. Some papers analyze whether or not there were implementations, but not the internal reasons as to why or why not. 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, per David Townsend & Steve Charnovitz, *Preventing unportunistic compliance by WTO members*, 14 (2) J. Int'l Econ. L. 437, 439 (2011).

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 that opposed Brazil, Europe and Uruguay. Using the perspective gained from this concrete case, it analyzes 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 provide an introduction to existing WTO law on implementation of reports and some creative aspects of the system compared with traditional international law. In the second part I introduce the case, specifically on the aspects not often analyzed regarding implementation problems, as the conflict among domestic actors and disputes in national, regional and multilateral courts. In the third part I highlight aspects of implementation that contribute to implementation problems encountered at the national level.

2. Existing WTO law and the implementation of international decisions

The Dispute Settlement Mechanism (DSB) of the WTO is built on a hybrid logic that comprises features of both continental law and common law. The use of statutes is intensive, but there is a significant attachment to precedents. This 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

2 Nico Krish, *Beyond Constitutionalism. The Pluralist Structure of Postnational Law* 227 (2010).

3 John Jackson, *The Jurisprudence of GATT and the WTO. Insights on Treaty Law and Economic Relations*, chapter 11 (2002)

The result is particular interpretative logics and a better content definition of statutes,⁴ which assures stability in the legal trade system.

A. The specificity of DSB/WTO

The DSB subsumes various specificities.⁵ It includes general usage from certain norms of international law, mostly from the Vienna Convention on Treaties. However, the use of precedents from other international and national tribunals for the same legal questions is relatively rare, especially when compared to the amount of self-references.⁶ References have been made, particularly in the first years, to decisions of the International Court of Justice, but such references have in general become rare over time. The WTO lacks formal material or jurisprudential relationships with other regional or international courts. In our view WTO law became “different”—respected but unknown to lawyers and judges at most national levels. The “specificities” of the WTO law create obstacles during implementation of its decisions.

This is, however, a highly effective system. During its first years, it has had more than 80%⁷ of its decisions implemented, a higher figure than that of most other international tribunals, higher even than that of some national courts. Practically every WTO treaty aligns itself with this system of conflict resolution.⁸ Mechanisms intended to induce compliance help to achieve effectiveness. The WTO legal system increases costs of noncompliance.

Since the multiplication of regional systems of integration, states have created many bilateral and unilateral dispute settlement mechanisms. Almost 510 regional systems of integration are registered at the WTO, many of them with their own

4 See, as an example, the analytical index of the Dispute settlement body. It is an useful tool, uncommon in other international dispute settlement systems.

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 alii* eds., 2009).

6 Anja Lindross & Michael Mehling, *Dispelling the Chimera of ‘Self-Contained Regimes International Law and the WTO*, 16 (5) *Eur. J. Int’l L.* 857 (2006).

7 In these twelve years, the rate of compliance in all cases is of 83%, where as 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, evolving dozens of members. It was already a subject of polemic in the 1970’s, prior to the creation of the WTO. Another is the case hormones, rejected by the European Union, above all, in function of the 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, 398-399 (2007).

8 John Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law* 145 (2006).

dispute settlement mechanism.⁹ Each regional or bilateral treaty has its own rationale, with its own instruments to implement its decisions. In fact, the relationship between regional bodies and the DSB/WTO is horizontal, not hierarchical.¹⁰ Distinct means of coordination and co-existence provide punctual solutions and, accordingly, concrete cases.

The WTO enforcement mechanisms reveal that international law, stimulated by globalization and the intensification of international relations, is highly specialized. Specialization generates specific new tools that increase the effectiveness of each legal subsystem. Various layers of norms and tribunals are manifest at national, regional, and international levels, involving public and private actors at state, substate, and transnational levels exercising numerous modes of interaction. A complicated scenario (many factors, with predictability) has become complex (innumerable factors, without predictability).¹¹

B. The creativity of the DSB/WTO enforcement mechanism

Numerous factors contribute to the effectiveness of the implementation of WTO decisions. The primary ones are the necessity to maintain and improve a reliable and legitimate system as a whole, the increase in costs of non-implementation, and the consolidation of an image of efficiency and impartiality through technical-legal density.¹²

The first and probably most significant factor is a sense of trust and legitimacy with the multilateral trade system. Although it is not measurable or easy to prove, this is the most common argument heard in international discussions among state officials on the subject. If the dispute settlement mechanism of the WTO loses legitimacy, prejudices would likely emerge in multilateral trade integration. This problem could arise from many reasons, such as the selective implementation of decisions or the lack of compliance of powerful states. The evolution of the multilateral integration process depends on the existence of a stable and predictable legal framework like that offered by the WTO. This framework is primarily responsible for the expectation that

9 Alice Rocha da Silva, *L'Articulation entre le Droit de l'OMC et les Accords Commerciaux Régionaux*. PhD. Dissertation. Université Paul-Cézanne - Aix-Marseille III, 322 (2012) at 322.

10 Nico Krish, above n. 3, at 229.

11 François Ost, *Legal System Between Order and Disorder* ix-x (1994).

12 Harold Koh, *Transnational Legal Process. The 1994 Roscoe Pound Lecture*, 75 *Neb. L. Rev.* 181, 200 (1996).

members respect and implement WTO decisions even when they diverge from the most economically powerful states' interests.

In the last 20 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 regionally powerful states, such as Japan, China, and Russia. Today, there is less concentration.¹³ International politics has developed multilaterally, and the use of force as a response to economic asymmetries is less likely.

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 ones. The current scenario is as favorable for developing countries as for developed countries. Ongoing multilateralism demands a legal, predictable framework and limits the possibility of deviations from the 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.¹⁴

At the time of the creation of the WTO, 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. The U.S. congress only approved the ratification because the DSB was not presented as an international court.¹⁵ Not only did the U.S. never leave the WTO, but also it is hard to find serious arguments today in favor of the U.S. abandoning the system. The DSB/WTO became an effective counterbalance to the E.U. and the U.S. after just a few years.

13 Bernard Hoekman & Peter Martin Holmes. *Competition Policy, Developing Countries and WTO* in FEEM Working Paper no. 66-99 (1999), <http://ssrn.com/abstract=200621> or <http://dx.doi.org/10.2139/ssrn.200621>.

14 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 (4) *Am. J. Int'l L.*, 6-16 (2001). Chad Bown & Bernard Hoekman, *Developing countries and enforcement of trade agreements. Why disputes settlement is not enough*. Discussion paper series, n. 6459. Centre for Economic Policy Research, www.cepr.org/pubs/dps/DP6459.asp, 16. Access on 14.08.2008, and John Jackson, above n. 9, at 160.

15 J. H. H. Wieler, *The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement*, Harvard Jean Monnet Working Paper (2000).

The second factor for the effectiveness of the WTO legal system is that it innovates when it allows interested states to implement decisions, sometimes creating conflict among distinct economic groups within a state, in particular those who have lost a particular case.¹⁶ As a last resort, enterprises with any connection to the case may become prejudiced. This is the main creative innovation of the implementation system of this international court. It occurs as a response to the possibility of retaliation against the DSB. 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. *A priori*, the waiver must occur in the same sector or in the same treaty violated. It can happen ultimately in any sector or treaty, however.

A winning state may choose as the object of its retaliation a politically strong economic sector in the losing state. Potentially affected enterprises thus are interested in pressuring their own governments to implement WTO decisions even when another sector in the nation will feel negative effects. A state not only has to defend itself internationally, protecting a politically strong sector of its national economy; it must also cope with international disputes that affect the evolution of various economic sectors.¹⁷ At the domestic level it becomes difficult to resist the WTO's pressure. On one side there is the protection of a national group of enterprises, considered illegal by an international court. On the other side another enterprise or group of enterprises sees its exports affected for no concrete reason.

The relative independence of the condemned state makes it possible for the WTO legal system to reach effective levels, even when the measure is illegal at a national level. The classic example, a fairly common one, occurs when a state changes its national legal framework, after 1995 (WTO), with a new legal act that implements a policy or creates benefits in contradiction to the WTO legal system. At the international level, there is no doubt: it is a wrongful act. At the national level, usually, international trade treaties have the same status as national legal acts. If a national law is newer than the WTO, the national statute will prevail. Then, there is a suspension of the validity of WTO legal norms according to most of national legal systems. If the interested parties had looked for a solution with a similar mechanism

16 Andrew Mitchell & Constantinos Salonidis, David's Sling, 'Cross-Agreement Retaliation In International Trade Disputes', 45 (2) Journal of World Trade 457 (2011) at 459.

17 In any case, the State who imposes the retaliation could also suffer the damages of increased import prices at the national level. Cf. Ngangjoh H. Yenkong, '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 (2006) at 377.

of bilateral treaties or regional systems of economic integration, then national courts, to be enforced, should internalize the arbitral decision. Most national judges would block the decision after the allegation of its nullity.

The third factor in the effectiveness of the WTO legal system is the strong attachment of its own precedents to the fulfillment of the legal chronogram. In other words, it is an efficient, stable, predictable court with high technical-legal density.¹⁸ WTO cases follow a rigid calendar, and it is possible to count on two hands the number of decisions disregarded.¹⁹ 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 judged. A solution would then not come from the court but from the asymmetry of forces and the success of the postponement of the solution by the state that imposes the measure.

There was substantive progress in the dispute settlement mechanisms of regional systems of integration and bilateral trade agreements.²⁰ Excepting the European Union, most regional systems of integration do not have tribunals to settle trade disputes. 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. Its members prefer to resolve their cases through other mechanisms, such as the WTO or ICJ systems, rather than resolving their problems internally.²¹

Many bilateral treaties with arbitral mechanisms exist. Normally, however, they provide few retaliation possibilities. International decisions rely only on the national courts or national concordance to be effective, without fear of retaliation. When an international decision runs contrary to a national ruling at the same level in

18 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 www.cnj.jus.br

19 Petros Mavroids and Henrik Horn, *The WTO Dispute Settlement System 1995-2006*. Some descriptive statistics (2008). http://siteresources.worldbank.org/INTRES/Resources/469232-1107449512766/DescriptiveStatistics_031408.pdf, access on 29.09.2008, p. 27. Cf. Marcelo D. Varella, *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 Law and Policy 100 (2009)

20 Allan Rosas, *Implementation and Enforcement of WTO Dispute Settlement Findings: an EU perspective*, 4 J. Int'l Econ. L. 131, 133 (2001).

21 The Tribunal ruled on only 10 cases between 1991 and 2012. Recently, some important cases were first proposed to WTO and International Court of Justice, as between Brazil and Argentina (dumping) and Argentina and Uruguay (cellulose).

the hierarchy, the arbitral decision should be considered invalid at a national level, and the chances of implementation then depend on factors not always available, such as assets in other countries. But the process of implementing WTO reports is not always easy. Many obstacles impede the implementation process.

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. The executive power is more susceptible to the pressure of the other state and the political demands of economic groups affected by the shadow of the possibility of retaliation. It is easier for the executive branch to change administrative acts. It has more flexibility and agility to provide a quick response to the DSB.

At the legislative level, the interested groups usually require 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 U.S., Canada, and European Community.²² In democratic countries the scenario can be even worse because according to the opposition's strategy, 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. 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 Supreme Court that does not object to contestation at the national level; and (3) a contradiction between WTO reports and the decision of another international court. As discussed below, the reports on the retreaded tire case

²² See above n. 20, at 136

illustrate fundamental difficulties with the implementation of decisions at different levels.

3. Retreaded tires in Brazil

This case involves measures affecting the importation of retreaded tires (DS 332), the main purpose of which was to challenge Brazilian measures to block the import of retreaded tires from the European Union. 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. They had to recycle the used tires, transform them into other materials, or simply export them to other countries. Since it was expensive to recycle or transform used tires in Europe, and the regulation permitted the exportation of this material, enterprises preferred to send used tires to other countries, even without profit. The story of this case can be divided into two poles: MERCOSUR and the European Union, poles that intersect at the WTO.

A. Context of the case

The economy of Brazil is growing quickly. Some authors consider it a developed country, but Brazil experiences many problems typical of a developing country, particularly regarding sanitation. One of the worst problems relates to the profusion of used tires over the last twenty years. National policies for recycling tires have been ineffective. People toss them in rivers, abandon them in backyards, or just burn them. 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. There is no recycling structure in the Amazon Region, for example.²³

Sanitary and environmental problems have emerged from Brazil's poor infrastructure for tire recycling. Tires would take thousands of years to decompose in rivers. They contribute to siltation. In São Paulo, a cleaning process meant to prevent floods at Tiete River removed more than 120,000 tires.²⁴ Tires disposed in back yards

23 BRASIL. Primeira petição perante a Organização Mundial do Comércio no Caso Pneus de 08.06.2006.

24 <http://www.riotiete.com.br/site/page/3>, access on July, 24, 2012.

or in wastelands create habitat for mosquitoes that communicate dengue fever. In a few years, dengue became an epidemic, with approximately half a million cases in 2011 alone. Burning tires liberates a toxin that endangers fauna and flora. Transporting tires between regions transmits illnesses because of insect larvae living in water inside the tires.²⁵

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. The National Council of the Environment (CONAMA - a plural organ 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.²⁶

However, Brazilian companies rejected restrictive rules against imports. Brazil has no national enterprises that produce tires. In Brazil, only subsidiaries of European and American companies produce tires, such as Good Year, Michelin, and Pirelli. These enterprises and their subsidiaries positioned themselves in favor of imports.²⁷ 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 U.S. \$90, depending on vehicle model. The cost of an imported tire is on average forty cents of dollar per unit.²⁸ A European subvention created a vast profit margin for Brazilian retreaded-tire companies.

25 See above n. 23.

26 Distinct organs created norms, prohibiting imports of used and retreaded tires. 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. Both norms were analyzed as in violation of art. XI: 1 of GATT by the panel.

27 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 Chad P. Bown & Bernard Hoekman, *WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector*, 8 (4) J. Int'l Econ. L. 861 (2005), <http://ssrn.com/abstract=915600>

28 WT/DS332/R, para. 63.

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 made recourse to 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, European Community invoked the DSB/WTO.

In Brazilian courts, Brazilian and foreign companies alleged that CONAMA and DECEX did not have the legal attribution to prohibit imports. *Grosso modo*, the cases found argument in the divergences between federal law and the infra-legal norms of these institutions. They requested, as an injunction, the liberalization of imports. In fact, dozens of judges issued injunctions permitting tire imports in various lawsuits. In the end, individual judges permitted an impressive volume of imports.

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

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

Source: WT/DS332/R, paragraph 7.299

At the MERCOSUR Court, Uruguay filed a case against Brazil on August 27 2001 on behalf of a state company that retreaded tires. The volume of tires produced was small, but there was political pressure, not only from the employees of the company, in front of the Brazilian Embassy in Montevideo, but also from the Uruguayan government, which sought to protect its enterprise. In its defense, Brazil did not argue environmental or sanitary questions. Brazil lost the case and had to accept Uruguayan imports from 09.01.2002.²⁹ Since MERCOSUR decision is not self-enforcing in Brazil, it would be necessary to a new legal act suspending the prohibitions of CONAMA and DECEX to implement it.

At the Dispute Settlement Body of the WTO, judges evaluated all of these questions. Both panel and appellate bodies have contributed many interesting aspects of these reports. Among them are the following: first, that the DSB reinforced the idea

²⁹ MERCOSUR Ad hoc Arbitrary Tribunal. Brazil – Prohibition on the import of remoulded tires originating in Uruguay. Decision, 9 Jan. 2002.

of a national level of accepted risk expressed in domestic policies seeking to avoid a sanitary or phytosanitary problem.³⁰ Second, a state can act at the WTO not only without any support from its private sector but also against its own private sector. 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, as normally happens. Fourth, a conflict emerged between the MERCOSUR and the DSB/WTO³¹ reports. Fifth, the WTO did not consider the exception of a regional system of integration (MERCOSUR).³²

The DSB/WTO decided, in short, that Brazil could prohibit imports of European tires for the following reasons:

- 1) Brazil prohibits the imports from Uruguay;³³
- 2) Brazil succeeded to revert all injunctions at National Courts;³⁴

The frame below clarifies the various processes:

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	08.27.2001	Case filed at the Arbitral Court of MERCOSUR, by Uruguay against Brazil
	01.09.2002	Arbitral Decision of MERCOSUR, condemning Brazil to accept

30 Steve Charnovitz, *The WTO's Environmental Progress*, 10 (3) J. Int'l Econ. L. 685, 703-705 (2007).

31 G. Shaffer *et alii.*, *The Trials of Winning at the WTO: What Lies Behind Brazil's Success*, 41 Cornell Int'l L. J. 381, 381- 501 (2008)

32 Other aspects could also be the subject of analysis. The fact that the President of Applet Body and the judge was a Brazilian; 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...".

33 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. 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/4, para. 228).

34 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. (WT/DS332/R, paras 7.306 and 7.310).

Multilateral	06.20.2005	imports from Uruguay European Community initiates consultations against Brazil at the WTO
	06.12.2006	Panel Report
	12.03.2007	Appellate Body Report
	08.29.2008	Arbitral Decision

3. Domestic difficulties implementing the WTO report

As normally occurs, both countries considered themselves winners of the case. The Brazilian government, the European Community, and the tire export companies announced their victories to the media. 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 Community that a national policy of education could have the same effect of preventing environmental and sanitary problems without causing harm to trade. In fact, the DSB followed its own tradition with 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.³⁵ The European Community won on the main points regarding the obligation of Brazil to accept the import of retreaded tires because of the finding that Brazil has an inconsistent system of import selections.

The difficulty for the Brazilian government, however, lay in implementing the WTO report such that it could prohibit the import of an expressive quantity of tires from the European Community. To do so, Brazil must also prohibit imports from Uruguay, thus violating the MERCOSUR Arbitral Decision, and must suspend all judicial injunctions.

Implementation requires acts at the executive, legislative, and judiciary levels. It also required the hard task to convince the main national political actors about the impacts of the WTO reports. There was a rigid timeline imposed by the WTO. 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.

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	09.22.2006	Executive proposes action in the Supreme Court, to nullify all

³⁵ Yuka Fukunaga, *Securing compliance through the WTO dispute settlement system: implementation of DSB recommendations*, 9 (2) J. Int'l Econ. L., 383, 400 (2006).

		imports
	06.24.2009	Supreme Court Rules
MERCOSUR	07.03.2008	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 branch in Brazil, the discussion in accept or not to implement the decision had a double impasse. On one side, the bureaucrats interested in economic consequences of tire retread imports did not want to create tension with MERCOSUR and the European Community, the main economic partners of Brazil. They believed it would be better accept tire imports. Concerned about health and environmental matters, other bureaucrats organized themselves to convince governmental structures to favor the prohibition of tire imports.

Facing internal conflict, Brazil's Executive Branch did not strongly commit to a single internal position. A decentralized reaction took place, with some institutions and individuals forming groups opposing each other. Thus, the known organizational capacity of the Brazilian administration and its contacts with society to better deal with the DSB/WTO and catalyze its results, noted in other articles, could also catalyze divergences and optimize resistances. A part of the Brazilian bureaucracy specializes in the WTO law.³⁶ This specialization and capacity reinforce arguments used when domestic actors act against each other. Also interesting is that the specialization in the Brazilian bureaucracy is shaped to implement victories but not defeats. Most important, most domestic players concerned with the implementation of changes to the DSB are not familiar with the WTO.³⁷

B. Internal conflicts at the Legislative Branch

The first strategy option for implementing the report was to resolve the legal ambiguities. Brazil should enact a law clearly prohibiting tire imports. Judges would have clear legislation to follow. The injunctions would finish. While evaluating the

³⁶ See above n. 31.

³⁷ Evans, David & Shaffer, Gregory C., *Introduction: The Developing Country Experience in WTO Dispute Settlement*, in *Dispute settlement at the WTO: The developing country experience* (Gregory Shaffer & Ricardo Meléndez-Ortiz eds., 2010); Minnesota Legal Studies Research Paper No. 11-03, <http://ssrn.com/abstract=1743727>.

WTO case, the executive branch proposed a bill to create a National System of Sustainable Management of Tires.³⁸ The Ministry of Health, the Ministry of Environment, and the presidency mobilized to pressure the congress to approve the bill.

Pressure groups favorable to imports lobbied against the bill and avoided debate. Since there were already many bills undergoing congressional analysis, the congress attached the bill to other environmentally related bills, a common legislative strategy used to postpone debate. The analysis would take years, longer than the WTO would allow. In other words, the solution would not come from congress.

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 Branch argued that the European Union was ready to propose measures against Brazil to the WTO. A clear domestic legal act could solve the conflict on the international level. However, congress denied a specific analysis on the executive proposition and postponed the discussion.³⁹ Congress did not vote on the bill before the conflict was resolved.

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 action taken directly at the Judiciary. This initiative was taken during the discussion at the WTO, since Brazil knew that change the judiciary position was its weakest point and hardest to implement. The Executive initiative was taken during the panel phase at the WTO. There were distinct obstacles. First, the majority of Brazilian judges do not even know what the World Trade Organization is. They could not understand that their *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 start new lawsuits.

It is noteworthy to point out that the regular duration of a lawsuit in Brazil is more than five years, on average, but it varies according to the state of federation and

38 Project of law 6.136/2005, presented on 10.31.2005

39 <http://www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=305058>, access on 07.24.2012.

the modality of the court (federal or state court). The DSB report requests implementation within 15 months. Therefore, Brazil needed to make its judges act faster. The need was not merely to implement a decision or to ask Brazil's national courts to obey a rule, but to do so in a time frame within which judges are not habituated. The conception of a reasonable period of time, under international criteria, could collide with the institutional culture of national actors, making it hard to implement international decisions.⁴⁰

The Executive Branch chose to file an *Arguição de Descumprimento de Preceito Fundamental*,⁴¹ similar to a class-action lawsuit, directly with the Supreme Court. This action solves conflicts with relevant constitutional subjects. The main purpose of the suit was to make the jurisprudence uniform, avoiding the possibility that individual judges would continue to order injunctions.

Brazil's Supreme Court justices are jealous of Brazilian sovereignty. The public lawyers held various meetings with justices to discuss and explain the WTO, how it works, and the environmental and health consequences of the tire imports. The purpose of the meetings was to clarify that if the Supreme Court decided to permit imports regarding the cases under discussion in the national courts, their decision would have international effects, as consequence of DSB report.

Remarkably, at the Supreme Court level arguments related to the environmental and health consequences of tire imports had more impact on justices than those related to the economic effects of retaliation or arguments related to the negative impacts for the economic relationship with the European Community or MERCOSUL.

Nonetheless, the Supreme Court decided to hear from diverse sectors of society before making a decision, through a public hearing. This is not a common procedure in Brazil. Only three other such events had taken place. 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.⁴² The main focus was the creation of jobs in Brazil and the environmental and health effects of the imports.

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

41ADPF 101 on September 2006.

42 The Public Hearings happened on 06.27.2008.

The process at the Supreme Court took three years to be completed. If the Executive Branch had waited to present the case just 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. In the end, the Supreme Court decided to prohibit tire imports and suspended all injunctions, thereby avoiding violation of the most favored nation clause.

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 supported imports from Uruguay. The Uruguayan state company was almost isolated. The national actors favorable to restrict imports became politic and legally stronger than those against it. The Chamber of Foreign Trade (council of Secretaries of State) decided to suspend tire imports from MERCOSUR, violating the decision, and arranged a deal on compensations with Uruguay.⁴³

The DSB report did not mention the invalidity of MERCOSUR arbitral or the non-recognition of the regional system of integration under GATT provisions.⁴⁴ In fact, the applet body did not analyze the exception of articles I.1, XIII: 1 of GATT 1994 and XX (d) and XXIV of GATT 1974.⁴⁵ It 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.⁴⁶ This DSB critique is noteworthy. According to DSB, the regional

43 CAMEX Resolution n. 46, of 07.03.2008.

44 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).

45 WTO. Appellate Body Report, Brazil – Measures Affecting Imports of Retreaded Tires (Brazil - Retreaded tires), WT/DS332/AB/R, adopted 17.12.2007, at para 256.

46 WTO. Appellate Body Report, Brazil – Measures Affecting Imports of Retreaded Tires (Brazil - Retreaded tires), WT/DS332/AB/R, adopted 12.17.2007, para 228, “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 note 22.

tribunal could have considered environmental aspects, even if not alleged by parties.⁴⁷ However, Brazil could obey both decisions at the same time because it accepted tire imports from Europe and Uruguay. Thus, there were no explicit divergences between the multilateral and the regional decisions. The DSB only asked for coherence.

4. Conclusion

States created an important tool to solve trade conflicts at the international level. The Dispute Settlement Body of the WTO became effective by increasing the costs of non-compliance 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 retread tires reveals some of those conflicts. First, the implementation of the DSB decision opposed 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 an internal 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 to 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) are not familiar with the DSB/WTO system and are jealous of Brazilian sovereignty, it was difficult to convince them that Brazil needed to obey the DSB report. In the end, they reach a solution, but the decision discussed almost exclusively 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

⁴⁷ Regarding the WTO, environmental and other organizations, see G. 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).

provisionary measures when there are clear signals that adopting a decision only after a report is issued or enforced would create excessive complexity. The DSB could also have more flexibility and request intermediary measures rather than requiring implementation within 18 months in all cases.