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THE REFLECTION OF WTO BRAZILIAN DISPUTE SETTLEMENTS ON DOMESTIC LAW: A PLACE TO LEGAL PLURALISM?

Monique Libardi, Patricia Glym

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Patricia Glym**

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International trade law, followed by the development of legal mechanisms for regulation of multilateral trading system, from General Agreement on Tariffs and Trade – GATT (1948–94), Uruguay Round (1986–94) to World Trade Organization – WTO (1995) dispute settlement system is the current scenario of the world economy transactions. This paper aims to analyze whether Brazilian activism in the world trading system may be identified in the WTO Dispute Settlement dealing with the concept of direct effect on international law. Since 1995, Brazil has been an assiduous claimant at the WTO and at the South American Common Market (MERCOSUR)[1] *dispute mechanism. However, explaining Brazilian participation at the WTO Dispute Settlement Body (DSB) requires a collision between the Brazilian private sector and the political relevance that trade disputes have acquired.*[2]

Key words: *WTO. – Domestic Law. – Legal Pluralism.*

* LL.M in Legal Theory at Goethe University and Master of Law in Fundamental Rights and Guarantees at FDV Vitoria Law School, *moniquelibardi@gmail.com*

** PhD Candidate at Goethe University in Frankfurt. Lawyer and LLM in Legal Theory at Goethe University in Frankfurt, *patriciaglym@gmail.com*

[1] With current political and economic crisis started since former president Dilma Rousseff, one may say that Mercosul is out of the international agenda, since Brazil is the primarily support of the Mercosur and currently is dealing with a huge decrease of its GNP.

[2] W. Barral, "Towards sustainable and equitable globalization", *Component 3: Improved access to global markets: The Brazilian Experience in Dispute Settlement*, ECLAC – Project Documents Collection, United Nations Publication LC/W 147 Brazil 2007, 7.

1. INTRODUCTION: A BRIEF BACKGROUND OF BRAZILIAN LEGAL ORDER AND INTERNATIONAL TRADE LAW

International trade law, as a phenomenon of globalization, is highly influenced by the increasing of institutionalization of international law, followed by the development of legal mechanisms for regulation of multilateral trading system: from General Agreement on Tariffs and Trade – GATT (1948–94), Uruguay Round (1986–94) to World Trade Organization – WTO (1995) dispute settlement system.

From this scenario, the present paper examines whether Brazilian activism in the world trading system may be also identified in the WTO Dispute Settlement backdrop. Since 1995, Brazil has been an assiduous claimant at the WTO and at the South American Common Market (MERCOSUR)[3] dispute mechanism. However, explaining Brazilian participation at the WTO Dispute Settlement Body (DSB) requires a collision between the Brazilian private sector and the political relevance that trade disputes have acquired.[4]

This paper is organized as follows. The first section briefly outlines the contemporary position of the WTO and its main features in international trade law. The second section of the paper provides information about the Brazilian regulation relative to the Dispute Settlements agreements, since the institution of WTO's 1995. Moreover, highlights the results of the settlements on landmarks Brazilian WTO cases and the trade policy involved.

The next section briefly states the Brazilian position from 2007 as an attempting to introduce a discussion related to the direct effect of WTO law, which is, arguably, the most relevant legal feature of its alleged constitutional function because it stipulates the supremacy of international treaties over domestic legislation. The discussion has been highly criticized by having a political supremacy character instead of concerning to general constitutional principles such as democratic government, legal equality and legal certainty.[5]

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[4] W. Barral, *op. cit*.

[5] A. Bogdandy, "Pluralism, direct effect, and the ultimate say: On the relationship between international and domestic constitutional law", *International Journal of Constitutional Law*, Volume 6, Issue 3–4, 1 Oxford, 2008, 404–405

After briefly outlining measures taken by the federal State government to introduce to the national normative order the WTO dispute settlements as a complaint, the paper analyse the outcomes of these measures as well as point some observations related to the development of Brazilian legal order to comply with those decisions.

Even though much has been written about the WTO Dispute Settlements on foreign affairs and trade policy, interpretations of this disputes from the lens of legal pluralism are scarce. From the descriptive legal pluralism perspective, on Brazilian legal order the WTO system gives the first step, but the discussion on normative pluralism is brief. The present paper, therefore, relies primarily on the features of Brazilian legal order and brings some reasons why it is so complex to comply with the international law in this area.

2. WTO AND BRAZIL: THE BEGINNING

2.1. Outline of the WTO system and his effects

Firstly, it is essential to clarify that the World Trade Organization (WTO) is not an international tribunal. According to the WTO agreement, it is the only international organization dealing with the global rules of trade between nations. Its main function is to ensure that trade flows freely as possible.[6]

Mostly all decisions in the WTO are taken by consensus among all member countries and they are ratified by members' legislative branches. That presupposes that the domestic constitutional law will decide how the agreement will be fulfilled in order for the member state legal order to comply with the international law. Also, the primary aim of the dispute settlement process is interpreting agreements and ensuring that nation's trade policies comply with them.[7]

Despite the common stance that the WTO's agreements are a result of negotiation process between the members, some scholars have argued that the real goal of the dispute settlement is to force the legislative institutions of the member states to comply with the WTO law.[8]

6 Understanding the WTO in: WTO, 20.11.2018.
7 *Ibid.*
8 A. Bogdandy, 404.

In his work on the thesis of direct effect on pluralism, Bogdandy uses the WTO law as an example, whereas he argues that the WTO law is an attempt to enforce its agreements in the European Union members. To be more precise, it represents a legal way to incorporate agreements into the domestic law.[9]

In that case, the norms of the international cooperation are clearly threatened as well as the principle of self-determination. Additionally, the Bogdandy's example referred to countries with tradition in trade law. For those which are still developing their trade law, the intervention is much stronger and unprecedented.[10]

2.2. 1990–2007: Overview of Brazilian trade policy

Despite starting with a marginal participation in international trade agreements since GATT, 1946, nowadays with 31 cases as a complainant, Brazil has emerged as a member with a decisive role among developing nations.[11]

Brazil introduced its democratic constitution in 1988, after long years of a military governance with a high level of state intervention, namely, a dictatorship regime. Until 1990, economic matters in Brazil were still heavily regulated by the state with its import substitution economic policy, protection of national industry and the underestimated value of the trade policy for its foreign policy.[12]

From the government of President Collor de Mello (1987–1989), and its continuity with President Fernando Henrique Cardoso (1995–2002), Brazil started its modernization and market efficiency based on deregulation, privatization and price stabilization with a new currency: Real.

Brazilian agricultural industry is a good illustration of the efforts towards trade development. Until the 1990s, it was mostly subsidized with generous loans from official banks. The market opening in 90's, in addition to inefficient techniques, poor infrastructure and foreign competition has spawned a severe crisis. However, it was overcomed with the emergence of a new model of the Brazilian agriculture due to a high level of investment. Also, it is essential to stress that even after

[9] *Ibid.*

[10] *Ibid.*

[11] Data from WTO website regarding Brazil participation as claimant, defender and third part on WTO dispute settlements.

[12] W. Barral, 10.

such an effort and investments, agricultural industry yet represents the primary subject of Brazilian cases taken to the WTO Dispute Settlement Body (DSB).[13]

The article 2.1[14] of WTO Agreement provides the concept of DSB by showing the international adjudicatory nature of its dispute resolution system in order to discipline the relation among political and legal structures which are responsible for the implementation of the WTO dispute settlement decisions and its impact on diverse interests of its members.

3. BRAZILIAN TRADE POLICY FROM 2007

3.1. Brief explanation on main aspects of Brazilian legal order regarding trade policy from 2007

Traditionally, Brazil has a legal order established on Kantian and Kelsenian theories. In other words, the Brazilian model is based on public law that promotes the principles of legality, impersonality, morality, publicity and efficiency.[15] Furthermore, it represents an extremely monist legal order.

Basic legal standards in Brazil are construed under the system overarched by the rule of law principle. It means that international law cannot be directly implemented into the domestic law.

Moreover, the 1988 Federal Constitution required transparency as a fundamental principle of foreign policy. In other words, its silence

[13] *Ibid*, 13.

[14] "Article 2. 1. The Dispute Settlement Body is hereby established to administer these rules and procedures and, except as otherwise provided in a covered agreement, the consultation and dispute settlement provisions of the covered agreements. Accordingly, the DSB shall have the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements. With respect to disputes arising under a covered agreement which is a Plurilateral Trade Agreement, the term "Member" as used herein shall refer only to those Members that are parties to the relevant Plurilateral Trade Agreement. Where the DSB administers the dispute settlement provisions of a Plurilateral Trade Agreement, only those Members that are parties to that Agreement may participate in decisions or actions taken by the DSB with respect to that dispute." (Dispute Settlement: Legal Text – Understanding on rules and procedures governing the settlement of disputes – Annex 2 of the WTO Agreement)

[15] Brazilian Constitution of 1988, Article 37.

regarding international law and its commitment either to the peaceful settlement of disputes or to international rule of law is based on a constitutional democratic general principle – transparency, which should also be applicable to the implementation of WTO dispute settlement decisions in Brazil.[16]

3.2. Recent measures for the implementation of WTO Dispute Settlements into the Brazilian domestic law

Despite the fact that the Brazilian legal order did not offer an official act internalizing decision of international organization as an adjudicative decision in Brazil, that does not exempt Brazil from international responsibility. Nevertheless, it can prevent the enforceability of its rules on the national level.[17]

Therefore, it has given to the Executive the freedom to conduct and possibly prevent judicial bodies from deciding cases related to the international trade law or even considering international bodies' decisions as legal sources, what in fact they are, when assessed from the pluralist approach.[18]

To confirm those arguments, a recent measure was taken since the beginning of the President Michel Temer administration (May 12th, 2016): changes of the governance structure of decision-making in external trade. It was transferred to the high command of Executive branch: The Presidency.[19]

Considering the strong voices raised by many civil society organizations against bureaucratic trade policy powers vested in the Executive branch, represented by the Ministry of Foreign Affairs, the federal government of 1990 proposed an amendment to the existing trade laws in order to tackle with this problem and *started public-private partnership*. It also sought to amend the Brazilian trade policy, but not the Brazilian legal order, still concentrated on the positivist legal tradition.

Thus, the Brazilian action without a proper regulation constructs an incomprehensive and diffused manner to cope with these disputes.

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16 C. Capuci, "Implementing decisions of the WTO Dispute Settlement in Brazil: is there a place for transparency and participation?", *Revista Brasileira de Política Internacional*, 59(1), Brazil, 2016, 10.

17 C. Capuci, 6.

18 *Ibid.*

19 *Ibid.*

Consequently, it can promote a discretionary environment and result in the violation of the constitutional principle of legal certainty and legal equality.

4. THE REFLECTIONS ON BRAZILIAN DOMESTIC LAW BY WTO DISPUTE SETTLEMENTS: PLACE FOR LEGAL PLURALISM?

Regarding the arguments aforementioned, one should say that, since the 1990's, Brazil has started to develop a trade policy community to defend itself in the international trading system while dealing with the challenges posed by the WTO system.[20]

To illustrate, some cases are of paramount importance for the Brazilian experience and seem to reflect successful practice of the joint participation of NGOs and the private sector in the process of case negotiation.

The case of *Aircrafts*[21] was an implementation of a relevant paradigm shift in normative acts on Brazilian Central Bank. It also tackled the inconsistencies identified in the law that regulates multilateral obligations emerging from these regulations.

Other remarkable case was the emblematic *Upland cotton case*.[22] Despite the claim not demonstrating an implementation of WTO Dispute settlement decisions, it expresses the relevant instance of Brazilian government showing its more transparent and democratic participation with the authorization to retaliate the United States for non-compliance.

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[20] G. C. Schaffer, C *et al*., "Winning at the WTO: the development of a trade policy community within Brazil", *The Developing Country Experience* (eds. K. Schaffer, G. C. & Melèndez, R.), Cambridge University Press, 2010, 99.

[21] Aircraft case addresses a complaint by Canada against Brazilian government payment for the regional aircraft export under the interest rate equalization component of a Brazilian export financing programme: the *Programa de Financiamento às Exportações* ("PROEX"). DSC 46 BRAZIL-AIRCRAFT. Started in 1999 and the last document is in 2001 with disagreement between the nations involved.

[22] The dispute *US – Subsidies on Upland Cotton* (WT/DS267) ("*Cotton*") started in 2002 when Brazil complains against United States regarding prohibited and actionable subsides provided to US producers what depressing world prices and hurting Brazilian farmers. In 2014, both nations have agreed that the *Cotton* dispute is hereby terminated with a payment of a final contribution by US to Brazil, https://www.wto.org/english/Tratop_e/dispu_e/cases_e/ds267_e.htm

Likewise, still in the negotiation arena, on June 12th, 2007, the panel on Brazil-Retreated Tires (DS 332) accepted Brazil's arguments that the ban on imports of rethreaded tires was justifiable and necessary to protect the environment and public health.[23]

Therefore, on 28 August 2009, the Brazilian Supreme Court has taken a well settled stand to enhance Brazil's environmental and public health policy relating to the risks associated with the generation, transportation and accumulation of used tires. In addition to it, an administrative act from Executive branch[24] was construed for the same purpose.

Consequently, these regulations together prohibit new licenses for the importation of used and rethreaded tires and therefore made Brazil in full compliance with the DSB recommendations and rulings in this dispute.

In all those cases Brazil has agreed on a reasonable period of time to comply with the dispute settlements. However, this is not solely due to government performance. The attention to the international public opinion and to a well– orchestrated release through the world press in addition to private sector interest of powerful groups and NGOs have had a decisive impact on the process as well.

Notably, the aforementioned cases demonstrate that Brazil has pursued the same strategy once a claim is presented, namely, to comply with the deadline defined on the WTO agreement. The reason why it has been settled in such concise timing should be emphasized: private sector and NGO are usually involved in the trade policy process to avoid the huge risk of a noncompliance by Brazilian government.

This line of behaviour can probably be understood by the long domestic process for a claim to be approved. Similarly, in domestic affairs Brazil still has a long and costly duration of decisions on all levels of government branches (judiciary, legislative and executive) on account of its largely bureaucratic legal system.[25]

All things considered, one could say that Brazil regardless of its colonial and postcolonial background of legal centralism, is striving its way to construct its own legal pluralism. Yet, concentrated on a weak

[23] Retreated tires case WT/DS332/19/Add.6. Last document referred to this case on 15 September 2009.

[24] Portaria SECEX 24/2009.

[25] W. Barral, 47.

model of state orientation of its legal basis, a turn towards a pluralist model where a descriptive and strong pluralism is the Brazilian current scenario in international trade law can be perceived.[26]

5. CONCLUSION

The debate around WTO dispute settlement cases reveals the complexity of social and normative ordering in Brazil, still clinging upon the monist tradition and its preference towards the domestic law regulatory framework. The system of a kind is inherently behind the global trends of international trade law regulation.

One might say that Schaffer[27] was correct when he described WTO dispute settlements as a growth of pluralism for trade policy making within Brazil.[28] Indeed, Brazilian governments have been pressed to be more transparent and open to dialogue. Despite the modest advance, it is definitely a lot of work to achieve a global legal standard of WTO legal system.

This changeover resonates the conception of legal pluralism depicted by Bogdandy on the analysis of the relationship between international and domestic constitutional law.[29] He argues that "the concept of legal pluralism does not imply a strict separation between legal regimes". Fortunately, there is an interaction that in Bogdandy's idea has named "coupling" considering the domestic law an element belonged to a *pluriversum.* It is also described as a normative *pluriversum* as far as all legal orders will be harmonized either in a pluralist order or a systems theory.

In conclusion, in Brazilian WTO dispute settlements, one might say that this *pluriversum* is present on some Brazilian cases (aircraft, cotton and retreated tires) albeit still embryonic due to the strong monist tradition of domestic law associated with a largely bureaucratic Executive branch.

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[26] J. Griffiths, "What is Legal Pluralism?", *Journal of Legal Pluralism*, 1986, 7–8, 38–39.

[27] G. C. Schaffer, 94.

[28] *Ibid,* 95–96.

[29] A. Bogdandy, 401–402.

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