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Arbitragem e Comércio Internacional

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ARBITRATION IN CHILE AND BRASIL*

Gonzalo Biggs

* Tribute to Professor Luiz Olavo Baptista.

1. Introduction

As a Chilean lawyer and arbitrator, I am especially honored to participate in this tribute to the eminent jurist, Professor Luiz Olavo Baptista.

I had the privilege of meeting Dr. Olavo Baptista, in Geneva, when he was a member, and later chairman of the Appellate Body of the Dispute Settlement Body of the World Trade Organization – WTO. In our conversations on professional subjects, he suggested the importance of developing joint programs between Brazilian and Chilean jurists, particularly in the area of international arbitration.

As a direct consequence of Dr Baptista's initiative, the Arbitration and Mediation Centres of São Paulo and Santiago, developed during 2008-2010, the programs described ahead which have been immensely successful.

Pursuant to the above, I shall refer to:

i) the historical linkages of Chile and Brazil in the area of international arbitration;

ii) the aforementioned programs of the São Paulo and Santiago Arbitration Centers; and

iii) Brazil's formidable leadership in the settlement of international trade disputes before the WTO.

2. The Alabama Arbitration[1]

As noted below, this arbitration, which was awarded in Geneva, on September 14, 1872, constitutes a landmark in the history of international arbitration. It has influenced the international arbitrations held thereafter, including those held in Chile, with the uninterrupted support of Brazil, during 1882-1888. For these reasons, and because it was the first time a Brazilian jurist was designated in an international arbitration tribunal, we believe the references which follow continue to be relevant.

With the termination, in 1865, of the American Civil War and defeat of the Southern States, the relations of the triumphant Union with Great Britain remained seriously damaged on account of the unambiguous support the latter gave to those States. The Union charged that Britain's actions were directly

1 On this subject see, "Le Traité de Washington" by Caleb Cushing, Paris, 1874. Hereinafter "Cushing".

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responsible for extending a war that should have terminated many years earlier and which caused immense human suffering and material damages to the country.

Based on the above facts, the United States demanded compensation for the damages caused by Britain's actions. The demand centered on Britain's breach of neutrality for building, supplying and arming the warships insurgents used against a government bound to Britain by treaties of peace and friendship. One of the ships which caused the greatest material damages to the United States was the "Alabama".

At that time, England was the first world power and its Empire extended without counterweight over all continents. The United States, by contrast, was a burgeoning State, extremely weakened by the scars of its civil war; and Europe was, likewise, just recovering from the disaster of the Franco-Prussian War of 1870.

These various factors forced the United States to initiate and conduct a very complex and lengthy diplomatic offensive which, finally, succeeded and culminated in the subscription with Britain of the Treaty of Washington, of July 4th.1871. The United States negotiator was the lawyer and member of Congress, Charles Francis Adams, son and grandson of former Presidents of his country, and that of Britain, Sir Alexander Cockburn, former Solicitor-General and, then, Chief-Justice of the House of Commons of his country.

The Treaty, which consisted of forty three very detailed provisions, established a tribunal of five arbitrators with jurisdiction to address and resolve the damage complaints of the United States. This sole detail illustrates its uniqueness because, through the years, public international tribunals of five arbitrators have been extremely rare.

Another special feature of the Treaty, which has remained relevant, was its detailed establishment of the three rules of maritime conduct which Neutral States such as, in this case, Great Britain, have to observe before an armed conflict[2].

An author of the period noted that, prior to the Alabama Arbitration, "arbitration had been entirely ignored and the examples offered and accepted were every time more rare and that, when the great Powers had established arbitration tribunals, it had generally been for matters of secondary interest"[3].

2 Treaty of Washington, article VI, In: Cushing, *Ibid*, p. 353.
3 Pradier Foderé, cited by Cushing, *Ibid*, p. 264.

The above statement was corroborated by a list of the international arbitrations undertaken until that date which confirmed their marginal significance[4].

With the ratification of the Treaty, the next step was the designation of the arbitrators and site of the arbitration. The chosen site was Geneva, Switzerland, in tribute to its traditional neutrality, and for having established, in 1847, the International Red Cross. A sign of the importance that country assigned to this arbitration was that it ceded, for the sessions of the tribunal, the premises of the Hôtel de Ville where, to this day, the minutes of its sessions can be consulted.

Regarding the arbitrators, the United States appointed the aforementioned Charles Francis Adams, and Britain, Sir Alexander Cockburn. In contrast with these appointments, those of the other members were the subject of extended negotiations. Together with the requirements of professional excellence and irreproachable integrity, the candidates had to come from absolutely neutral countries. Finally, the following personalities were chosen: Count Frederico Sclopis de Salerano, Minister of State and Senator of the Kingdom of Italy; Jacob Staempfli, former President during three periods of the Swiss Confederation; and the Vizcount of Itajubá, Marcos Antônio d'Araújo, prestigious Brazilian diplomat and, at that moment, Minister of his country in France.

Regarding the latter, the US Representative before the Tribunal, described him as follows.

> "He belongs to the category of jurists and men of State which are the natural product of those parliamentary institutions based on the popular vote which now honor Brazil. In his youth, he occupied the chair of professor of law at the University of Pernambuco. His first diplomatic appointment was before the Hanseatic League with residence in Hamburg. Thereafter he was, successively, Minister in Hanover, Kopenhagen and, finally Paris. In sum, he has had more than forty years of diplomatic functions in Europe. He is characterized by his intelligent discipline and instinctive appreciation of principles and facts, and his quality to express his thoughts with great ease and the appropriate words. On the other hand, he does not have the tendency

4 Among other cases mentioned by Pradier Foderé, is a compensation issue between Brazil and the United States which was resolved in 1870 by an award of British Minister, Sir Edward Thorton.

to intervene in long debates or speeches as, by contrast, is done by some of his colleagues of the Tribunal"[5].

The final award accepted and adjudicated the more substantive parts of the American claim, with the contrary vote of the British arbitrator. Among its rulings[6], the award stated that Britain breached the three rules of neutrality of the Treaty of Washington and condemned it to pay as compensation US$15,500,000 in gold.

The British arbitrator, Sir Alexander Cockburn, stated that his duty in this arbitration had been to represent the interests of the government of His British Majesty[7].

3. THE INTERNATIONAL ARBITRATIONS OF SANTIAGO, CHILE (1882-1888)[8]

The establishment and functioning of these arbitration tribunals – which resolved the claims of European Powers for the damages suffered by their citizens from Chilean troops during the War of the Pacific, between Chile, Peru and Bolivia – has no precedent in international arbitration law, for the following, among other reasons:

"1. The corresponding tribunals were established and functioned in the territory of the defendant country, Santiago, Chile, and not in that of a neutral country as was the case of the Alabama arbitration where, as has been noted, the tribunal was established and functioned in Switzerland.

2. The conventions and stipulations by which the parties defined the arbitral agreement were directly influenced – and cited as their model – by the Treaty of Washington of 1871 and the aforementioned Alabama arbitration.

3. It was the first time in the XIX century that European Powers accepted to submit to international arbitration, pecuniary claims of its citizens

5 Cushing, *Ibid*, p. 114.
6 The award cites, in support of its decision, the opinion of the Argentine internationalist, based in Paris, and founding member of the Institute of International Law, Carlos Calvo, Cushing, *Ibid*, p. 312.
7 Cushing, *Ibid*, p. 177.
8 The souces of informatiom are: i) Alejandro Soto Cárdenas: "Guerra del Pacífico: Los Tribunales Arbitrales (1882-1888)". Santiago de Chile. 1950. Hereinafter, "Soto Cárdenas". ii) Mario Barros, "Historia Diplomática de Chile. 1541-1938" Ediciones Ariel. Barcelona. 1970. and iii) Francisco Antonio Encina "Historia de Chile" v. XVIII. Chapter CVII. Editorial Nascimento. Santiago, 1951.

against a Latin American country. Previously, and, indeed, even thereafter, invoking the principles of diplomatic protection in their relations with certain countries, such claims were coupled with the use of force or the threats of force. Examples of the latter are numerous and need not be listed here. Perhaps, one of the most shameful was the award rendered by the Permanent Court of Arbitration of The Hague which legitimized the use of force by three European countries for the collection of the public debt of Venezuela.[9]

4. Compared with other international arbitrations, its extreme duration – six years – for reasons not attributed to Chile, was manifestly excessive. The claims were raised in the midst of the War – in 1882 – and were resolved in 1888, several years after its conclusion.[10]

5. During the course of the arbitrations, and in the midst of the War of the Pacific, presidential elections were held with absolute normality in Chile and a new President took office[11]. This was not the case with Peru where the President fled the country and it would take several years before a newly elected President were to take office.

6. The arbitration proceedings suffered long interruptions and incidences due to the rejection by certain countries – notably Britain, France and Italy – of those arbitral decisions favorable to Chile. However, the direct intervention of the Emperor of Brazil, Dom Pedro II – permitted the normal resumption of the proceedings until their final conclusion.

7. Four tribunals of three arbitrators – each separate and independent from the other-were established to address the complaints of Britain, France, Italy and Germany[12]. They consisted of one Chilean arbitrator, one from the claimants, and the latter from Brazil, which acted as President.

8. Before the construction of the Panama Canal, the only access route to the Pacific and Chile was through the Strait of Magellan

9 Award of 22 February, 1904, of the Permanent Court of Arbitration of the Hague.

10 The War started on 14 February 1879 with the occupation by Chilean troops of the Bolivian Port of Antofagasta and terminated on October 20, 1883 with the signature of the Treaty of Ancon between Chile and Peru.

11 The period of President Domingo Santa María ended in 1886 and was succeeded by President José Manuel Balmaceda during whose period, in 1888, the arbitrations were finally concluded.

12 The Chilean-talian Tribunal also resolved the Belgian claims and the Chilean – German tribunal those of the Swiss and Austrian – Hungarian Empire.

or the fateful Cape Horn. This geographic reality gave a marked exceptionality to these arbitrations. For this reason, the arbitrators appointed by the European countries were their diplomatic representatives before the Chilean government. But this was not the case of the arbitrators appointed by Brazil. The latter had to abandon their ordinary responsibilities and make the hazardous ocean trip to Chile and dedicate themselves exclusively to administer the arbitrations. As the arbitrations lasted six years, three different Brazilian arbitrators had to be appointed

9. The international influence and tenacity of the Emperor of Brazil, Dom Pedro II, was instrumental to the initiation, development, uninterrupted continuation and peaceful conclusion of these extensive and complex arbitrations. Indeed, if it had not been for him, the arbitrations would not have taken place or, once started, would not have been concluded. His influence was manifested in multiple forms, including the prompt replacement of those arbitrators which, for different reasons, had to resign and return to their country.

10. The three arbitrators appointed by Brazil were prestigious international personalities.

The first was Felipe López Netto, prior Minister of his country in Washington. However, his performance was faced with multiple difficulties and had to resign in 1885.[13]

He was succeeded by Lafayette Rodriguez Pereira, an eminent jurist, Senator and Minister of State. When he was appointed he was chairing the Drafting Committee of the Civil Code of his country[14]. Of the fifteen awards issued during his Presidency non condemned Chile[15]. However, the reaction of the European governments to these decisions was to suspend their participation and proffer multiple threats and menaces, thus causing a major crisis. Lafayette Rodríguez reported to his government that "Brazil could not expose a friendly American nation to suffer the coercions of one or more European countries"[16]. However, on 15 October 1886, reasons of health forced him to resign which, again caused a major crisis. In his resignation

13 Experienced Diplomat.. Before his appointment, he had been Minister of his country in Washington. See editorial of "O Paiz", of 22 May 1885
14 Soto Cárdenas, *Ibid*, p. 194.
15 Soto Cárdenas, *Ibid*, p. 200.
16 Soto Cárdenas, *Ibid*, p. 224.

– letter to Baron de Cotegipe, he signaled that "the only reason for his resignation was his health. That the climate was excessively cold and subject to sharp variations that were very prejudicial to his organism. That he had no reason of discontent whatsoever towards the Chilean government and its people from whom he had received constant testimonies of sympathy and respect."[17]

His successor was Baron Francisco Xavier da Costa d' Aguiar d'Andrada, diplomat and former representative of his country in Chile: He assumed his post in 1887 and had the task of signing the last awards and compromise protocols which terminated those complaints which could not be resolved and awarded by the arbitration tribunals.

11. Upon the termination of the proceedings, Chile was ordered to pay a sum which was equivalent to 3.5% of the original complaints of the plaintiffs.

The above outcome filled the country with joy and motivated an autographic letter, of 13 February 1888, of recognition and appreciation from President Balmaceda to Dom Pedro II. However, as noted below, the next years for both leaders were to be thoroughly dramatic."

4. Epilogue of the Arbitrations

Upon the termination of the arbitrations, Chile, in recognition to the friendship and support received, dispatched the iron-clad Cochrane to pay an official visit to Brazil; it entered the bay of Guanabara in 1889. Destiny determined that its arrival preceded in six days the deposition of the Emperor and installation of the Republic[18].

The above circumstances did not prevent the ostentatious celebrations and demonstrations of friendship presented to the naval representatives of Chile. According to the chronicles of the period, 4,500 guests were invited to what was described as "en evening of dream and fantasy" and which took place in the Palacio da Ilha Fiscal at the entry of the Bay of Guanabara[19].

17 Soto Cárdenas, *Ibid*, p. 228.

18 Unconfirmed sources have indicated that the Commander of the Admiral Cochrane would have offered the asylum of Chile to Emperor Dom Pedro II but that the latter would have refused.

19 VEJA, 20 November 1889.

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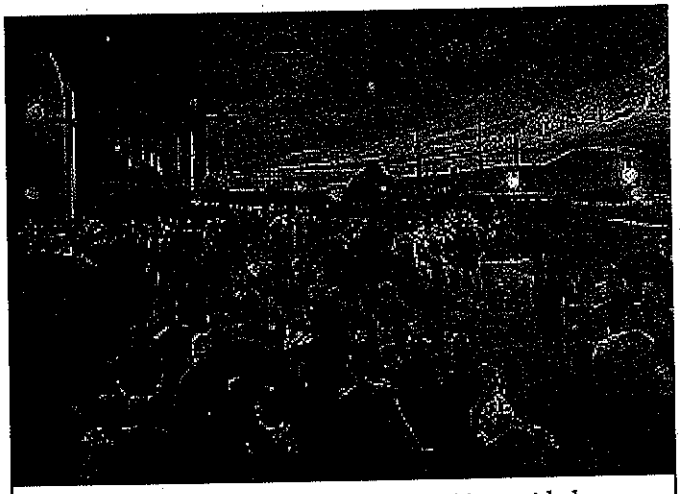

O imperador (à esq.) recebe os 4.500 convidados
Rio de Janeiro parou para ver o desfile de elegância

In contrast with the pacific political and institutional transition of Brazil, from Empire to Republic, in Chile, the most violent civil war of its history erupted in 1891. It culminated with the dramatic suicide of President Balmaceda and the replacement of the presidential system, which had been in force since 1831, by a parliamentary regime that would last until 1925.

5. Evolution of International Commercial Arbitration, International Investment and International Trade Law in Chile

a) International Commercial Arbitration

In 1975, Chile ratified the 1958 New York Convention for the Recognition and Execution of Foreign Arbitral Awards, and, in 1976, ratified the Inter-American Convention on International Commercial Arbitration, or Panama Convention, of that same date.

The above ratifications were followed by two landmarks decisions. The first was the adoption, in 1992, of institutional arbitration by the Santiago Chamber of Commerce. Indeed, on that date the Chamber established the Mediation and Arbitration Centre, or "CAM", which effectively administers both domestic and international arbitrations. Reference is made ahead to these two programs.

The second was the enactment, in 2004, of Law nº 19,971 on International Commercial Arbitration, or "LACI", based on the UNCITRAL Model Law which coexists separately from the laws applicable to domestic arbitration.

b) International Investments

As of July 2010, Chile had signed Bilateral Investment Treaties or "BITS" with 49 countries all of which establish international arbitration for the settlement of investment disputes.

In 1978, Chile enacted Decree Law nº 2,349, which validated the submission of the State and its public agencies to foreign jurisdictions – including international arbitration jurisdictions – on financial matters[20].

In 1991, Chile ratified the Washington Convention of 1965 which established the International Centre for the Settlement of investment Disputes, or "ICSID". As of this writing, Chile has been the defendant in three ICSID investment claims

c) International Trade

Since 1996, Chile has signed or has in force Agreements and Treaties of Economic Complementation or Free Trade with 21 countries. Among others, they include Free Trade Agreements with the United States, Canada, China, and Japan.

As mentioned ahead, the above trade agreements establish international arbitration for the settlement of the commercial or investment disputes which may arise between the respective contracting parties.

6. The Mediation and Arbitration Centre – CAM – of the Santiago Chamber of Commerce[21]

This Centre was established in 1992 with the support of the Colegio de Abogados and has had the constant support of the Inter-American Development Bank.

It is governed by a Council formed by leading personalities from the business, legal and academic community and has a roster of arbitrators which include the principal jurists of the country. A signal of its success is

20 Decree Law N°.2.349 was published in the Official Gazette of 28 October 1978.
21 See <http://www.camsantiago.com>.

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that, presently, the great majority of civil or commercial contracts include an arbitration provision by which future disputes between the respective parties are submitted to the jurisdiction of an arbitrator of the CAM

Since its establishment and until 2011, the CAM has administered over 1.600 civil or commercial disputes and its activities have included the publication in five volumes of the arbitral awards issued during 1994-2009, and a systematic compilation of the jurisprudence on arbitration of 120 judicial decisions of the 1980-2002 period.

The CAM is the Chilean Section of the Inter-American Commission on International Commercial Arbitration and, since the entry into force, on 2006, of Law nº 19,971, has been administering the international commercial arbitrations that have arisen in Chile.

The current President is Mr. Carlos Eugenio Jorquiera, and the vice--president, Mr. Sergio Urrejola.

7. JOINT SANTIAGO – SÃO PAULO SEMINARS

In response to a suggestion from Brazil[22], the Arbitration Centres or CAMs of Santiago, led by its President, Carlos Eugenio Jorquiera, and of São Paulo[23], led by its President, Frederico Straube, initiated an ambitious program for the promotion of arbitration and exchange of mutual experiences with the objective, among others, of ensuring the international recognition of their respective cities as attractive sites for international commercial arbitration. These programs have had the unflinching support of the Embassy of Brazil in Santiago[24].

As part of this program, three joint seminars have been undertaken. The first was held on December 2008 in Santiago; the second, on June 2009, in São Paulo; and the third, on November 2010, again, in Santiago.

The above initiative and program responded to the priorities which trade and investments have for the economic development of Chile and Brazil and confirmed the excellent relations between the two countries, which, the Baron of Rio Branco, described as a "friendship without limits".

22 The initiative was of Doctor Luiz Olava Baptista.
23 Centro de Arbitragem e Mediação, Câmara de Comércio Brasil-Canada.
24 The constant personal support received from Ambassadors Mario Vilalba and Frederico Cesar d' Araujo must be highlighted.

The subject matters of the first two seminars were devoted exclusively to arbitration. However, the third was devoted to both arbitration and investments, and a reference was made to Brazil's experience in the World Trade Organization.

The addition of investments to the debate proved to be extremely useful: it permitted to record the experiences of Chilean investors in Brazil and of Brazilian investors in Chile. In addition, a reference was made to the Chilean experience with bilateral investment agreements which is a subject now being debated in Brazil; a reference to this subject is made below. It is to be noted that the interventions and debates in these seminars were made in both Spanish and Portuguese[25].

What must be highlighted was the significant contribution given to these programs, from their very start, by colleague Adriana Braghettta from Brazil[26].

8. Bilateral Investment Treaties or "BITs"[27] and Free Trade Agreements – "FTAS"

A) BITs

The governments of Chile and Brazil have under their respective agendas the legislative approval of a BIT between them. Its adoption is considered by Brazil as a test case which, if negotiations are successful, a long list of other countries will probably follow.

The entry into force of a BIT between Chile and Brazil is a matter which pertains exclusively to the negotiators of both countries. However, for what it may be worth, a brief reference to Chile's experience on the subject may prove helpful.

The impact of a BIT is closely related to whether the respective parties are, or are not, members of ICSID. However, although membership in ICSID is not a pre-condition to the signature of a BIT, the existence or non-existence of that relationship, will influence the contents and terms of the respective BIT. In this context, it should be noted that, in contrast with Chile, Brazil is not a member of ICSID and does not have BITs in force with other countries.

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25 In 2008, both Centres signed an Agreement of Mutual Cooperation.

26 Adriana Braghetta is the President of the Brazilian Arbitration Committee and partner of LO Baptista Advogados in São Paulo.

27 See Gonzalo Biggs "Settlement of International Investment and Commercial Disputes". Revista de la CEPAL nº 80. August 2003.

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As of July 2010, Chile had signed BITs with 49 countries of which 36 were in force[28]. These agreements establish, without exception, international arbitration for the settlement of the disputes that may arise between one of the Contracting States and a foreign investor from the other Contracting State.

Since the first BIT, the contents of those signed thereafter have greatly changed as a result of the establishment, in 1965, of ICSID, and the experience and jurisprudence developed by this Centre. As a consequence, the contents of BITS have achieved a relative uniformity[29].

Generally, but not always, their signature will imply that the Contracting States give their consent to settle through international arbitration the eventual disputes between an investor from one Contracting State and the other Contracting State.

The inclusion in the respective agreements of this previous consent is important because, once included, it can prevent the other Contracting State – when the controversy arises – from validly opposing arbitration. If that consent is not included, the claiming party will need to rely on other means to obtain jurisdiction, which may prove lengthy and uncertain.

The arbitral jurisdictions and procedures most frequently designated in the BITs are those of ICSID and/or ICSID's Additional Facility (which may be invoked by non-members of ICSID such as Brazil or Mexico), and the Arbitration Rules of UNCITRAL[30].

Two frequent – but not imperative – provisions of these Agreements should be noted. The first prohibits the exercise of diplomatic protection on behalf of an investor of one Contracting State that has a dispute with the other Contracting State. The second states that, when one Contracting State pays one of its investors by virtue of a guarantee of that investment, the other Contracting State must recognize the transfer or subrogation of its title to the first Contracting State.

B) FREE TRADE AGREEMENTS ("FTAs")

As stated earlier, Chile has in force 21 FTAs which include, among others, those with the most industrialized countries and regions of the world.

28 See <http://www.direcon.cl> and <http://www.cinver.cl>.
29 See Antonio Parra, "ICSID and Bilateral Investment Treaties". News from ICSID", v. 17, nº 1. Washington D.C. 2000.
30 UNCITRAL is the acronym for the United Nations Commission for International Trade Law. In 1976 UNCITRAL approved these Arbitration Rules which have achieved universal acceptance.

One significant provision of these agreements are those on rules of origin which limit trade benefits, exclusively, to those entities – national or foreign – that fulfill these rules.

Consequently, entities from third countries, such as Brazil, may accede to the export benefits of these FTAs – liberated or reduced tariffs – if they include in their products a national component or percentage in accordance with those rules. An analysis of the application of these rules to the Chile – US FTA was made by the US International Trade Commission[31].

A majority of these FTAs establish International arbitration to settle investor – State disputes. This modality has been influenced by the NAFTA between the United States, Mexico and Canada which, with some variations, has been replicated in Chile's FTAs with Canada, the United States and other countries.

For example, the FTA between Chile and the United States establishes that, in the event of an investor – State dispute, the claimant or investor has the option of submitting his claim, on his own behalf or of an enterprise of the respondent State, that is a juridical person the claimant owns or controls directly or indirectly, in accordance with the following rules:

> "– Under the Rules of the ICSID Convention, provided that both the non-disputing party and the respondent are parties to the ICSID Convention;
>
> – Under the rules of ICSID's Additional Facility, provided that either the non-disputing party or the respondent, but not both, is a party to the ICSID Convention;
>
> – Under the UNCITRAL Arbitration Rules; or
>
> **– If the disputing parties agree, to any other arbitration institution or under any other arbitration rules (emphasis added).**"[32]

c) Comments

The general advantages of the recourse to international arbitration established in the BITs are, in my opinion, the following:

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31 United States International Trade Commission Investigation nº Chile FTA-103-019. Publication 4042. October 2008.

32 Article 10.15(1 & 5) of the FTA between Chile and the United States. Signed on June 6, 2003. Entered into force on January 1, 2004. See <http://www.ustr.gov>.

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It reduces or eliminates the possibility investor-State disputes may escalate into a dispute between States;

It substitutes the less – expeditious jurisdiction of the domestic courts of one of the contracting parties, by that of independent arbitration tribunals. This option stimulates investments, shortens procedures and preserves the rights of both investors and recipient States.

An interesting option is the fourth listed in the above cited Chile – US FTA. Under the same, the parties may designate in the BIT, a jurisdiction different from ICSID, its Additional Facility or of UNCITRAL. For example, that jurisdiction can be – if the parties so agree – that of the International Court of Arbitration of the Paris International Chamber of Commerce (institution with which Brazil has considerable experience), the Stockholm Arbitration Centre, the American Arbitration Association, or the Arbitration Centers of Santiago or São Paulo.

In other words, under this last option, the parties can resolve their investor – State disputes without necessarily having to accede to the jurisdiction of ICSID or its Additional Facility.

9. The International Trade Experience of Brazil

1. Summary

Since 1996 and until 25 July 2001, Brazil had participated in 39 disputes before the WTO; had been a complainant in 25 and a defendant in 14 cases[33].

Brazil's experience with the WTO is illustrated by the following four disputes:

– the Gasoline Dispute with the United States;

– the Byrd Amendment Dispute with the United States;

– the Sugar Dispute with the European Communities; and

– the Cotton Dispute with the United States.

Brazil prevailed in the above four disputes.

Brazil was the sole complainant in the cotton case against the United States. In the other three cases, Brazil was a joint complainant, together with

33 <http://www.wto.org/disputes>.

Venezuela, in the gasoline case; a joint complainant, together with Australia and Thailand, in the sugar case; and a joint complainant, together with another ten countries, and the European Communities, in the Byrd Amendment case.

Of the above disputes, that, which in our opinion, must be highlighted, is the cotton dispute. It is one of the few cases where enforcement required the establishment of a compliance panel. It is also a glaring illustration of how the remedy of suspension of concessions can be used effectively against a recalcitrant defendant.

2. Description of the disputes involving Brazil

a) United States Standards for Reformulated Gasoline[34]

On 12 April 1995, Brazil complained, jointly with Venezuela, against the regulations on foreign gasoline imports approved by the United States. Amendments to the latter's Clean Air Act of 1990 established that only clean or "reformulated" gasoline could be sold in the most polluted metropolitan areas. The Complainants argued that the methodology used by this law was discriminatory and subjected imported gasoline to less favorable treatment than domestic gasoline in violation of GATT Articles I and III and Article 2 of the Agreement on Technical Barriers to Trade.

The Panel Report found the regulation to be inconsistent with GATT Article III:4 and that it could not be justified under the exceptions of paragraphs b), d) and g) of Article XX of the GATT 1994 Agreement.

The Appellate Body upheld the Complaint but modified the Panel's interpretation of the exception of GATT Article XX (g) and concluded that "the baseline establishment rules of the Gasoline Rule fell within the terms of that exception". That is, they were measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption". However, the AB then stated that, in order to justify the exceptions of GATT Article XX, **"they must also satisfy the requirements imposed by the opening clauses (chapeau) of Article XX"**(emphasis added)[35].

34 <http://www.wto.org.disputes>. Dispute DS4. Request for Consultations, 10 April 1995; Panel Report, 29 January 1996; Appellate Body Report, 29 April 1996.

35 Paragraph IV, p. 13 of the AB decision.

In its analysis of the latter requirements, the Appellate Body concluded that the US restrictions represented an "unjustifiable discrimination" and "a disguised restriction on international trade" prohibited by the Chapeau of Article XX of GATT 1994. It, accordingly, ordered the United States to modify its regulations and bring them into line with the relevant rules of GATT 1994. On 20 May 1996, the Dispute Settlement Body or "DSB"[36] adopted the Appellate Body Report.

B) UNITED STATES – CONTINUED DUMPING AND SUBSIDY OFFSET ACT OF 2000 OR BYRD AMENDMENT[37]

Australia, Brazil, Chile, the European Communities, India, Indonesia, Japan, Korea, Thailand, Canada and Mexico complained against the United States for its adoption of the Byrd Amendment. This law amended a 1930 Tariff Act and established that import duties collected by the Treasury in accordance with the anti-dumping and countervailing duties legislation be transferred and distributed to the affected domestic producers for qualifying expenditures.

The Appellate Body upheld the findings of the panel that the Byrd Amendment was a non-permissible specific action against dumping or a subsidy, contrary to Articles 18.1 of the Anti-Dumping (AD) Agreement and 32.1 of the SCM Agreement[38]. That, therefore, the United States had failed to comply with Articles 18.4 of the AD Agreement, 32.1 of the SCM Agreement and XVI (4) of the WTO Agreement. The latter compels Member countries to ensure that their laws, regulations and administrative procedures are consistent with their obligations under the annexed agreements of the WTO. By committing these legal breaches, the AB found that the United States had nullified or impaired the benefits conferred by those agreements to the Complainants, and requested that it bring the Byrd Amendment into conformity with the AD and SCM Agreements, and the GATT 1994. At its meeting of 27 January 2003, the DSB adopted the AB's report.

On 15 January 2004, on the grounds that the US had failed to implement the DSB's recommendations, Brazil, Chile and other countries requested the

36 The DSB administers the Understanding on Rules and Procedures Governing the Settlement of Disputes of Annex 2 of the WTO Agreement. Otherwise known as "DSU" According to Article IV.3 of this Agreement, its responsibilities are discharged by the General Council of the WTO.

37 <http://www.wto.org.disputes>. Dispute DS217. Request for Consultations, 21 December 2000; Panel Report, 16 September 2002.AB Report, 16 January 2003.

38 Subsidies and Countervailing Measures Agreement or "SCM Agreement".

DSB authorization to suspend concessions pursuant to Article 22.2 of the DSU. Following a request from the US, the DSB, on 26 January 2004, referred the matter to arbitration.

Some months later, on 10 November 2004, Brazil and other countries again requested authorization to suspend concessions, this time under Article 22.7 of the DSU. At its meetings of 17 December 2004, the DSB authorized the suspension of concessions.

However, the parties were unable to agree on the suspension measures to be adopted by the United States to comply with the above ruling, and Brazil, the European Communities, India, Japan, South Korea, Mexico and Chile requested authorization to suspend tariff concessions. At the DSB meeting, of 17 February 2006, the United States stated that the US Congress had approved the Deficit Reduction Act, of 1 February 2006, and the President had signed the Act into law on 8 February 2006 bringing the US into conformity with its WTO obligations.

Australia, Brazil, Canada, Chile, Indonesia, Hong Kong, China, India, Japan, South Korea, Mexico, Thailand and the European Communities welcomed the steps taken by the US Congress towards the repeal of the Amendment. However, they disagreed that those measures had been in full conformity with the DSBs recommendations and rulings.

The DSB resolution established that Brazil could suspend concessions by levying additional import duties on a definitive schedule of products originating in the United States. This schedule would cover, each year, a total trade value no greater than the amount yielded by a particular equation. This would take into account the amount of reimbursements under the Byrd Amendment during the last year for which date were available on the anti-dumping or countervailing duties paid by Brazil that year, multiplied by a coefficient calculated to ensure that the level of suspension would be equivalent to that of the nullification or impairment of the benefits conferred upon Brazil by the breached agreements.

c) European Communities – Export Subsidies on Sugar[39]

One peculiarity of this dispute was that, in addition to the complainants, Brazil, Australia and Thailand, a total of 22 countries reserved third-party rights,

39 <http://www.wto.org.disputes>. Dispute DS266. Consultations started 27 September 2002. Panel Report, 15 October 2004. Appellate Body Report, 8 April 2005.

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including China, Canada, the United States, India and the sugar-producing countries of Africa, the Caribbean and the Pacific. This last group of countries, known as the "ACP countries", received the financial support of the European Communities.

The complainants stated that the subsidies granted to the domestic sugar industry by the European Communities, exceeded the limits specified in their respective schedules of concessions, and, thus, violated the Agreement on Agriculture and the SCM Agreement.

In particular, the complainants alleged that the European Communities guaranteed a high price to the domestic sugar included in their respective production quotas, but that the sugar which exceeded these quotas, known as "C sugar", was not sold internally but exported. The high prices paid to producers and processors enabled them to finance the production and export of C sugar at prices lower than their costs of production. Furthermore, the complainants stated that the Communities provided annual export subsidies of, approximately, 1.6 million tons for a value equivalent to that of the imports received from the ACP countries. Because the values and volumes of these exports exceeded the limits committed to and agreed, the subsidies of the European Communities breached the relevant provisions of the Agreement on Agriculture and the SCM Agreement[40].

The Panel and Appellate Body Reports concluded that the European Communities, through its sugar regime, acted inconsistently with its obligations under Articles 3.3 and 8 of the Agreement on Agriculture, "by providing subsidies within the meaning of Article 9.1(a) and (c) of the Agreement on Agriculture in excess of the quantity commitment level and the budgetary outlay commitment level specified in Section II, Part IV of Schedule CXL".

At the DSB meeting of 13 June, 2005, the European Communities informed of its intention to implement the recommendations and rulings of the DSB, and stated that it would require a reasonable period of time to implement them.

On 8 June 2006, Australia, Brazil and Thailand informed the DSB that they each had reached an understanding with the European Communities under Articles 21 and 22 of the DSU.

40 Articles 3.3, 8, 9.1 a) and c) or, alternatively, article 10.1 of the Agreement on Agriculture and Articles 3.1(a) and 3.2 of the SCM Agreement, and Articles III(4) and XVI of the GATT 1994.

d) United States – Subsidies on Upland Cotton[41]

Brazil complained against the United States for providing prohibited and actionable subsidies to US producers, users and/or exporters of upland cotton, and against the US legislation and regulations providing such subsidies and other assistance to the US cotton industry.

According to Brazil, above measures and legislation were inconsistent with the US's obligations under the SCM[42], and Agriculture Agreements, and Article III (4) of the GATT 1994.

The Panel Report found that:

> – "agricultural export credit guarantees are subject to WTO export subsidy disciplines and US programs were prohibited export subsidies with no Peace Clause Protection[43] and in violation of such disciplines;"
>
> – "the US also grants several other prohibited subsidies in respect of cotton;"
>
> – "the US's domestic support programs in respect of cotton are not protected by the Peace Clause, and certain of these programs result in serious prejudice to Brazil's interests in the form of price suppression in the world market".

On the appeal of the US, the Appellate Report's findings referred to the applicability of the Peace Clause, the serious prejudices caused to the complainant, the user marketing payments and the export credit guarantee programs:

Regarding the Peace Clause, the Appellate Report:

Upheld the Panel's findings that the two challenged measures (production flexibility contracts and direct payments) were related to production undertaken after the base period and, therefore, not exempt, by virtue of Article 13 (a) (ii) of the Agriculture Agreement, from actions under Article XVI of GATT 1994 and part III of the SCM Agreement;

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41 <http://www.wto.org.disputes>. Dispute WTO DS267, Request for consultations, 27 September, 2002; Panel Report, 8 September 2004; Appellate Body Report, 3 March 2005; Compliance Panel Report, 18 December 2007.

42 SCM Agreement. Articles 5 (c), 6.3(b),(c) and d), 3.1(b) and 3.2 of the SCM Agreement; and Articles 3.3,7.1,8,9.1 and 10 of the Agreement on Agriculture and Article III.4 of the GATT 1994.

43 Under the Peace Clause (Article 13(a)(i) and (i) of the Agriculture Agreement), during the implementation period which expired in 2004, domestic support measures that conformed to the provisions of the above Agreement would be non-actionable subsidies for purposes of countervailing duties and exempt from actions based on Article XVI GATT 1994 and Part III of the Subsidies Agreement.

Regarding the Export Credit Guarantee Program, the Appellate Report[44]:

b) in a majority opinion, **upheld** the Panel's finding that Article 10.2 of the Agreement on Agriculture did not exempt export credit guarantees from the export subsidy disciplines in Article 10.1 of that Agreement;

c) one Member of the Division, in a separate opinion, expressed the contrary view that Article 10.2 of the Agreement on Agriculture exempts export credit guarantees from the disciplines of Article 10.1 of that Agreement until international disciplines are agreed upon;

d) **found** that the Panel did not improperly apply the burden of proof in finding that the United States' export credit guarantee programs are prohibited export subsidies under Article 3.1(a) of the SCM Agreement and are consequently inconsistent with Article 3.2 of that Agreement;

e) **upheld** the Panel's finding that "the United States export credit guarantee programs at issue-GSM 102, GSM 103 and SCGP-constitute a *per se* export subsidy within the meaning of item (j) of the Illustrative List of Export Subsidies in Annex I of the SCM Agreement", and upheld the Panel's findings that these export credit guarantee programs are export subsidies for purposes of Article 3.1(a) of the SCM Agreement and are inconsistent with Articles 3.1(a) and 3.2 of that Agreement; and

f) **found** that the Panel did not err in exercising judicial economy in respect of Brazil's allegation that the United States' export credit guarantee programs are prohibited export subsidies, under Article 3.1(a) of the SCM Agreement, because they confer a "benefit" within the meaning of Article 1.1 of that Agreement.

At the DSB meeting of 20 April 2005, the US stated its intention to comply with the recommendations and rulings of the DSB in a manner that respected its WTO obligations and had already begun evaluating options for doing so.

However, after more than a year had transpired without developments, on 18 August 2006, Brazil found it necessary to request the DSB to establish a

44 Paragraph D of the Panel Report.

Compliance Panel; it was established on 25 October 2006 and, on 18 December 2007, the Panel issued its report.

On February 2008, both the United States and Brazil appealed to the Appellate Body certain issues of law and legal interpretations of the Compliance Panel report.

On 2 June 2008, the Appellate Body issued its report which, with regard to most of the issues raised in the appeals, upheld the Compliance Panel's findings. The AB recommended that the DSB request the United States to bring its measures, found to be inconsistent with the Agreement on Agriculture and SCM Agreement, into conformity with its obligations under those Agreements.

At its meeting of 20 June 2008, the DSB adopted the Appellate Body Report and the Compliance Panel Report, as modified by the Appellate Body Report.

The failure of the US to implement within the established period of time, the measures ordered in the above reports, led Brazil, with respect to the prohibited subsidies, to request, on 4 July 2005, authorization from the DSB to suspend concessions under Articles 4.10 of the SCM Agreement and 22.2 of the DSU.

A similar suspension request by Brazil, of 6 October 2005, and reference by the DSB to arbitration, occurred with respect to the actionable subsidies under Article 7.9 of the SCM Agreement.

Following the objections of the US to the above requests, on 15 July 2005 and 18 October 2005, respectively, the DSB referred both matters to separate arbitrations.

On 31 August 2009, the two decisions of the arbitrators were issued.

With respect to the prohibited subsidies, the arbitrator determined that Brazil might request authorization from the DSB to suspend concessions or other obligations under the agreement on trade on goods in Annex A, at a level not to exceed US$147.3 million for FY 2006, or, for subsequent years, an annual amount to be determined by the Arbitrator. A similar determination was made by the other arbitrator with respect to the actionable subsidies.

The arbitrators also determined that, in the event that the total level of countermeasures Brazil would be entitled to in a given year should increase to a level that would exceed a threshold described in the decisions, updated to account for the change in Brazil's total imports from the US, then, Brazil would also be entitled to seek to suspend certain obligations under the TRIPS

Agreement[45] and/or the GATS[46] with respect to any amount of permissible countermeasures applied in excess of that figure.

At the request of Brazil, on 19 November 2009, the DSB authorized Brazil, pursuant to Article 22.7 of the DSU, to suspend the application to the United States of concessions or other obligations, and, on 8 March 2010, Brazil notified the DSB that, starting from 7 April 2010, it would suspend the application of concessions or other obligations under the GATT 1994 in the form of increased import duties on certain products when they are imported from the United States.

Brazil also informed the DSB that it would suspend the application to the United States of certain concessions or obligations under the TRIPS Agreement and/or the GATS and would notify the DSB the specific concessions or obligations under the above agreements whose application to the United States would be suspended before such suspension came into force.

On 25 August 2010, Brazil and the United States informed the DSB that they had concluded a Framework for a Mutually Agreed Solution to the Cotton Dispute in the WTO, and, that as long as the Framework is in effect, Brazil would not impose the countermeasures authorized by the DSB.

Santiago, Chile, 9 August 2011.

45 TRIPS Agreement: Agreement on Trade-Related Aspects of Intellectual Property Rights.
46 GATS: General Agreement on Trade in Services.