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ENFORCING TRADE RULES WITHOUT A SHERIFF: BRAZIL'S APPROACH TO RETALIATION IN A FRAGMENTING TRADING SYSTEM

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Retaliation has long been the principal means through which countries enforce their international trade commitments. Yet even during the years when the World Trade Organization's (WTO) dispute settlement system operated as originally designed in 1994, the effective use of retaliation remained elusive, particularly for smaller economies confronting larger trading partners. The collapse of the Appellate Body, coupled with the sweeping tariff increases imposed by the United States (U.S.) during the Trump II administration, further exposed the fragility of retaliation as an enforcement tool. While many countries hesitated to respond, Brazil emerged as a notable exception. This article examines Brazil's distinctive approach to retaliation. It first analyses the legal strategies and institutional mechanisms Brazil developed to operationalise retaliation within the multilateral framework, highlighting how it distinguished itself from other developing countries during the WTO's first 25 years. It then considers Brazil's more recent legislative reforms enabling unilateral retaliation and reflects on the paradox that, despite these innovations, countries — including Brazil — ultimately refrained from retaliating against the United States' global tariffs.

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I. INTRODUCTION

Retaliation occupies a paradoxical place in international trade law. On the one hand, under the rules of the WTO and other international trade agreements, it is a key last-resort instrument through which parties may enforce their rights against persistent violations. On the other hand, it has long been recognised as an imperfect instrument: costly to implement, uneven in its effects, and often inaccessible to smaller or less diversified economies facing violations by larger trading partners. The practice of retaliation has thus always raised challenging questions about the balance of power within the multilateral trading system and the ability of weaker states to defend their trade rights in practice.[1]

During the years in which the WTO's dispute settlement system operated as originally designed in 1994, few developing countries were able to employ retaliation

[1] *See, e.g.*, THE LAW, ECONOMICS AND POLITICS OF RETALIATION IN WTO SETTLEMENT, (Joost Pauwelyn & Chad P. Bown eds., 2010); Joost Pauwelyn, *Enforcement and Countermeasures in the WTO: Rules are Rules -Toward a More Collective Approach*, 94 AM. J. INT'L L. 335, 335-337 (2000); Henning Grosse Ruse-Khan, *Suspension of Obligations under TRIPS as an Effective Means to Induce Compliance?* MAX-PLANCK-INST. FOR INNOV. & COMPETITION (May 21, 2007), https://ip.mpg.de/fileadmin/ipmpg/content/personen/henning_grosse_ruse-kahn/suspension_of_obligations_under_trips_grosse_ruse-khan_21-05-2007.pdf.

effectively. Brazil was an exception. It developed a distinctive legal and institutional framework that not only allowed it to impose retaliatory measures but also enabled it to deploy them in novel ways, leveraging their strategic and symbolic value. In doing so, Brazil established itself as one of the rare developing countries capable of transforming retaliation from a largely theoretical option into a credible enforcement tool.

The demise of the Appellate Body and the weakening of WTO dispute settlement after 2020 have dramatically altered the context in which retaliation operates. At the same time, the unilateral imposition of sweeping tariffs by the U.S. during the second Trump administration highlighted the limitations of multilateral enforcement. Confronted with the largest disruption to global tariff commitments in recent decades, most countries refrained from responding in kind. Brazil again stood out — this time by reforming its domestic legislation to authorise and regulate retaliation on a unilateral basis, first by relying on appealed panel reports and then dispensing with WTO adjudication entirely.

This article analyses Brazil's experience with retaliation under both the multilateral and the post-multilateral authorization settings. It first explores the strategies and legal technologies Brazil devised to operationalise retaliation during the years in which the WTO operated as designed, situating them within broader debates about power asymmetries and enforcement in trade law. It then examines Brazil's recent legislative innovations enabling unilateral retaliation and considers the success of its negotiating strategy. Though focusing on the Brazilian case, the article seeks to illuminate the changing role of retaliation in the multilateral trading system more broadly, and to assess its viability as a tool for trade enforcement in an era of systemic uncertainty under a fragmented legal framework.

The article proceeds in four parts. Part II situates retaliation within the architecture of the WTO, outlining its legal basis, historical practice, and well-known limitations for smaller economies. Part III examines Brazil's use of retaliation during the WTO's 'regular' years (1995–2020), focusing on the strategies and legal innovations that enabled it to operationalise an otherwise limited instrument. Part IV turns to the post-Appellate Body crisis, analysing Brazil's legislative reforms permitting unilateral retaliation and considering how they interact with multilateral rules. Part V concludes by reflecting on the paradox that, despite these innovations, Brazil — unlike China and Canada — delayed its retaliation against the Trump administration's global tariffs, instead seeking a negotiated solution. It also assesses what this reveals about the evolving role of retaliation in an uncertain trading system.

II. NEGATIVE RECIPROCITY AND RETALIATION IN INTERNATIONAL TRADE LAW

International law generally permits reciprocal non-compliance as a means of sanctioning violations of commitments. This use of 'negative reciprocity' can take the form of countermeasures, that is, the temporary reciprocal non-performance of obligations to incentivise compliance with violated rules and the provision of reparation for injury. The Arbitral Tribunal in *Air Service Agreement* noted that countermeasures serve to "restore in a negative way" the relations between the parties following a violation, and should aim to "encourage them to continue negotiations with mutual desire to reach an acceptable solution".[2] Another form of negative reciprocity is the termination or suspension of treaties, in whole or in part, as a response to their material violation.[3]

International trade agreements are organised as the prototypical 'reciprocal' or 'synallagmatic' international treaty, whereby each party's obligations are owed to the other party. In most trade agreements, public interest in rule compliance is considered accessory to each state's interest in compliance with the obligations owed to its own individuals and companies. For reciprocal obligations, unilateral remedies are in principle apt mechanisms for sanctioning breaches. Thus, since the bilateral trade agreements from the 1930s, trade agreements foresee the possibility for parties to respond to measures that undermine their trade interests protected by the agreement through reciprocal suspension of compliance with their own commitments. Reciprocal trade barriers — or 'trade retaliation' — continue to be the principal form of sanction for violations of international agreements.

However, the use of international law's traditional reciprocal remedies represents a challenge. On the one hand, these instruments ensure a degree of compliance with, and consequences for violations of, international obligations. On the other hand, the fact that they are unilaterally deployed by states based on their self-interpretation of the law, self-assessment of the existence of a violation, and self-determination of the appropriate response, means that they are prone to abuse. As Bruno Simma noted, a key difficulty with international law's state-to-state sanctioning mechanisms is that they subject the sanctioning of legal violations to the mercy of individual states' auto-determination and self-enforcement.[4]

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[2] *Air Service Agreement* (Fr. Vs U.S.)18 R.I.A.A. 417, 444-445 (Ad hoc Arb. 1978).

[3] *See* GERALD FITZMAURICE, (Special Rapporteur), *Fourth Rep. on the Law of Treaties* U.N. Doc. A/CN.4/120 (Mar. 17, 1959).

[4] Bruno Simma, *From Bilateralism to Community Interests*, *in* 250 REC. DES COURS 217, 331 (1994).

For this reason, international trade agreements have slowly developed to incorporate safeguards against unilateral reciprocity while allowing parties to resort to adjudication for dispute settlement and incorporating the possibility of authorised reciprocity as a last resort in case of non-compliance. Thus, the General Agreement on Tariffs and Trade 1947 (GATT 1947) allowed the Contracting Parties, acting jointly, to collectively authorise reciprocal suspension of concession if the circumstances were 'serious enough'. The practice of the Contracting Parties, together with GATT panels, made authorised trade retaliation the key instrument of last resort to enforce international trade commitments.[5] At the same time, GATT 1947 did not prohibit unilateral retaliation. In the 1980s, the U.S. became a heavy user of trade retaliation as an instrument to sanction what it saw as violations of the rights of American companies, whether or not the targeted conduct was prohibited by GATT 1947 (and including, in particular, protection for intellectual property rights that the U.S. deemed lacking or insufficient).[6]

As part of the 'grand bargain' involved in the creation of the WTO in 1994, the WTO Dispute Settlement Understanding (DSU) featured two key elements. On the one hand, the DSU prohibited Members from unilaterally determining violations of WTO commitments, as well as from unilaterally responding to violations. On the other hand, the DSU created a mechanism for multilateral authorisation of retaliation, following a multilateral ruling that a violation had taken place. The DSU allowed WTO Members to bring formal disputes for adjudication by WTO panels, regarding any measures of other WTO Members that, in the complainant's view, affected its WTO rights.[7] These disputes would lead to a WTO multilateral ruling, condemning the breach and requiring compliance within a reasonable period of time. In case of non-compliance, the WTO would authorise retaliation against the persistent wrongdoer.[8]

The DSU system of adjudication and authorised retaliation operated well, from an institutional perspective, between 1996 and 2020. During this period, the Dispute Settlement Body (DSB) adopted 199 WTO original panel reports, many after review by the Appellate Body, and 36 compliance panel reports, many of which were

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[5] Geraldo Vidigal, *Not So Member-driven After All: The GATT-Era Origins of the WTO's System of Remedies*, *in* RECKONING AND RENEWAL: THE WORLD TRADE ORGANIZATION AND ITS DISPUTE SETTLEMENT SYSTEM 229, 229–241 (Nicholas Lamp ed., 2025).

[6] *See* Alan O. Sykes, *Constructive Unilateral Threats in International Commercial Relations: The Limited Case for Section 301*, 23 L. & POL'Y. INT'L. BUS. 263 (1992).

[7] Understanding on Rules and Procedures Governing the Settlement of Disputes arts. 4.2, 6.1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

[8] *Id.*, art. 22.2.

adopted after appeal.[9] The DSB also authorised retaliation, after arbitration of the permissible level, 25 times over this period and two times in 2022.[10] These numbers demonstrate that a WTO authorisation to retaliate could be obtained reliably and that it was perceived as useful, while also revealing that the vast majority of disputes were settled without reaching the retaliation stage.

Since 2020, however, the lack of a WTO Appellate Body means that, although disputes can still be brought before WTO panels, any party to a panel dispute can appeal the panel report 'into the void', preventing the adoption by the DSB of a final ruling.[11] And, without a final ruling, the obligation to implement the report does not arise, the reasonable period of time for compliance does not start, and the possibility to request from the DSB an authorisation to retaliate against non-compliance becomes inaccessible. Although some WTO Members have been able to address this by establishing a system of 'appeal arbitrations' through the Multi-Party Interim Appeal Arbitration Arrangement (MPIA), adherence to this system is voluntary. The growing number of WTO Members that have joined the MPIA (currently, thirty-one, plus the individual European Union (EU) Member States) does not yet include key participants in WTO dispute settlement, such as India, Russia, Indonesia, Argentina, any African nation or, crucially for present purposes, the U.S.[12]

The lack of a reliable system for securing the final settlement of disputes by WTO adjudicators has put many Members in a bind. On the one hand, their WTO commitments expressly include refraining from adopting trade retaliation without formal DSB authorisation. On the other hand, the impossibility of securing an authorisation to retaliate — due to the ability of respondents to 'appeal into the void' — means that their access to all enforcement mechanisms, both adjudicative and retaliatory, is now blocked if they continue to adhere to the WTO prohibition on unilateral retaliation.

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[9] *Information from WTO Panels*, WORLDTRADELAW.NET (Oct. 20, 2025), https://www.worldtradelaw.net/databases/wtopanels.php (noting that the number of reports can vary depending on how one counts multiple panels assessing the same or related measures).

[10] *Id.*

[11] *See* DSU, *supra* note 7, art. 16.4. (the Appellate Body's demise was brought about by a decision of the U.S., communicated formally in 2019, to block all appointment proposals to the organ until its concerns with WTO dispute settlement were addressed. The U.S. has not yet put forward a full proposal to address these concerns or responded to others' proposals indicating that they, or a version of them, would be acceptable).

[12] *WTO Multi-Party Interim Appeal Arbitration Arrangement (MPIA)*, WORLDTRADELAW.NET (Oct. 26, 2025), https://www.worldtradelaw.net/static.php?type=public&page=mpia.

The remainder of this article surveys the response to this dilemma encountered by a key user of WTO dispute settlement: Brazil. Among developing countries, Brazil became known for its ability to employ WTO dispute settlement to its advantage. In *U.S. — Cotton* and *EC — Sugar*, Brazil successfully challenged, using the WTO dispute settlement system, significant U.S. and EU subsidies to agricultural production.[13] .In *U.S.– Cotton*, Brazil then successfully deployed the threat of WTO retaliation to obtain concessions from the U.S. Brazil's case is key because it has also, following the demise of the Appellate Body, sought to adjust its legislation to address the new institutional setting of international trade, setting aside the restrictions to unilateral action previously contained in its laws and threatening to retaliate, once more against the U.S., in response to its unilateral tariff escalation of 2025.

III. DEVELOPING INSTITUTIONAL MACHINERY TO RETALIATE: THE BRAZIL-CANADA AIRCRAFT AND U.S. — COTTON DISPUTES

Brazil was highly successful in developing an institutional machinery that allowed it to use the WTO Dispute Settlement System to its advantage.[14] As an original Member of the WTO, Brazil incorporated the WTO Agreements into its legal system in 1994[15] and, for several years, relied on the stability and rules-based system of the WTO to resolve trade-related disputes. Brazil initiated requests for consultations thirty-five times and was a complainant in thirteen disputes that led to panel reports. On two occasions, in its disputes with Canada concerning aircraft subsidies and with the U.S. concerning cotton subsidies, Brazil obtained authorisation from the WTO DSB to retaliate against a persistent violation.

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[13] Stephen J. Powell & Andrew Schmitz, *The Cotton and Sugar Subsidies Decisions: WTO's Dispute Settlement System Rebalances the Agreement on Agriculture*, 10 DRAKE J. AGRIC. L., 287 (2005).

[14] TOMER BROUDE & MICHELLE RATON SANCHEZ BADIN, INSTITUTIONAL ASPECTS OF INTERNATIONAL TRADE LAW (2013); *see also* Gregory Shaffer et al., *The Trials of Winning at the WTO: What Lies behind Brazil's Success*, 41 CORNELL INT'L. L. J. 383 (2008) [hereinafter Shaffer].

[15] Decreto Legislativo n. 30, de 15 de dezembro de 1994, Aprova a Ata Final da Rodada Uruguai de Negociações Comerciais Multilaterais do GATT, as listas de concessões do Brasil na área tarifária (Lista III) e no setor de serviços e o texto do Acordo Plurilateral sobre Carne Bovina. [Approves the Final Act of the Uruguay Round of Multilateral Trade Negotiations of the GATT, the lists of concessions from Brazil in the tariff area (List III) and in the services sector, and the text of the Plurilateral Agreement on Bovine Meat.], D.O.U. de 19 de dezembro de 1994, p. 28481 (Bra.).

A. The Early Experiment: The Brazil-Canada Aircraft Disputes

A key concern in the initial years of the WTO was the ability of developing countries to take part effectively in WTO dispute settlement, both to use the system to enforce their WTO rights and to defend their policies in WTO adjudication. At this time, Brazil became a key case study for the ability of a developing country to establish legal infrastructure and institutional machinery to make use of WTO dispute settlement. Gregory Shaffer, Michelle Ratton Sanchez, and Barbara Rosenberg found that Brazil's "successful capacity-building initiatives for international trade negotiations and dispute settlement" resulted from the "institutionalisation of a legalised and judicialized system of international trade relations", characterised by "pluralist interaction between the private sector, civil society, and the government on trade matters".[16]

Brazil's first contact with authorised retaliation, however, was not a win. In their reciprocal disputes concerning subsidies to their national aircraft manufacturers — Brazil's Embraer and Canada's Bombardier — both Brazil and Canada were initially found in breach. However, at the compliance stage, the Appellate Body concluded that "Brazil ha[d] failed to establish that Canada ha[d] not implemented the recommendations and rulings of the DSB."[17] By contrast, in Canada's complaint, the Appellate Body concluded that "Brazil ha[d] failed to implement the recommendation of the DSB that it withdraw the export subsidies for regional aircraft . . . within 90 days."[18]

The DSB adopted both compliance reports on the same day. Having prevailed, Canada proceeded to seek and obtain an authorisation from the DSB to suspend WTO concessions *vis-à-vis* Brazil. On August 28, 2000, the Arbitrator held that "appropriate countermeasures within the meaning of Article 4.10 of the *SCM Agreement*" in the case would be "the suspension by Canada of the application to Brazil of tariff concessions or other obligations . . . covering trade in a maximum amount of C$344.2 million per year."[19]

Brazil only managed to 'tie' the score three years later. Brazil requested a fresh WTO panel to assess Canadian subsidies to its aircraft manufacturing. The panel report, adopted in 2002 without appeal, accepted three of Brazil's eight claims, all

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[16] Shaffer, *supra* note 1.
[17] Appellate Body Report, *Canada—Measures Affecting the Export of Civilian Aircraft,* ¶53, WTO Doc. WT/DS70/AB/RW (adopted Aug. 20, 1999).
[18] Appellate Body Report, *Brazil—Export Financing Programme for Aircraft,* ¶82(b), WTO Doc. WT/DS46/AB/RW (adopted Aug. 20, 1999).
[19] Decision by the Arbitrators, *Brazil—Export Financing Programme for Aircraft*, ¶4.1, WTO Doc. WT/DS46/ARB (circulated Aug. 28, 2000).

concerning specific financing to purchasers of Bombardier aircraft.[20] After ninety days, rather than requesting a compliance panel, Brazil requested arbitration on retaliation, since Canada maintained that, because the findings all concerned specific financing operations, "there are no subsidies for Canada to withdraw and no recommendation of the DSB for Canada to comply with."[21] Brazil requested "authorisation to take appropriate countermeasures in the amount of US$3.36 billion."[22]

In February 2023, the *Canada — Aircraft II* Arbitrator sided with Brazil but found that the level of appropriate countermeasures was far lower than that proposed. On the other hand, having calculated an amount of nullification caused by Canada's subsidies, the Arbitrator noted with disapproval "Canada's statement that, for the moment, it does not intend to withdraw the subsidy", finding that "in order to induce compliance in this case a higher level of countermeasures than that based on the Canadian methodology would be necessary and appropriate".[23] The Arbitrator decided to "adjust the level of countermeasures by an amount corresponding to 20% of the amount of the subsidy as calculated."[24] With the 20% added to the total, Brazil was found to be entitled to suspend obligations towards Canada, covering trade in a total amount of US$247,797,000, as "appropriate countermeasures within the meaning of Article 4.10 of the *SCM Agreement*".[25]

The six years of *Brazil-Canada Aircraft* disputes resulted in two Arbitrations that authorised very similar levels of retaliation for the two breaches. The outcome was a mutual acceptance of the subsidies.[26] Indeed, the arbitrator of *Canada — Aircraft II* foresaw this outcome, holding that "a mutually satisfactory agreement between the parties" would be the preferred option, given the particular circumstances of the case.[27] This was followed by a renegotiation of the rules on export credits of the

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[20] Panel Report, *Canada—Export Credits and Loan Guarantees for Regional*, ¶8.1, WTO Doc. WT/DS222/R (adopted on Feb. 19, 2002) [hereinafter PR, *Canada—Aircraft Credits and Guarantees*].

[21] Communication by Canada, *Canada—Aircraft Credits and Guarantees*, p. 1 WTO Doc. WT/DS222/8 (June 24, 2022).

[22] *Id.*

[23] Decision by the Arbitrator, *Canada—Aircraft Credits and Guarantees*, WTO Doc. WT/DS222/ARB, ¶ 3.107 (Feb. 17, 2003) [hereinafter Arbitral Decision, *Canada—Aircraft Credits and Guarantees*].

[24] *Id.*, ¶ 3.121.

[25] *Id.*, ¶ 4.1.

[26] *See* Hunter Nottage, *Evaluating the Criticism that WTO Retaliation Rules Undermine the Utility of WTO Dispute Settlement for Developing Countries*, *in* THE LAW, ECONOMICS. AND POLITICS. OF RETALIATION IN WTO DISPUTE. SETTLEMENT 319, 334 (Chad P. Bown & Joost Pauwelyn eds., 2010).

[27] Arbitral Decision, *Canada—Aircraft Credits and Guarantees*, *supra* note 23, ¶ 4.4.

Organisation for Economic Cooperation and Development, which, owing to a veiled cross-reference in Annex I(k) of the SCM Agreement, guides the interpretation of the WTO rules on subsidies.[28]

B. Using Cross-Retaliation to Seek Compensation: The U.S — Cotton Dispute

In *U.S. — Cotton*, Brazil went one step beyond trade retaliation and developed legal and institutional mechanisms to credibly threaten retaliation in intellectual property rights (IPRs). Suspending obligations under the Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS) had previously been authorised twice: for Ecuador, which was authorized to suspend TRIPS commitments owed to the European Communities in 2000,[29] and for Antigua and Barbuda, which was authorised to suspend U.S. IPRs in 2007.[30] Several elements made the suspension of IPRs problematic: the impact it had on other international agreements, the difficulty of reconciling it with rights acquired domestically, and the question of how to limit the payment-free use of IPRs to authorised amounts only. These difficulties prevented both countries from making successful use of the authorisation to retaliate under TRIPS to obtain compensation or speedy compliance.

1. The *U.S. — Cotton* Dispute and the Authorisation to Cross-Retaliate

Brazil managed to use this entitlement to obtain concessions in *U.S. — Cotton*. On March 21, 2005, the WTO DSB adopted the panel and Appellate Body reports, ruling that the U.S. was engaging in export subsidies, which the SCM Agreement prohibits entirely, as well as in domestic subsidies that distorted cotton prices, producing unlawful adverse effects for producers in other countries.[31] This engendered an obligation for the U.S. to withdraw the unlawful subsidies and eliminate the trade-distortive effects of the domestic subsidies.

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[28] *See* Michelle Ratton Sanchez Badin, *The WTO and the OECD Rules on Export Credits: A Virtuous Circle? The Example of the Embraer Case and the 2007 Civil Aircraft Understanding* (2008), https://ssrn.com/abstract=1483364.

[29] Decision by the Arbitrators, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WTO Doc. WT/DS27/ARB/ECU (adopted March 24, 2000).

[30] Decision by the Arbitrator, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc. WT/DS285/ARB (adopted Dec. 21, 2007), ¶6.1 (Antigua only specifically requested the right to retaliate in December 2012. Authorisation was granted in January 2013, WT/DSB/M/328).

[31] Appellate Body Report, *United States—Subsidies on Upland Cotton*, WTO Doc. WT/DS267/AB/R (adopted Mar. 21, 2005) [hereinafter ABR, *US—Upland Cotton*]; Panel Report; *US—Upland Cotton*, WTO Doc. WT/DS267/R (adopted Mar. 21, 2005) [hereinafter PR, *US—Upland Cotton*].

Although there was little prospect of compliance before 2008 — the date on which the 2002 Farm Bill was due to expire[32] — Brazil moved ahead and initiated litigation on implementation in 2006. The compliance panel reaffirmed the illegality of the subsidies, and on May 14, 2008, the Appellate Body confirmed the U.S.'s failure to comply with the original DSB report.[33] On June 18, days after the Appellate Body found the U.S. in non-compliance with subsidy limits, the U.S. Congress passed the 2008 Farm Bill.[34] President George W. Bush vetoed the legislation, but the veto was overridden by Congress before the DSB had adopted its reports on compliance. On this basis, Brazil requested arbitration on the permissible retaliation.

On August 31, 2009, the Article 22.6 arbitrator circulated its rulings on authorised retaliation. Brazil requested authorisation to 'cross-retaliate', countering the U.S. subsidy (which affected its producers of goods) by suspending obligations in intellectual property rights. Retaliation in intellectual property rights provides developing countries, in particular, with a threat that they can employ more effectively against developed countries, affecting powerful industries such as pharmaceuticals, software, and entertainment.[35]

The Arbitrators linked the entitlement to cross-retaliate to Brazil's capacity to retaliate effectively against U.S. goods. First, they established the amount of permissible retaliation. As regards U.S. prohibited export subsidies, the amount of nullification or impairment caused was assessed as US$152.7 million annually.[36] As regards the trade-distorting domestic subsidies, on the other hand, the Arbitrator reached not a fixed number but a formula. The nullification or impairment (to which retaliation should correspond)[37] would depend on the value of transfers made by the U.S. domestic subsidy programme each year. Although estimated at US$147.4

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[32] Farm Security and Rural Investment Act of 2002, Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, 116 Stat. 134 (codified as amended in scattered sections of 7, 15, 16, 26 & 43 U.S.C.) (U.S. agricultural subsidies are not established in a single, continuously applicable piece of legislation. Instead, the U.S. Congress periodically reconsiders the amount of these subsidies and passes legislation known as 'Farm Bills', providing funding for subsequent years. Brazil initiated consultations on the cotton issue in 2002, after diplomatic channels failed to obtain a reduction in U.S. cotton subsidies established in the 2002 Farm Bill (H.R. 2646 - 107th Congress (2001-2002)).

[33] ABR, *US—Upland Cotton*, *supra* note 31; PR, *US—Upland Cotton*, *supra* note 31.

[34] Food, Conservation, and Energy Act of 2008, Pub. L. 110–246, H.R. 6124, 122 Stat. 1651 (2008) (also known as the 2008 U.S. Farm Bill).

[35] *See* Henning Grosse Ruse-Kahn, *A Pirate of the Caribbean? The Attractions of Suspending TRIPS Obligations*, 11(2) J. INT'L. ECON. L. 313, 335-339 (2008).

[36] Decision by the Arbitrator, *United States—Subsidies on Upland Cotton,* WTO Doc. WT/DS26/ARB/2 ¶ 6.1 (Aug. 31, 2009).

[37] *See* DSU, *supra* note 7, art. 22.3; Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154.

million for 2006, this 'level' could increase or decrease with the quantum of subsidies granted by the U.S. to its farmers increased or decreased.[38]

Considering Brazil's developing country status and its trade relations with the U.S., the Arbitrator set a threshold above which retaliating solely by increasing tariffs on goods would be 'not practical or effective'.[39] For the year 2007, this threshold was US$409.7 million, above the level of US$294.7 million authorised as retaliation for that year.[40] Therefore, only if the adverse effects of U.S. subsidies increased significantly would Brazil be allowed to cross-retaliate. However, as the Arbitrator noted, such a significant increase in subsidised transactions was already expected for 2009.[41] In March 2010, running the formula established by the Arbitrator, Brazil found that its entitlement to retaliate amounted to US$829 million.[42] Although bilateral trade had also grown, the Arbitrator's formula still authorised Brazil to retaliate in services or intellectual property rights for amounts above US$591 million. Brazil could therefore suspend concessions to the U.S. outside the area of goods, in services or intellectual property rights, to a level of US$238 million.[43]

In the implementation of retaliation, Brazil had clear advantages over Ecuador and Antigua and Barbuda — the two countries previously allowed to cross-retaliate in intellectual property rights. Its economy was hundreds or thousands of times larger than theirs, giving Brazil both the economic dimension needed to produce goods in violation of IPRs on a meaningful scale and the political capacity to resist potential threats from large intellectual property holders. Even so, operationalising the suspension of IPRs legally was a challenge.

Brazil developed a retaliatory strategy in two stages. It first developed framework legislation — the 'IP Retaliation Law' — allowing the domestic suspension of IPRs following DSB authorisation.[44] It then simultaneously issued two resolutions. The first resolution provided that listed products were to be subject to tariff retaliation from April 7, 2010. These were primarily cotton fabrics, motor vehicles, white

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[38] Decision by the Arbitrator, *United States—Subsidies on Upland Cotton*, ¶6.5, WTO Doc. WT/DS26/ARB/1 (Aug. 31, 2009).
[39] *See* DSU, *supra* note 7, art. 22(3)(c).
[40] *Supra* note 38, ¶ 5.201.
[41] *Id.*, ¶ 5.216.
[42] Communication from Brazil, *United States—Subsidies on Upland Cotton,* WTO Doc. WT/DS267/43 (March 12, 2010) (the formula for the adverse effects of U.S. domestic subsidies yielded US$682 million for 2009. To this was added the $147.3 million authorised for prohibited subsidies).
[43] *Id.*
[44] Provisional Measure No. 482, of 10 February 2010, converted into Law No. 12,270 of 24 June 2010. Medida Provisória nº 482, de 10 de fevereiro de 2010, *convertida em* Lei nº 12.270, de 24 de junho de 2010, Diário Oficial da União [D.O.U.] de 25.6.2010 (Braz.).

goods, agricultural products, cosmetics, and motor vehicles.[45] Through the other resolution, Brazil initiated a public consultation on possible IPR suspension measures. Listed measures ranged from increasing IPR registration fees in Brazil to removing IPR protection over certain products, including patents on medicines, agricultural chemicals, and biotechnology processes, as well as copyrights on public musical performances, audiovisual reproductions, and software use.[46]

2. Using the Threat to Retaliate to Obtain Compensation

Intense negotiations followed. In an exchange of letters on April 5 and 6, 2010, Brazil and the U.S. established the terms of an agreement to avoid retaliation. Brazil then suspended the two resolutions, initially for sixty days.[47] Following a Framework Agreement for a Mutually Agreed Solution to the dispute, Brazil definitively suspended these resolutions.[48] Although the threat of retaliation was not carried out, it led to a mutually agreed solution with different types of compensation for Brazil.

The Brazil-U.S. agreement of April 6, 2010, was followed by a Memorandum of Understanding signed on April 20, then a Framework Agreement dated June 25, communicated to the WTO on August 25, 2010. As reported to the WTO, the original agreement provided for three U.S. actions: (i) the establishment of a technical assistance fund, financed by the U.S. with $147.3 million annually; (ii) the reform of the domestic subsidy programme to reduce its adverse effects; and (iii) the recognition of the State of Santa Catarina as free of foot-and-mouth disease, rinderpest, and swine fever.[49]

The Memorandum of Understanding of April 20 consolidated the first part of this agreement, determining that Brazil should create an entity to receive the funds, later named the Brazilian Cotton Institute (IBA).[50] The IBA, administered by the

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[45] Camex Resolution 15/2010, of 12 March 2010. Resolução Camex nº 15, de 12 de março de 2010, Diário Oficial da União [hereinafter D.O.U.] de 15.3.2010 (Braz.).

[46] Camex Resolution 16/2010 of 12 March 2010, Annex III. Resolução Camex nº 16, de 12 de março de 2010, anexo III, D.O.U. de 15.3.2010 (Braz.).

[47] Camex Resolution 20/2010, of April 20, 2010. Resolução Camex nº 20, de 20 de abril de 2010, D.O.U. de 21.4.2010 (Braz.).

[48] Camex Resolution 43/3010, of June 17, 2010. Resolução Camex nº 43, de 17 de junho de 2010, D.O.U. de 18.6.2010 (Braz.).

[49] *US, Brazil Agree on Framework Regarding WTO Cotton Dispute*, OFF. OF THE UNITED STATES TRADE REP. (June 17, 2010), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2010/june/us-brazil-agree-framework-regarding-wto-cotton-disput.

[50] Memorandum of Understanding on a Technical Assistance and Capacity-Building Fund Relating to the Cotton Dispute (DS267) at the WTO, Braz. -U.S., June 25, 2010, http://www.iba-br.com/documents/10180/13185/MOU_final.pdf/e48dee13-5a16-4417-95cd-64db7e34a5bb.

Brazilian government in partnership with the cotton industry, would be audited by the U.S. government. It was to provide only technical assistance and training activities to the cotton sector in Brazil, Mercosur countries, Haiti, and sub-Saharan African countries. The second part of the agreement was consolidated in the Framework Agreement. This agreement provided for limits on the domestic agricultural subsidy programme, and quarterly consultations between the parties regarding compliance with the imposed limits until the issuance of successor legislation to the 2008 Farm Bill. The third part of the agreement was not formalised by the parties. However, in April 2010, U.S. authorities proposed a change in the state of Santa Catarina's foot-and-mouth disease status. The change was approved on November 16, 2010, and came into effect on December 1, 2010.[51]

Initially, the U.S. faithfully implemented the mutually agreed solution, guaranteeing both limits on U.S. subsidies and funding for the IBA. Although the IBA was an extremely successful experiment, in subsequent years there was significant pressure in the U.S. Congress to increase subsidies, exceeding the limits established in the Framework Agreement.[52] The deterioration in compliance culminated in the U.S. Congress's discussion and subsequent approval of the 2014 Farm Bill,[53] containing new agricultural subsidies that violated WTO rules. Brazil's response was to reactivate the mechanisms permitted by the WTO, both for adjudication and retaliation, with the aim of pressing for compliance.

The 2014 Farm Bill began being discussed in mid-2013, after the 2008 Farm Bill expired. In October 2013, the Senate approved the Farm Bill and sent it to the House of Representatives. That same month, the U.S. announced that, with the agreement expiring, it would no longer pay the monthly instalments established in the 2010 Memorandum of Understanding. This announcement raised fears in Brazil that the U.S. would cease compliance with the agreement and reverse the steps taken to comply with the DSB recommendations. These difficulties culminated in a renewed threat of retaliation against IPRs. On December 18, 2013, Camex Resolution 105/2013 revived procedures for applying trade retaliation against IPRs.[54]

In February 2014, the House approved and the U.S. President signed the 2014 Farm Bill into law. This Farm Bill eliminated some non-trade-distorting subsidies, such as the one in which the government paid farmers based on the size of their land,

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[51] Changes in the Disease Status of the Brazilian State of Santa Catarina with Regard to Certain Ruminant and Swine Diseases, 75 Fed. Reg. 69,851 (Nov. 16, 2010).

[52] Jeanne J. Grimmett, CONG. RSCH. SERV., WTO Dispute Settlement: Status of U.S. Compliance in Pending Cases (Apr. 23, 2012). 80-83.

[53] Agricultural Act of 2014, Pub. L. No. 113-79.

[54] Resolução Camex nº 105, de 18 de dezembro de 2013, D.O.U. de 19.12.2013 (Braz.).

regardless of whether they were producing. It also created an insurance programme — the Stacked Income Protection Plan (STAX) — through which, in the event of losses, the U.S. government would pay producers 70% to 90% of their losses. Furthermore, under the 2014 Farm Bill, the government covered up to 80% of the insurance costs for the remaining losses. This combination of programmes created an incentive for U.S. producers to plant cotton even if the expected result were a loss, resulting in increased supply and depressed international prices. The non-compliance of these programs with WTO rules in general and with the DSB recommendations in the *U.S. — Cotton* case was recognised by the U.S. Congressional Research Service itself.[55]

Brazil had no choice but to either move forward and implement retaliation against IPRs or back away from this strategy. Brazil chose the latter, merely threatening to request a new implementation panel to verify compliance with the DSB recommendations. Not even this action, which was already seen as a step backwards and an overly conservative stance,[56] was taken: Brazil did not even mention the issue before the DSB.

The issue resurfaced before the DSB only on October 20, 2014, when the parties communicated the signing of a Mutually Agreed Solution dated October 16, 2014. The Mutually Agreed Solution officially ended the dispute, specifically prohibiting both retaliation and the request for enforcement panels in the DS267 dispute. Brazil did not recognise the new Farm Bill's compliance with WTO rules but formally withdrew the case.

In return for dropping the case, Brazil received from the U.S. the back payments owed for the previous year, between October 2013 and September 2014 ($147.3 million), plus an equivalent amount ($152.7 million), for a total of $300 million. This amount was directed in full to the IBA for use in the same activities authorised in 2010. In addition to making this payment, the U.S. committed to maintaining one of its domestic assistance programmes (the one already condemned by the DSB in 2005) within certain parameters and to inform Brazil on the programme's progress every six months.

So long as the parameters established in the 2014 Memorandum for the programme already deemed illegal are respected, Brazil will not be able to challenge this programme before the DSB. Furthermore, Brazil committed to not challenge a

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[55] Randy Schnepf, CONG. RSCH. SERV., R43817, *2014 Farm Bill Provisions and WTO Compliance* 19 (2015).

[56] Mariana Branco, *Decision in cotton case is political and cautious, experts say*, AGÊNCIA BRASIL (Feb. 22, 2014), http://agenciabrasil.ebc.com.br/economia/noticia/2014-02/decisao-do-brasil-no-caso-do-algodao-epolitica-e-cautelosa-dizem.

number of agricultural subsidy programmes under the 2014 Farm Bill and to notify the U.S. in advance if it considered challenging any other agricultural subsidy programme.

Thus, Brazil was able to employ its WTO authorisation to retaliate, and a concrete threat of retaliation in both goods and IPRs, to obtain from the U.S. over 1 billion U.S. dollars in funding for its agriculture modernization programmes. On the other hand, in the 2014 Memorandum Brazil accepted the terms of the U.S. when adopting the 2014 Farm Bill and temporarily waived its right to challenge U.S. subsidies, all in exchange for a total amount equivalent to the amount that, under the terms of the 2010 Framework Agreement, the country would have been entitled to receive annually. While some considered this last phase an 'unconditional surrender'[57] in the face of the *fait accompli* of the 2014 Farm Bill, it did not prevent Brazil from becoming the world's leading cotton exporter in 2024, overtaking the U.S.[58]

IV. RETALIATING UNDER A DAMAGED WTO DISPUTE SETTLEMENT SYSTEM: THE ECONOMIC RECIPROCITY LAW

In 2020, following the dismantling of the WTO Appellate Body, the Dispute Settlement System of the WTO lost its ability to generate binding, final reports based on a unilateral request of a complainant.[59] This has resulted in a WTO dispute settlement system that, although operational, is now 'damaged'. WTO Members may still bring disputes before a WTO panel and obtain a report. However, only a report adopted by the DSB produces legal effects. A party may now prevent the panel report from producing legal effects by appealing it 'into the void', that is, to the non-existent Appellate Body, therefore preventing its adoption by the DSB. WTO Members still may agree to alternative means of securing a final outcome, such as by adhering to the MPIA, by agreeing to *ad hoc* appeal arbitration, or simply by not appealing from the panel report. However, a final, binding outcome is no longer

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[57] Steve Suppan, *Unconditional surrender: The U.S.-Brazil deal to end WTO-authorized retaliation*, INST. FOR AGRIC. & TRADE POL. (Oct. 09, 2014), http://www.iatp.org/blog/201410/unconditional-surrender-the-us-brazil-deal-to-end-wto-authorized-retaliation.

[58] U.S. Department of Agriculture – Foreign Agricultural Service, *Brazil Cotton: Record MY 2024/25 Production on the Heels of Becoming the World's Leading Cotton Exporter*, (Commodity Intelligence Report, Sep. 19, 2024), https://ipad.fas.usda.gov/highlights/2024/09/Brazil/index.pdf.

[59] *See* Steve Charnovitz, *How WTO Dispute Settlement Succumbed to the Trump Administration* (GW Law Sch. Pub. L. & Legal Theory Paper No. 2019-73 Dec. 17, 2019).

guaranteed without the active cooperation of the party accused of violating WTO law.[60]

The lack of a reliable dispute settlement system was compounded by the increasingly WTO-sceptical trade policy of the U.S. First, where a series of extra-WTO tariffs, imposed during the first Trump administration and maintained by the Biden administration, were justified on vague 'national security' grounds and defended under Article XXI of the GATT 1947. Domestically, these tariffs were mainly adopted under Sections 201[61] and 301 of the U.S. Trade Act of 1974[62], and Section 232[63] of the Trade Expansion Act of 1962.[64] Although a few panels found these tariffs to be WTO-inconsistent and not justified under either GATT general exceptions or security exceptions, these reports were appealed into the void, with no attempt to settle the disputes through alternative adjudication procedures.[65]

Then, in the second Trump administration, the White House engaged in a recurring cycle of tariff imposition, trade tensions, retaliatory measures, negotiations, and non-

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[60] Kristen Hopewell, *Unravelling of the trade legal order: enforcement, defection and the crisis of the WTO dispute settlement system*, 101 INT'L. AFF. 3, 1103 (2025).

[61] Trade Act of 1974, 19 U.S.C. §§ 2101–2497 (1974), §201 [hereinafter Trade Act] (according to Section 201 of the Trade Act, the President is entitled to adopt actions aimed at supporting the domestic industry to face external competition and provide greater economic and social benefits than costs).

[62] *Id.*, §301 (section 301 provides that actions may be adopted by the Trade Representative, under the direction of the President, if it is found that the rights of the United States are being denied under a trade agreement or as the result of the application of an act, policy, or practice of a foreign country. The same section, however, establishes that the Trade Representative is not required to take action if: (A) The Dispute Settlement Body (...) has adopted a report, or a ruling issued under a formal dispute settlement proceeding provided under any other trade agreement finds that (i) the rights of the United States under a trade agreement are not being denied, or (ii) the act, policy, or practice (1) is not a violation of, or inconsistent with, the rights of the United States, or (2) does not deny, nullify, or impair benefits to the United States under any trade agreement).

[63] *Id.*, §232 (according to this provision, the President is entitled to establish the initiation of an investigation to determine whether there are any effects on the national security resulting from imports of a specific article. In the event that the investigation demonstrates that the imports are occurring in a number that represents a threat or impairment to national security, the President shall take action to adjust the import of the article and its derivatives).

[64] Mary Amiti et al., *The Impact of the 2018 Tariffs on Prices and Welfare*, 33 J. ECON. PERSP. 4, 187 (2019).

[65] Panel Report, *United States—Tariff Measures on Certain Goods from China*, WTO Doc. WT/DS543/R (adopted Sept. 15, 2020); Panel Report, *United States—Certain Measures on Steel and Aluminium Products*, WTO Doc. WT/DS544/R (circulated Dec. 09, 2022); *see also* Panel Report, *United States—Origin Marking Requirement,* WTO Doc. WT/DS597/R (circulated Dec. 21, 2022).

binding 'trade deals'. Many actions, differently from this president's first term, were justified under the International Emergency Economic Powers Act (IEEPA) and the National Emergency Act (NEA). In February, tariffs of 25% on Mexican and Canadian imports and 10% on Chinese goods were imposed under the IEEPA, citing drug trafficking as a national security threat.[66] Shortly afterwards, the administration, similar to Trump's first term, reinstated 25% global tariffs on steel[67] and aluminium[68] imports under Section 232 of the Trade Expansion Act, and later extended them to automobiles and parts.[69] On April 2, 2025, a universal 10% tariff was declared, with additional country-specific rates based on these countries' alleged trade surplus with the U.S.[70], though these were suspended for ninety days.[71] Escalating retaliation with China led to tariffs as high as 145% on U.S. goods and 125% on Chinese goods until a provisional deal was reached in May 2025 to reduce them to 30% and 10%, respectively.[72]

An apparent 'second stage' of the U.S. strategy to remake global trade took place in the second semester of 2025. This stage included a series of agreements whereby other states, setting aside their WTO obligations, commit to a variety of U.S. demands. These include agreeing to apply below-WTO tariffs to the U.S. (without presumably applying them to other parties), as well as agreeing to allow the U.S. to

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[66] Exec. Order No. 14,193, 90 Fed. Reg. 26,915 (Feb. 07, 2025); Exec. Order No. 14,194, 90 Fed. Reg. 26,915 (Feb. 07, 2025); Exec. Order No. 14,195, 90 Fed. Reg. 26,915 (Feb. 07, 2025) (two days after the imposition of the tariffs on Mexico and Canada, however, a provisional agreement was reached, and the tariffs were suspended); *see* Exec. Order No. 14,19, 90 Fed. Reg. 27,627 (Feb. 03, 2025).

[67] Proclamation No. 10896, 90 Fed. Reg. 7,631 (Feb. 10, 2025).

[68] Proclamation No. 10895, 90 Fed. Reg. 7,631 (Feb. 18, 2025).

[69] Proclamation No. 10908, 90 Fed. Reg.14,705(Mar. 26, 2025).

[70] Exec. Order No. 14,257, 90 Fed. Reg. 17,665 (Apr. 02, 2025) [hereinafter Exec. Order No. 14,257].

[71] Exec. Order No. 14,266, 90 Fed. Reg. 15,625 (Apr. 15, 2025).

[72] *Joint Statement on U.S.-China Economic and Trade Meeting in Geneva*, THE WHITE HOUSE: BRIEFINGS & STATEMENTS (May 12, 2025), https://www.whitehouse.gov/briefings-statements/2025/05/joint-statement-on-u-s-china-economic-and-trade-meeting-in-geneva/.

apply above-WTO tariffs to the other country's products;[73] and, in some cases, committing to emulate U.S. trade restrictions on third parties.[74]

A. The 2025 U.S. Measures Targeting Brazil

On April 02, 2025, the Trump administration announced what it termed new, extra-WTO 'reciprocal' tariffs on various countries. The basis for the calculation of the tariffs was the trade surplus that each country happened to have had with the U.S. over the previous few years.[75] Each country's surplus (exports to the U.S., minus U.S. imports) was divided by the country's imports from the U.S. If applying this formula resulted in a 1.32, the 0.32 was interpreted as the level of unfairness towards the U.S. in the relationship. Half of this level (16%) was imposed as 'reciprocal' tariffs. This number was then added to a 'baseline' extra-WTO tariff of 10%. The administration invoked, as the reason for these tariffs, U.S. national security.

Bilateral trade balances are not a relevant measure of protectionism. Switzerland, a highly open economy with zero percent tariffs on all industrial products, had significant exports to the U.S. owing to being a node in global gold trade. It was accordingly targeted with a 39% country-specific tariff, 29% above the new 'baseline' 10% tariff. By contrast, Brazil is relatively a highly protected economy that, owing principally to commodities and agricultural products, runs an overall trade surplus. However, because Brazil's surplus is primarily with Asia, Europe, and Latin America, it had a bilateral trade deficit with the U.S. As a result, Brazil was originally assigned the 'baseline' extra-WTO tariff of 10% and was spared any additional country-specific tariff rate.[76]

This changed on July 9, 2025. Donald Trump announced on his personal social media platform the adoption of a country-specific tariff rate of 40% for Brazil, reaching a total tariff rate of 50% on Brazilian goods.[77] The announcement came shortly after the seventeenth BRICS Summit in Brazil, which ended with a

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[73] *Joint Statement on a United States-European Union Framework on an Agreement on Reciprocal, Fair, and Balanced Trade* ¶¶1-2, THE WHITE HOUSE: BRIEFINGS & STATEMENTS (Aug. 21, 2025), https://www.whitehouse.gov/briefings-statements/2025/08/joint-statement-on-a-united-states-european-union-framework-on-an-agreement-on-reciprocal-fair-and-balanced-trade/.

[74] Agreement Between the United States of America and Malaysia on Reciprocal Trade, art. 5, U.S.-Mal. (Oct. 26, 2025); Agreement Between the United States of America and the Kingdom of Cambodia on Reciprocal Trade, art. 5, U.S.-Camb. (Oct. 26, 2025).

[75] Exec. Order No. 14,257, *supra* note 70.

[76] *Id.*

[77] Donald J. Trump (@realDonaldTrump), TRUTH SOCIAL (July 09, 2025), https://truthsocial.com/@realDonaldTrump/posts/114825119138468153 [hereinafter Donald J. Trump].

declaration by the participating countries' leaders emphasising the commitment to strengthening multilateralism while condemning 'the proliferation of trade-restrictive actions' and 'unilateral coercive measures'.[78]

The grounds to justify the measures on Brazil varied. The initial announcement made by Donald Trump began by referring to the judgement of former Brazilian president Jair Bolsonaro by the Supreme Court for an attempted *coup d'état*, which Donald Trump qualified as a "witchhunt".[79] It also mentioned "the fundamental Free Speech Right of Americans", a "very unfair trade relationship", and the need for "a Level Playing Field", while alluding to the possibility of a future "no Tariffs" arrangement in case "Brazil, or companies within your Country, decide to build or manufacture product[s] within the United States."[80]

Shortly afterwards, the Office of the U.S. Trade Representative announced a Section 301 investigation against Brazil for "unfair trade practices". The Press Release mentioned as such practices: moves to "censor political speech" on electronic platforms; "unfair practices with respect to electronic payment services", including policies advantaging Brazil's government-developed electronic payment services; 'preferential tariff rates to the exports of certain globally competitive trade partners" [under regional trade agreements]; "failure to enforce anti-corruption and transparency measures"; a denial of "adequate and effective protection and enforcement of intellectual property rights"; Brazil's tariff on U.S. ethanol exports; and even "illegal deforestation, thereby undermining the competitiveness of U.S. producers of timber and agricultural products."[81]

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[78] *See Rio de Janeiro Declaration: Strengthening Global South Cooperation for a More Inclusive and Sustainable Governance*, Rio de Janeiro, Brazil, (July 06, 2025), https://dirco.gov.za/wp-content/uploads/2025/07/2025.07.05.-BRICS-Leaders-Declaration.pdf; *see also* Shubham Kalia, *Trump says alignment with BRICS' 'anti-American policies' to invite additional 10% tariffs*, REUTERS (July 07, 2025), https://www.reuters.com/world/china/trump-says-alignment-with-brics-anti-american-policies-invite-additional-10-2025-07-07/ (the BRICS were originally four: Brazil, Russia, India, and China. Since 2011, six countries have joined: South Africa, Egypt, Ethiopia, Indonesia, Iran, and the United Arab Emirates).

[79] Donald J. Trump, *supra* note 77.

[80] *Id.*

[81] *USTR Announces Initiation of Section 301 Investigation of Brazil's Unfair Trading Practices*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE (July 15, 2025), https://ustr.gov/about/policy-offices/press-office/press-releases/2025/july/ustr-announces-initiation-section-301-investigation-brazils-unfair-trading-practices; *see also* Initiation of Section 301 Investigation: Brazil's Acts, Policies, and Practices Related to Digital Trade and Electronic Payment Services; Unfair, Preferential Tariffs; Anti-Corruption Enforcement; Intellectual Property Protection; Ethanol Market Access; and Illegal Deforestation; Hearing; and Request for Public Comments, 90 Fed. Reg. 34, 069 (July 18,

Later that month, a Presidential Executive Order implemented tariffs on Brazil, formally to address threats to the United States by the Government of Brazil.[82] The same day, the U.S. Treasury sanctioned a Brazilian Supreme Court Justice, preventing engagement by American companies with him or his family. Besides claiming that this Justice was engaging in "an oppressive campaign of censorship, arbitrary detentions that violate human rights, and politicized prosecutions", the announcement stated U.S. resolve to act against "those who threaten U.S. interests and the freedoms of our citizens." Besides blocking property of the sanctioned Justice in the U.S. (which he did not have), the announcements stated, more vaguely, that "financial institutions and other persons may risk exposure to sanctions for engaging in certain transactions or activities involving designated or otherwise blocked persons."[83]

The letters announcing the 2025 U.S. tariffs featured a statement asserting that any reciprocal increase in tariffs would lead the U.S. to raise its original extra-WTO tariffs towards that country by the same amount as their retaliatory tariffs. Only Canada and China retaliated.[84] Most economies faced with new tariffs avoided retaliation and sought to negotiate a reduction to their new tariff rates.[85]

2025), https://www.federalregister.gov/documents/2025/07/18/2025-13498/initiation-of-section-301-investigation-brazils-acts-policies-and-practices-related-to-digital-trade.

[82] Exec. Order No. 14,323, 90 Fed. Reg. 37,739 (July 30, 2025), https://www.federalregister.gov/documents/2025/08/05/2025-14896/addressing-threats-to-the-united-states-by-the-government-of-brazil [hereinafter Exec. Order No. 14,323].

[83] *Treasury Sanctions Alexandre de Moraes*, Off. of Foreign Assets Control: Press Releases (July 30, 2025), https://home.treasury.gov/news/press-releases/sb0211.

[84] *Canada announces robust tariff package in response to unjustified U.S. tariffs*, DEP'T. OF FIN., GOV'T. OF CAN. (Mar. 04, 2025), https://www.canada.ca/en/department-finance/news/2025/03/canada-announces-robust-tariff-package-in-response-to-unjustified-us-tariffs.html; *see also* Katja Drinhausen & Helena Legarda, *China's Anti-Foreign Sanctions Law: A warning to the world, Merics*, MERCATOR INST. FOR CHINA STUD. (June 24, 2021), https://merics.org/en/comment/chinas-anti-foreign-sanctions-law-warning-world; Law of the People's Republic of China on Countering Foreign Sanctions, STANDING COMM. NAT'L. PEOPLE'S CONG., art. 1–15 (adopted June 10, 2021) (the EU adopted a reviewed framework allowing retaliation in spite of the existence of a final decision from the WTO DSB, but the designed measures were never indeed enforced, given the negotiation of a framework agreement with the US); *see* Commission Implementing Regulation (EU) 2025/1564 of 24 July 2025 on commercial rebalancing measures concerning certain products originating in the United States of America and certain products exported from the Union to the United States of America, and repealing Implementing Regulations (EU) 2018/724, (EU) 2018/886, (EU) 2020/502 and (EU) 2025/778 (2025), O.J. (L 1564) 1, C/2025/5314.

[85] *US sets new 19 % tariff on Thai goods*, THAILAND'S PUB. RELS. DEP'T. (Aug. 01, 2025), https://thailand.prd.go.th/en/content/category/detail/id/2078/iid/411229; *see also Fact*

Brazil did not retaliate, despite being targeted with a 50% additional tariff on, at least as per the initial social media announcement, all its exports to the U.S.[86] This was the highest rate applied to countries other than China. Only India was (subsequently) targeted with the same amount, on the grounds that it purchased particularly large amounts of Russian oil.[87] Instead, Brazil adopted what can be seen as an intermediate position: updating its legal framework designed to address unilateral trade measures, enhancing its capacity to retaliate to protect its sovereign interests, and negotiating not by seeking accommodation and offering the U.S. and its President favours but by testing U.S. resolve and exploring alternative markets.

Brazil's strategic determination to not abide ultimately led to the withdrawal of the additional 40% tariff for many critical domestic exporting sectors (as well as, eventually, the financial sanctions against the Brazilian Justice), without having to make any direct concessions to the U.S. administration.[88] While a binding, long-lasting trade agreement was not reached — and perhaps could not be reached without making unacceptable statements and commitments — Brazil achieved the finest 'deal' in comparison to the other economies that, to have their tariff rates reduced, acquiesced to Trump's framing and demands.[89] By November 20, 2025, all additional tariffs had been removed on 36% of Brazil's exports to the U.S., and for another 15% only the 'baseline' 10% tariffs were applied. For 27% of exports, the global 25% tariffs on steel, aluminium and cars continued to apply, and 22% of

Sheet: The United States and Indonesia Reach Historic Trade Deal, WHITE HOUSE (July 22, 2025), https://www.whitehouse.gov/fact-sheets/2025/07/fact-sheet-the-united-states-and-indonesia-reach-historic-trade-deal/; *PBBM: Reduction to 19% US tariff rate on PH exports after negotiations 'significant*, PRESIDENTIAL COMMC'NS. OFF. (July 23, 2025), https://pco.gov.ph/news_releases/pbbm-reduction-to-19-us-tariff-rate-on-ph-exports-after-negotiations-significant/; Nicholas Chapman, *Vietnam's bamboo diplomacy bends under US trade pressure*, E. ASIA F., (Sept. 02, 2025), https://www.eastasiaforum.org/2025/09/02/vietnams-bamboo-diplomacy-bends-under-us-trade-pressure/.

[86] The 30 July Executive Order implementing the tariffs already featured various exceptions, so that many products continued to pay the new 'baseline' 10% tariff rate. The list was subsequently expanded.

[87] Exec. Order 14,329, 90 Fed. Reg. 38,701 (Aug. 06, 2025) [hereinafter Exec. Order 14,329] (addressing threats to the United States by the Government of the Russian Federation).

[88] Exec. Order 14,361, 90 Fed. Reg. 54,467 (Nov. 20, 2025).

[89] *E.g. Joint Statement on a United States-European Union Framework on an Agreement on Reciprocal, Fair, and Balanced Trade, U.S.-E.U.* (Aug. 21, 2025); Exec. Order No. 14,345, 90 Fed. Reg., Implementing the United States-Japan Agreement, (Sept. 04, 2025).

exports still faced either 40% or 50% tariffs (some global exemptions from the 10% tariffs were given to products that remain subject to the 40% tariffs).[90]

Finally, this entire roster of U.S. extra-WTO tariffs was cancelled when, in February 2026, the U.S. Supreme Court declared the procedural instrument used (the IEEPA) inadequate for the purpose of instituting tariffs.[91] The President responded by instituting a flat 10% tariff on all countries, affecting all products except those in the already extensive exceptions lists.[92] Compared to those WTO members that, with the aim of placating the U.S. President, rushed to agree to extensive lists of commitments to favour U.S. products and companies, or to adopt certain conducts in various areas, and that in exchange obtained as a 'concession' U.S. commitments to reduce the original IEEPA tariff levels of 10%, 15% or 18%, Brazil's strategy, of not moving to make concessions and instead preparing but not applying retaliation, appears to have fully paid off.

B. R*etaliating under a Damage Regime: Brazil's Revised WTO Retaliation Law*

During the Appellate Body era, Brazil's regime for trade retaliation was intrinsically connected to multilateral dispute settlement. As a matter of domestic law, express trade retaliation could only be adopted following an authorisation by the WTO DSB. Once the Appellate Body's inoperation seemed permanent, Brazil enacted a new retaliation regime — a 'Revised WTO Retaliation Law'[93] — under which domestic authorities could apply economic retaliatory measures even when a final decision had not been issued by the DSB in a dispute involving Brazil.

Under the Revised WTO Retaliation Law, the Brazilian Chamber of Foreign Trade is entitled to decide on the suspension of concessions or other obligations adopted by Brazil. This decision may derive from the authorisation by the WTO DSB, as per the previous law. But, under the Revised Law, the committee may adopt these measures without WTO authorisation, provided that four conditions are fulfilled:

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[90] Ministry of Development, Industry, Trade and Services, *Nota do MDIC sobre a Ordem Executiva dos Estados Unidos publicada no dia 20 de novembro de 2025*, 21/11/2025, https://www.gov.br/mdic/pt-br/assuntos/noticias/2025/novembro/nota-do-mdic-sobre-a-ordem-executiva-dos-estados-unidos-publicada-no-dia-20-de-novembro-de-2025.

[91] U.S. Supreme Court, *Learning Resources, Inc. v. Trump,* 607 U.S. (Feb. 20, 2026).

[92] Kathleen Claussen, *What Just Happened: Tariffs Are Gone and Then Back Again*, JUST SEC. (Feb. 23, 2026), https://www.justsecurity.org/132269/what-just-happened-tariffs-are-gone-and-then-back-again/.

[93] Lei nº 14.353, de 26 de maio de 2022, Dispõe sobre procedimentos de suspensão de concessões ou de outras obrigações na hipótese de descumprimento de obrigações multilaterais por membro da Organização Mundial do Comércio (OMC); e altera a Lei nº 12.270, de 24 de junho de 2010., D.O.U., 30 December. 2022. Lei nº 14.353, de 26 de maio de 2022, D.O.U. de 30.12.2022 (Braz.).

(i) a WTO panel report confirms, in whole or in part, the allegations presented by Brazil as the complaining party; (ii) there is an appeal by the WTO member, as the respondent; (iii) the appeal cannot be heard by the Appellate Body or the report cannot be approved by the WTO DSB; and (iv) sixty days elapse after Brazil notifies the respondent WTO member of its intention to suspend concessions or other obligations. The Revised WTO Retaliation law also incorporates the proportionality requirement, stating that "the suspension of concessions or other obligations shall not be greater than the nullification or the harm caused to the country's trade benefits by the said WTO member."[94]

Under Brazil's Revised WTO Retaliation Law, therefore, the Executive Committee does not need to wait for a final authorisation by the DSB, considering its possible paralysis owing to an appeal 'into the void'. The Executive Committee is authorised to proportionally retaliate against the other disputing party, including by suspending IPRs. The instrument further provides that, in the event that the Appellate Body re-establishes its activities and modifies the recommendations issued by the Panel (or the DSB revokes its authorisation), the retaliatory measures shall be withdrawn.[95]

C. Retaliating Outside the WTO Framework: The Economic Reciprocity Law

The next element in Brazil's strengthening of its retaliation arsenal was not triggered by a U.S. action. Following the EU's adoption of regulatory measures with extraterritorial effects, with the potential to harm trade relations with Brazil and impair the conclusion of the EU-Mercosur Agreement, in 2023, a Brazilian Member of Congress proposed a new instrument authorising the adoption of trade measures as a response to unilateral trade-related measures harming Brazilian trade. Initially, the proposed bill would require countries exporting to Brazil to comply with Brazilian environmental protection legislation — a kind of 'mirror legislation' emulating some aspects of the (then draft) EU Deforestation Regulation.[96] The bill was labelled a reaction to the "imposition of non-tariff barriers to trade with Brazil related to environmental rules". It originally aimed at establishing a form of 'extraterritorial reciprocity' in Brazil's trade policy *vis-à-vis* trade partners — essentially, the EU — that were perceived to be regulating extraterritorially.[97]

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[94] *Id.*, art. 4.
[95] *Id.*
[96] Projeto de Lei No. 2,088/2023, Acrescenta o art. 12-A à Lei nº 12.187, de 29 de dezembro de 2009, que institui a Política Nacional sobre Mudança do Clima, para tornar obrigatório o cumprimento de padrões ambientais compatíveis aos do Brasil, para a disponibilização de bens no mercado brasileiro, D.S.F. 26 April 2022. Projeto de Lei nº 2.088, de 2023, D.O.U. de 26.4.2023 (Braz.).
[97] *Id.,* at 2.

Debates on the proposed instrument took a new turn after the election of Donald Trump and his adoption of worldwide unilateral tariffs. Shortly after his April 2 announcement, the Brazilian Congress approved by unanimity an 'Economic Reciprocity Law'.[98] This law shifted the framing of the original bill, providing instead "criteria for the suspension of trade concessions, investment concessions, and obligations relating to intellectual property rights … in response to unilateral actions, policies, or practices of a country or economic bloc that negatively affect Brazil's international competitiveness."[99]

Article 2 sets out the conditions for the applicability of the law. The Economic Reciprocity Law applies wherever a country or an economic bloc adopts actions, policies or practices that: (i) interfere with Brazil's sovereign choices, seeking to prevent or obtain the cessation, modification, or adoption of a specific act or practices in Brazil, through the application or threat of application of unilateral trade, financial, or investment measures; (ii) violate or are inconsistent with the provisions of trade agreements or otherwise deny, nullify, or impair benefits to Brazil under any trade agreement; (iii) constitute unilateral measures based on environmental requirements that are more burdensome than the parameters, rules, and environmental protection standards adopted by Brazil.[100]

The items seem to apply alternatively rather than cumulatively. Item (i) refers to actions similar to what the EU has termed 'economic coercion' in its 2023 Anti-Coercion Instrument.[101] Item (ii) refers to permissible trade retaliation, including not only authorised retaliation under WTO law but also permitted retaliation for the violation of any trade agreements. Item (iii) refers to the original objective of the bill, that is, responses to unilaterally established environmental requirements. The latter item refers solely to environmental standards and does not include human rights or labour standards more onerous than those adopted in Brazil. To find a violation under item (iii), the respective capabilities of the adopting country or

[98] Lei nº 15.122, de 11 de abril de 2025, Estabelece critérios para suspensão de concessões comerciais, de investimentos e de obrigações relativas a direitos de propriedade intelectual em resposta a medidas unilaterais adotadas por país ou bloco econômico que impactem negativamente a competitividade internacional brasileira; e dá outras providências, D.O.U. 14 April 2025. Lei nº 15.122, de 11 de abril de 2025, D.O.U. de 14.4.2025 (Braz.).

[99] *Id.,* art. 1.

[100] *Id.*, art. 2.

[101] Regulation (EU) 2023/2675 of the European Parliament and of the Council of Nov. 22, 2023, on the protection of the Union and its Member States from Economic Coercion by third countries, 2023 O.J. (L 305) 1.

economic bloc must be considered, as pursuant to the Paris Agreement.[102] The assessment should also consider the environmental standards adopted in Brazil.[103]

Article 3 lists the 'countermeasures' available under the Economic Reciprocity Law. These include, individually or cumulatively: (i) the imposition of customs duties on imports of goods or services; (ii) the suspension of intellectual property rights;[104] and (iii) other measures suspending concessions or other obligations established in any trade agreements to which Brazil is a party. It also establishes some limitations for the use of these instruments. Retaliatory measures must be proportional to the economic harm caused by the violating country. They must seek to minimise the impact on economic activity and avoid disproportionate administrative costs. In addition, the adoption of these measures is to be constantly followed by diplomatic consultations and periodically monitored. Finally, under this law's Article 6, the Executive branch may adopt provisional countermeasures during the procedure to determine countermeasures.

Following the announcement of 40% country-specific tariffs on Brazil on July 30, 2025,[105] Brazil's President enacted a decree regulating the operation of the Economic Reciprocity Law (the 'Regulating Decree'). The Regulating Decree establishes the procedure to be followed to activate the Economic Reciprocity Law.[106] It sets out an implementing authority (the Interministerial Committee for Negotiation and Economic and Trade Countermeasures), both to consider provisional countermeasures and to keep under surveillance post-establishment negotiations.[107] Subsequently, the adoption of 'ordinary' countermeasures would still be determined by the organ regularly responsible for administering trade measures — the International Trade Chamber.

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[102] Presumably, this incorporates the Common 'but' Differentiated Responsibilities and Respective Capabilities (CBDR-RC) principle into the Economic Reciprocity Law.

[103] Specific mention is made of the nationally determined contributions adopted under the Paris Agreement, as well as of the specificities of Brazil's productive system, including its reliance on a high rate of renewable energy in its energy matrix.

[104] Pursuant to Article 5, Sole Paragraph, the suspension of intellectual property rights must be applied 'exceptionally', when other countermeasures are "inadequate to reverse the acts, policies or practices" targeted by the law.

[105] Exec. Order No. 14,323, *supra* note 82.

[106] Decree No. 12,551/2025, of July 14, 2025, Regulating Law No. 15,122, of 11 April 2025, D.O.U. 14 July 2025, p. 2. Decreto nº 12.551, de 14 de julho de 2025, Diário Oficial da União [D.O.U.] de 14.7.2025, p. 2 (Braz.).

[107] The Interministerial Group includes members of the Ministry of Development and Industry, Trade and Services (MDIC); the Ministry for Foreign Relations; and the Ministry of Economy.

Both provisional and ordinary countermeasures may only be requested by a governmental representative: a member of the Interministerial Committee or the International Trade Chamber.[108] If an initial report finds that the conditions for the adoption of countermeasures are fulfilled, a working group may be established to discuss the adoption of countermeasures, to which private sector entities may be invited. The working group may propose countermeasures and must hold public consultations for thirty days, aiming to "obtain expressions by the interested parties, as well as by potentially affected trade partners."[109] Different ministries are tasked with assessing specific effects of proposed measures.[110] The decision to adopt countermeasures lies with the Trade Chamber's Strategic Counsel, which may adopt them or delay their adoption depending on the state of negotiations.[111]

In short, the Economic Reciprocity Law seeks to permit a targeted, proportionate, and calculated response to measures adopted by other countries or economic blocs that harm Brazil's international competitiveness. Following the 2023 Revised WTO Retaliation Law, Brazil no longer relied on the damaged WTO regime but was still required to obtain a condemnatory WTO panel report to ensure its objectives. After the 2025 Economic Reciprocity Law, Brazil went one step further: it is now empowered to adopt retaliatory measures without waiting for a WTO authorisation or other document, on the basis of its own understanding that an international trade agreement has been violated, harming Brazil's international competitiveness.

D. International Trade Law under the 2025 Tariffs: Between Retaliation and Renegotiation

After the U.S. tariffs imposed at the beginning of the second semester of 2025 on Brazilian products went into force, the Brazilian government adopted a multi-layered approach. At the multilateral level, Brazil requested consultations with the U.S. within the WTO DSB.[112] Bilaterally, Brazil has been laying down arguments

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[108] Regulating Decree, *supra* note 104, art. 4.

[109] *Id.,* art. 13.

[110] *Id.,* art. 6 (Art. 6: The Committee's Executive Secretariat shall share the request with the Ministry of Development, Industry, Trade, and Services, for: a) evaluation of the commercial and sectoral effects of the unilateral measures on the competitiveness of domestic productive sectors; and b) proposal, where appropriate, of provisional countermeasures to be adopted; II – the Ministry of Foreign Affairs, for: a) analysis of the effects of unilateral measures on diplomatic relations and possible violations of international commitments undertaken by Brazil; and b) proposal, where appropriate, of provisional countermeasures to be adopted; III – the Ministry of Finance, for: a) evaluation of the economic effects of the unilateral measures on the competitiveness of domestic productive sectors; and b) proposal, where appropriate, of provisional countermeasures to be adopted).

[111] *Id.,* art. 15.

[112] Request for Consultations, *United States—Tariff Measures on Goods from Brazil*, WT/DS640 (Aug. 05, 2025).

before the USTR.[113] These movements demonstrate Brazil's ongoing adherence to the principle that discussions on international trade should be taken to the international and, preferably, multilateral level.

Beyond the intergovernmental level, private actors in Brazil and in the U.S. played a significant role in obtaining a reduction in the scope of the July tariffs.[114] While, as announced, they were meant to affect all Brazilian goods exported to the U.S., when applied the tariffs only affected around 40% of these exports, sparing relevant sectors, such as orange juice, civil aircraft and parts, minerals, and fertilizers.[115] Further exemptions were given for products such as wood pulp, industrial chemical products, critical minerals, iron-nickel alloy and certain metals.[116] Subsequently, the 40% country-specific tariff was removed for 200 products, including key products such as coffee, beef, and fruits and fruit juices.

The approach adopted was similar to the approach adopted by Brazil in 2018, after the U.S. imposed additional tariffs on global imports of steel and aluminium, significantly hitting these industries in Brazil. Even though no formal agreement was signed, private sector requests, coupled with negotiations by the Ministry of Foreign Affairs, resulted in an alternative solution. For Brazilian steel, the 25% tariff was replaced with quotas for Brazil for various types of steel. By contrast, Brazil's aluminium producers preferred to endure the additional 10% tariffs rather than accept a quota.[117]

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[113] *Comentários Escritos do Brasil ao USTR no âmbito da Seção 301*, Nota à Imprensa No. 371 (Aug. 18, 2025), http://portal.stf.jus.br/processos/detalhe.asp?incidente=4943985.

[114] Mônica Scaramuzzo et al., *Brazilian firms lobby U.S. to ease tariffs imposed by Trump*, VALOR INT'L. (Sep. 26, 2025), https://valorinternational.globo.com/business/news/2025/09/26/brazilian-firms-lobby-us-to-ease-tariffs-imposed-by-trump.ghtml.

[115] Exec. Order No. 14,323, *supra* note 82.

[116] *Nem 10%: Casa Branca retira tarifa de importação sobre celulose brasileira*, INVESTNEWS (Sept. 10, 2025), https://investnews.com.br/negocios/nem-10-casa-branca-retira-tarifa-de-importacao-sobre-celulose-brasileira; *Mesmo com novas isenções, 73,8% das exportações brasileiras seguem sob tarifas dos EUA*, ASSOCIAÇÃO BRASILEIRA DOS PRODUTORES DE FLORESTAS PLANTADAS (July 23, 2025), https://www.asbrafe.com.br/post/mesmo-com-novas-isen%C3%A7%C3%B5es-73-8-das-exporta%C3%A7%C3%B5es-brasileiras-seguem-sob-tarifas-dos-eua.

[117] Press Release, *American restrictions on steel and aluminum exports – Press release from the Minister of Foreign Affairs and the Minister of Industry, Foreign Trade and Services*, Governo Federal: (June 28, 2018), https://www.gov.br/mre/en/contact-us/press-area/press-releases/american-restrictions-on-steel-and-aluminum-exports-press-release-from-the-minister-of-foreign-affairs-and-the-minister-of-industry-foreign-trade-and-services.

Brazil thus refused to join countries that rushed to seek preferential treatment.[118] In September, the Ministry of Foreign Affairs requested the International Trade Chamber to issue a report assessing the applicability of the Economic Reciprocity Law. This report, which faced lengthy delays,[119] may never see the light of day as negotiations taking place in parallel have already led to more satisfactory outcomes.

The preparation for the November withdrawal of much of the 405 tariffs involved political manoeuvring on both sides. In off-the-cuff remarks during his address to the United Nations General Assembly, the U.S. President suggested an openness to negotiations. Following that, the Brazilian and U.S. Presidents spoke over the phone before agreeing to an informal in-person meeting in Malaysia, which took place during the Summit of the Association of Southeast Asian Nations (ASEAN) on October 26, 2025. As explained above, a partial victory for Brazil was reached, as the 40% additional tariffs were withdrawn from a comprehensive list of products on November 20, 2025.

Despite the seemingly successful Brazilian strategy, the country's ideal outcome — a full withdrawal of the extra-WTO tariffs — seems unlikely during the Trump administration. In this setting, the post-Supreme Court ruling situation, in which Brazilian products receive the same treatment as those of countries that made significant concessions, is already a significant win. While a complete removal of the additional tariffs does not find many precedents in the Trump trade agenda, the present status quo may still be imperilled by political and geopolitical developments. These include Brazil's position as a strategic Latin American player, following the intervention of the U.S. in Venezuela; the signature of a trade agreement between Mercosur and the European Union that might threaten U.S. expectations to have decisive influence in the region;[120] or any other developments that the U.S. President decides warrant tariffs — in late 2025, for example, he posted on his personal social media platform an "Order", which never became a governmental document, stating

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[118] Rodrigo Viga Gaier & Lisandra Paraguassu, *Brazil set to talk tariffs with US on Thursday*, REUTERS (Oct. 15, 2025) https://www.reuters.com/business/brazil-us-hold-tariff-talks-thursday-says-lula-2025-10-15/.

[119] *Deliberation of the 4th Extraordinary Meeting of the do Executive Management Committee*, GECEX (Sep. 29, 2025), https://www.gov.br/mdic/pt-br/assuntos/camex/outros-documentos/deliberacoes/deliberacao-da-4a-reuniao-extraordinaria-do-comite-executivo-de-gestao-gecex (as of the date this paper was finalised, no report had been issued).

[120] Mariano Aguirre Ernst, *The 'Trump Corollary' in the US security strategy brings a new focus on Latin America – but it is a disordered plan*, CHATHAM HOUSE (Dec. 11, 2025) https://www.chathamhouse.org/2025/12/trump-corollary-us-security-strategy-brings-new-focus-latin-america-it-disordered-plan.

that 25% tariffs would apply to "any Country doing business with the Islamic Republic of Iran".[121]

E. Brazil's Reaction in Comparison to Other Emerging Economies

Given their limited economic bargaining power and resources to conduct diplomatic negotiations, developing and least-developed countries are left worse off, in comparison to wealthier countries, when seeking to address a trade dispute under a non-operational Appellate Body. In addition to political difficulties, engaging in a trade war would most likely result in significant economic losses. Cooperation, liberalisation, and diversification of trade partners thus appear as more beneficial options.[122] This notwithstanding, Brazil's Economic Reciprocity Law demonstrates the possibility of autonomous retaliation supported by a rules-based approach, going further than other economies targeted with high tariffs under the Trump II Administration.

The 'inaction' of other economies might stem from the specificities of their situation. Mexico's economy, in particular, has become umbilically connected to the U.S. market due to a combination of geography and the operation of NAFTA and then the USMCA, which has preserved (mostly) tariff-free trade among the U.S., Mexico, and Canada.[123] This results in 85% of Mexico's exports being sent to the U.S., contributing to approximately 27% of Mexico's Gross Domestic Product (GDP). By contrast, only 3.2% of Mexico's exports are destined for Canada.[124]

China, on the other hand, adopted the most forceful response, acting under its Anti-Foreign Sanctions Law (AFSL), which establishes the legal framework according to which the Chinese government may adopt countermeasures against a foreign state that violates Chinese interests and rights under international law.

The AFSL had its application recently regulated by the Provisions on Implementing the Anti-Foreign Sanctions Law, adopted on March 23, 2025 (Provisions). This instrument determines that countermeasures may be adopted when a foreign state (or any organisation or individual) commits, assists in, or supports any conduct that compromises China's sovereignty, security, or development interest. It does not

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[121] Hadriana Lowenkron, *Trump Vows 25% Tariff on Countries Doing Business With Iran*, BLOOMBERG (Jan. 12, 2026), https://www.bloomberg.com/news/articles/2026-01-12/trump-says-he-s-imposed-25-tariff-on-countries-linked-to-iran.

[122] Shantayanan Devarajan et al., *Trader's Dilemma: Developing Countries' Response to Trade Disputes* (World Bank Pol'y. Rsch., Working Paper No. 8640, 2018).

[123] United States-Mexico-Canada Agreement, Nov. 30, 2018 (entered into force 1 July 2020).

[124] *Mexico: Exports by Country*, TRADING ECONOMICS (Aug. 27, 2025), https://tradingeconomics.com/mexico/exports-by-country.

specify a meaning for 'sovereignty, security or development', leaving a large margin for governmental discretion.[125]

Under the AFSL, the countermeasures go beyond mere trade retaliation and include the seizure, detention and freezing of assets (including cash, bills, bank deposits, securities, fund shares, equity, IPRs and other property rights), the refusal to issue a visa, the denial of entry, the cancellation of visas, and deportations.[126] Moreover, the Provisions also include an innovative aspect — the right of action in Chinese courts for Chinese organisations and individuals against those who implement or assist in the implementation of unilateral discriminatory restrictions against China.

The AFSL and the regulating Provisions differ from the Brazilian strategies by not relying on a precisely calculated retaliation measure, instead expanding the powers of Chinese authorities to target foreign entities and individuals in various manners. Notwithstanding these differences, the two legal frameworks share the same pattern — the absence of a reference to any international law instruments, and more specifically, to WTO law.

In conjunction with the AFSL, China has also established a legal framework for its export control, especially directed to its exports of rare earth minerals. The Export Control Law, adopted in 2020 by the end of Trump I, establishes an export control regime for dual-use items, military products, nuclear items, and other goods, technologies, and services seen as important to the maintenance of national security and interests (although these terms are also not defined).[127] Earlier in September 2020, China had adopted the Unreliable Entities List Provisions, targeting foreign entities that may "endanger China's national sovereignty, security, or development interests" or that violate "normal market transactions principles", interrupt "normal transactions with Chinese enterprises" or which take "discriminatory measures against Chinese enterprises, organizations or individuals."

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[125] Bård Breda Bjerken & Sherry Qiu, *China Enhances Sanctions Countermeasures Amidst Escalating Trade Tensions*, WIKBORG REIN (June 04, 2025), https://www.wr.no/en/news/china-enhances-sanctions-countermeasures-amidst-escalating-trade-tensions.

[126] Provisions Implementing the Anti-Foreign Sanctions Law of the People's Republic of China, State Council of the People's Republic of China (2025), https://english.www.gov.cn/policies/latestreleases/202505/01/content_WS6812f7c8c6d0868f4e8f1a5.html.

[127] Export Control Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l. People's Cong., Oct. 17, 2020, effective Dec. 1, 2020), http://www.npc.gov.cn/npc/c30834/202010/7e0f9f7a9d9f4a1f8b5f6c5e5f6c5e5f.shtml.

The Unreliable Entities List Provisions, though not providing for a definition of 'national sovereignty, security, or development interests', makes reference to the application of 'internationally accepted economic and trade rules'[128], while directly opposing 'unilateralism and protectionism' and upholding 'the multilateral trading system'.[129] The Provisions, nevertheless, do not define how the risk to China's interests caused by foreign entities, organisations, or individuals may be ascertained or measured.

As for India, after being subject to a 25% tariff by the U.S., which escalated to a total of 50% in the beginning of August, amidst criticism regarding India's purchase of Russian oil,[130] the country decided to avoid retaliation and now seeks further negotiations with the U.S., aiming at achieving a final agreement.[131]

This less combative approach may stem from the fact that a large portion of India's exports are destined for the U.S., reaching 20% of its total exports. By simply retaliating against the U.S., India would face not only an increase in prices internally, but also risk counter-retaliation and the possible dismantling of certain relevant sectors of its productive system, which are highly dependent on exports to the U.S.[132]

Brazil finds itself in a different position when it comes to the trade relationship with the U.S., leaving it with a greater margin to bargain. First, differently from China, India, or Mexico, for over ten years Brazil has had a trade deficit with the U.S., importing more in goods than it exports to that country.[133] Besides this, the U.S. comes third in the list of destinations of Brazilian exports, far behind China and the EU.[134] Nor are Brazil's imports concentrated in the U.S.; here, too, China and the

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[128] Provisions on the Unreliable Entity List art. 7(3) (promulgated by Ministry of Commerce, Sept. 19, 2020).
[129] *Id.,* art. 3.
[130] Exec. Order 14,329, *supra* note 87.
[131] Dhirendra Kumar & Puja Mehra, *India, US trade deal likely soon, huge tariff cuts on the horizon*, MINT (Oct. 22, 2025), https://www.livemint.com/economy/india-us-trade-deal-likely-soon-huge-tariff-cuts-on-the-horizon-11761046733288.html.
[132] *See* Kenneth I. Juster, *Will Trump's India Tariffs Affect a Critical U.S. Partnership?* COUNCIL ON FOREIGN RELATIONS (Aug. 18, 2025), https://www.cfr.org/article/will-trumps-india-tariffs-affect-critical-us-partnership (the most dependent sectors include textiles, gems and jewellery, and auto parts).
[133] *Brazil / United States: Bilateral Trade Profile,* OBSERVATORY ECON. COMPLEXITY (Aug. 27, 2025), https://oec.world/en/profile/bilateral-country/bra/partner/usa.
[134] *Exports by Country,* TRADING ECONOMICS, BRAZIL (Aug. 27, 2025), https://tradingeconomics.com/brazil/exports-by-country.

EU are its biggest partners.[135] The imposition of retaliatory measures on the U.S., at first glance, would thus not seem so harmful to Brazil's economy. Finally, in the past few years, Brazil has engaged with different trade partners while seeking to establish new allies through the discussions in the BRICS grouping and the now likely implementation of the EU-Mercosur Agreement,[136] signed in January 2026.[137]

Yet, even though Brazil has equipped itself for further, more elaborate, and structured actions against unilateral measures adopted in violation of multilaterally agreed rules for international trade, not much has been done to effectively apply these instruments. In fact, just like the other key U.S. trade partners, Brazil has resisted applying retaliatory tariffs and has opted for domestic measures focused on supporting the sectors harmed by the tariffs. Following the removal of a large part of the extra-WTO tariffs, Brazil sought an agreement to eliminate them — possibly involving a broader bargain, including facilitating U.S. investments to extract and process Brazil's rare earths.[138] Should the U.S. Executive find an alternative path to IEEPA to institute high tariffs, as it has vowed to do, Brazil is likely to continue to suggest an agreement instead.

V. CONCLUDING REMARKS

The adoption of the Economic Reciprocity Law and of its Regulating Decree marked a significant shift in Brazil's legal framework governing responses to trade-restrictive measures by other countries. The new legislation does not require a pending dispute in the WTO or even to a request for consultations. By adopting these instruments, Brazil, having relied for years on the WTO dispute system, detaches the country's responses from the international trade law framework, establishing a wholly autonomous response mechanism, based solely on domestic decisions to act in order to protect its international competitiveness. Although not directly applying WTO rules to legitimise the adoption of retaliatory measures, the new framework retains a degree of predictability in its application.

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[135] *ComexVis – COMEXSTAT*, MINISTÉRIO DA INDÚSTRIA, COMÉRCIO EXTERIOR E SERVIÇOS (Aug. 27, 2025) https://comexstat.mdic.gov.br/pt/comex-vis.

[136] Till Schöfer, *From Developing Country Leader to Flexible Negotiator: New Directions in Brazilian Trade Strategy*, 22 WORLD TRADE REV. 5, 629 (2023).

[137] *EU-Mercosur: Council greenlights signature of the comprehensive partnership and trade agreement*, Council of the EU (Jan. 09, 2025), https://www.consilium.europa.eu/en/press/press-releases/2026/01/09/eu-mercosur-council-greenlights-signature-of-the-comprehensive-partnership-and-trade-agreement/.

[138] Michael Pooler, Camilla Hodgson and Michael Stott, *Brazil and US eye rare earths deal*, Financial Times (Jan. 18, 2026).

The response — including establishing the legal instrument of response, as well as not deploying it — succeeded in achieving a comparatively positive outcome with the U.S., avoiding adherence to the current administration's agenda for its trade relations. Though making predictions for its future actions would be foolhardy given the record so far, we can speculate that the decision-makers will continue to favour diplomatic solutions, using as leverage not so much the entitlement to retaliate as the additional costs that imposing tariffs on Brazil's key exports — beef, coffee, fruits, tropical products, aircraft and minerals — produces for the U.S. economy, its industry, and its consumers.

Non-use notwithstanding, the adoption of instruments such as the Economic Reciprocity Law, alongside comparable measures adopted by the EU and China, reflects and reinforces a broader environment of disengagement from multilateral institutions, owing to mistrust in their ability to credibly assist in addressing the new reality of trade disputes.[139] The outcome is a fragmented 'system', marked by decentralised responses, determined autonomously by each state or bloc, rather than operating under a common, independent declaration of violation, or collective determination of a proportionate response. Besides its effects on states, the new framework confronts economic actors with a dispersed array of domestic regimes, functioning simultaneously, independently, and closely tied to shifting political contexts.

[139] Mona Paulsen*, The Past, Present, and Potential of Economic Security*, 50 YALE J. INT'L. L. 222 (2025).