

## **ABSTRACT**

Contrary to the impression that many writers and media outlets have promulgated over the last few years Brazil and China are not providing each other with preferential treatment to the detriment of other nations. Historically the two countries had often seen themselves as partners linked by common desires for economic development and world political recognition. In truth theirs is as nuanced as the relations between any two states. It is necessary to examine their past and more recent trade and investment relations to understand China and Brazil's present positioning and possible future dealings. This examination must be thorough and take into account not only the promises between the countries but also whether such promises are realized. As well it must consider trade barriers and legal issues that affect each country's ability to accomplish trade and investment goals. A deeper look can develop understanding of trade between these two countries and in fact all countries in the contentious world market.

## I.

On June 12, 2007 Brazil announced it would begin applying new tariffs on imported clothing goods, including pants and textiles. The increase raised tariffs of 20% to 35% and Brazil had one mark in mind for the move: China. Contrary to the impression that both governments and many media outlets have promulgated over the last few years, this move was yet one of many measures taken by Brazil in attempt to control an influx of Chinese products. Historically the two countries had often seen themselves as partners linked by common desires for economic development and world political recognition. The potential for the two countries to partner and increase individual and joint power has caused many to single them out as a threat to the developed nations of the world. This approach continues the paradigm of placing the developed nations against developing nations and nations in transition. It also ignores the truth that the reality of how Brazil and China interact is just as nuanced as the relations between any two nations.

This paper will examine the background of China and Brazil's trade and investment relations and highlight their more recent successes and challenges in this arena. It will also address some of the trade barriers and legal issues that affect each country's ability to accomplish trade and investment goals. Important historical and cultural bases that inform both the relations and difficulties these countries have will be considered. Too often these are given a perfunctory nod in analyzing trade and political relations; by doing so the risk that solutions will be inadequate or inappropriate rises. Further, all nations are grappling with challenges in successfully increasing trade and economic growth, as well as cross border understanding and compromise; a deeper examination of Brazil and China can function as a lesson for us all.

## II.

Brazil is a country of the ‘new world’ that began to be colonized in the 1500’s. It gained independence in 1822 and became a republic in 1889. At the time that Brazil was first seeing Europeans, China had had approximately thirty-five hundred years to develop an incredibly powerful country.<sup>1</sup> From the 1500’s to the time of Brazil’s independence, China’s Qing dynasty went through a period of expansion followed by one of increasing economic and social crisis.<sup>2</sup> China and Brazil first established official trade relations through the Commercial and Navigation Agreement of 1881, yet few other trade or diplomatic agreements between the two countries occurred until this agreement was reaffirmed in 1943.<sup>3</sup> In 1946 Chiang Kai-shek, then leader of the Republic of China, visited Rio de Janeiro; the two countries discussed many issues and signed a cultural covenant.<sup>4</sup> China was in the throes of political and social upheaval and with the establishment of the Peoples’ Republic of China in 1949 relations were again interrupted.<sup>5</sup> In 1961 then vice-president of Brazil, João Goulart, visited Beijing in an attempt to mend the broken ties; promising to support China’s entrance into the UN, proposing a permanent post in each country to represent commercial interests, and signing a bilateral economic agreement.<sup>6</sup> Goulart went on to be president of Brazil, but in 1964 a military coup completely re-aligned

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<sup>1</sup> David E. Mungello, *Great Encounter of China and the West*, 3, Rowan & Littlefield (1999).

<sup>2</sup> Philip Richardson, *Economic Change in China c.1800-1950*, 1, Cambridge University Press (1999).

<sup>3</sup> Leticia Pinheiro, *Restabelecimento de Relações Diplomáticas com a República Popular da China: uma análise do processo de tomada de decisão*, 6 *Estudos Históricos*, Rio de Janeiro 247, 250 (1993) [hereinafter *Pinheiro*]; *See also*, John Van Antwerp MacMurray, *Treaties and Agreements with and Concerning China, 1894-1919*, Oxford University Press, 1921 (Listing an Arbitration Convention between the two countries in 1909 and The Treaty of Peace between Allied and Associated Powers and Germany of 1919); *see also*, Ying-ching Ch’én, *Treaties and Agreements Between the Republic of China and other Powers*, Sino-American Pub. Service, 1957 (noting a now nullified treaty from 1933).

<sup>4</sup> Pinheiro, *supra* note 3, at 250.

<sup>5</sup> Henrique Altemanide Oliveira, *Brasil-China: trinta anos de uma parceria estratégica*, *Rev. Bras. Polít. Int.* 47 (1), 7, 11 (2004) [hereinafter *Oliveira*].

<sup>6</sup> Pinheiro, *supra* note 3, at 252.

Brazilian priorities. Africa became an area of primary interest and the military government focused on its relations with Hong Kong rather than Mainland China.<sup>7</sup>

By 1971 there were movements toward reconciliation, many initiated by interested business leaders.<sup>8</sup> Both countries were growing economically and saw themselves as potential players in the changing world political stage. The countries shared many interests in common and many similar complaints of their treatment at the hands of the developed nations that directed not only international organizations such as the UN, but also used their economic power too often to the detriment of undeveloped nations. China began to back away from its expressed desire to bring the revolution to the countries of Latin America and in February of 1974 Chairman Mao Zedong forwarded his “three world theory”, which served as an ideological unification of China with Africa, Latin America, and excepting Japan, the rest of Asia as well. In contrast to this group of “third world” nations Mao placed the United States and the Soviet Union in the first world; and Japan, Europe and Canada as belonging to the second world.<sup>9</sup> In April 1974 China’s Deng Xiaoping stood before the UN 6<sup>th</sup> Special Session and China officially aligned itself with Latin America as part of the Third World.<sup>10</sup> Soon after in August of 1974 Brazil and China re-established diplomatic ties<sup>11</sup> and Brazil officially recognized China’s claim to both Hong Kong and Taiwan.<sup>12</sup>

These times were tumultuous for both countries, however, as the military dictatorship still held control in Brazil and the Cultural Revolution was occurring in China. As a result there was

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<sup>7</sup> Id.; Oliveira, *supra* note 5, at 11.

<sup>8</sup> Pinheiro, *supra* note 3, at 253-54.

<sup>9</sup> Ministry of Foreign Affairs of the People’s Republic of China, Chairman Mao Zedong’s Theory on the Division of the Three World and the Strategy of Forming an Alliance Against an opponent, Nov.17, 2000, <http://www.fmprc.gov.cn/eng/ziliao/3602/3604/t18008.htm> (last visited Nov. 18, 2007).

<sup>10</sup> Id.

<sup>11</sup> Oliveira, *supra* note 5, at 12.

<sup>12</sup> Pinheiro, *supra* note 3, at 263.

little real economic partnership or even diplomatic exchange. In 1985 President, General João Figueiredo, visited China, but Brazil's government radically shifted again when Brazil's peaceful movement to a civil government succeeded in March of that year. Over the next five years a handful of official state visits were made by the leaders of each country to visit the other, which did result in some agreements such as the China-Brazil Earth Resources Satellite Program in 1988,<sup>13</sup> as well as other diplomatic discussions.<sup>14</sup> However, it was only in 1993 that Brazilian President Itamar Franco prioritized developing economic and political ties with Asia.<sup>15</sup> That year Vice-Premier Zhu Rongji and President Jiang Zemin visited Brazil to discuss the creation of a "strategic partnership".<sup>16</sup>

The next few years would see increasing trade between the two countries, as well as between Brazil and other Asian countries. China and Brazil saw the payoff of their joint scientific efforts in the launching of its first satellite with China. Then came the unexpected Asian economic crisis of 1999. Asian markets were thrown into chaos, greatly affecting Brazil's ability to export goods to these countries, while it saw its imports from those same countries remain stable.<sup>17</sup> At the same time Brazil was attempting to further its ties with all of Asia and to establish itself as a player in international circles. 1999 saw the creation of FEALAC, the Forum for East Asia – Latin American Cooperation, which was envisioned as a means for both regions to work together to forward their collective agendas in a world forum often dominated by the US

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<sup>13</sup> *Brazil, China to launch satellite to monitor Earth*, Asian Economic News, April 10, 2000, available at [http://findarticles.com/p/articles/mi\\_m0WDP/is\\_2000\\_April\\_10/ai\\_61859722](http://findarticles.com/p/articles/mi_m0WDP/is_2000_April_10/ai_61859722).

<sup>14</sup> One of these visits produced a notable quote from then President of Brazil, José Sarney, in 1988: "The similarity in our [China and Brazil's] way of thinking is demonstrated by the similarity of our votes in international forums. Of the questions in debate 95% of the time they are seen from the same perspective by our countries." Severino Cabral from the Brazilian Ministry of Foreign Affairs, *Brasil e China – aliança e cooperação para o novo milênio (1999)*, available at <http://www2.mre.gov.br/ipri/Papers/China/3%20-%20Severino%20Cabral.op.doc>.

<sup>15</sup> Oliveira, *supra* note 5, at 14.

<sup>16</sup> Pronouncement of Chinese Ambassador to Brazil, Chen Duqing, *Parceria Estratégica entre a China e o Brasil* (May, 14, 2007) <http://www.embchina.org.br/por/szxw/t319567.htm> (last visited Nov. 18, 2007).

<sup>17</sup> Oliveira, *supra* note 5, at 15.

and Europe.<sup>18</sup> Brazil's description of the mission of the organization reflects Brazil's present diplomatic approach to China as well as the other member states:

FEALAC is based on the principles of respect for each other's sovereignty and territorial integrity; non-interference in each other's internal affairs; equality, mutual benefit, and the common goal of development; respect and understanding for each other's unique culture and way of life; and decision-making by consensus.<sup>19</sup>

Such diplomatic emphasis upon respect for sovereignty and non-interference with internal affairs, at stark contrast with the approach of many western countries, allowed Brazil to realign itself on the issue of Taiwan's sovereignty in 1974. Such desire for mutual benefit saw increased trade levels surge between the two countries. From 2000 to 2003 trade between the two countries rose from USD 2.3 to USD 8 billion; putting China right behind the US in trade with Brazil.<sup>20</sup> By 2005 trade would rise to USD 12.18 billion.<sup>21</sup> Chinese imports increased to USD 5.35 billion by 2005 with Brazilian exports to China hitting USD 6.83 billion that year.<sup>22</sup> China became the third largest market for Brazilian imports behind the US and Argentina.<sup>23</sup>

It was in the midst of this growth that Brazil's Foreign Minister Celso Amorim came to Beijing in 2004, stating that: "Brazil does not deem China to be a strategic threat to Latin America, on the contrary, China is a strategic partner of Latin America as well as a strategic opportunity for the development of this continent. This point has been fully borne out by the rapid growth of our bilateral trade volume."<sup>24</sup> The trade increases, statements such as this, and the apparent ever growing diplomatic partnership began to present the two countries as having an

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<sup>18</sup> The original 27 member countries were: Argentina, Australia, Bolivia, Brazil, Brunei Darussalam, Burma (Myanmar), Cambodia, Chile, China, Colombia, Ecuador, Indonesia, Japan, Korea, Laos, Malaysia, Mexico, New Zealand, Panama, Paraguay, Peru, Philippines, Singapore, Thailand, Uruguay, Venezuela and Vietnam. It has come to include 6 more: Costa Rica, Cuba, El Salvador, Guatemala, Nicaragua, and the Dominican Republic.

<sup>19</sup> Brazilian Ministry of Foreign Affairs, <http://www.focalal.mre.gov.br/focalal-en> (last visited Nov. 17, 2007).

<sup>20</sup> Id.

<sup>21</sup> Government National Radio site, Radiobras, *Na década de 70, negócios com a China não chegaram a USD 20 milhões por ano* (March 24, 2006), available at <http://www.radiobras.gov.br/materia.phtml?materia=259946&q=1>.

<sup>22</sup> Id.

<sup>23</sup> Id.

<sup>24</sup> *Cooperate in seeking development: Interview*, People's Daily Online (March 28, 2004), available at [http://english.peopledaily.com.cn/200403/28/eng20040328\\_138723.shtml](http://english.peopledaily.com.cn/200403/28/eng20040328_138723.shtml).

unprecedented level of cooperation. The President of Brazil, Luiz Inacio (Lula) da Silva and Chinese President, Hu Jintao met in both China and Brazil in 2004, to much fanfare.<sup>25</sup> Brazil was to recognize China as a “market economy”, which would mean Brazil would waive its right to impose antidumping<sup>26</sup> measures upon Chinese goods.<sup>27</sup> For his part, President Hu, promised massive infrastructure investments totaling USD 10 billion for Brazil.<sup>28</sup> The broad designs of bringing the countries together and pooling their resources seemed to be working.

Under the rules of the WTO all textile import quotas were to be phased out gradually and in 2005 this system of quotas that countries had used to limit imports ended. Brazil was overwhelmed with Chinese textile imports. That was also the same year Argentina saw its imports from China rise 70% while its exports to China rose only 22%. Argentina’s reaction to this imbalance was to place licensing requirements on imports of shoes and toys.<sup>29</sup> Brazil’s response was to raise tariffs on shoes from 14% to 35%.<sup>30</sup> Brazil also employed other measures to attempt to meter the influx: in 2006 Brazil had effected a total of 50 antidumping or safeguard measures, 11 of them were against Chinese products, compared to the four measures Brazil placed against the US in the same time period.<sup>31</sup>

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<sup>25</sup> Ministry of Foreign Affairs of the People’s Republic of China, *President Hu Jintao Holds Talks with President Luiz Inacio Lula da Silva of Brazil*, (May 25, 2004), <http://www.fmprc.gov.cn/eng/zxxx/t120311.htm>.

<sup>26</sup> Under the terms of WTO agreements antidumping measures, governmental responses (normally a duty) to an illegal influx of a product at a less than “normal value” which creates or threatens to create “material injury” to the local producers, are allowed but only inasmuch as the response bring the price of foreign goods to the level of domestic ones. General Agreement on Tariffs and Trade art. VI, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter *GATT*]. Antidumping measures should be differentiated from safeguard measures, which are the placement of temporary restrictions (normally quotas) on a product’s import if it significantly increases through legal means yet still creates or threatens to create “material injury” to the local producers. *GATT* art. XIX.

<sup>27</sup> *Brazil backs China on trade bid*, BBC, Nov. 12, 2004, <http://news.bbc.co.uk/2/hi/americas/4008499.stm>.

<sup>28</sup> *Id.*

<sup>29</sup> Matt Moffett & Geraldo Samor, *Brazil Regrets its China Affair*, *Wall St. J.*, Oct. 12, 2005.

<sup>30</sup> China.org’s Foreign Market Access Report 2006, <http://www.china.org.cn/english/features/fmar/165815.htm>.

<sup>31</sup> Laboratório Industrial Sindical, Janes Rocha e Raquel Landim, *Atiros entre Argentina e Brasil diminuem*, Sept. 09, 2006, <http://www.sindlab.org/noticia02.asp?noticia=6977>.

This decidedly unfriendly approach was taken at the same time when many in the US were concerned that China was gaining too big a piece of the South American pie. There were those in Washington that were concerned about the possibility of China becoming so cozy with South America that there was a risk of dangerous heavy political influence; some politicians and academics were even invoking the Monroe Doctrine.<sup>32</sup> While strategic meetings continued, such as Brazil representing South America in joint talks with China, India, and Mexico to discuss strengthening ties, the US wrung its hands.<sup>33</sup> Yet if the US had paid more attention they would have realized not all was well in paradise. Brazil followed its promises to some degree, lowering its tariffs on electrical goods from 35% to 10% in 2005.<sup>34</sup> In light of the continued use of the aforementioned antidumping measures and safeguards this seems a small move toward open borders. Similarly, President Hu's promises of investments so far have proven hollow, and Chinese investment in Latin America as a whole in 2005 in fact fell from USD 882 million the year before to USD 651 million; any major investments have yet to materialize.<sup>35</sup> Yet the two countries continued to be seen as working well together, perhaps to the exclusion of others.<sup>36</sup>

Which brings us to the present. In March of 2007 Brazil sent its Vice Minister of Development, Industry, and Foreign Trade, Ivan Ramalho, to attempt to convince China to voluntarily limit its exports to Brazil of toys and clothing. Chinese toys are supposed to be

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<sup>32</sup> Id., Juan Vega, *China's Economic and Political Clout Grows at the Expense of American Interest*, 14 Minn. J. Global Trade 377, 382, Summer 2005 [hereinafter *Vega*].

<sup>33</sup> Consulate General of the PRC in San Francisco, *Hu Jintao Talks with the Leaders of India, Brazil, South Africa, and Mexico*, July 7, 2005, <http://www.chinaconsulatesf.org/eng/xw/t203480.htm> (last visited Nov. 18, 2007).

<sup>34</sup> Hong Kong Trade Development Council, *International Market News*, Oct. 4, 2005. <http://www.tdctrade.com/imm/05100401/electrical136.htm>.

<sup>35</sup> Arthur Kroeber, *Mais uma vez, com emoção*, Carta da China of the Conselho Empresarial Brasil-China, July, 2007, at 12, *Reprinted from the English*. [hereinafter *Carta*].

<sup>36</sup> *Chinese influence in Brazil worries US*, BBC, April 6, 2006, available at <http://news.bbc.co.uk/1/hi/world/americas/4872522.stm>.

limited to 40% of the market, but there has been disagreement by the countries in how to ensure the numbers sold are correctly monitored, as many toys come to Brazil from China as though they are coming from another source.<sup>37</sup> The meeting proved fruitless and Brazil initiated the tariffs first mentioned in this article. Beyond the increase on present tariffs from 20% to 35%, the manner in which pricing is to be established was also altered. Instead of gauging the value of goods based on the import price (ad valorem) the value would be adjusted by quantity as measured by weight (ad rem) with distinctions made for clothes made of different primary materials.<sup>38</sup> This presents the first time in many years that Brazil utilized an ad rem measurement system and it is an important divergence because instead of using a more easily manipulated import price a good's weight is a way to ensure consistent measurement of the tariffs. In August of 2007 Argentina announced it was joining its compatriot in Mercosul<sup>39</sup> and began to apply restrictions on Chinese bicycles, tires, pants, computer materials, and more.<sup>40</sup>

There are also unresolved questions about where Brazil will be exporting its primary goods, especially its fossil fuels and minerals, in the future. In 2005 Latin America and the Caribbean supplied over 30% of U.S. imported oil, surpassing that of all the Middle Eastern countries combined.<sup>41</sup> Brazil's crude oil output is projected to steadily increase 27% to 2.37 million barrels a day in 2011 and 2.81 million in 2015.<sup>42</sup> Much of this could be shipped to

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<sup>37</sup> Valor, *Brasil vai à China para ampliar acordo de restrição voluntária de importações*, March 8, 2007.

<sup>38</sup> Carta da China of the Conselho Empresarial Brasil-China, June, 2007 *Brasil adota preço de referência para importações do setor de vestuário*.

<sup>39</sup> Mercosul is the united regional trade area of Brazil, Paraguay, Uruguay, and Argentina. According to the Brazilian website <http://www.mre.gov.br/cdbrasil/itamaraty/web/ingles/relext/mre/orgreg/mercom/index.htm> Mercosul (Mercosur) has made it possible for approximately 95% of all trade between the countries to be carried out without tariff barriers.

<sup>40</sup> Associação Brasileira dos Transportadores de Carga, *Mercosul intensifica ofensa anti-China*, August 28, 2007 <http://www.abtc.org.br/noticias.php?codigo=1620> [hereinafter *Associação*].

<sup>41</sup> Vega, *supra* note 32, at 387.

<sup>42</sup> Andrei Khalip, *Brazil oil output gushes, exports hinge on economy*, Reuters, July 27, 2007, available at <http://www.reuters.com/article/reutersEdge/idUSN2742719920070727>.

China, but whether or not it is, and whether many other trade and investment ventures are to be realized will depend upon China and Brazil's ability to maintain balanced trade relations.

Though there are claims to the opposite, China and Brazil both have continually reacted to each other's strategic moves in a way meant to protect their own ability to grow economically. There may have been a time when overtures between them seemed overly excited, but the hard reality is that as with the US and other nations Brazil has been struggling to develop equal trade with China. Part of that struggle is to encourage exports to China as well as investment by China in the Brazilian economy through government-backed projects or private foreign direct investment (FDI). Brazil sees an obstacle in increasing the worth of its exports because the majority of Brazil's exports to China are low-value-added goods such as soy, wheat, and minerals. Traditionally low-value-added goods were assumed to have a smaller ratio of profit to cost than higher-value-added goods (usually finished products) that add more cost to the good because of the work done to create them. Toys, clothing, and other labor-intensive goods once brought more wealth to the seller. As a result some of Brazil's highest remaining tariffs are those discussed for clothing and shoes, and those for toys at 37%.<sup>43</sup> However, China's very production models have altered the reality of these once traditional assumptions. Now the profit margin on high-value-added goods can be as slim as a percentage of a cent and producers depend on volume to maintain profitability. By the time China entered the WTO in 2001 it had lowered its tariffs on all imports from a high 41% in 1992 to an incredibly low 6%.<sup>44</sup> Accordingly, Brazil could realize larger benefit from its exports if it altered its approach and focused on increasing production and exportation of low-value-added products.<sup>45</sup>

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<sup>43</sup> The Economist Intelligence Unit, Country Profile Brazil 2007.

<sup>44</sup> Vega, *supra* note 32, at 383.

<sup>45</sup> Conversation with Ciro Biderman, economist, MIT

Like all nations Brazil desires, at the very least, balance of economic trade and development between it and other countries. Whether or not that is occurring can be demonstrated to a degree through basic numbers. While in 2006 Mexico saw its trade deficit with China increase enormously (USD 22.8 billion from USD 8.9 billion in 2003 and USD 2.7 billion in 2000) in comparison Brazil saw a smaller drop in its trade surplus (USD 400 million in 2006 from USD 2.2 billion in 2003 and a deficit of USD 300 million in 2000).<sup>46</sup> Even so, in real numbers the difference is large. From January to June of 2007 Brazil found itself with a trade deficit of USD 295.3 million dollars when it had had a surplus of USD 166.4 million at the same time the year before.<sup>47</sup> There are economists that argue trade deficits are of little worry, what is of real concern is that the exports as a whole are increasing, as that will add to the economy's growth.<sup>48</sup> Nonetheless, the disparities between how much export growth and profit growth China and Brazil are realizing is of concern for Brazil, a concern it manifests in continuing to levy trade measures it sees as required to keep the trade playing field level.

Promises to recognize China as a "market economy" and end the use of tariffs and other trade control measures has not happened, neither has direct foreign investment reached the level Presidents Hu and Lula had promised. FDI is sought after by both countries, as it provides an influx of capital. FDI traditionally only requires enough equity ownership in an enterprise that an investor has an effective voice in management, usually a minimum of 10%,<sup>49</sup> which means the foreign enterprise can still create large profits for the country it is in, as well as growth in human capital through training and exposure to new ideas. This is not a guarantee, however, and there are arguably as many opportunities for the foreign investor to reap benefits while providing

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<sup>46</sup> Carta, *supra* note 35, at 10.

<sup>47</sup> Associação, *supra* note 40.

<sup>48</sup> Carta, *supra* note 35, at 11.

<sup>49</sup> Balance of Payments Manual: Fifth Edition, International Monetary Fund, 86 (1993).

little in the way of financial and other growth to the country housing the investment. Intelligent regulation and or management of FDI can result in positive outcomes for all involved but there will not even be the opportunity to realize success if the investment never occurs.

There are some enormous FDI projects said to be in the works but others have been scrapped: such as Brazil's Companhia Vale do Rio Doce's (CVRD) agreement with China's Baosteel to fund the creation of a steel plant in the state of Maranhão. It was to be the single largest FDI project undertaken by a Chinese company at USD 1.4 billion.<sup>50</sup> The project ran into numerous problems in the planning and initializing stages, a third partner balked and there was a community reaction by the over 14,000 people that would have been impacted by the refinery with forced relocation.<sup>51</sup> The Brazilian government has infringed upon its own constitutional and municipal laws to rezone the land to be developed from residential to industrial.<sup>52</sup> One cannot be sure if it was the activity of the community organizations protesting the construction, but in August of 2007 the China announced that this project had been abandoned because of environmental concerns on the part of the Maranhão politicians and a similar plant is now proposed in the state of Espirito Santo.<sup>53</sup> Whether it is finally completed remains to be seen.

CVRD is looking to have its own success with direct investment into China. In 2006 it announced its subsidiary, MBR, would invest 25% of the needed capital, USD 4 million, in a joint venture to build a new pelletizing plant (pellets are more concentrated pieces of iron ore that are ready to be placed in furnaces to create steel) in Zhuhai, Guangdong, China. More importantly, after the plant is up and running CVRD will supply 70% of the iron ore for the plant

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<sup>50</sup> Marcelo de Paiva Abreu, *China's Emergence in the Global Economy and Brazil*, Departamento de Economia, PUC-RIO, 22 (2005) [hereinafter *Abreu*].

<sup>51</sup> Plataforma Brasileira de Direitos Humanos Econômicos, Sociais, Culturais e Ambientais, *Relatores Nacionais em Direitos Econômicos, Sociais, Culturais e Ambientais*, 2006.

<sup>52</sup> Id.; *Estatuto das Cidades* (Lei Federal nº 10.257/2001).

<sup>53</sup> Hong Kong Trade Development Council, *CVRD and Baosteel build new steel plant*, Aug. 24, 2007 available at <http://emerging.tdctrade.com>.

and have a 30-year contract to do so.<sup>54</sup> This would provide CVRD with a confirmed purchaser of iron ore in China, even as it expands its potential to produce in Brazil. That is assuming that both the Maranhão refinery and the pelletizing plant are successful. CVRD is also planning USD 6.5 billion investments into its nickel and coal producing activities in China.<sup>55</sup> The sheer size and scope of CVRD's production and sales to China also make it a success story in Brazil's attempts to maintain a better balance in trade and profits. CVRD has been able to negotiate ever-higher prices for iron ore with China, despite China's protests, up 9.5% from 2006 to 2007 alone.<sup>56</sup> However, not all Brazilian businesses have the clout of CVRD, as it is now the largest single iron ore exporter to China and iron ore is a necessary ingredient in the production of steel of which China is the world's largest producer.<sup>57</sup>

More Brazilian FDI in China comes through Embraer, a Brazilian commercial jet producer that successfully opened a factory in Harbin, Heilongjiang province in a joint venture with China's Harbin Aircraft Industry and Hafei Aviation Industry.<sup>58</sup> Production has gone from a first contract for 6 planes to an order from China in 2006 to produce 100 planes.<sup>59</sup> Still, China receives much more FDI overall than it makes itself, receiving USD 63 billion in 2006 but making only USD 16.1 billion in 2006.<sup>60</sup> Brazil received USD 19 billion and made USD 28 billion of FDI

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<sup>54</sup> Companhia Vale do Rio Doce's report to the US Securities and Exchange Commission, 2006.

<sup>55</sup> *Brazilian iron ore giant to boost investment in China*, Xinhua News Agency, Mar. 3, 2007, <http://www.china.org.cn/english/BAT/202167.htm>.

<sup>56</sup> Companhia Vale do Rio Doce, [http://www.cvrld.com.br/cvrld\\_us/cgi/cgilua.exe/sys/start.htm?infolid=1779&sid=373](http://www.cvrld.com.br/cvrld_us/cgi/cgilua.exe/sys/start.htm?infolid=1779&sid=373) (last visited Nov 2, 2007).

<sup>57</sup> *Id.*

<sup>58</sup> Abreu, *supra* note 50, at 20.

<sup>59</sup> *Id.*; Airwise News, *Embraer Gets China Order for 100 Jets*, Aug. 30, 2006, <http://news.airwise.com/story/view/1156977487.html>.

<sup>60</sup> China Daily, *China's FDI tops US\$63 billion in 2006*, Jan. 15, 2007, available at [http://www.chinadaily.com.cn/bizchina/2007-01/15/content\\_783851.htm](http://www.chinadaily.com.cn/bizchina/2007-01/15/content_783851.htm).

in 2006;<sup>61</sup> only USD 95 million of that investment came from China.<sup>62</sup> China received little from Brazil as well, a mere USD 150 million.<sup>63</sup>

With the current plan to build the refinery in Maranhão there could be a significant increase of FDI in the future, but it remains to be seen if that increase will occur or be sustained with further investments. It is important to keep in perspective the investments that come from other countries. For instance, the summer of 2007 it was announced that Norsk Hydro, a Norwegian company, had pledged USD 1.5 billion investment with CVRD to create an aluminum processing plant in Brazil.<sup>64</sup> In October 2007 Volkswagen unveiled its plan to increase investment in Brazil to USD 1.8 billion in the next five years with two-thirds of the money going to development and marketing new cars.<sup>65</sup> Even the smaller investments of some foreign firms like Equity International, a privately held international real estate investment company in the US, rival that of China's at USD 45 million in 2006 and USD 50 million in 2005.<sup>66</sup> Brazil and China's trade restrictions and FDI barriers come from and create some of the same challenges; the next section will examine how they both may improve their economic power.

### III.

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<sup>61</sup> Press Release, UNCTAD, FDI inflows to Latin America and the Caribbean increased Moderately – and outflows soared (Oct. 16, 2007), <http://www.unctad.org/Templates/webflyer.asp?docid=9105&intItemID=1634&lang=1>.

<sup>62</sup> BBCBrasil.com, *Chineses reclamam de entraves a investimentos no Brasil*, Sept. 10, 2007, [http://www.bbc.co.uk/portuguese/reporterbbc/story/2007/09/070910\\_chinareclamacaoss.shtml](http://www.bbc.co.uk/portuguese/reporterbbc/story/2007/09/070910_chinareclamacaoss.shtml).

<sup>63</sup> UOL, *Para brasileiros, negócios da China são raros*, Sept. 8, 2007, <http://noticias.uol.com.br/bbc/reporter/2007/09/08/ult4907u79.jhtm>.

<sup>64</sup> Press Release, Norsk Hydro, Hydro Joins New Alumina Project in Brazil, Jul. 23, 2007, *available at* [http://www.nortrade.com/index.php?cmd=show\\_news&id=3516](http://www.nortrade.com/index.php?cmd=show_news&id=3516).

<sup>65</sup> Bloomberg.com, Volkswagen Boosts Brazil Investment 28% to 3.2 Billion Reais, (Oct. 30, 2007), <http://www.bloomberg.com/apps/news?pid=20601086&sid=aBUeJIDyZqtc>.

<sup>66</sup> Press Release, Equity International, Equity International Announces Investment in Leading Brazilian Property Company (Nov. 8, 2006), *available at* <http://homeequityloanjournal.com/hoq/Equity-International-Announces-Investment-in-Leading-Brazilian-Property-Company.asp>.

Brazil and China have multiple challenges ahead in making reform to their legal and trading systems. While an exhaustive examination of all of them is beyond the scope of this paper, a discussion of some issues that are pertinent to trade and investment between the two countries can aid in understanding the complexities of their relations. It can also inform our understanding of the changes needed globally to encourage more balanced trade.

Before delving into trade law issues in more detail consider the historical perspective above and what it may indicate about China and Brazil's individual identities as nation states. Trade for each country has expanded as both moved from a period of complete governmental control of markets to what is deemed more liberalized markets. Yet neither has fully embraced the western blueprint of development. In evaluating the present legal and business environment of each country continue to note how each country has done this in its own fashion. Brazil and China have not ceded control of their economies to outside forces, instead they push to meet the model of liberalized trade on their own terms. Perhaps it is just this maintenance of control that has allowed their successes. World organizations are pressuring both countries to alter their trade and legal structures but it is important to recognize it may be that not all the desired changes would benefit China or Brazil. What follows is an exploration of areas of possible change with commentary on how these changes could work in China and Brazil's favor prefaced here with an acknowledgement that there is no one way for a country to develop and no "one size fits all" manner of governance.

In its desire to involve itself in the world market China enacted different legal reforms. Many of these were done specifically to meet requirements established for membership in the WTO. In order to fulfill its WTO responsibilities China must provide appropriate legal review of custom actions by a body that is "independent of the agencies entrusted with administrative

enforcement” of its decisions.<sup>67</sup> This judicial body or tribunal must have its “laws, regulations, decisions and rulings” administered “in a uniform, impartial and reasonable manner.”<sup>68</sup> To that end China promulgated the Foreign Trade Law in 1994 and then the State Council issued Regulations on Anti-dumping and Countervailing Measures in March of 1997, yet scholars at the time pointed out that the lack of a designated “judicial, arbitral, or administrative tribunal” to hear domestic complaints in this area was a fatal flaw in the laws.<sup>69</sup> Other WTO members also took issue with the broad generality of the laws and in 2002 new Anti-Dumping Regulations and Anti-Subsidy Regulations came into affect, followed almost immediately by China’s accession.<sup>70</sup> The laws were further revised after major governmental restructuring in 2003 and the Ministry of Commerce (MOFCOM) was designated as the body that would oversee antidumping and anti-subsidy investigations.<sup>71</sup>

At first blush this would intimate that China had successfully established adequate legal review in order to satisfy its WTO commitments, but an investigation into both the construction of the government of China and the actual daily reality of how legal standards are reviewed and upheld demonstrates China is still open to criticism that it has not satisfied the mandate for an impartial and uniform application of laws by an independent tribunal. First let us consider how the judiciary functions in China and compare its position in the governmental system in China to the position of MOFCOM.

The Government of the People’s Republic of China (PRC) is led by the National People’s Congress (NPC). The NPC is a body elected by the body below it, which in turn is elected by

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<sup>67</sup> GATT art. X.

<sup>68</sup> *Id.*

<sup>69</sup> *See*, Li Chengbin, *The Impact of the WTO Rules on the Judicial Review System in China*, in *China and the WTO*, Going West, 20,20 (ed. D. Smith and G. Zhu, 2002) [hereinafter *Li*].

<sup>70</sup> *See*, Won-Mog Choi, & Henery S. Gao, *Procedural issues in the Anti-Dumping Regulations of China: A Critical Review Under the WTO Rules*, *Chinese J. of Int’l Law*, 2 (Nov. 2006).

<sup>71</sup> *Id.*

the body below it, and so on until the fifth and final level is reached, that of Townships, Nationality townships, and towns, which is ostensibly elected by universal suffrage. The courts function within these levels with the congresses having oversight of the courts.<sup>72</sup> These levels and their corresponding courts can be imagined as:

NPC- Supreme People's Court

Congress of Provinces, Autonomous Regions, Municipalities Directly Under the Central Government – High Courts and Intermediate Courts

Prefectoral Level – no court oversight  
County, Cities, Autonomous County – Basic Courts

Townships, Nationality townships, and towns- no court oversight

The NPC and the people's congresses below it are responsible for the creation of laws, but they are also responsible for supervision of the courts that apply the laws. This supervision includes accepting annual reports on the courts' work and "putting forth suggestions and opinions" on the courts' work, as well as sometimes supervising individual cases.<sup>73</sup> Further, there is an adjudicative committee in each court that is appointed by the people's congress that oversees the court in question and this committee must be consulted on cases that are considered important and difficult.<sup>74</sup> Often these committees decide the case with only the benefit of a short oral presentation by the judge hearing the case; this approach of decision without review of any evidence is sometimes referred to as "first decide then try".<sup>75</sup> Lastly, it is not unusual for a lower

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<sup>72</sup> PRC constitution Article 3 states that all courts and other administrative, adjudicative, and procuratorial organs are created by the people's congresses and so are overseen by the congresses and answer to them. *See*, Albert Hung-ye Chen, *An Introduction to the Legal System of the People's Republic of China*, 50 (2004) [hereinafter *Chen*].

<sup>73</sup> *Id.* at 154.

<sup>74</sup> *Id.* at 142.

<sup>75</sup> *Id.* at 143.

court to ask its superior court what action to take in a case, effectively ending any opportunity for a true chance at appellate review later.<sup>76</sup>

While the constitution states that courts are to act independent of any other administrative organ, social organizations, or individuals,<sup>77</sup> the actual position of the courts in reference to the people's congresses and the blurred lines of adjudicative committees and judges' work create an end result where there is often little, if any, distinction between the executive, legislative, and judicial branch of the government.

It is also important to remember that running beneath all of these organs and institutions is the unifying power of the Communist Party of China (CPC). This is the body entrusted with the ultimate leadership of the country, as specified in the PRC Constitution.<sup>78</sup> The NPC and the other people's congresses have traditionally acted not as independent legislative bodies but as a "rubber stamp" for the CPC's policies at all levels of government. Part of this control is the State Council, which is "responsible for ensuring Communist Party policies are implemented".<sup>79</sup> The State Council acts as an administrative complement to the NPC. More explicitly, the State Council encompasses the Ministries, including MOFCOM. It is an arm of the CPC that is hearing domestic cases concerning potential dumping and subsidy infringements under the GATT and other WTO agreements.

All this demonstrates CPC involvement in the functioning of adjudications, be they through the courts or other bodies, is endemic. In order to fully comply with WTO provisions, including Article X of the GATT, Article 13 of the Agreement on the Implementation of Article VI of the GATT, and Article 23 of the Agreement on Subsidies and Countervailing Measures,

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<sup>76</sup> Id.

<sup>77</sup> Id. at 50.

<sup>78</sup> Xian Fa. pmb. (1982) (P.R.C.)

<sup>79</sup> Chinese Embassy in Britain, [http://www.uk.cn/bj/trade\\_index.asp?menu\\_id=379&artid=2538](http://www.uk.cn/bj/trade_index.asp?menu_id=379&artid=2538).

the PRC must actuate what is accepted by other states to be real impartiality in these processes.<sup>80</sup> Without fulfilling this requirement China runs the risk of invalidating its treatment of antidumping and anti-subsidy complaints. This has implications for all members of the WTO, but also raises issues of reciprocity on the part of Brazil. To be blunt, why should Brazil respect such cases involving Chinese goods in its courts when there is no guarantee it will have Brazilian goods subject to the type of review agreed to under the WTO?

However, it would be more than disingenuous to suggest China is the only nation that has political involvement in its court systems. It is therefore illogical to insist that the governmental influence, national or regional, will end if China adopts every aspect of other nations' systems. Instead, the better approach is to encourage China to continue its legal reforms with a mind toward increasing judicial independence. This would be advanced by constitutional reform to remove the oversight of the courts from the congresses and the dismantling of the adjudicative committees. China's legal system is very young and China's constitution has been rewritten and refined a great deal in the last fifty years.<sup>81</sup> Restructuring has been beneficial in creating an increasingly more reliable jurisprudence and the stronger its dependability to outsiders the more attractive the Chinese market becomes.

Perhaps of more immediate concern is what the lack of independent judicial review does to FDI. Many foreign investors have been confronted with the present reality of CPC control when attempting to secure what they believe to be legal protections.<sup>82</sup> There is also continued confusion about what the law actually is, as not only may the NPC, its Standing Committee, and the State Council enact laws, but local people's congresses and other administrative bodies have

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<sup>80</sup> Li, *supra* note 69, at 20.

<sup>81</sup> Chen, *supra* note 72, at 41-46.

<sup>82</sup> See, Stanley Lubman, *Looking for Law in China*, 20 Colum. J. Asian L. 1 (2006) [hereinafter *Lubman*].

the power to enact certain types of laws as well.<sup>83</sup> Throw into this mix that CPC edicts can also carry the weight of law and one becomes aware of just how confusing the application of law is in China.<sup>84</sup> Chinese judges fare no better than foreign counsel in dissecting this web of often redundant<sup>85</sup> and even unconstitutional laws,<sup>86</sup> for China has just begun training judges in earnest; many are extremely inexperienced and there are still many on the bench that have had no formal legal training at all. These problems are to be expected from a system that just began to be constructed 30 years ago, but without changes Brazilian FDI will remain difficult to encourage. Again, reform to create more division between branches of government would create greater legal security – leading to more interest in entering the Chinese market.

If there continue to be such large legal impediments, both in establishing what is required to comply with the law and in defending legal rights, there could be a very real slow down of FDI from Brazil to China. Further complicating the issue is the question of whether there will be continued independent control of those assets once the investment has been made. Recently Li Rongrong, the chairman of the State Assets Supervision and Administration Commission, said the State must have “absolute control [over] strategically important sectors.” such as armaments, power generation and distribution, oil, petrochemicals and gas, telecommunications, coal, aviation, and shipping industries.<sup>87</sup> This could include, as he put it, state owned enterprises becoming, “heavyweights in sectors including machinery, automobiles, IT, construction, iron and steel, and non-ferrous metals.”<sup>88</sup> Questions about whether an investment will suddenly be nationalized are a less than auspicious way to begin negotiations. Again, it is imperative to

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<sup>83</sup> Included among these have been provincially approved tax incentives that are completely inconsistent with national laws, which even central government declarations have been unable to end. *Id.* at 21.

<sup>84</sup> Chen, *supra* note 72, at 95.

<sup>85</sup> *Id.* at 118.

<sup>86</sup> *Id.* at 114.

<sup>87</sup> Lubman, *supra* note 82, at 17.

<sup>88</sup> *Id.*

continued bilateral economic involvement that China address the many judicial issues it now has.

For its own part, Brazil must address impediments to trade and investment such as its own problems with judicial corruption and convoluted regulatory and licensing systems.<sup>89</sup> Just as China has bureaucratic areas that suffer from a lack of transparency, Brazil can improve its ability to give access to information. Both China and the US (in nearly identical language) bemoan the system of import licensing in Brazil, SISCOMEX.<sup>90</sup> Many goods receive automatic licenses through this system, but an estimated 40% do not,<sup>91</sup> including beverages and many foodstuffs.<sup>92</sup> The problems in the system are a lack of specific information about why licenses were denied and, perhaps most defeating, a lack of specific information on what is needed to license products.<sup>93</sup> The documentation to register products can also stifle movement of goods, such as how some pharmaceuticals require full testing in Brazil even if they have already gone through such testing before.<sup>94</sup> Another area with limited transparency is government procurement programs, wherein it is not clear how goods are given preferential status.<sup>95</sup> Brazil has yet to be a signatory to the WTO Agreement on Government Procurement<sup>96</sup> and losing such a large market for unclear reasons could cause China to pressure Brazil to sign on or even cause it to initiate or participate in complaints to the WTO. Brazil has to address these issues of transparency in its regulations and their implementation or risk reactions from China and other

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<sup>89</sup> Heritage Foundation and Wall Street Journal Index of Economic Freedom, <http://www.heritage.org/research/features/index/country.cfm?id=brazil> (last visited Nov 26, 2007).

<sup>90</sup> China.org's Foreign Market Access Report 2006 *supra*; and The U.S. Trade Representative 2007 Report on Brazil *available at* [http://www.ustr.gov/assets/Document\\_Library/Reports\\_Publications/2007/2007\\_NTE\\_Report/asset\\_upload\\_file150\\_10930.pdf](http://www.ustr.gov/assets/Document_Library/Reports_Publications/2007/2007_NTE_Report/asset_upload_file150_10930.pdf).

<sup>91</sup> The Economist Intelligence Unit, Country Profile Brazil 2007.

<sup>92</sup> A comprehensive list of what goods do or do not receive an automatic license is available at <http://www.desenvolvimento.gov.br/sitio/secex/opeComExterior/impProcedimentos/impProcedimentos.php>.

<sup>93</sup> The U.S. Trade Representative 2007 Report on Brazil; *supra* at 2.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at pg. 3.

<sup>96</sup> Signatories can be viewed at the WTO website [http://www.wto.org/english/tratop\\_e/gproc\\_e/memobs\\_e.htm](http://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm).

countries, including possible retaliatory measures that would only harm Brazil's export capabilities.

Brazil must continue to address its own issues with intellectual property (IP) rights. This invokes the issue of reciprocity again. China has been much maligned for its lack of IP protections. However, if Brazil is to demand protections from China in the future it must work to ensure the same is done on its own soil. For years other WTO members cited Brazil as not meeting its commitments to protect intellectual property rights.<sup>97</sup> The International Intellectual Property Alliance (IIPA) estimated losses in Brazil from piracy in 2005 to total more than USD 858.5 million.<sup>98</sup> The numbers for 2006 show that in areas such as software, levels of piracy have increased and in books held steady, even as levels in music have fallen.<sup>99</sup> The IIPA has also warned that too few criminal cases are being pursued, they often take three years or more to be decided, too few convictions have been made, and that convictions often amount to small fines or community service.<sup>100</sup> This seemed to be changing as Brazil continued a crackdown on counterfeiting and piracy that even gained recognition by the Office of the United States Trade Representative.<sup>101</sup> Note, that same month Brazil issued a compulsory license for Merck & Co.'s HIV/AIDS medication Efavirenz in of 2007.<sup>102</sup> This allows, in accordance with WTO regulations, the production of generic versions of the drug in Brazil while the patent holder's rights have yet to expire. It is also a demonstration of Brazil's multi-faceted approach to IP protection, as it couches the recent compulsory license in the country's need for adequate

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<sup>97</sup> For a scathing overview on Brazil's IP history *see*, Lawrence A. Kogan, Brazil's IP Opportunism Threatens U.S. Private Property Rights, 38 U. Miami Inter-Am. L. Rev. 1, 2007.

<sup>98</sup> IIPA 2006 Special 301 Report, Brazil, 2, available at [www.iipa.com/rbc/2006/2006SPEC301BRAZIL.pdf](http://www.iipa.com/rbc/2006/2006SPEC301BRAZIL.pdf).

<sup>99</sup> IIPA 2007 Table of Estimated Trade Losses and Piracy Levels for 2006, available at [www.iipa.com/pdf/IIPA2007TableofEstimatedTradeLossesandPiracyLevelsfor2006AMERICAS060607.pdf](http://www.iipa.com/pdf/IIPA2007TableofEstimatedTradeLossesandPiracyLevelsfor2006AMERICAS060607.pdf).

<sup>100</sup> IIPA 2006 Special 301 Report, Brazil, *supra* at 11.

<sup>101</sup> Latin Business Chronicle, *Brazil & IPR: One Step Forward, One Step Back*, May 7, 2007, available at <http://www.latinbusinesschronicle.com/app/article.aspx?id=1189>.

<sup>102</sup> *Id.*

treatment in the face of a national AIDS crisis, even while castigating vendors of pirated CDs.

Brazil may be justified in issuing the compulsory license but it is nonetheless possible that another WTO member could bring a complaint because of it. It is also possible that another country could bring a complaint based on the fact that Brazil requires its health ministry, ANVISA, to give approval to pharmaceutical patents.<sup>103</sup> This is in fact an issue of import to China, which argues Brazil is in violation of Article 27 of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).<sup>104</sup> Whether either of such complaints would be successful is unknown, but it is clear that Brazil must continue to focus on enforcement on pirated goods or it could face a similar action as China is currently with the U.S.'s case before the WTO.<sup>105</sup> The U.S. alleges that China's lack of copyright and trademark enforcement is a violation of TRIPS;<sup>106</sup> ironically, if Brazil does not rectify the rampant infringement of the same China could initiate a complaint against Brazil on the very same grounds.

One barrier to enforcement of IP is the inefficacy of Brazilian courts; rampant corruption and inefficiencies are a key issue in FDI as well. In a 2003 survey 64% of Brazilian companies said they believed bribery and nepotism are extremely frequently practiced in the judicial system, 33% saw it as a low frequency rate.<sup>107</sup> The high level of corruption found in the judicial system affects the country's ability to protect the rights of individual investors. In response to the

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<sup>103</sup> Lei No. 10196/01 Art. 229-C.

<sup>104</sup> China.org's Foreign Market Access Report 2006, *supra* note 30.

<sup>105</sup> World Trade Organization, "DSB Establishes a Panel on China's Protection of IPR, World Trade Organization News, Sept. 25, 2007, available at [http://www.wto.org/english/news\\_e/news07\\_e/dsb\\_25sep07\\_e.htm](http://www.wto.org/english/news_e/news07_e/dsb_25sep07_e.htm).

<sup>106</sup> Office of the United States Trade Representative, "WTO Case Challenging Weaknesses in China's Legal Regime for Protection and Enforcement of Copyrights and Trademarks," USTR Fact Sheet, April 2007, available at [http://www.ustr.gov/assets/Document\\_Library/Fact\\_Sheets/2007/asset\\_upload\\_file908\\_11061.pdf](http://www.ustr.gov/assets/Document_Library/Fact_Sheets/2007/asset_upload_file908_11061.pdf).

<sup>107</sup> Claudio Weber Abramo, *Corrupção no Brasil: A perspectiva do setor privado*, 6 (2003) available at <http://www.transparencia.org.br/docs/kroll-tb-summary-eng.pdf>.

judicial crisis the federal government passed a constitutional amendment in 2004.<sup>108</sup> Among other things it created an outside governmental oversight system of the judiciary in the form of a board made up of lawyers, magistrates, members of the Public Ministry, and others appointed by the Senate and Congress.<sup>109</sup> Whether this “external control” will result in a real overhaul of the judicial system remains to be seen.

There are other challenges to FDI. It is often very time consuming just to make the first steps in developing any projects; in the Amazon, for example, there are nine different municipal, state, and federal authorities that must be worked with just to begin a business.<sup>110</sup> The tax cost to business is also an impediment; Rio has one of the heaviest tax burdens to businesses in the world.<sup>111</sup> The aforementioned corruption of the court system has an affect, as well as the terrible judicial inefficiencies; the national average for adjudication on commercial disputes taking 899 days.<sup>112</sup> São Paulo, where it takes 18 months to enforce a contract, is the state seen as having the least problems in doing so but note: it lags behind even Shanghai where the process takes six months.<sup>113</sup> All of these affect the ability for investors to protect their rights and some 22% of Brazilian companies do not believe the judicial system is effective in protecting property rights and upholding contracts.<sup>114</sup>

Brazil is working to improve all of these conditions, as it must in order to attract and

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<sup>108</sup> Emenda Constitucional No. 45, de 08.12.2004 – made over protests by many judges and legal experts it was unconstitutional as it violated the division of powers. *See also*, A Folha Online, *Presidente do STJ diz que controle externo do Judiciário é inconstitucional*, Jan. 22, 2004, available at <http://www1.folha.uol.com.br/folha/brasil/ult96u57436.shtml>.

<sup>109</sup> Fernando Neves Curty, *Controle Externo do Poder Judiciário*, available at <http://www.advogado.adv.br/artigos/2004/fernandonevescurty/controlejudiciario.htm>.

<sup>110</sup> The World Bank report, *Doing Business in Brazil*, 5 (2006) available at <http://www.doingbusiness.org/Downloads/>.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 12.

<sup>113</sup> *Id.* at 2.

<sup>114</sup> World Bank, *Brazil Investment Climate Assessment*, 26 (Dec. 6, 2005) available at [www.enterprisesurveys.org/documents/enterprisesurveys/ICA/Brazil\\_Volume%20I.pdf](http://www.enterprisesurveys.org/documents/enterprisesurveys/ICA/Brazil_Volume%20I.pdf).

maintain investment. Commercial disputes are now normally decided in thirty days in the states of Minas Gerais and Matto Grosso do Sul.<sup>115</sup> In the city of Porto Alegre an operational license for a business usually takes only a day to secure because of a reduction of procedures to do so.<sup>116</sup> Maranhão state has digitized its records and accordingly has reduced the time it takes to register property to 27 days.<sup>117</sup> Federal and state requirements for registration are becoming more streamlined and many are going online.<sup>118</sup> These are positive steps, but more reform is needed.

#### IV.

Contrary to the common impression many have, one too often framed by an environment rife with fear mongering, China and Brazil are still attempting to construct trade relations that meet the needs of both countries. Their setbacks and the effect of their conflicting agendas are particular to their histories together and separately, but can serve as a means for other countries to gain further understanding into their own trade relationships with these two nations as well as between each other. It is as yet unclear if the objectives of free trade will actually be to the benefit to all participants, be they states or individuals. Brazil and China are developing nations that have sectors of immense wealth and staggering poverty. Regardless, to have a parallel rate of trade increase would be facilitated by more knowledge of the other's interests. Without such knowledge there exists the real possibility that future reactive protectionist measures will be taken by both sides as a lack of investment (both financial and moral) in the other country's development drives them to respond in ways they believe to be beneficial to their own ends. Protectionist measures may well be to a country's best interest. With such knowledge, however, the potential for mutual economic growth is ever more likely.

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<sup>115</sup> The World Bank report, *Doing Business in Brazil*, *supra* at 11.

<sup>116</sup> *Id.* at 2, 5.

<sup>117</sup> *Id.* at 5.

<sup>118</sup> *Id.* at 1.