

EU-BRAZIL RELATIONS AT THE WORLD TRADE ORGANIZATION: DISPUTE SETTLEMENT AS LEVERAGE

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Abstract. This paper addresses how Brazil's use of the WTO dispute settlement vis-à-vis the EU has an impact on trade relations between both parties. After describing their economic relationship, it is demonstrated that Brazil and the EU are not only successful and avid users of the dispute settlement system, but are also striving to strengthen its judicialization. Together with indirect economic advantages and agenda-setting capacities, the judicialization of the WTO dispute settlement system can be considered factors by which Brazil relatively strengthened its position vis-à-vis the EU. However, the final section of the paper demonstrates how tensions within Mercosur, the rise of mega-regionalism and the prioritization of the EU's negotiation capacity towards the U.S. and Japan, undermine Brazil's position in trade relations with the EU.

Keywords. EU-Brazil trade relations, World Trade Organization, dispute settlement, leverage, mobilization, judicialization, mega-regionalism

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I. INTRODUCTION

during the last decade, Brazil has joined the European Union (EU) as one of the principal players in the global economy. As the global financial crisis and the European sovereign debt crisis continue to shake the EU at its economic foundations, Brazil has shown resilience against the economic downturn.¹ Along with maintaining economic growth, Brazil has also been able to carve out a strategic position for itself on the international scene, setting the tone and influencing policy negotiations in several areas. Under the presidency of Lula da Silva, Brazil became an assertive global player. It re-oriented its foreign policy

¹ WT/TPR/S/283, "Trade Policy Review: Brazil", 17 May 2013, 8; A Hurrell, "Brazil and the New Global Order" (2010) 109 *Current History* 60; R Sharma, 'Bearish on Brazil: The Commodity Slowdown and the End of the Magic Moment' (2012) 91 *Foreign Affairs* 80, 87.

toward developing countries; spearheaded South-South cooperation; and established new, largely informal, strategic formations with other fast growing world economies such as the BRICS (Brazil, Russia, India, China and South Africa), the G3 or IBSA (India, Brazil and South Africa), and BASIC (Brazil, South Africa, India and China).² Brazil's vocal advocacy of the "Global South" and its capacity to mobilize coalitions on international forums have inevitably come into conflict with certain aspects of EU external policies: for example on combating climate change at the Copenhagen summit at the end of 2009, or by not supporting European positions in the UN Security Council (e.g. by abstaining when UNSC Resolution 1973 on Libya was adopted). At the same time, Brussels and Brasilia share a commitment to multilateralism and international rule-making. The Joint Action Plan of the EU-Brazil Strategic Partnership highlights this willingness to strengthen the multilateral system.³ Still, at the same time, Brazil is also a strong proponent of reforming the current global institutional architecture. From an international relations perspective, Brazil acts as a "middle-power", preferring multilateral solutions to international problems.⁴ The multilateral trading system, embodied by the World Trade Organization (WTO), is one area where Brazil and the EU have been interacting with each other.

This paper concentrates on the relationship between the EU and Brazil at the WTO, with a specific focus on how Brazil uses the latter's dispute settlement system and how this impacts their trade relations. Trade ties are at the heart of EU-Brazil relations, and as stated by EU Trade Commissioner Karel De Gucht, "if we can make progress on our economic agenda we will be laying solid foundations for a stronger alliance across all areas".⁵

Interaction concerning trade between the EU and Brazil takes place on several policy levels: multilaterally through the WTO framework; interregionally through the EU-Mercosur dialogue; and bilaterally through the dialogue as part of their Strategic Partnership. Despite these exchanges and the increasing trade flows between Brazil and the EU, a comprehensive and substantial trade agreement has not materialized. This paper probes into the dynamics connecting these different levels of engagement between the EU and Brazil. First, it argues that Brazil has adopted an assertive position in the WTO – particularly in the use of its dispute settlement system – in order to generate

² See C Alden and MA Vieira, "The New Diplomacy of the South: South Africa, Brazil, India and Trilateralism" (2005) 26 *Third World Quarterly* 1077; P Sotero, "Brazil's Rising Ambition in a Shifting Global Balance of Power" (2010) 30 *Politics* 71; SW Burges, *Brazilian Foreign Policy After the Cold War* (University Press of Florida 2011) 248; PF Vizontini, "Brazil's Contemporary Foreign Policy: An Affirmative Agenda" in W Hofmeister and S Vogt (eds), *G20 - Perceptions and Perspectives for Global Governance* (Konrad Adenauer Stiftung 2011); P Dauvergne and DBL Farias "The Rise of Brazil as a Global Development Power" (2012) 33 *Third World Quarterly* 903.

³ Council of the European Union, "European Union-Brazil Strategic Partnership Joint Action Plan" (4 October 2011).

⁴ D Flandes, 'Brazilian Foreign Policy in the changing World Order' (2009) 16 *South African Journal of International Affairs* 161, 163.

⁵ K De Gucht, "Brazil and the European Union: Allies in a Changing World", Speech delivered at the International Conference Strategic Challenges in the EU-Brazil Relationship (7 May 2012).

leverage. “Leverage” is understood here as increased strategic advantage resulting from the following indirect effects of WTO dispute settlement: (i) economic advantages other than those concerned in the dispute, (ii) international and domestic mobilization and agenda-setting, and (iii) judicialization of the WTO dispute settlement system. As one of the most frequent and successful users of this system, Brazil has been able to use it as a strategic tool, strengthening its position vis-à-vis the EU and the U.S. Second, it is submitted that recent developments, *inter alia* related to political economy, have resulted in a loss of leverage and weakened Brazil’s strategic position in trade negotiations.

The structure of the paper is as follows: section 2 sketches the broader economic context and nature of EU-Brazil trade relations. Section 3 elaborates how Brazil’s use of the WTO dispute settlement system has created leverage and how the EU interacts with Brazilian actions. Section 4 connects these dynamics to Brazil’s position in trade negotiations, particularly those for an EU-Mercosur agreement. Section 5 discusses how recent developments undermine Brazil’s bargaining strength.

II. BRAZIL, THE EU AND INTERNATIONAL TRADE

A. ECONOMIC WEIGHT

The decade of growth experienced by Brazil’s economy stands in contrast to the stagnation of the Eurozone and this trend is likely to continue.⁶ In terms of GDP, Brazil has become the seventh biggest economy in the world, and by 2015-16 it is expected to overtake the UK and France according to IMF estimates.⁷ Although the Chinese and Indian economies are growing at a faster pace, Brazil’s higher GDP per capita is embodied by a broad and growing middle class and a thriving consumer market, leading a Financial Times article to describe it as “the perfect marketplace”.⁸ Moreover, Brazil’s financial responsibility, exemplified by its efforts to resist hyperinflation and curb its debt, has made it an attractive place for foreign direct investment and arguably one of the most “hyped” ones among the emerging market nations.⁹

⁶ Although, according to the 2013 WTO Trade Policy Review (*supra* note 1), the growth of the Brazilian economy has slowed down significantly in the last years in comparison to the strong growth between 2006 and 2012, the IMF still projects healthy growth rates for Brazil in 2013, while the EU27 is expected to experience a minimal decline. See IMF, “World Economic Outlook Update: Gradual Upturn in Global Growth During 2013” (2013).

⁷ *Ibid.*

⁸ AGA Valladão, “Emergent Brazil and the Curse of the ‘Hen’s Flight’”, (2013) CEPS Working Document 379, 3; L Lucas and S Pearson, ‘Brazil: Consumer Rhythm’ Financial Times (7 January 2013).

⁹ Sharma (n 1) 87.

Brazil's sustained growth and the EU's lack of growth characterize the broad macro-economic context of their mutual trade relations, however, this image should be nuanced. While Brazil's growth has propelled its status on the international scene, the combined economic weight of the EU Member States still dwarfs the Brazilian economy. The EU is the largest economic entity in the world and is more than seven times the size of Brazil in terms of GDP. Putting things in perspective by looking at global trade flows, WTO statistics indicate that EU27 economies account for 37% of the total global export value and a similar share of total global imports, whereas Brazil's share is 1.3% and 1.4% respectively.¹⁰ Nonetheless, Brazil and the EU are important economic partners to each other.

B. BRAZIL-EU TRADE AND INVESTMENT RELATIONS

The EU is Brazil's largest foreign direct investor and also its largest trading partner, accounting for 21.7% of its total trade in 2010.¹¹ Vice versa, the economic weight of Brazil in Europe has increased dramatically over the last decade, with the value of Brazilian imports doubling between 2000 and 2008. Brazil advanced from being ranked the EU's twelfth trading partner in 2006 to its ninth in 2011.¹² In the first half of 2011, the total volume of EU-Brazil trade reached new record heights.¹³ However, the rise of China as a trade partner for Brazil has led to a relative decline of the EU's prime position. China has already surpassed the U.S. in becoming Brazil's second largest trading partner, and when considering EU Member States' trade separately, China is Brazil's biggest partner. China's increasing importance notwithstanding, the EU is still central to Brazil's trade policy agenda.

Two key issues represent the most contentious aspects of the trade relations between Brazil and the EU. First, the Brazilian and EU positions in regard to agriculture have up to now proven to be irreconcilable. The majority of Brazilian exports to the EU are agricultural products, making up about 42% of exports in 2011.¹⁴ Brazil is the single biggest exporter of agricultural products to the EU, giving it a clear offensive interest in this area. Agricultural output is a key component of the other Mercosur economies as well. Accordingly, better market access for Brazil's and Mercosur's agricultural exports – mainly soy beans, coffee, sugar, meat, and dairy products – has been one of the most sensitive

¹⁰ WTO, *International Trade Statistics* (WTO Publications 2012) 24.

¹¹ Commission (EC), "Brazil: EU Bilateral Trade and Trade with the World" <http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_113359.pdf>, accessed 2 April 2013.

¹² Commission (EC), "Bilateral Relations: Statistics" <<http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/statistics/>>, accessed 2 April 2013.

¹³ *Ibid.*

¹⁴ Commission (EC) (n 11).

issues in trade negotiations. Thus, the European Commission's Trade Sustainability Impact Assessment of a possible EU-Mercosur trade agreement notes that "the overall effect for EU agricultural production is expected to be adverse" while the competitive agricultural sector in Brazil and other Mercosur countries would benefit significantly.¹⁵ As is well-documented, certain key EU Member States form a bloc which, in this respect, is "notoriously more protectionist than the U.S."¹⁶ This bloc has shown an unwillingness to compromise on reducing tariffs or increasing tariff quotas for these product groups. This in turn protects European farmers from external competition. The EU's agricultural protectionism has been openly challenged by Brazil on various occasions, both through dispute settlement at the WTO and in the Doha Round of negotiations, where Brazil has pushed for a multilateral solution in this area.¹⁷

A second key issue in EU-Brazil trade dialogues has arisen from Brazil's defensive interests in the manufacturing sector. Historically, protecting the domestic economy from potential trade-related vulnerabilities has been central to Brazilian foreign policy, and arguably, Brazil still has one of the most protected economies in the world.¹⁸ Despite economic liberalization taking off in the early 1990s, some manufacturing sectors, notably the automobile sector, were able to maintain high levels of protection.¹⁹ More recently, the increasing importance of agricultural and commodity exports to the EU and China has generated fears concerning a possible de-industrialization of the Brazilian economy. This in turn has spurred the Rousseff administration to emphasize its defensive interests in trade negotiations and take additional protectionist measures.²⁰ At Brazil's WTO trade policy review in June 2013, the EU "expressed serious concerns with respect to Brazil's current policies and the impact on trade and investment". Angelos Pangratis, EU Ambassador to the WTO, stated that Brazil's protectionist industrial policies, especially through indirect taxation of imported goods, in many respects run counter Brazil's international commitments.²¹ As EU exports to Brazil consist principally of manufactured goods, particularly machinery and transport equipment, these developments have led the

¹⁵ C Kirkpatrick and C George, "Trade Sustainable Impact Assessment of the Association Agreement under Negotiation Between the European Community and Mercosur" (University of Manchester 2009), 41.

¹⁶ P Messerlin, "The Mercosur-EU Preferential Trade Agreement: A view from Europe" (2013) CEPS Working Document 377, 3.

¹⁷ R Leal-Arcas, "The European Union and New Leading Powers: Towards Partnership in Strategic Trade Policy Areas" (2008) 32 *Fordham International Law Journal* 345, 386.

¹⁸ M Doctor, "Brazil's New Government and Trade: An Evaluation of Policy and Performance" (2012) 38 *Critical Sociology* 799, 800; Sharma (n 1) 87.

¹⁹ P Motta Veiga, "Brazil's Trade Policy: Moving Away from Old Paradigms?" in L Brainard and L Martinez-Diaz (eds), "Brazil as an Economic Superpower? Understanding Brazil's Changing Role in the Global Economy" (Brookings 2009).

²⁰ Doctor (n 18) 803; Messerlin (n 16) 2.

²¹ A Pangratis, "EU Statement at the Trade Policy Review of Brazil" (24 June 2013).

European Commission to urge Brasilia to refrain from protectionism.²² Importantly, the EU has also reminded Brazil of its responsibility to address the broader trend towards protectionism within the Mercosur bloc, particularly concerning Argentina, which, as discussed below (*infra*, 5.2), has adopted a problematic position in this regard.²³

These main offensive and defensive trade interests have marked EU-Brazil trade relations and not surprisingly, have resulted into cases at the WTO. They are also a crucial obstacle in EU-Mercosur trade negotiations. However, EU officials and commentators have recently indicated that these traditional issues are not the main problem at hand and that the problem is one of a changed political climate (see in more detail *infra*, 5.2).

III. BRAZIL-EU INTERACTIONS IN WTO DISPUTE SETTLEMENT

Brazil has been a contracting party to the GATT, the precursor to the WTO, since July 1948 – only months after the multilateral trading system was established. As the fifth most active user, Brazil frequently engaged in the GATT dispute settlement system.²⁴ From the beginning, many of these disputes involved the then named European Economic Communities.²⁵ Since the establishment of the WTO in 1995, Brazil has become a very active user of the WTO dispute settlement system as well.²⁶ On a total of around 450 cases, it brought complaints in 26 cases, was respondent in 14 and acted as a third party in 74 more. The EU makes even more use of the system, acting as complainant in 87 cases, as respondent in 73 and as a third party in 131. Considering these figures and the reciprocal importance of their economies for each other, it is inevitable that Brazil and the EU would bring up complaints against each other. This occurred in five disputes leading to panel reports and, as each of them was also appealed, Appellate Body (AB)

²² Commission (EC), “EU Urges Brazil to resist protectionism” (9 March 2009) Press Release. Also see Commission (EC), “Trade and Investment Barriers Report 2013” (28 February 2013) Report to the European Council.

²³ K De Gucht (n 5).

²⁴ G Shaffer, M Ratton Sanchez and B Rosenberg, “The Trials of Winning at the WTO: What Lies Behind Brazil’s Success?” (2008) 41 *Cornell International Law Journal* 383, 404-405.

²⁵ As concerns adopted Panel reports: *Brazilian Internal Taxes* (1949); *EC—Refunds on Exports of Sugar* (1980); *Spain—Tariff Treatment of Unroasted Coffee* (1981); *Japan—Trade in Semiconductors* (1988) (Brazil acted as a third party); *US—Countervailing Duties on Non-Rubber Footwear from Brazil* (1989); *US—Restrictions on Imports of Sugar* (1989) (Brazil acted as a third party); *US—Denial of Most-Favoured-Nation Treatment as to Non-Rubber Footwear from Brazil* (1992); *Brazil—Imposition of Provisional and Definitive Countervailing Duties on Milk Powder and Certain Types of Milk from the EEC* (1994); *EC—Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil* (1995).

²⁶ This happened right from the start: Brazil was the complainant in the fourth WTO case, *WT/DS4, US—Gasoline*.

reports.²⁷ Six disputes between both parties were settled.²⁸ The present section illustrates how Brazil has attempted to influence and strengthen the rules-based nature of the WTO dispute settlement system and which role the EU played in this respect. It also explores how Brazil's successful use of the dispute settlement system resulted in increased leverage vis-à-vis the EU.

Brazil's gradual shift towards a more open market under Henrique Cardoso's presidency coincided with the establishment of the WTO and its dispute settlement system.²⁹ Brazil built up significant domestic legal capacity to adequately deal with issues of WTO law and policy. This resulted in a "pluralist trade law community" based on three pillars. First, there is a specialized WTO dispute settlement unit within the government. Second, Brazil has a WTO mission in Geneva which coordinates with the WTO unit in Brazil. The third pillar consists of the private sector, law firms, and economic consultants.³⁰ Moreover, the country benefits from strong trade associations which help businesses mobilize, compile information, and fund assistance to the government for trade disputes if necessary.³¹ Brazil has used this pluralist trade law community intensively to advance and defend its interests.

Apart from being an avid user of the WTO dispute settlement system, Brazil has also put forth several proposals at the WTO regarding the improvement of its rules and procedures, four of which are highlighted here. The EU has played a significant role in two of these procedural reform issues as well. These proposals all seem to aim at strengthening the judicialization of the system (see *infra*, 4.3).

First, both Brazil and the EU have been involved in the contentious issue of *amicus curiae* briefs in WTO dispute settlement since 2000. The year 2000 marked the first case in which the AB presented its legal reasoning on accepting such briefs³², which had been accepted in an earlier case.³³ In *US - Lead and Bismuth II*, the U.S. argued in favor of the AB accepting *amicus curiae* briefs. The EU (complainant in the case) and Brazil (as a third party) opposed such acceptance, both arguing that the AB could not accept such briefs. Brazil also stated that parties and third parties are "uniquely qualified to make

²⁷ WT/DS69, *EC—Poultry*; WT/DS219, *EC—Tube or Pipe Fittings*; WT/DS266, *EC—Export Subsidies on Sugar*; WT/DS269, *EC—Chicken Cuts*; WT/DS332, *Brazil—Retreaded Tyres*.

²⁸ WT/DS81, *Brazil—Autos*; WT/DS116, *Brazil—Payment Terms for Imports*; WT/DS154, *EC—Coffee*; WT/DS183, *Brazil—Import Licensing & Import Pricing*; WT/DS209, *EC—Soluble Coffee*; WT/DS409, *EC—Generic Drugs*.

²⁹ Shaffer, Raton Sanchez and Rosenberg (n 24) 404.

³⁰ *Ibid* 423-446.

³¹ *Ibid* 399-404 and 446-456.

³² WT/DS138/AB/R, *US—Lead and Bismuth II*, §39-42. See P Ala'i, "Judicial Lobbying at the WTO: The Debate over the Use of Amicus Curiae Briefs and the U.S. Experience" (2000) 24 *Fordham International Law Journal* 62; A Appleton, "Amicus Curiae Submissions in the *Carbon Steel* Case: Another Rabbit from the Appellate Body's Hat?" (2000) 3 *Journal of International Economic Law* 691; G Marceau and M Stillwell, "Practical Suggestions for Amicus Curiae Briefs Before WTO Adjudicating Bodies" (2001) 4 *Journal of International Economic Law* 155; G Marceau and M Hurley, "Transparency and Public Participation in the WTO: A Report Card on WTO Transparency Mechanisms" (2012) 4 *Trade, Law & Development* 19.

³³ WT/DS58/AB/R, *US—Shrimp*, §91.

legal arguments”.³⁴ Nonetheless, the AB followed the reasoning of the U.S. and held that the AB, as well as panels, may accept *amicus curiae* briefs when they find them useful and pertinent based on their right to draft their own working procedures, as enshrined in Article 17.9 of the Dispute Settlement Understanding (DSU).³⁵ It has been argued that the AB’s position was an attempt to manage and make public an existing practice of “judicial lobbying”³⁶, however, it did so in an “activist” way by assuming a broad interpretation of the working procedures it adopted.³⁷ In a subsequent report, the AB even drew up an additional procedure, applicable only to the case at hand, regulating the filing of *amicus curiae* briefs.³⁸ This led many WTO Members, including Brazil and the EU, to fiercely object this openness to accept briefs.³⁹ Nonetheless, panels and the AB continue to accept and take into consideration unsolicited *amicus curiae* briefs.⁴⁰

Second, in 2003 Brazil presented a proposal to amend the WTO DSU, which establishes the procedures of the WTO dispute settlement system. According to Brazil, the system would be rendered more efficient and streamlined by a “fast track” panel or expedited procedure. According to the proposal, in cases in which a Member’s measure has been found inconsistent with WTO law through the WTO dispute settlement system, another Member whose rights are nullified or impaired by that same measure would have the right to an expedited procedure. The complainant would first have to prove that the measure is identical to the one found inconsistent with the issuing Member’s obligations. A separate finding on that matter would determine whether, in case the measure is not the same, the ordinary procedure applies. If it is the same, the expedited procedure applies.⁴¹ As a result, a fast track panel would reduce the timeframe and options for political compromise or diplomatic tactics, placing an emphasis on legal rules rather than diplomatic power.⁴² Although the EU highlighted that a similar expedited procedure could be useful in regard to unjustified initiations of antidumping and countervailing duty investigations,⁴³ it did

³⁴ WT/DS138/AB/R, *US—Lead and Bismuth II*, §37.

³⁵ *Ibid*, §39.

³⁶ Ala’i (n 32) 94.

³⁷ Appleton (n 32) 699.

³⁸ WT/DS135/AB/R, *EC—Hormones*, §52.

³⁹ WT/GC/M/60, Minutes of the Meeting Held on 22 November 2000 (23 January 2001), §41-47 and 94-96.

⁴⁰ For a detailed account of practice, see Marceau and Hurley (n 32) 30-34.

⁴¹ TN/DS/W/45/Rev.1, Communication from Brazil (4 March 2003). The proposal was discussed at a meeting of the Dispute Settlement Body Special Session, see TN/DS/M/9, Minutes of Meeting Held on 17-18 February 2003 (1 July 2003).

⁴² TA Zimmermann, “The DSU Review (1998-2004): Negotiations, Problems and Perspectives” in D Georgiev and K Van der Borgh (eds), *Reform and Development of the WTO Dispute Settlement System* (Cameron May 2006), 455 and 457-458.

⁴³ TN/RL/W/67, Negotiations on Anti-Dumping and Subsidies - Reflection Paper of the European Communities on a Swift Control Mechanism for Initiations (7 March 2003); TN/RL/W/142, Replies by the European Communities to Questions on TN/RL/W/67 - “Reflection Paper of the European Communities on a

not take a formal stance regarding Brazil's proposal. The proposal no longer appears to be on the table.

A third point concerns the relationship between WTO disciplines and currency manipulations. Although the best-known case is the one regarding the U.S.' discontent with China's monetary policy, Brazil plays a central role in this debate. In 2010, Brazil's Finance Minister Guido Mantega stated that the global economy was in an "international currency war" as developed economies (among which he referred explicitly to the EU) were devaluating their currency to improve their competitiveness.⁴⁴ These headline-grabbing remarks were the result of an appreciated real which negatively influenced Brazil's export capacity and augmented imports, putting pressure on domestic producers.⁴⁵ Triggered by these effects, Brazil has raised its tariffs on certain goods and imposed anti-dumping measures on Chinese steel.⁴⁶ Moreover, Brazil took exchange rate volatility and currency misalignment to the WTO and has actively tried to have the organization deal with the trade-distortive effects of these issues. Although exchange rate volatility and undervaluation of currencies do have an impact on trade, it remains subject to debate to what extent the WTO is or should be the forum to address these issues.⁴⁷ It was argued recently that the WTO and the International Monetary Fund (IMF) should not renounce responsibility for this issue considering the extraordinary monetary policies resulting from the economic and financial crises without explicitly indicating whether WTO and/or IMF disciplines apply.⁴⁸ Brazil clearly favors the former and prepared two submissions.⁴⁹ Meanwhile, as attention had shifted from exchange rate volatility to currency misalignment, Brazil issued a conceptual note on the latter. In this note it holds

Swift Control Mechanism for Initiations" (28 July 2003).

⁴⁴ ICTSD, "Brazilian Finance Minister Warns of 'International Currency War'" (29 September 2010) 14 Bridges Weekly 33.

⁴⁵ ICTSD, "Brazil Pushes Forward with Currency Discussion at WTO" (28 September 2011) 15 Bridges Weekly 32.

⁴⁶ ICTSD, "Brazil Slaps Anti-Dumping Tax on Chinese Steel Imports" (14 September 2011) 15 Bridges Weekly 30.

⁴⁷ See, *inter alia*, R Staiger and AO Sykes, "Currency Manipulation" and World Trade' (2010) 9 World Trade Review 583; H Jung, "Tackling Currency Manipulation with International Law: Why and How Currency Manipulation Should be Adjudicated?" (2012) 9 Manchester Journal of International Economic Law 184; Brazilian researchers have also shown a particular interest in this matter. See A de Lima-Campos and JA Gaviña, "A Case for Misaligned Currencies as Countervailable Subsidies" (2012) 46 Journal of World Trade 1017; V Thorstensen, E Marçal and L Ferraz, 'Exchange Rate Misalignments and International Trade Policy: Impacts on Tariffs' (2012) 46 Journal of World Trade 597; V Boverotti Lopes, "Exchange Undervaluations: The Solution Must Come from the WTO" (2013) 1 Latin American Journal of International Trade Law 383; and V Thorstensen, D Ramos and C Muller, "The 'Missing Link' Between the WTO and the IMF" (2013) 16 Journal of International Economic Law 353.

⁴⁸ R Zoellick, "Questions for the World's Next Trade Chief" *Financial Times* (1 April 2013).

⁴⁹ WT/WGTDF/W/53, Submission by Brazil (13 April 2011); WT/WGTDF/W/56, Submission by Brazil (20 September 2011). Subsequently, the WTO Secretariat issued a note on the subject: WT/WGTDF/W/57, The Relationship between Exchange Rates and International Trade: A Review Of Economic Literature (27 September 2011) and an update: WT/WGTDF/W/65 (18 July 2012).

that “the WTO should look into ways to address their effects in a systemic manner”. Brazil submits that no appropriate remedies currently exist under GATT law and therefore suggests starting analytical work to consider the need for exchange rate trade remedies.⁵⁰ Aside from some remarks on the appreciation of currencies in Eastern Europe, the EU remained silent on the matter on record⁵¹ apart from a statement by the French delegation welcoming the discussion of the issue at the WTO.⁵² Despite Finance Minister Mantega’s naming and shaming the EU as one of the currency manipulators, an overvalued currency is a problem for the EU as well. The euro appreciated substantially with respect to major currencies, deteriorating the competitive position of European exporters.⁵³ However, from opposite views within the Euro area on political intervention in the euro’s exchange rate⁵⁴ it appears that the EU is not looking to subject the sensitive issue of exchange rate policy to the scrutiny of the WTO dispute settlement system.

A fourth point concerns the issue of access to documents, a theme on which the EU has developed a great amount of case-law before its Court of Justice. At the 28 January 2013 meeting of the Dispute Settlement Body (DSB), Brazil issued a statement on the manner in which preliminary rulings have been issued as of late. It submitted that an indiscriminate use of preliminary rulings in the absence of proper rules may have systemic impacts on dispute settlement proceedings as a whole. Moreover, the procedural aspects which are usually the subject of requests for preliminary rulings are relevant rules of the DSU.⁵⁵ Although it is not clear what systemic consequences Brazil referred to, it appeared again in favor of a transparent rules-based approach to the WTO’s dispute settlement system. Scholarship is divided on the question of whether panels are well-suited to issue preliminary rulings and how to approach them.⁵⁶ In any case, Brazil’s concerns on preliminary rulings were partly echoed at the same meeting by the EU, which raised the issue of third party access to documents in preliminary ruling procedures. While such rulings are usually reproduced in the panel reports, this may

⁵⁰ WT/WGTDF/W/68, A Conceptual Note by Brazil (5 November 2012).

⁵¹ WT/WGTDF/M/24, Report of the Meeting of 27 and 28 March 2012 (24 September 2012), §24.

⁵² WT/WGTDF/W/64, Statement by the French Delegation (25 May 2012).

⁵³ A Evans-Pritchard, “Europe Drawn into Global Currency Wars as Slump Deepens” *The Telegraph* (16 January 2013); M Hesse and A Seith, “Calls for Cheap Euro: ECB Caught in Currency-War Crossfire” *Der Spiegel* (11 February 2013).

⁵⁴ I Wishart, “Concerns Growing over Global Currency Wars”, *European Voice* (14 February 2013), <<http://www.europeanvoice.com/article/imported/concerns-growing-over-global-currency-wars-/76419.aspx>>, accessed 28 March 2013.

⁵⁵ The minutes of this meeting were still restricted at the time of writing. A summary of the meeting was prepared by the WTO Secretariat and is available at <http://www.wto.org/english/news_e/news13_e/dsb_28jan13_e.htm>.

⁵⁶ See for example a current Appellate Body member who, prior to his appointment, indicated dealing with preliminary rulings as an issue of the current system of *ad hoc* panels: SW Chang, “Comment on a WTO Permanent Panel Body” (2003) 6 *Journal of International Economic Law* 211, 221. See for a different view by an experienced panellist, M Cartland, “Comment on a WTO Permanent Panel Body” (2003) 6 *Journal of International Economic Law* 211, 216.

be too late for third parties to anticipate and act upon them. Therefore, the question arose whether panels should issue the preliminary ruling to third parties. Currently, this is a discretionary decision by the panel in the context of its right to organize working procedures, within the limits of the DSU and more specifically Appendix 3 thereof. Practice shows that panels sometimes do and sometimes do not issue the rulings.⁵⁷ The same is true for the participation of third parties in preliminary proceedings. On this issue, a panel has held that in such a case third parties were to be invited to participate in the proceedings up to the time the panel issued its preliminary ruling.⁵⁸ In a case where Brazil was the complainant, a different panel held that third parties should have access to the parties' initial written comments and any written comments the parties may make on each other's comments.⁵⁹

The matter continues to be contested as in the aforementioned DSB meeting, the EU (and Australia and China) stated that third parties should be given access to information submitted by the parties and should be given the opportunity to comment.⁶⁰ The EU's statement should not come as a surprise, as it has long been addressing third party rights to access to documents. For example, the EU has previously requested preliminary rulings giving third parties access to all written submissions of the parties in Article 21.5 DSU proceedings. However, these requests were denied by panels in various instances.⁶¹ The EU persevered and found a panel which endorsed its reasoning.⁶² However, the finding was not followed by another panel in a subsequent case.⁶³ To settle the matter, the AB stated that the relevant provision of the DSU, Article 10.3, is to be interpreted as meaning that third parties shall be given all written submissions made prior to the first meeting of the panel.⁶⁴ In practice, this means that only the first written submissions of the complainant and the respondent are to be issued to third parties since the rebuttal submissions of both parties are typically only filed after the first meeting of the panel.⁶⁵

⁵⁷ See for example WT/DS156/R, *Guatemala—Cement II*, §8.11, in which the third parties were issued the preliminary ruling, and WT/DS291/R, WT/DS292/R, WT/DS293/R, EC—Approval and Marketing of Biotech Products, §7.47, in which only the parties did.

⁵⁸ WT/DS276/R, *Canada—Wheat Exports and Grain Imports*, §6.6 and footnote 3.

⁵⁹ WT/DS267/R, *US—Upland Cotton*, §7.3.

⁶⁰ *Supra* (n 55).

⁶¹ WT/DS18/RW, *Australia—Salmon*, §7.5-7.6; WT/DS126/RW, *Australia—Automotive Leather II*, §3.9.

⁶² WT/DS103/RW, WT/DS113/RW, *Canada—Dairy*, §2.34.

⁶³ WT/DS108/RW, *US—FSC*, §6.1-6.3.

⁶⁴ WT/DS108/AB/RW, *US—FSC*, §245.

⁶⁵ Appendix 3 to the DSU, §12.

IV. LEVERAGE FOR BRAZIL VIS-À-VIS THE EU

This section establishes how the above interactions in the area of WTO dispute settlement may have increased Brazil's leverage vis-à-vis the EU in three respects: (i) by creating indirect economic advantages, (ii) by increasing international and domestic mobilization and agenda-setting, and (iii) by strengthening the judicialization of the WTO dispute settlement system.

A. INDIRECT ECONOMIC ADVANTAGES

First of all, the active use of the dispute settlement system and concurrent domestic capacity building has made Brazil a very successful WTO complainant, one that is able to bring and win cases against highly contested EU measures especially in the context of the EU's agricultural policy.⁶⁶ The outcome in *EC - Export Subsidies on Sugar*,⁶⁷ a prominent case against essential measures of EU sugar policy, induced significant sectoral changes with positive effects for the Brazilian economy. After the AB found the EU's export subsidies on sugar inconsistent with the WTO Agreement on Agriculture, the EU's sugar policy was substantially reformed.⁶⁸ As a result of these reforms, the EU became a net importer of sugar. Even though the EU imports mainly from African, Caribbean and Pacific states and least developed countries which may benefit from duty-free quota-free access to the EU market, its altered sugar policy favors Brazil as the world's largest sugar producer and exporter.⁶⁹ These benefits extend the direct outcome of the dispute, and thus create economic leverage for Brazil. This case, as well as the dispute against U.S. export subsidies for upland cotton, brought before the WTO on the same day,⁷⁰ were also instrumental in a broader sense and enhanced Brazil's position as a complainant.

⁶⁶ See WT/DS69/AB/R, *EC—Poultry*, in which a European measure which disadvantaged exported poultry from Brazil, was deemed inconsistent with Article 5.5 of the Agreement on Agriculture; WT/DS269/AB/R, *EC—Chicken Cuts*, in which a modification of the EU's Combined Nomenclature altered the tariffs for salted chicken cuts, leading to less favourable treatment for poultry within this category than the treatment awarded in the EU's tariff concessions; and WT/DS266/AB/R, *EC—Export Subsidies on Sugar*, also discussed in this section.

⁶⁷ WT/DS266, *EC—Export Subsidies on Sugar*.

⁶⁸ Commission (EC), "Sugar" (2012) <http://ec.europa.eu/agriculture/sugar/index_en.htm>, accessed 2 April 2013.

⁶⁹ D Brough, "Brazil Sugar, Ethanol Exports at Peaks - ISO" *Reuters* (8 January 2013) <<http://www.reuters.com/article/2013/01/08/brazil-sugar-ethanol-idUSL5E9C8A9S20130108>>, accessed 2 April 2013.

⁷⁰ WT/DS267, *US—Upland Cotton*.

B. INTERNATIONAL AND DOMESTIC MOBILIZATION AND AGENDA-SETTING

This relates to a second point. Through its success as a WTO litigator, Brazil was able to prominently and bluntly put the EU's restrictive agricultural policy measures on the international agenda. This strengthened the position of opponents of agricultural subsidies both within the EU and amongst other WTO Members.⁷¹ Consequently, international pressure mounted on the EU regarding one of the most contentious issues of its trade policy. In return, this gave more weight to Brazil's request to diminish or end EU export subsidization of agricultural products. Similar dynamics can be seen in a patent protection case lodged by the U.S. against Brazil, in which the latter claimed that the contested measures were necessary to combat an HIV epidemic.⁷² After initial international outrage regarding the relationship between trade and access to medicine, and a symbolically interesting opening of the United Nations General Assembly on HIV/Aids, the case was settled.⁷³ Here too, international agenda-setting proved valuable for Brazilian trade policy. With respect to the EU and building on their position as proponents of access to generic medicines⁷⁴, Brazil and India lodged two separate WTO complaints against the EU and the Netherlands regarding Indian produced generic drugs that were seized in transit to the Netherlands on their way to Brazil.⁷⁵ The measure provoked comments from *inter alia* sixteen WTO Members, public health advocates, global health care interest groups and NGOs.⁷⁶ In the end, Brazil was able to put its interests in a positive light in comparison to the EU's interpretation of intellectual property protection and trade rules.

Brazil's efforts to bring such high-profile contentious issues before the WTO's dispute settlement system led to increased leverage for it as a negotiator in the Doha Round, reaffirming its leadership in the "G-20 of developing countries", an informal coalition which it had co-established with India and South Africa.⁷⁷ Moreover, Brazil's harder negotiation position during the Lula administration vis-à-vis the EU in the Doha Round

⁷¹ Shaffer, Ratton Sanchez and Rosenberg (n 24) 421-422.

⁷² WT/DS199, *Brazil—Measures Affecting Patent Protection*.

⁷³ P Capella, "Brazil wins HIV Drug Concession from US" *The Guardian* (26 June 2001).

⁷⁴ See J Wouters et al, "Some Critical Issues in EU-India Free Trade Agreement Negotiations" (2013) Leuven Centre for Global Governance Studies Working Paper 102, 14-16. India has reached an interim agreement with the EU on the matter: "India-EU Generic Drug Row 'Resolved' at Brussels Summit" *BBC News Europe* (10 December 2010) <<http://www.bbc.co.uk/news/world-europe-11971568>>, accessed 2 April 2013.

⁷⁵ WT/DS408, WT/DS409, *EU and a Member State—Seizure of Generic Drugs in Transit*, respectively brought by India and Brazil.

⁷⁶ ICTSD, "Brazil Slams EU for Seizure of Generic Drugs" (4 February 2009) 13 Bridges Weekly; "EU Challenged on Generics Seizures" (3 September 2010) 14 Bridges 3.

⁷⁷ Shaffer, Ratton Sanchez and Rosenberg (n 24) 421-422.

was arguably one of the main reasons why Brussels decided to establish the EU-Brazil Strategic Partnership.⁷⁸

Apart from these external aspects, WTO litigation also contains a “domestic” leverage dimension for Brazil. First of all, and importantly, complaints have given rise to increased domestic interest and support from well-organized sectoral interest groups and private sector actors. Their trade knowhow and political and financial mobilization resulted in interactions with the government, helping Brazil to win cases and build more capacity.⁷⁹ Second, a number of symbolically important cases in which Brazil acted as a respondent have incited attention in public opinion. The most symbolic dispute settlement saga followed a Canadian complaint against Brazil for alleged aircraft subsidies, followed by two complaints by Brazil against Canada on the same subject.⁸⁰ At first, Canada’s claim was successful. However, in the cases brought by Brazil, the Canadian subsidies were deemed inconsistent with WTO law as well. Shortly after this decision, Canada banned Brazilian beef on the account of alleged risks of BSE or mad cow disease.⁸¹ This caused a stir among Brazilian trade unions and farmers and influenced anti-Canadian actions by the Brazilian public.⁸² The result of such internal leverage is increased political and financial mobilization in favor of Brazil’s trade interests. Nonetheless, even though their influence is significant indirect domestic factors do not seem to play a vital role in Brazil’s position in trade negotiations.⁸³

C. JUDICIALIZATION OF WTO DISPUTE SETTLEMENT

Brazil’s active use of the dispute settlement mechanism and its proposals for reform contribute to focusing the WTO dispute settlement system more on rules and less on economic power. Judicialization aims at increasing predictability and transparency and allows economically weaker parties to bring complaints against stronger economies, as typified by the catchphrase “*right* perseveres over *might*”.⁸⁴ The split between judicialization

⁷⁸ E Mesquita Ceia, “The new approach of the European Union towards Mercosur: What is behind the launch of the Strategic Partnership with Brazil and what are its chances of being effective?” (2008) 61 *Studia Diplomatica* 81.

⁷⁹ Shaffer, Ratton Sanchez and Rosenberg (n 24), 481.

⁸⁰ WT/DS46, *Brazil—Aircraft*; WT/DS70, *Canada—Aircraft*; WT/DS222, *Canada—Aircraft Credits and Guarantees*. See Shaffer, Ratton Sanchez and Rosenberg (n 24), 414-416 for an account of these matters.

⁸¹ ICTSD, “Canadian Ban on Brazilian Beef Imports Escalates Trade Battle” (13 February 2001) 5 *Bridges Weekly* 5.

⁸² ICTSD, “Canada Under Pressure to Revoke Ban on Brazilian Beef” (20 February 2001) 5 *Bridges Weekly* 6; J Rich, “Tempers Flare and Losses Mount After Canada Bans Brazil Beef”, *New York Times* (20 February 2001).

⁸³ A Hurrell and A Narlikar, “A New Politics of Confrontation? Brazil and India in Multilateral Trade Negotiations” (2006) 20 *Global Society* 415, 433.

⁸⁴ J Lacarte-Muró and P Gappah, “Developing Countries and the WTO Legal and Dispute Settlement System: A View from the Bench” (2000) 3 *Journal of International Economic Law* 395, 400-401 (original emphasis).

and politicization has been referred to as “the fundamental controversy” in negotiations on amending the dispute settlement system.⁸⁵ Although Brazil can hardly be considered a small economy and one may therefore ask what interest it has in judicialization, it must be noted that its trade disputes mainly involve the U.S. and the EU. These actors are not only Brazil’s main trading partners but also the two largest economies in the world. Additionally, a rules-based orientation implies that legal capacity is crucial in making optimal use of the complex and expensive system.⁸⁶ Combining these two factors, it becomes clear why Brazil is a fierce proponent of an increased judicialization of the WTO dispute settlement system.⁸⁷

Brazil’s use of the WTO dispute settlement system and its reform proposals illustrate its interest in the judicialization of the system. An active use of the dispute settlement system allows the panels and AB to interpret WTO law, which reduces the scope for political arguments as economic and legal arguments become more important.⁸⁸ Participation helps shaping WTO law by influencing how the gaps in the WTO agreements are filled by the panels and AB. This in turn affects the bargaining position of a Member in subsequent negotiations.⁸⁹ The relative power of an economically more powerful party may decline as a result of the other party’s influence on how legal gaps are bridged. However, in the case of Brazil and the EU, both appear to be on the same side of this argument. Apart from its positions on reform discussed in the previous section, the EU also proposed increasing external transparency⁹⁰ and strengthening third party rights⁹¹ in order to reduce the power element in the WTO’s dispute settlement system.⁹² This being said, the EU has also initiated a proposal for reform which at first glance tends to strengthen the power-orientation of the dispute settlement system. The proposal concerns an automatic

⁸⁵ Zimmermann (n 42) 455-468.

⁸⁶ ML Busch, E Reinhardt and G Shaffer, “Does Legal Capacity Matter? A Survey of WTO Members” (2009) 8 *World Trade Review* 559, especially pp. 559-563 in which the authors refer to various other studies on the impact of legal capacity in WTO law.

⁸⁷ More so, these two factors are to be seen in a direct relationship with the judicialization of the WTO dispute settlement system. See D De Bièvre, “Legislative and Judicial Decision Making in the World Trade Organization” in M Koenig-Archibugi and M Zürn (eds), *New Modes of Governance in the Global System: Exploring Publicness, Delegation and Inclusiveness* (Palgrave Macmillan 2006), 51. See more generally: G Shaffer, “How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies”, (2003) ICTSD Sustainable Development and Trade Issues Resource Paper 5.

⁸⁸ J Wouters and M Burnay, “China And The European Union in the World Trade Organization: Living Apart Together?” in J Wouters et al (eds), *China, the European Union and the Restructuring of Global Governance* (Edward Elgar 2012), 85.

⁸⁹ G Schaffer, “Developing Country Use of the WTO Dispute Settlement System: Why it Matters, the Barriers Posed” in J Hartigan (ed), *Trade Disputes and the Dispute Settlement Understanding of the WTO: An Interdisciplinary Assessment* (Emerald 2009), 172.

⁹⁰ TN/DS/W/1, Communication from the EC, 13 March 2002, 6-7.

⁹¹ TN/DS/W/38, Communication from the EC, 23 January 2003, §15-16.

⁹² See, for a categorisation of proposals for reform, Zimmermann (n 42) 466.

lapse and easier withdrawal of requests for consultations or for the establishment of panels.⁹³ This may be seen as facilitating a tactical use of such requests for the purpose of negotiations.⁹⁴ Nonetheless, considering that at the time of writing, 143 disputes are in consultations⁹⁵ and in 22 cases a panel has been established but not yet composed⁹⁶ on a total of 456 disputes, current procedures have clearly not restrained Members from tactically requesting consultations and, to a lesser extent, the establishment of a panel. In that sense, the EU's proposal does not reduce the judicialization of the dispute settlement system.

The foregoing does not mean that Brazil or the EU refrain from using power politics in trade disputes. Brazil does use the threat of WTO dispute settlement vis-à-vis the EU from time to time. Apart from the dispute regarding the seizure of generic drugs mentioned above, it threatened to lodge a WTO complaint if EU environmental standards would harm Brazilian ethanol exports.⁹⁷

When considering the impact of judicialization of the WTO dispute settlement system on the interaction between Brazil and the EU, it should also be noted that the EU, one of the two most experienced users of the system, has built up an equally strong legal capacity in the WTO. Moreover, whether for ideological, cultural, historical or strategic reasons, the EU also favors the judicialization of the WTO dispute settlement system. This perhaps is not surprising, as even from the perspective of power politics, this approach entails less uncertainty on the outcome of disputes and alleviates potential economic power loss. Although this may be, the increasing importance of rules over power may only shift the concern, as substantial legal capacity may serve as a deterrent in a similar way as economic power.⁹⁸ Nonetheless, the former may perhaps be solved more easily than the latter.⁹⁹ In this sense, Brazil may serve as a model for newly emerging economies as it has

⁹³ EC (n 90), 9.

⁹⁴ Zimmermann (n 42) 463.

⁹⁵ Of which only about 30 stem from the last five years and can thus be expected to possibly lead to the establishment of a panel.

⁹⁶ Of which about half for more than five years.

⁹⁷ ICTSD, 'Doha Round at Crossroads' (May 2008) 12 Bridges 3, 19. Brazil had a similar trade row with the U.S. on ethanol, which led to a request for consultations in WT/DS365, *US—Agricultural Subsidies*. The complaint was framed broader than ethanol. A mutual agreement appears to have been found. See L Karp and M Stevenson, "Green Industrial Policy: Trade and Theory" (2012) World Bank Policy Research Working Paper 6238, 12-13. In this respect, also see WT/DS443, *EU and a Member State—Certain Measures Concerning the Importation of Biodiesels* in which Argentina brought a complaint against Spain and the EU attacking the Spanish implementation of the EU regulatory framework for energy from renewable sources. Argentina has put this dispute on hold after Spain announced it would modify the measure. Additionally, see WT/DS459, *EU and Certain Member States—Certain Measures on the Importation and Marketing of Biodiesel and Measures Supporting the Biodiesel Industry*. In this case, Argentina is targeting support schemes which promote renewable energies. ICTSD, "Argentina Lodges New WTO Complaint on EU Biodiesel Policies" (16 May 2013) 17 Bridges Weekly 17.

⁹⁸ Busch, Reinhardt and Shaffer (n 86), 577.

⁹⁹ T Sattler and T Bernauer, "Gravitation or Discrimination? Determinants of Litigation in the World Trade

strengthened its trade position through legal capacity-building whilst gaining economic power.

V. RECENT DEVELOPMENTS CAUSING A LOSS OF LEVERAGE FOR BRAZIL

The previous sections explained how Brazil and the EU are both committed to strengthening the WTO dispute settlement system's rules-based approach. It also discusses how Brazil has successfully created leverage through using the system to further its economic interests, strengthen its position in trade negotiations, and consolidate its image as an assertive new global player. However, this leverage might be dampened by several trade dynamics that currently shape international trade and commerce.

A. EMERGING GLOBAL TRENDS AND DEVELOPMENTS

First, the stalemate at the WTO's Doha Round of negotiations is a disappointing outcome for Brazil, as it has been one of the focal points of its trade negotiation strategy for more than a decade.¹⁰⁰ As illustrated above, Brazil uses the dispute settlement system to successfully target the protectionist agricultural policies of developed countries, strengthening its negotiating position in the Doha Round, where it initially played an assertive role. Brazil and the EU have moderated their demands and adopt a constructive approach in the Round, however, India and the U.S. still cling to their initial positions. To a certain extent, this neutralizes the Brazil's and the EU's key role in these negotiations.¹⁰¹ At the Sixth EU-Brazil Summit in January 2013, both partners agreed on the "need to accelerate negotiations in Geneva" and reiterated their commitment to concluding the Doha Round.¹⁰² Despite this reaffirmation – an evergreen in all statements under the EU-Brazil Strategic Partnership – both partners seem unable to reinvigorate the Doha process.

Second, Brazil's overall trade negotiating position is being undermined by a number of broader dynamics outside the WTO framework at the same time. This includes the informal consultations on a plurilateral free trade agreement addressing solely services, the International Services Agreement or Trade in Services Agreement. This initiative was launched by a group of countries in 2012 in an effort to make progress on services

Organisation" (2011) 50 *European Journal of Political Research* 143, 163.

¹⁰⁰ Valladão (n 8) 1.

¹⁰¹ Messerlin (n 16) 1-2.

¹⁰² Council of the European Union, "VI Brazil-EU Summit Joint Statement" (24 January 2013).

liberalization outside the “paralyzed” Doha framework. Negotiations are meanwhile entering the formal stage.¹⁰³ Brazil and other emerging economies are not involved and have openly criticized this initiative for compromising progress in the Doha Round and not meeting the standards of transparency and inclusiveness.¹⁰⁴

Furthermore, progress has recently been made towards several comprehensive multilateral trade negotiations, which signals a trend towards “mega-regionalism”. There is the Trans-Pacific Partnership (TPP) between the U.S. and ten countries around the Pacific, including Japan and perhaps South Korea in a later stage.¹⁰⁵ In the same region, talks to form a trilateral trade agreement between Japan, South Korea and China have been initiated but have not yet entered the stage of formal negotiations.¹⁰⁶ In Latin America, progressing talks on a Pacific Alliance between Chile, Colombia, Mexico, and Peru could lead to a competing trade bloc for Mercosur.¹⁰⁷ Interestingly, the EU (and the U.S.) has trade agreements in place with all current Pacific Alliance members. In addition, negotiations for a Trans-Atlantic Trade and Investment Partnership (TTIP) between the U.S. and the EU will commence in July 2013. If concluded, the TTIP would be the biggest trade deal ever negotiated.¹⁰⁸ Importantly, Brazil is not part of any of these processes.

While the scope and successful conclusion of these mega-regional trade agreements are still very uncertain, these agreements, if concluded, will shape the future of the global trade regime. Because of the sheer combined size and economic weight of the trade blocs involved, these new agreements have the potential to set standards for international trade. The TTIP has even been described as an attempt to create a “WTO version 2.0”.¹⁰⁹ Brazil’s economic interests and its role in the Doha Round could be undermined by the emergence of these mega-regional trade blocs. These concerns have been expressed by its Foreign Minister Antonio Patriota. Addressing the EU-U.S. negotiations, he noted there is a “strong possibility that something might emerge outside the framework and regulations of the World Trade Organization”, referring to a “framework which then they will want

¹⁰³ Commission (EC) “Negotiations for a Plurilateral Agreement on Trade in services” (15 February 2013) MEMO/13/107.

¹⁰⁴ RK Devarakonda, “An Assault on Multilateral Trade Negotiations”, International Press Service (17 March 2012) <<http://www.ipsnews.net/2012/03/an-assault-on-multilateral-trade-negotiations/>>, accessed 9 April 2013.

¹⁰⁵ PA Petri and MG Plummer, “The Trans-Pacific Partnership and Asia-Pacific Integration: Policy Implications” (2012) PIIIE Policy Brief.

¹⁰⁶ Joint Study Committee, “Report for an FTA among China, Japan and Korea”, 30 March 2012, <http://www.meti.go.jp/english/press/2012/0330_06.html>, accessed 16 April 2013.

¹⁰⁷ B Kotschwar, “Will the Pacific Alliance Succeed in Latin America After Other Trade Pacts Have Failed?” (23 May 2013) PIIIE Real Time Economic Issues Watch.

¹⁰⁸ Commission (EC), “European Union and United States to launch negotiations for a Transatlantic Trade and Investment Partnership” (13 February 2013) MEMO/13/95.

¹⁰⁹ Messerlin (n 6) 4.

to impose on the rest of world trade".¹¹⁰ Brazil seems to fear that WTO rules, including the Doha Round, might lose relevance. This is perhaps of a lesser concern for the EU.

The prospect of a TTIP between the U.S. and the EU also has implications for EU-Mercosur negotiations. Foreign Minister Antonio Patriota, while admitting that the start of EU-U.S. negotiations constitutes an "alert signal", reassured the Brazilian senate's Foreign Affairs Committee that EU-Mercosur negotiations have reached a further stage. Whereas the emergence of mega-regionals is pressuring Brazil to conclude an agreement with the EU, similar dynamics pressure the EU to reassess its priorities and make a "pivot" to East Asia and away from Latin America.¹¹¹

B. DEVELOPMENTS UNDERMINING BRAZIL'S POSITION VIS-À-VIS THE EU

Brazil's ability to generate leverage and gain influence in the international trade community was one of the reasons why the EU took steps to "upgrade" its relationship with Brazil to a Strategic Partnership in 2007. However, Brazil's position vis-à-vis the EU has come under pressure since then. First of all, at the end of 2013 Brazil will be removed from the list of countries benefiting from the EU's Generalized Scheme of Preferences (GSP), which grants preferential access to the EU market.¹¹² To come to a new, substantive trade agreement on market access with the EU, Brazil is dependent on progress in the EU-Mercosur dialogue. While negotiations on the EU-Mercosur trade agreement have carried on since 1998, fifteen years later Brussels and Brasilia still remain committed to an interregional agreement and do not openly consider a bilateral Brazil-EU alternative.¹¹³ Despite this commitment, EU-Mercosur trade negotiations continue to face a number of challenges. The Mercosur bloc is experiencing internal changes which make it difficult for Brazil, its largest economic power and therefore its main negotiator, to turn all heads in the same direction. These changes include the new membership of Venezuela, the possible opening of accession dialogues with Bolivia and the suspension of Paraguay.¹¹⁴ In addition to these membership issues, Mercosur is plagued by a number of economic difficulties. Argentina, the second biggest economy in Mercosur, has proven to be unwilling

¹¹⁰ BricsPost, "Brazil FM Warns EU-US on trade talks" (6 April 2013) <<http://thebricspost.com/brazil-fm-warns-eu-us-on-trade-talks/#.UWQJqUrZfTo>>, accessed 9 April 2013; MercoPress, 'Brazil hopeful an EU/Mercosur Trade Accord can be Concluded This Year' (6 April 2013), <<http://en.mercopress.com/2013/04/06/brazil-hopeful-an-eu-mercotur-trade-accord-can-be-concluded-this-year>>, accessed 9 April 2013.

¹¹¹ P Messerlin, "The Much Needed EU Pivoting to East Asia" (2012) 10 *Asia-Pacific Journal of EU Studies* 1.

¹¹² As Brazil has entered the group countries with a high or upper middle income per capita according to World Bank classification, the EU's GSP expires.

¹¹³ In the second Joint Action Plan of the EU-Brazil Strategic Partnership, covering 2012-2014, the partners agreed to "continue to work towards the conclusion of a balanced and comprehensive EU-Mercosur agreement".

¹¹⁴ RG Flóres "In Search of a Feasible EU-Mercosul Free Trade Agreement" (2013) CEPS Working Document 378, 5-6.

to make concessions to clinch the trade agreement. At the same time, the country faces problematic inflation rates, and the government has taken a number of controversial regulatory measures. Argentina's expropriation of the Spanish-owned petrol company YPF Repsol has been particularly painful for relations with the EU. In late 2012, the EU, Japan and the U.S. requested a WTO dispute panel to rule on Argentina's import restrictions.¹¹⁵ Buenos Aires has made the prospects of trade and foreign investment in Argentina increasingly unattractive, to the point where it has been labeled a "pariah" in the global economy.¹¹⁶ Not surprisingly, top EU officials have denounced Argentina's actions and spelled out its negative effects for the EU-Mercosur negotiations.¹¹⁷ Within Mercosur, similar trade tensions have arisen, and Brazil has expressed frustration with Argentina's regulatory measures which delay Brazilian imports.¹¹⁸

Both Mercosur's membership issues and the problematic economic policies of Argentina greatly undermine Brazil's negotiating position vis-à-vis the EU. Indeed, as Brazilian and EU officials reiterated the need to come to an agreement as fast as possible, Argentina's President Cristina Kirchner downplayed this sense of urgency and called for a more cautious approach.¹¹⁹ While Brazil accounts for 80% of Mercosur's total GDP, the "highly asymmetrical" power relations within the trade bloc have impeded it from effectively leading and concluding negotiations.¹²⁰

Not only do these issues complicate Brazil's efforts to conclude a trade agreement with the EU, in all likelihood, the EU's trade policy will be focused elsewhere for the coming years. First, the TTIP negotiations will be a priority. Second, in response to the U.S.-led TPP and the possible start of trilateral negotiations between China, Japan and South Korea, the EU is likely to invest its efforts in securing its trade interests in East Asia.¹²¹ To this end, in addition to the EU-Korea trade agreement, official negotiations with Japan were launched in March 2013. The upcoming negotiations with Washington and Tokyo, and additionally, the plurilateral services agreement, are expected to be

¹¹⁵ WT/DS438, WT/DS445 and WT/DS446, *Argentina—Measures Affecting the Importation of Goods*; ICTSD, "Four Argentina WTO Disputes Reach Panel Stage" (30 January 2013) 17 Bridges Weekly 3.

¹¹⁶ F Erixon and L Brandt, "Pariah in the World Economy: How Should Countries Respond to Argentina's Return to Economic Nationalism?" (2013) ECIPE Policy Brief 1 .

¹¹⁷ MercoPress, "Argentina's Behaviour' Main Obstacle for EU-Mercosur Trade Talks Says Brussels" (14 December 2012), <<http://en.mercopress.com/2012/12/14/argentina-s-behaviour-main-obstacle-for-eu-mercador-trade-talks-says-brussels>>, accessed 16 April 2013; MercoPress, "EC Regrets Stances of 'Protectionism' and 'Populism' in some Mercosur Members" (5 September 2012) <<http://en.mercopress.com/2012/09/05/ec-regrets-stances-of-protectionism-and-populism-in-some-mercador-members>>, accessed 16 April 2013.

¹¹⁸ ICTSD, "Brazilian Minister: EU-Mercosur Talks to Pick Up Momentum This Year" (11 April 2013) 17 Bridges Weekly 12.

¹¹⁹ MercoPress, "Cristina Fernandez Delaying Mercosur/EU discussions for a Free Trade Agreement" (28 January 2013) <<http://en.mercopress.com/2013/01/28/cristina-fernandez-delaying-mercador-eu-discussions-for-a-free-trade-agreement>>, accessed 16 April 2013.

¹²⁰ Leal-Arcas (n 17) 384.

¹²¹ Messerlin (n 111).

demanding and will likely absorb much of the high-level political support needed to conclude such comprehensive trade agreements. Hence, trade negotiations with Brazil or Mercosur are unlikely to receive similar attention. It has been argued that only when Brazil's economy eventually becomes "big, dynamic and better regulated enough", it will appear on the EU's political agenda and progress will be made.¹²² Several experts advance alternative approaches to the EU-Mercosur dialogue, indicating that it might be more constructive to first agree on a "smaller package" or an agreement on "anything but trade".¹²³ However, such an approach seems unlikely as the EU has signaled that it is only interested in concluding a trade agreement with Mercosur if it is substantial. Moreover, to come to a fully-fledged trade agreement, there might also be hurdles within the EU. Not only does the economic crisis continue to plague European economies, it is also uncertain whether the current French administration has the political capital to face Europe's strongest agricultural lobby, which stands to lose in the case of a future EU-Mercosur trade agreement.¹²⁴

VI. CONCLUDING REMARKS

On international trade issues the EU and Brazil interact at several scenes: multilaterally in the WTO, plurilaterally through the EU-Mercosur dialogue, and bilaterally. This paper examined how Brazil created leverage through these interactions in the WTO, and how recent trade developments are likely to reduce this leverage. Brazil made successful use of the WTO dispute settlement system and is committed to strengthening the rules-based approach of the system. As a result of its successful challenges of *inter alia* EU agricultural measures, Brazil created internal and external leverage to strengthen its position in the trade dialogue with the EU. In this sense, the experience of Brazil might serve as an example for other developing countries, and highlights the importance of domestic capacity-building.

Nonetheless, it was found that a number of current developments undermine Brazil's position. These include the negotiations to conclude a number of very large trade agreements, such as the TTIP, the TPP, trade integration proposals in Asia, or the international services agreement. These agreements are being negotiated outside the WTO framework as regional trade agreements and Brazil is not involved in any of them. If these agreements are concluded, they risk to isolate Brazil and reduce its competitiveness concerning market access conditions and trade diversion. As a result of this pressure, Brazil appears committed to conclude the long overdue EU-Mercosur free

¹²² Messerlin (n 16) 5.

¹²³ These views were presented at the conference "The Brazil-EU Strategic Partnership: Realities and Potential", organized by Centre for European Policy Studies (CEPS) (Brussels 4-5 March 2013).

¹²⁴ Valladão (n 8) 12.

trade agreement, but faces challenges in finding a common position with other Mercosur members, particularly Argentina. Moreover, the EU's interest to conclude the talks will be limited at a time where negotiations with the U.S. and Japan and the plurilateral services agreement are more likely to attract political support and prioritization.

In the meantime, the EU and Brazil continue to address and denounce each other's trade restrictive measures. The Commission's most recent report on "Potentially Trade Restrictive Measures" lists Brazil, as well as Argentina, among the countries which have resorted to the highest number of new restrictive measures.¹²⁵ The EU's vote for Mexico's Herminio Blanco in the race for the position of WTO Director-General, won by the Brazilian Roberto Azevêdo may be illustrative of existing tensions, although the vote may be of little political significance.¹²⁶ It remains to be seen how trade relations between the EU and Brazil will continue to be shaped by all these current developments. If no agreement is reached swiftly, it would appear that Brazil's position will gradually deteriorate. It might then take a long time before Brussels and Brasilia reconnect.

¹²⁵ Commission (EC), "Ninth Report on Potentially Trade Restrictive Measures Identified in the Context of the Financial and Economic Crisis" (6 May 2012).

¹²⁶ P Sotero, "Lessons of Azevêdo's Victory at the WTO" *Financial Times Beyond BRICS* (9 May 2013).