Chapter 5
Comparing the Role of Domestic Courts in International Trade Agreements

This chapter compares the Brazilian and EU courts' perspectives on the domestic application of the WTO agreements by elaborating on the main similarities and divergences between them, and the consequences of traditionalism and the rational choice theory approach. Thinking beyond the Brazilian experience, this chapter reveals patterns of emerging economies in Latin America, as they have adopted the direct effect of international trade agreements, namely Mexico and Argentina. This chapter finally suggests that the findings of the Brazilian experience may also be relevant to these Latin America countries, with due reservation to each country's social history.

5.1 The Main Similarities and Divergences Between Brazilian and European Union Courts in International Trade Agreements

In broad terms, the comparative study of Brazilian and EU courts' decisions provides the similarities and divergences in the understanding of the GATT/WTO agreements by the judiciary in the domestic legal order of both Brazil and EU territory. Because both Brazilian and EU legislation are silent about the status of international trade agreements, the judiciary gets to decide on the legal effects of the GATT/WTO agreements in the domestic legal order. However, such common ground on the power to establish the domestic legal status of international trade agreements by the judiciary has generated diverging positions. While the Brazilian courts settled the question that international trade agreements have the same status of ordinary federal law and in principle have direct effect in the domestic legal order, the ECJ has ensured the supremacy of international trade law but denied direct effect of WTO agreements.

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The main divergence between Brazilian and European Union courts regarding the application of WTO agreements (or lack of application) shows how the diverse levels of judicial review can disparately affect governmental trade policies. The ECJ ensured the executive with flexibility to administer the changeability of trade policy, and denied private invocability of trade rules before European courts. Conversely, Brazil has given WTO rules direct effect and therefore opened the door for private corporations to impact on public policy goals through the judiciary. Indeed, the views of the Brazilian judiciary on WTO agreements are different from the European case law. As this book argues, direct enforcement of WTO law in domestic legal systems is a very controversial topic due to the function and objective of the agreements as well as the questions it raises on popular sovereignty and self-government in choosing how to discharge international obligations.

A diverging characteristic between the Brazilian and EU courts that seems to affect why judges give (or not) direct effect to WTO agreements, although not specific to trade law, is the composition of the courts. The Brazilian judiciary has a mixed method of judicial selection, composed by career judges at the lower courts, with reputation judges at the higher courts. In this sense, the Brazilian judiciary contrasts with the membership of the EU courts, which are composed of recognition judges only, carefully nominated by EU Member States, who have more awareness of the international impact of their decisions. Generally speaking, judges in the developed world are mostly very reluctant to adjudicate on governmental trade policy, as they have more professional experience and are nominated later in their careers. Moreover, the lack of judicial self-restraint in Brazil based on the constitutional prominence given to access to courts also plays an indirect role in the direct effect of WTO agreements. Indeed, in Brazil, after the dictatorship ended in 1984, courts have not adopted the political question doctrine as a means to avoid deciding on complex governmental policy decisions. The Brazilian judiciary, on the contrary, has been most activist in assessing highly politically controverted matters,[1] international trade included. The new democratic Constitution of 1988, aiming at enhancing access to the judiciary, determined in Article 5, XXXV, that "*the law shall not exclude any injury or threat to a right from the consideration of the Judicial Power*."

As anticipated in the international legal scholarship, in what concerns the Brazilian experience in adopting traditionalism, diverse and conflicting judicial decisions were rendered, a flood of cases reached the domestic judiciary neutralizing trade measures, and the domestic interpretation of trade rules was different from the international understanding of such rules. As documented in Chap. 3, the impact and amount of diverse judicial decisions interpreting trade rules jeopardized the Brazilian stance before the WTO with the threat of retaliation for lack of compliance with WTO rules up to when the Brazilian Supreme Court, while not giving any legal effect to the WTO ruling, settled the controversy in a implicit consistent interpretation approach vis-à-vis the WTO Appellate Body. In the meantime, the

[1] Rodrigues (2009), Taylor (2004), Ballard (1999), and Faro de Castro (1997).

ECJ has avoided such consequences and lack of legal certainty by not allowing private litigation against public policies over economic interests and better bargains.

Divergence between Brazilian and EU courts also is found on the issue of reciprocity of GATT/WTO agreements. Brazilian domestic courts have never considered the question of reciprocity in relation to international trade agreements. Contrastingly, the ECJ has bestowed a great level of importance to reciprocity with regards to GATT/WTO agreements having in mind the prevalence of the rational choice theory approach in the role of domestic courts in the United States. The original intent in the conception of the GATT, and United States leadership in adopting the rational choice theory approach in the role of domestic courts has much influenced the ECJ, as can be perceived in the cases studied. Nevertheless, when it comes to association agreements, the ECJ took a different position regarding reciprocity, which, as mentioned, gives out power relations between the EU and their former colonies or potential new members.

The divergences between Brazilian and EU courts indicate that the political and economic incentives seem to play a fundamental role on whether international trade agreements have direct effect. The ECJ focused on the question of reciprocity from its major trading partners to secure the EU room of maneuver in trade negotiations and disputes. In this sense, a political motivation to maintain the same power level of other rich economies, mainly the United States, certainly played a role in the ECJ's adoption of the rational choice theory in relation to the WTO agreements. On the other hand, in what concerns the Brazilian Supreme Court position, it seems that incentives to interpret the WTO/GATT agreements in a more liberal perspective was also caused by concerns on abiding to international rules for the lack of competitive power conditions in trade relations. After all, as Conforti argues, traditionalism advances the idea that *"[a] State can greatly enhance its position within the international community by establishing its conformity to international law rules*."[2]

With reference to the direct effect of WTO agreements, however, enhancing a country's position in trade relations by claiming more compliance with GATT/WTO rules may seem to be overestimated. The political benefits in traditionalism regarding WTO agreements do not seem to constitute a strong argument against the most powerful trading players—the EU and the US—which adopted the rational choice theory approach. The direct effect of WTO agreements seems much more linked to a subservient perspective arisen in a former imperial dominion than grounded on a more realistic observation of the international contemporary standards. Although Brazil has a long path to attain the standards of living and infrastructure found in developed economies, the argument that allowing private companies to challenge governmental public policy based on WTO state-to-state commitments on market access would improve Brazilian stance before the contemporary international trade milieu seems to be largely unrealistic. The WTO

[2] Conforti (1993), pp. 10–11.

members have never agreed on providing the WTO agreements with direct effect, and have never asserted that private companies' interests should prevail over domestic public policy goals. Hence, the lack of direct effect in the majority of WTO members' domestic legal orders.

Beyond the controversial positions on the policy debate on whether private invocability of WTO rules is desirable, there is a point of convergence between the Brazilian and European perspective. Neither the Brazilian nor the EU courts have considered the WTO rulings as being directly enforceable in their territories. Even though both Brazilian and EU courts have not enforced WTO rulings in their jurisdiction, analysis reveals certain interesting parallels in substance of the decisions rendered. In Brazil, WTO rulings were qualified as part of Brazil's international obligations, not as having any domestic legal status in relation to their enforceability. Indeed, they are not legally enforceable in the Brazilian territory. Similarly, in the EU, the ECJ has stated that, although it is possible to challenge the legality of a community measure that implements WTO rules, there is no right enabling private actors to ask European courts to question the EU implementation of WTO rulings.[3]

[3] Reiterating its original case law on WTO rules, the ECJ stated in the *Van Parys* case (2005 E.C.R I-1465, Summary of judgment):

> Given their nature and structure, the WTO agreements are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions. It is only where the Community has intended to implement a particular obligation assumed in the context of the WTO, or where the Community measure refers expressly to the precise provisions of the WTO agreements, that it is for the Court to review the legality of the Community measure in question in the light of the WTO rules.
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> By undertaking after the adoption of the decision of the WTO Dispute Settlement Body (DSB) to comply with the rules of that organisation and, in particular, with Articles I(1) and XIII of GATT 1994, the Community did not intend to assume a particular obligation in the context of the WTO, capable of justifying an exception to the impossibility of relying on WTO rules before the Community Courts and enabling the latter to exercise judicial review of the relevant Community provisions in the light of those rules.
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> First, even where there is a decision of the DSB holding that the measures adopted by a member are incompatible with the WTO rules, the WTO dispute settlement system nevertheless accords considerable importance to negotiation between the parties. In those circumstances, to require courts to refrain from applying rules of domestic law which are inconsistent with the WTO agreements would have the consequence of depriving the legislative or executive organs of the contracting parties of the possibility afforded in particular by Article 22 of the Understanding on rules and procedures governing the settlement of disputes of reaching a negotiated settlement, even on a temporary basis.
>
> Secondly, to accept that the Community Courts have the direct responsibility for ensuring that Community law complies with the WTO rules would deprive the Community's legislative or executive bodies of the discretion which the equivalent bodies of the Community's commercial partners enjoy.
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> Therefore, an economic operator cannot plead before a court of a Member State that Community legislation is incompatible with certain WTO rules, even if the DSB has stated that that legislation is incompatible with those rules.

Convergence is also found in that both Brazilian and EU courts have made use of judicial deference towards the executive, although in different degrees. Under Conforti's typology, judicial deference towards the executive branch is understood as a judicial avoidance technique, implying that the governmental action does not conform with international law. Depending on the context, however, judicial deference to the executive may in fact stand for the appropriate enforcement of international trade rules. The Brazilian case on the imports of thermo bottles from China is an example where the Superior Court of Justice deferred to the executive to review the applicability of antidumping duties to an individual exporter. This ruling in fact favors the implementation of the Antidumping Agreement,[4] which requires members to maintain judicial review of administrative actions relating to "final determinations," and not, as happened at the Brazilian first instance level, to substitute the administrative agencies that would first analyze the individual request of non-application of antidumping duties to certain specific transactions.

Therefore, judicial deference towards the executive does not necessarily mean that international trade rules are not being respected by the executive. It could also mean that the executive has more adequate resources to evaluate whether a specific product is being dumped, rather than the judicial branch. However, this can be the case for countries where the political configuration provides a more self-restrained judiciary in reviewing governmental policies. Accordingly, instead of considering that judicial deference to the executive translates into a judicial avoidance technique against the application of international law, this study shows that in fact, there are instances where deference to the executive qualifies as compliance with international trade rights. Therefore, the assumption that the role of domestic courts regarding international trade rules is necessary and beneficial for international law requires the analysis of the context of the political institutions and the role of the judiciary in a specific country.

Another point of convergence in the way Brazilian and EU courts understand the WTO agreements is that, in a general perspective, both Brazilian and EU courts give a high value to the presumption of consistency of domestic law with international law. Although not recognizing the legal effect of WTO rulings in their respective legal orders, both Brazil and the European Union have interpreted litigation brought before them in a consistent way with WTO rulings, as seen in the *Retreated Tires*[5] case, before the Brazilian Supreme Court, and the *Ikea*

[4] Antidumping Agreement, Article 13 reads:

> Article 13: Judicial Review
> Each Member whose national legislation contains provisions on anti-dumping measures shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review of administrative actions relating to final determinations and reviews of determinations within the meaning of Article 11. Such tribunals or procedures shall be independent of the authorities responsible for the determination or review in question.

[5] STF, Argüição de Descumprimento de Preceito Fundamental 101-DF, Relatora: Ministra Carmem Lúcia, 24.6.2009, D.J.U. 4.6.2012.

Wholesale[6] case before the ECJ. In the *Retreated Tires* case, the Brazilian Supreme Court's decision reached a similar outcome to the WTO ruling, but the legal grounds were based on domestic constitutional law and international treaties other than the WTO agreements. In the *Ikea Wholesale* case, the ECJ rejected the request for reimbursement of antidumping duties collected on imports of cotton-type

[6] Ikea Wholesale Ltd. v. Commissioners of Customs & Excise, 2007 E.C.R. I-07723. The ECJ stated:

29. It must be recalled, as a preliminary point that, according to settled case-law, given their nature and structure, the WTO agreements are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions (Case C-93/02 P Biret International v Council [2003] ECR I-10497, paragraph 52, and Case C-377/02 Van Parys [2005] ECR I-1465, paragraph 39 and the case-law cited).
30. It is only where the Community has intended to implement a particular obligation assumed in the context of the WTO, or where the Community measure refers expressly to the precise provisions of the WTO agreements, that it is for the Court to review the legality of the Community measure in question in the light of the WTO rules (Case C-149/96 Portugal v Council [1999] ECR I-8395, paragraph 49; Biret International v Council, paragraph 53; and Van Parys, paragraph 40 and the case-law cited).
31. In accordance with Article 1 of Regulation No 1515/2001, the Council may, following a report adopted by the DSB, and depending on the circumstances, repeal or amend the disputed measure or adopt any other special measures which are deemed to be appropriate in the circumstances.
32. Regulation No 1515/2001 applies, according to its Article 4, to reports adopted after 1 January 2001 by the DSB. In the present case, the DSB adopted the report of the Appellate Body on 12 March 2001 together with that of the Panel as amended by the Appellate Body's report.
33. Pursuant to Article 3 of Regulation No 1515/2001, any measures adopted pursuant to that regulation are to take effect from the date of their entry into force and may not serve as basis for the reimbursement of the duties collected prior to that date, unless otherwise provided for. Recital (6) in the preamble to the regulation provides in that connection that the recommendations in reports adopted by the DSB only have prospective effect. Therefore, 'any measures taken under [Regulation No 1515/2001] will take effect from the date of their entry into force, unless otherwise specified, and . . . do not provide any basis for the reimbursement of the duties collected prior to that date'.
34. In this case, having regard to the provisions of Regulation No 1515/2001 and to the DSB's recommendations, the Council first of all adopted Regulation No 1644/2001 on 7 August 2001. Next, on 28 January 2002, it adopted Regulation No 160/2002, and finally, on 22 April 2002, Regulation No 696/2002 confirming the definitive anti-dumping duty imposed by Regulation No 2398/97, as amended and suspended by Regulation No 1644/2001.
35. It follows from all of the foregoing that, in circumstances such as those in the main proceedings, the legality of Regulation No 2398/97 cannot be reviewed in the light of the Anti-dumping Agreement, as subsequently interpreted by the DSB's recommendations, since it is clear from the subsequent regulations that the Community, by excluding repayment of rights paid under Regulation No 2398/97, did not in any way intend to give effect to a specific obligation assumed in the context of the WTO.

bed linen under the zeroing methodology as interpreted by the WTO Dispute Settlement Body in the *EC-Bed Linen*[7] case. At the same time, however, the ECJ granted the relief sought by the plaintiff based on an autonomous interpretation of the European regulation on antidumping. Table 5.1 provides a summary of the main divergences and similarities in the role of Brazilian and EU courts, and Table 5.2 the main consequences of their perspectives as discussed in Chaps. 3 and 4.

Table 5.1 Synopsis of divergences and similarities between Brazilian and EU courts regarding WTO agreements

	Brazil	European Union
Divergences	1. Traditionalism 2. WTO agreements equal to federal law 3. Private corporations may impact public policy based on WTO rules 4. Judiciary may decide on international trade obligations 5. No reciprocity required	1. Rational choice theory 2. Supremacy of WTO agreements 3. No possibility of interference in public policy choices based on WTO rules 4. The EU executive bodies decide how to discharge international trade obligations 5. Reciprocity is needed from other major trading partners
Similarities	1. Domestic legislation is silent on the domestic status of international trade agreements 2. Judicial deference to the executive, although in variable extents 3. No domestic legal status of WTO rulings, but use of consistent interpretation	

Table 5.2 The main consequences of the Brazilian and EU courts' perspective on the domestic legal effect of the WTO agreements

Brazil	European Union
1. Private parties may have recourse to courts to secure their economic position or increase profits	1. Private companies cannot challenge domestic public policy over their economic interests or market share
2. A flood of individual cases to revert unfavorable governmental trade policy, potentially neutralizing trade policies	2. Private companies have to support loss of market access or sales over governmental public policy, without recourse to courts
3. Diverse and inconsistent rulings among domestic courts within Brazil	3. Uniformity of interpretation of WTO rules in the EU territory by the EU executive
4. Domestic courts' interpretation of WTO rules differs from the international and foreign interpretation	4. Executive bodies are in charge of interpreting WTO rules and finding negotiable solutions for conflicting international obligations or foreign interpretations
5. Disequilibrium in international trade's concessions and rights among WTO members	5. International trade's balance of concessions and rights are under WTO review
6. Shift of decision-making on governmental public policies from the political powers to the judiciary	6. Empowerment of executive bodies to make public policy decisions that benefit society

[7] WTO, *European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, adopted on 12 March 2001.

From the point of view of the general implementation of international law, the supremacy of international trade agreements, coupled with lack of direct effect of international trade rules in the European case, contrasts with the non-primacy of international law with the potential application of the *lex posteriori* principle in Brazil. Indeed, this research provides evidence that formal considerations on hierarchical primacy of international law, per se, do not necessarily translate into a more favorable role of domestic courts regarding international trade agreements. Likewise, the ordinary status of federal law given to international trade rules, when interpreted by domestic judges in a way that requires a clear intent of the legislator to revoke an international rule, may also provide stronger compliance with international law at the domestic level. What really seems to guarantee that WTO law is respected in domestic systems is, after all, the willingness of courts to construe domestic norms in a consistent way with the WTO agreements. Such approach towards international law seems to be the case in both Brazilian Supreme Court and the ECJ.

As earlier advanced, this research argues that the function and objective of WTO Agreements and the principle of popular sovereignty and self-government do not create individual rights at the domestic level. The reasons considered by the European Union courts, in line with other major economies, such as the United States, Japan, Canada, India and China, to consider WTO agreements as non-self-executing or as not having direct effect seem compelling. Furthermore, the implementation of the WTO agreements at the domestic level seems to be more effective when courts are willing to make use of the doctrine of consistent interpretation, which, indeed, has occasionally happened in both Brazil and the European Union. This conclusion is even more convincing in relation to the Brazilian standpoint due to the flood of individual claims filed against governmental trade measures, with the consequent hindrance of its objectives. Lastly, despite punctual economic crisis, the world trade will intensify and more complex cases may arise. Domestic courts may be not the optimal venue for deciding trade conflicts, as there is always the possibility of negotiating and finding a better solution among the countries involved, which are for the executive to assess and balance the alternatives available.

As a result, the WTO dispute settlement mechanism provides a more appropriate venue for deciding disputes and unifies the application of WTO rules to all member states. In fact, the international trade system has an effective dispute settlement at the international level and the primary argument for traditionalism—the lack of international mechanisms to make member states comply with international law—turns out to be not so relevant in the case of the world trade system.

With the main similarities and divergences between the understanding of the Brazilian and EU courts regarding the GATT/WTO agreements in mind, the next section will suggest that the findings of the Brazilian experience regarding the GATT/WTO agreements can be extended to a high degree to other emerging economies in Latin America, with due reservation to each country's social history.

5.2 Thinking Beyond Brazilian Perspectives: The Patterns of Emerging Economies in Latin America

As the world economy has been undergoing massive changes and the importance of emerging markets has been growing, the findings of this study can also be relevant to other emerging countries in Latin America that have adopted traditionalism in their domestic court's approach to international trade agreements. The Latin American emerging economies' courts approach on international trade law becomes of increasing significance because of their potential impact as international trade increases in the region.

The term "emerging markets" is a terminology created in the 1980s by Antoine van Agtmael to identify developing world countries with higher economic growth rates to promote foreign investment in markets with expansive consumer demands.[8] The term emerging markets however does not have a common and consistent definition in international institutions. For instance, the International Monetary Fund, in its World Economic Outlook Database,[9] divides the world into two major groups: (1) advanced economies and (2) emerging market and developing economies. This list however does not identify which countries are considered emerging countries out of the developing economies. Other institutions and international investment agencies make their own assessments and definitions. As a matter of fact, there is no clear consensus about which countries are considered emerging economies.[10]

Despite the lack of a consistent concept of emerging countries, the growing attention on the Latin American markets has made the role of domestic courts regarding international trade agreements in their domestic jurisdictions increasingly relevant. Because this study focuses on international trade, it will consider for the definition of emerging economies in Latin America the membership of the Group of Twenty (G-20),[11] all of which are members of the WTO. In addition to Brazil, Mexico and Argentina are the Latin American members of the G-20. The G-20 is currently one of the most relevant negotiation groups at the multilateral level, which aggregates the major developing and developed countries. In addition, according to the 2013 World Bank ranking table of countries' GDP,[12] Brazil, Mexico and Argentina ranked 7th, 15th and 21st, respectively, which show their economies' weight in Latin America.[13]

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[8] Van Agtmael (2007), pp. 4–5.

[9] International Monetary Fund (2014), p. 180.

[10] Kvint (2008).

[11] The G-20 members are: Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Mexico, Russia, Saudi Arabia, South Africa, Republic of Korea, Turkey, United Kingdom, and the United States of America.

[12] World Bank (2014).

[13] Venezuela and Chile respectively ranked 27th and 38th in the 2013 table. *See* World Bank (2014).

The Latin American emerging economies become more relevant in the international arena as the world economy has been undergoing massive changes and the importance of emerging markets has been growing. Besides their membership to the WTO, Latin American emerging economies are also members of other significant regional trade agreements, with potential for overlapping obligations and conflicting rules and rulings. Brazil and Argentina are members of the Common Market of the South (MERCOSUL), and Mexico is member of North American Free Trade Agreement (NAFTA). This study will therefore assess, in relation to Mexico and Argentina, the domestic status of international treaties and their traditionalist perspective of these countries' domestic courts.

In relation to the domestic status of international treaties in the domestic law, the Mexican Constitution provides that international treaties, along with laws of Congress, are the supreme law of the Union.[14] This provision however has raised great controversies. In the last two decades, the Mexican Supreme Court [*Suprema Corte de Justicia de la Nación*] has taken different positions on this issue.[15]

A prominent position of the Mexican Supreme Court was taken in the case *Amparo de Revisión n. 120/2002*.[16] In this case, McCain Mexico, a subsidiary of Canadian company McCain Foods, challenged the imposition of a 20 % ad valorem safeguard duty on imported frozen potatoes from Canada. This safeguard duty was based on several provisions, being the most relevant a presidential Decree that fixed, for the year of 2001, the import tax of goods from North America and other countries. McCain Mexico argued that the safeguard duty was unconstitutional because the NAFTA established an import tax of zero percent and other rules of lesser hierarchy could not take precedence over an international treaty.

The Mexican Supreme Court then decided that international treaties are hierarchically above general statutory laws from all spheres of government, that is, they are superior to all state, federal, and local laws. The Mexican Supreme Court stated that international treaties are nevertheless not equal to Mexican constitutional rules. The Mexican Supreme Court made a systematic interpretation of Article 133 of the Mexican Constitution in balance with other international law principles prescribed in the Constitution, and concluded that international treaties are below the Federal Constitution and above all federal, state and municipal laws.

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[14] Mexican Constitution, Article 133 reads:

> This Constitution, the laws of the Congress of the Union that emanate therefrom, and all treaties that have been made and shall be made in accordance therewith by the President of the Republic, with the approval of the Senate, shall be the supreme law of the whole Union. The judges of each State shall conform to the said Constitution, the laws, and treaties, in spite of any contradictory provisions that may appear in the constitutions or laws of the States.

[15] Mexico, Suprema Corte de Justicia de la Nación, Amparo en Revisión 2069/91, considering that international treaties have the same hierarchical status of federal law; Amparo en Revisión 1475/98, stating that international treaties are situated above federal law and below the Constitution.

[16] Mexico, Suprema Corte de Justicia de la Nación, Amparo en Revisión 120/2002. Mc Cain México, S.A. de C.V. 13 de febrero de 2007, Semanario Judicial de la Federación y su Gaceta XXV, Abril de 2007, Tesis: P. IX/2007.

Nevertheless, constitutional reforms in 2011 brought about new constitutional provisions that affect the domestic status of international treaties in Mexico. Among several changes, these new constitutional amendments modified Article 1 of the Mexican Constitution which now provides that that every person in Mexico shall enjoy the guarantees granted not only by the Mexican Constitution but also by the international treaties to which the Mexican State is party, which cannot be restricted or suspended except in such cases and under such conditions provided by the Constitution itself.

In interpreting this new constitutional amendment in the case *Contradicción de Tesis 293/2011*,[17] the Supreme Court of Mexico, by a 10–1 vote, decided that human rights, regardless of their source, have constitutional status. In practice, the Court granted international human rights treaties the same status as the Constitution. However, whenever the Constitution provides any restriction to such international human rights, the Constitution prevails. Moreover, in this decision, the Mexican Supreme Court, by a 11–6 vote, ruled that the case law of the Interamerican Court of Human Rights is binding to the Mexican judiciary in case it is more favorable to individuals and consistent interpretation is not possible.

In what concerns Argentina, the Argentinean Constitution establishes as a general rule that international treaties signed with other countries or international organizations are hierarchically superior to general laws. The Constitutional Reform of 1994 introduced the constitutional rule establishing the supremacy of international treaties over domestic laws in the Argentinean system.[18] At that occasion, several international human rights treaties[19] were elevated to constitutional hierarchy.[20] Article 75, 22 of the Argentinean Constitution also created the possibility that other international treaties on human rights, after their approval by Congress, may be granted constitutional hierarchy with the vote of two-thirds of all members of each House. Most importantly, the Argentinean Constitution opened a door to the possibility of transferring sovereign power to international integration treaties in Latin America, if approved with absolute majority of members of each House.

[17] Mexico, Suprema Corte de Justicia de la Nación, Contradicción de Tesis n. 293/2011 suscitada entre el Primer Tribunal Colegiado en Materias Administrativa y de Trabajo del Décimo Primer Circuito y el Séptimo Tribunal Colegiado en Materia Civil del Primer Circuito, 2 y 3 de septiembre de 2013.

[18] Argentinean Constitution, Art. 75, XXII.

[19] According to Article 75, XXII, of the Argentinean Constitution, the human rights treaties with constitutional hierarchy are: the American Declaration of the Rights and Duties of Man; the Universal Declaration of Human Rights; the American Convention on Human Rights; the International Pact on Economic, Social and Cultural Rights; the International Pact on Civil and Political Rights and its empowering Protocol; the Convention on the Prevention and Punishment of Genocide; the International Convention on the Elimination of all Forms of Racial Discrimination; the Convention on the Elimination of all Forms of Discrimination against Woman; the Convention against Torture and other Cruel, Inhuman or Degrading Treatments or Punishments; and the Convention on the Rights of the Child.

[20] Argentinean Constitution, Art. 75, XXII.

In relation to countries outside Latin America, the Argentinean Constitution also permits integration agreements with the same qualified Congress vote, but only after Congress pass a previous "declaration of advisability" to allow such treaty to be considered for approval.[21] The possibility of sovereign power transfer to other countries that are not around Argentinean territorial limits showed the willingness of Argentina to develop a higher level of integration process within MERCOSUL and triggered tensions with Brazil. The Brazilian Constitution had not been amended to include a similar provision and there has been no clear inclination from the Brazilian political branches to do so.

Table 5.3 provides a comparative summary of the domestic legal status of international treaties in Brazil, Mexico and Argentina.

Table 5.3 The domestic legal status of international treaties in Brazil, Mexico and Argentina

Hierarchy of treaties	Brazil	Mexico	Argentina
Equal to federal law	International treaties (trade included)	No	No
Above federal law but below the constitution	International human rights treaties	International treaties (trade included)	International treaties (trade included)
Equal to constitution	International human rights treaties with qualified vote for approval	All international human rights treaties to which Mexico is party	1. Certain treaties on human rights; 2. Other human rights treaties with qualified vote
Sovereignty transfer to integration treaties	No	No	1. In Latin America: absolute majority 2. Other countries: absolute majority after the declaration of advisability

[21] Argentinean Constitution, Art. 75, XXIV, reads:

> To approve treaties of integration which delegate powers and jurisdiction to supranational organizations under reciprocal and equal conditions, and which respect the democratic order and human rights. The rules derived therefrom have a higher hierarchy than laws.
>
> The approval of these treaties with Latin American States shall require the absolute majority of all the members of each House. In the case of treaties with other States, the National Congress, with the absolute majority of the members present of each House, shall declare the advisability of the approval of the treaty which shall only be approved with the vote of the absolute majority of all the members of each House, one hundred and twenty days after said declaration of advisability.
>
> The denouncement of the treaties referred to in this subsection shall require the prior approval of the absolute majority of all the members of each House.

Like Brazil, Mexico and Argentina have also a tradition of giving direct effect to international treaties, including WTO agreements. In Argentina, WTO agreements have direct effect and precedence over domestic law.[22] Due to the constitutional rank of international treaties, any domestic judge in Argentina may, if requested in a case, "*declare the unconstitutionality of any measure adopted in breach of rules contained in an international treaty, such as the WTO Agreement*."[23]

According to Mexican law, once an international treaty is ratified by the Senate, it becomes domestic law with self-executing character.[24] Therefore, in Mexico, WTO agreements have direct effect, and international agreements have a status higher than ordinary federal law.[25] As a result, in case of conflict with domestic law, WTO agreements prevail. In fact, Mexico and Argentina confer individuals the right of action to challenge domestic law based the WTO agreements.

The Judicial Power of Mexico is composed by the Supreme Court of Justice of the Nation [*Suprema Corte de Justicia de la Nación*], the Electoral Court, the collegiate and unitary circuit courts, and district courts.[26] The Federal Judicial Council oversees of the administration of the judiciary, except in relation to the Supreme Court of Justice, and selects district judges. Federal courts adjudicate on matters involving the enforcement and application of international treaties.[27] The Supreme Court of Justice of the Nation may exercise abstract judicial review against international treaties.[28] In Mexico, the structure of state courts is defined by local law and, with some variations, is divided into state superior court of justice [*tribunal superior de justicia*] and courts of first instance [*tribunales de justicia del fuero común/primera instancia*].[29]

In Mexico, trade litigation between private parties and government authorities is decided by the federal administrative court [*Tribunal Federal de Justicia Fiscal y Administrativa*] with technical autonomy to adjudicate on cases involving international trade treaties and the Foreign Trade Law.[30] Final decisions of this administrative court may be reviewed by federal courts.[31]

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[22] WTO, *Argentina—Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/R, paragraph 3.214, circulated on 25 November 1997.

[23] Ibid.

[24] Miranda and Partida (2013), p. 56.

[25] The direct effect of WTO agreements, and the fact that they prevail in conflict with domestic legislation in Mexico, was used as a defense before the WTO dispute settlement mechanism in *Mexico—Definitive Anti-Dumping Measures on Beef and Rice*, WT/DS295/R, circulated on 6 June 2005.

[26] Mexican Constitution, Art. 94.

[27] Mexican Constitution, Art. 104.

[28] Mexican Constitution, Art. 105, II, b, c, g.

[29] Kossick Jr (2000), pp. 27–28.

[30] Mexico, Ley Orgánica del Tribunal Federal de Justicia Fiscal y Administrativa, D.O.F. 6.12.2007, Art. 14, X and XIII.

[31] Hernández (2003) p. 161.

In Argentina, the Supreme Court of Justice of the Nation [*Corte Suprema de Justicia de la Nación*] and federal lower courts constitute the federal judiciary.[32] The Argentinean Constitution gives autonomy to Argentinean provinces regarding the administration of justice[33] and, as a result, each Argentinean province has a particular court system. The Judicial Council is in charge of the selection of judges as well as of the administration of the judiciary.[34] Federal courts have the attribution to decide on cases involving international treaties with foreign countries.[35] For instance, in 1999, the federal judge of Concepción del Uruguay ordered the limitation of chicken imports from Brazil into Argentina until Argentinean authorities reanalyzed a request for antidumping measures made by Argentinean poultry producers.[36] Nevertheless, tax and customs authorities decisions can be challenged before an administrative court [*Tribunal Fiscal de la Nación Argentina*], which provides an independent technical venue for questioning government authorities decisions on such matters. However, this administrative court cannot review the constitutionality of any customs and tax laws and regulations, except if the Argentinean Supreme Court, whose interpretation should be followed, has already decided the issue.[37]

There are numerous decisions involving international trade agreements such as the NAFTA and MERCOSUR before the Mexican and the Argentinean judiciaries, but not as much in relation to WTO agreements. For instance, the Argentinean Supreme Court of Justice has rendered more than 55 cases involving MERCOSUR, while the lower courts have decided on 420 cases.[38] However, there is not much domestic litigation based on the WTO agreements. To illustrate, although Argentinean authorities initiated 325 antidumping investigations in the period between 1995 and 2010, "*only a few were subjected to judicial review*."[39] The Argentinean Constitution provides all citizens with right of access to courts, but the case law of the Argentinean Supreme Court requires that, in most cases, an administrative review be first filed over a dispute against an administrative act.[40] Commentary has noted that the lack of use of judicial review of trade remedies may be due to the requirement of administrative remedies' exhaustion and the time-length of court proceedings. [41]

[32] Argentinean Constitution, Art. 108.
[33] Argentinean Constitution, Art. 5.
[34] Argentinean Constitution, Art. 114.
[35] Argentinean Constitution, Art. 116.
[36] La Nación (1999).
[37] Argentina, Ley 11.683, Art. 185.
[38] De Klor and Perotti (2009), pp. 93–94.
[39] De Artaza (2013), p. 131.
[40] Ibid., p. 134.
[41] Ibid., p. 151.

With regards to Mexico, in a search of the Mexican Supreme Court database, five cases related to WTO trade remedies were found.[42] An important case to mention is the one that the Mexican Supreme Court considered the WTO Appellate Body ruling as an additional reason to maintain a disputed governmental trade measure. The plaintiff in this case challenged a presidential decree that raised to 20 % the import taxes under the NAFTA on American wine and distilled beverages.[43] This tariff raise was issued in retaliation to the United States lack of compliance with the WTO ruling on the *US—Offset Act (Byrd Amendment)*, as authorized by the WTO DSS.[44] In order words, the WTO authorized retaliation over products protected under a different trade agreement, although such agreement was between the same dispute parties. The plaintiff argued that the federal executive could not modify the preferential tariff quotas enshrined in the NAFTA, alleging several constitutional grounds.[45] The Mexican Supreme Court considered that the

[42] The search was made at the Mexican Supreme Court case law database [*Jurisprudencia y Tesis Aisladas*] under the words "acuerdo general aranceles," with three results on antidumping; "OMC" and "GATT" with no results, and finally "Organización Mundial del Comercio" with two results in 2013.

[43] Mexico, Amparo en revisión 196/2007. Unión de Grandes Marcas, S.A. de C.V. 20 de junio de 2007. Ponente: Juan N. Silva Meza. Novena Época, Primera Sala, Semanario Judicial de la Federación y su Gaceta XXVI, Septiembre de 2007, Página: 374, Tesis: 1a. CLXXXVIII/2007, Tesis Aislada.

[44] WTO, Decision by the Arbitrator, *United States—Continued Dumping and Subsidy Offset Act of 2000, Original Complaint by Mexico—Recourse to Arbitration by the United States under Article 22.6 of the DSU*, WT/DS234/ARB/MEX, 31 August 2004, DSR 2004:X, 4931.

[45] The most relevant constitutional argument was that the presidential decree violated Article 131, 2nd paragraph, of the Mexican Constitution, which reads:

> The Executive may be empowered by the Congress of the Union to increase, decrease, or abolish tariff rates on imports and exports, that were imposed by the Congress itself, and to establish others; likewise to restrict and to prohibit the importation, exportation, or transit of articles, products, and goods, when he deems this expedient for the purpose of regulating foreign commerce, the economy of the country, the stability of domestic production, or for accomplishing any other purpose to the benefit of the country *The Executive himself, in submitting the fiscal budget to Congress each year, shall submit for its approval the use that he has made of this power*. (emphasis added).

In his view, the plaintiff interpreted Article 131 as prescribing that the extraordinary powers of the executive on foreign trade was conditioned to the previous approval of Congress through regular legislative proceedings. In this case, the Presidential decree modifying the tariffs was not informed to Congress. The Mexican Supreme Court of Justice rejected the plaintiff's argument, and clarified that the President may enact decrees modifying tariffs based on Article 131 of the Constitutional, and considered that the respective authorization of Congress's had already been granted by the Foreign Trade Law (Mexico, Ley de Comercio Exterior, D.O.F. 27.6.2003, Art. 4). The Court added that the fact that the President had not informed Congress of such decree does not turn the decree invalid and, as mentioned above, that he President may modify preferential tariff rate quotas of NAFTA more so if he is enforcing a WTO rulings.

The Mexican Supreme Court of Justice considered that the Mexican Constitution Article 131, 2nd paragraph, allows the executive to face situations that impair the national economy with Congress permission in a timely and efficient manner, because it is the executive branch that may respond to the dynamism of international trade. The Court clarified that the interpretation

Executive needed mechanisms to respond to the dynamics of international trade, and to face conflicting international obligations originated from diverse international trade agreements. Like in the Brazilian *Retreated Tires* case, the Mexican Supreme Court decision validating the presidential decree originated from a WTO authorization to retaliate may also be understood as the judicial inclination to apply the doctrine of consistent interpretation. Although the WTO rulings did not have legal effect in their domestic legal order, the Brazilian and Mexican Supreme Courts implicitly validated the WTO rulings' outcome. Conversely, in these cases, both MERCOSUL and NAFTA did not prevail over WTO agreements.

It is most likely that particular interpretations and characteristics of the Brazilian courts' experience on the domestic application of WTO agreements may not be entirely shared by the Argentinean or Mexican judiciaries. Nevertheless, the crucial point here is that all these Latin American emerging economies have considered, at least in principle, that WTO agreements are to be enforced by domestic courts. Accordingly, the conclusion of this study to bring into question the level of domestic judicial protection given to international trade rules may also be extended to these Latin American emerging economies, with due respect to each country's particularities. More field research is required to understand the context of the political institutions and the role of the judiciary in these countries. However, Latin American emerging economies have in principle restrained their own policy autonomy at the domestic level by adopting traditionalism in the role of domestic courts regarding international trade agreements. As earlier noted, major trading players of the world adopt the rational choice perspective and do not give up their power to set domestic policy according to their own higher societal values. Therefore, international trade agreements should be distinguished from other international treaties and should not have direct effect in WTO member states domestic legal orders. Whenever necessary, the doctrine of consistent interpretation may be applied through guidance of the Supreme Court to avoid incurring the country into international responsibility.

The question that remains to be answered is whether Latin American emerging economies would be willing to keep this additional restraint infringed by traditionalism in their domestic public policy to achieve public interest goals to favor private companies' interests based on WTO rules, out of a political incentive to improve their reputation of abiding to international law, or would they want to make domestic public policy choices by themselves.

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sought by the complainant, that is, the need of Congress approval through regular legislative process, would render the constitutional provision ineffective. Based on the principle of useful effect, the Mexican Supreme Court of Justice interpreted that the last part of Article 131, 2nd paragraph of the Mexican Constitution, conferring the possibility of extraordinary powers to the executive, created a speedily and exceptional system to evaluate the changing circumstances and adopt measures in international trade matters in accordance with Mexican state's objectives. The Mexican Supreme Court of Justice expressly referred to the dynamism of trade relations, globalization and, more importantly, the multiplication of international trade agreements that, in the Court's opinion, escape from Congress and are clearly perceivable by the executive.

Meanwhile, at the international level, developed countries have managed to increase their regulatory capacity through litigation at the WTO dispute settlement system.[46] This research therefore suggests that Latin American emerging economies should, like the overwhelming majority of WTO members, protect their public policy autonomy to purse public interest goals based on legitimate societal values by not allowing private companies to invoke WTO rules before the domestic judiciary to impair public policy choices.

Therefore, the contrasting perspectives between the Latin American countries vis-à-vis major developed economies of the world give rise to an issue of power. Commentary remarked that weaker countries tied their hands more easily than powerful economies in relation to international trade law.[47] This seems to be a safe assumption to explain why Latin American countries have given direct effect to WTO law. In principle, as the Latin American economies grow, and their stance at the international trade system increases, it may be reasonably expected a move from traditionalism to the rational choice theory approach in Latin American countries, as it happened in European courts and American courts. However, this potential shift is yet to be seen in future years. So far, Brazilian courts' tendency has been to address highly politically complex issues, not the opposite.

To be sure, any potential lack of compliance with the WTO obligations is to be questioned and discussed through the WTO dispute settlement system, which is the forum for settlement of disputes between states. This book advances the idea that, instead of adopting traditionalism regarding WTO agreements, Latin American emerging economies should be focusing their attention on WTO rights and obligations at the international level by having recourse to the WTO dispute settlement system whenever needed. As argued by Santos, through lawyering and litigation before the WTO DSS, developing countries may use their legal capacity to further development goals by influencing changes in WTO rules' interpretation.[48] Santos notes that there are examples at the WTO dispute settlement system where a WTO member has succeeded in making such changes by expanding WTO exceptions.[49] In this sense, by focusing on the WTO dispute settlement system, Latin American emerging economies may strive for securing sovereign policy space for their regulatory objectives.[50] After all, international trade is not an end in itself, but it is at the service of the peoples of the world for their benefit and welfare[51] to allow sustained economic development.

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[46] Santos (2012).

[47] Guzman and Pauwelyn (2009), p. 77.

[48] Santos (2012).

[49] Ibid. Santos notes that the United States has managed to gradually expand the boundaries of the GATT Article XX exceptions regarding extraterritorial effects of U.S. regulatory measures on environment protection, starting from full prohibition in the case *Tuna Dolphin I* up to permission in the *Shrimp Turtle II* case.

[50] Ibid.

[51] Azevedo (2013).

5.3 Conclusion

This chapter provided comparative studies on how the European and Brazilian judiciaries have adjudicated on domestic litigation based on WTO agreements. Based on the original intent of the GATT, this chapter elaborated on the main similarities and divergences between Brazilian and EU courts regarding the domestic effects international trade agreements and provided the consequences of each approach. It concluded that the function and objective of international trade agreements conjoined with the principle of popular sovereignty and democratic self-government require the adoption of the rational choice theory approach regarding the WTO agreements. Finally, this chapter suggested the findings of this research may also be extended to other emerging economies in Latin America, namely, Argentina and Mexico.

In the comparison between Brazilian and EU domestic courts, a common ground between them is that the domestic legislation is silent on the domestic status of international trade agreements. Consequently, it is for the highest courts of each jurisdiction to decide on the domestic status of international trade agreements. Another similarity among Brazilian and EU courts is that, when confronted with WTO DSB rulings, both jurisdictions did not grant any domestic legal status for such rulings. Nevertheless, in the cases analyzed, both Brazilian and EU courts applied the technique of consistent interpretation and ruled in a consistent way with the DSB recommendations, despite the fact that the lack of domestic effect of WTO rulings, as shown in the *Retreaded Tires* case and in the *Ikea* case. In other cases, however, the ECJ did not use the doctrine of consistent interpretation and did not recognize the possibility of domestic courts reviewing domestic public policies in light of WTO rulings, such as in the *FIAMM* case. Another point of convergence between Brazilian and EU courts, though in very different extents, is the use of the doctrine of judicial deference to the executive.

With regard to the divergences, the most outstanding is the adoption of traditionalism by Brazilian courts, with the legal status of federal law to WTO agreements, whereas the EU courts implicitly adopted the rational choice theory approach along with supremacy of WTO agreements. As a result, private companies or individuals may interfere with public policy choices based on WTO rules in Brazil, while there is no such possibility in the EU domestic legal order. Another point of divergence derived from such contrasts is that the Brazilian judiciary may unilaterally decide on the content of international trade obligations, when the EU courts ensure that the executive bodies are the proper venue for deciding how international trade obligations are to be discharged. Divergence between Brazilian and EU courts is also found in the question of reciprocity, where Brazilian courts have never required reciprocity from other WTO Member States, while the EU courts considered reciprocity as needed from major trading partners.

With this main divergences in mind, attention is drawn to why the Brazilian judges have considered international trade agreements as creating private rights of

action domestically, as also it is also documented in relation to Mexico and Argentina, while EU courts have decided in an opposite way.

Developing countries in Latin America have a long settled tradition of enforcing international treaties, trade agreements included, in their domestic systems. Generally, Latin American emerging countries do not distinguish the GATT/WTO agreements from other international treaties. The volume of trade of Latin American countries largely depend on trade with developed countries, therefore it seems that it is an incentive for Latin American countries' economies to follow WTO agreements in a more visible and clear way, more so with the extensive scholarship on the influence of the rule of law on economic development and prosperity. Indeed, there are some possible economic, cultural, and social reasons why Brazilian courts, and to a greater extent Latin American courts in general, give direct effect to international trade rules.

The first possible explanation from an economic viewpoint for why Latin American emerging economies give direct effect to all international treaties, WTO agreements included, could be that developing countries compete with each other to attract more investment from the developed countries. Therefore, to enhance their position as other similarly positioned countries, developing countries would want to enhance their standards of protection.[52] International pressure, particularly from major economies, combined with economic strains, encourages a developing country to demonstrate at all levels its commitment to international obligations to attract foreign investment.

Another possible reason for why developing countries in Latin America give direct effect to international trade rules and do not distinguish them from other international treaties may be grounded on these countries' legal culture. In what concerns Brazil, and Latin American countries in general, respecting and enforcing international treaties is embedded in their legal culture. In these countries, international law is mostly perceived as being more advanced because it promotes cooperation between nations, in a Kantian concept of international law as promoting peace in the world.[53] In fact, applying internationally agreed rules at the domestic level is perceived as a progress of cooperation between nations, where courts do not question whether there is effective reciprocity from the other signatory countries to enforce international trade treaties, and do not allow domestic law to trump international rules, as seen in the Brazilian codfish case, where the GATT was not invalidated even in the face of a constitutional change. Under this Kantian perspective, the firm commitment to international trade obligations at the domestic

[52] Sornarajah (2010), p. 173.

[53] *See* Kant (1795). While elaborating on the law of nations, which should be founded on a federation of free states, Kant affirms that states

> should give up their savage (lawless) freedom, adjust themselves to the constraints of public law, and thus establish a continuously growing state consisting of various nations (civitas gentium), which will ultimately include all the nations of the world.

level would arguably increase joint gains from international agreements,[54] and would maintain the reputation of compliance in international law. However, as earlier noted, such gains cannot be achieved by unilateral concession, as trade agreements are made in return for other states' concessions.[55]

In addition to the legal culture, social ties with the "motherland" (*madre patria*), particularly in Hispanic culture, may be a major factor for explaining the general enforcement of international treaties before domestic courts. As former European colonies, most Latin American countries have inherited colonial features that are used to receive rules imposed from abroad. With a strong historical background in abiding to impose rules coupled with strong social relations with economically powerful countries, former colonies with much more reason would be willing to enforce internationally agreed rules at the domestic level which are seen as a natural consequence of the ratification of an international treaty.

There may have been other reasons why WTO agreements are provided with direct effect in the Latin American emerging economies. Regardless of the historical context that brought about the current jurisprudence on the direct effect of WTO agreements, the reasons considered by the European Union, as well as other major economies, primarily the United States which conceptualized the international trade system, to consider WTO agreements as non-self-executing or as not having direct effect seem compelling, as new strategies are required to deal with the new developments in international trade.

An example of new developments can be taken from the effects of exchange rate variations on tariff protection, whereby tariffs concessions can be distorted by overvalued and by devaluated currencies.[56] To illustrate, one can look at the unfair increase of China's trade due to its undervalued currency. Before the G-20 summit at the end of 2010, the Brazilian Minister of Economy declared that a currency war had begun, whereby countries were trying to undervalue their exchange rates to strengthen their exports, turning into a de facto trade war.[57] As a result, the artificially low prices of Chinese imports into Brazil has made antidumping remedies ineffective, as even with these duties, the Chinese products still enter the Brazilian market with extremely low prices, therefore hurting the national industry. These new developments in trade after the 2008 financial crisis require state-to-state negotiations and collective solutions at the international level to deal with the impact of exchange rate misalignments, not domestic judicial adjudication of trade rules.

Be as it may, whereas some member countries do not give direct effect of WTO obligations and others do consider WTO agreements as self-executing at the national level, the imbalance of trade concessions through the application of international trade rules at the domestic level increases. Direct effect of WTO agreements may bring about a disproportionate cost to countries where private individuals or companies may seek courts to supersede a desirable trade policy

[54] Jackson and Sykes (1997), p. 462.

[55] Sykes (2005), p. 646.

[56] Thorstensen et al. (2014).

[57] Wheatley and Leahy (2011).

based on the public interest, to favor a most economically advantageous transaction for a private importer, as *the Retreated Tires* case showed.

Due to these imbalances, countries that grant direct effect to WTO agreements should consider these differences in future agreements and negotiations; either for anticipating the potential consequences of traditionalism, or for using it to actually enhance their leverage to attain more concessions, although the latter does not seem to be a powerful argument in diplomatic negotiations. Even in the remote possibility that all signatory members would give direct to WTO agreements, the diverse domestic courts' decisions from different countries would generate what Knop has identified as "fragmentation of meaning"[58] of international law whose benefits in the long term for the development of international law are contentious.

Although given direct effect to WTO agreements has been proved to be counterproductive and generated unintended consequences as shown in the Brazilian cases, more conclusive elements are required in relation to Mexico and Argentina. The lack of actual litigation involving WTO agreements has not allowed to deepen this research in relation to these countries. Although the Brazilian experience may not be fully representative of the Mexican and Argentinean perspectives, due to each state's particular social history and legal culture, the fact that Mexico and Argentina have granted direct effect to the WTO agreements shows that the potential for unintended consequences of traditionalism is always a possibility.

Therefore, this study suggests that the Brazilian findings with regard to traditionalism in WTO agreements may bring into question the desirability of the role of domestic courts in both Argentina and Mexico, as global coherence in the lack of direct effect of WTO agreements is necessary per the original intent of the contracting parties of the GATT/WTO agreements, in accordance with the function and objective of international trade agreements, and the principle of popular sovereignty and democratic self-government. This book's argument, however, does not exclude the possibility of application of consistent interpretation by the highest domestic court, if necessary to divert potential international responsibility for non-compliance with WTO rules.

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[58] Knop (2000), p. 517.

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