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# 'Direct Effect' of International Agreements within the Brazilian Legal System: The Case of the TRIPs Agreement

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## **Abstract**

The objective of this research is to analyze the occurrence of the legal phenomenon of 'direct effect' in Brazil. That is, the possibility that incorporated treaties confer rights and obligations on individuals within the Brazilian legal system, with a particular attention to the case of the TRIPs Agreement. The study defines the concept of 'direct effect' and comments on its implications in the context of WTO law, and analyzes the process of incorporation and the legal status of international treaties within the Brazilian legal system, always with a focus on the TRIPs Agreement. The research was elaborated with the use of specialized opinions from the doctrine and governmental authorities and the predominant position of Brazilian case laws. The study presents a discussion of the legal force and effectiveness of the TRIPs Agreement and as regards the date of its entrance into force in face of the transitional arrangements of Article 65 (1) and (2), of the TRIPs Agreement.

### List of Abbreviations

AB - Appellate Body

ADI - Direct Plea of Unconstitutionality (*Ação Direta de Inconstitucionalidade*)

AgR - Regimental Appeal (*Agravo Regimental*)

AMS - Appeal in Injunction (*Apelação em Mandado de Segurança*)

CF - Brazilian Federative Constitution of 1988

CR - Rogatory Letter (*Carta Rogatória*)

CTN - National Tax Code

ECJ - European Court of Justice

INPI - National Institute of Industrial Property (*Instituto Nacional de Propriedade Industrial*)

LICC - Law of Introduction to the Brazilian Civil Code (*Lei de Introdução ao Código Civil*)

DSB - Dispute Settlement Body

DSU - Dispute Settlement Understanding

GATT - General Agreement on Tariffs and Trade

MDIC - Ministry of Development, Industry and Foreign Trade

MRE - Ministry of Foreign Relations

PIL - Public International Law

RE - Extraordinary Appeal to the STF (*Recurso Extraordinário*)

REsp - Special Appeal to the STJ (*Recurso Especial*)

STF - Supreme Federal Court (*Supremo Tribunal Federal*)

STJ - Superior Court of Justice (*Superior Tribunal de Justiça*)

TRF - Federal Regional Court of Appeal (*Tribunal Regional Federal*)

TRIPS - Trade-Related Aspects of Intellectual Property Rights

WTO - World Trade Organization

## 1. Introduction

The issue of direct effect, that is, the possibility of granting self-executing power to an international agreement is central to the question of the implementation of World Trade Organization (WTO) laws in national legal systems and may play an important role in the context of the rules of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement). It is also important to determine the balance of powers within the government competences in trade-decision policies and rule-making power.

The matter of direct effect is usually disciplined by the Constitution of each country, but not always under clear borders, as it happens in the case of Brazil, which leaves room to a certain discretion on the part of the Executive, the Legislative and the Judiciary branches, sometimes with conflicting positions among them. Not rarely also with conflicting positions within the Judiciary. This seems to be the case in relation to the implementation and the granting of direct effects to the TRIPs Agreement within the Brazilian legal system. Because of the political and economical sensitiveness of trade rules, the normal feature in this regard is the non-occurrence of direct effect for WTO laws. In Brazil, however, WTO agreements, among which the TRIPs Agreement, formally incorporated into its domestic legal system are likely to be granted direct effect.

The interest for this topic is, on the one hand, purely legal, and, on the other, essentially practical. The possibility that Brazilian courts directly apply the provisions of the TRIPs Agreement independent from the enactment of related Brazilian laws is disputable and raises several legal, economic and political issues that have not yet been extensively dealt by Brazilian federal authorities. Despite the existence of important leading cases decided by Brazilian highest courts, the subject remains controversial between the Executive and the Judiciary, and is neither at ease also among judges.

The aim of this research is to briefly discuss the issue of direct effect in the context of WTO law. Then analyze the process of incorporation of treaties into the Brazilian legal system, with a focus on the TRIPs Agreement, and to discuss about their legal hierarchy in relation to other laws and the Constitution. Finally, to clarify how and when the TRIPs Agreement entered

into force in Brazil (taking into account the transitional arrangements of its article 65 (1) and (2)) and to what extent it has been granted direct effect in order to confer rights and obligations on individuals and on the state. Last but not least, some other considerations will be put forward to further discussion.

## **2. The issue of "direct effect"**

The focus of this research, as provided in the title, is the discussion on the possibility of granting direct effect to the TRIPs Agreement in Brazil. For that reason, it is indispensable on the first instance to define the concept of direct effect, which has a precise and technical meaning in international law, but is eventually a source of ambiguity even among professionals of law. Moreover it is compelling to briefly explore some of its implications, which are, at the very end, the reasons of theoretical and practical interest for this topic.

### **2.1. Definition**

'Direct effect', for the purpose of this research, means the possibility of an international agreement,<sup>1</sup> once incorporated into the legal system of a given country, be granted self-executing power domestically, creating rights on which individuals can rely on before national courts. In other words, an international provision having direct effect within the territory of a considered country (regularly bound to the treaty containing that provision) is not dependent upon the enactment of further legislation to implement its content in order to produce legal effects. The international provision is, henceforth, valid and bound in the domestic legal system just like an ordinary piece of domestic law.

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<sup>1</sup> During the present essay, the terms "treaty" and "international agreement" will be used interchangeably, with the meaning provided in Article 2:1(a) of the Vienna Convention on the Law of Treaties, of 1969, which reads: "treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation".

In general, in order to occur direct effect, two basic requirements should be fulfilled: 1) that the international provision is formally incorporated into the law of the land, i.e. legally binding domestically (regularly entered into force and being applicable), and 2) that it is appropriate to be conferred self-executing power, i.e. establishing sufficiently clear and precise rights (and obligations) at the behest of individuals, that further implementing legislation would be redundant or at least dispensable.<sup>2</sup> Private parties would have, therefore, legitimate standing before local courts to directly invoke a WTO provision horizontally (one against each other) but also vertically (against the government). The latter is of particular importance in the case of implementation of WTO law.

The granting of direct effect to international agreements is particularly interesting because its dynamics vary from country to country, according to each one's constitutional law, practices and interpretation given by local courts. Eventually, the type of agreement or its subject matter also plays a determinant role. Depending on the interests and purposes of the parties, a treaty may self confer direct effect to its rules or some part of it, or a country may confer direct effect to certain kinds of agreements (e.g. only those relating to bilateral investment treaties) or subjects (e.g. Human Rights).

Eventually, direct effect may be conferred as an obligation of the treaty itself, that is, as an instrumental obligation for the implementation of the treaty. This is the case, for instance in the case of the Agreement on Government Procurement, Article XX (2), which prescribes to the parties the provision of judicial review enabling suppliers to challenge alleged breaches of the Agreement arising in the context of procurements in which they have, or have had, an interest. And depending on the political convenience, a country may also 'choose' to grant direct effect to an international agreement while to another, not. In summary, direct effect is not imperative and may take different nuances according to a case by case analysis, in different countries, and in relation to different agreements and subjects.

The question of direct effect goes therefore beyond the legal discussion of a matter of law, as it entails political and strategic considerations. By the words of Trachtman, "(t)he natural condition of law is rough and imperfect, like our society, and like us. To say that the natural condition of law entails direct effect, or perfect compliance, is surely incorrect".<sup>3</sup> An international agreement that has been through all the constitutional or statutory requirements

<sup>2</sup> Cottier, T., Oesch, M. (2001) WTO Law, Precedents and Legal Change, *Turku Law Journal* 3, pp. 27, 31-3. In: Cottier, T., Oesch, M., (2005) *International Trade Regulation*, London/Berne: Cameron May. p. 210.

<sup>3</sup> Trachtman, J. P. (1999) 'Bananas, Direct Effect and Compliance', *European Journal of International Law* 10(4). p. 677.



of a considered country in order to become internationally bound to that same country (e.g. formally ratified) and domestically valid within its national legal system does not necessarily lead to self applicability of its textual provisions, in other words, to direct effect.

Direct effect should not be confused with the subject of monism or dualism. According to the dualistic approach, initiated by Triepel,<sup>4</sup> international and domestic law are two independent orders of law. The former regulates the obligation of sovereign states among themselves, the latter, the obligations of citizens within the territory of each state. In this case, some sort of incorporation of international laws into the national legal order is necessary for them to produce effects domestically. As for the monist doctrine, there is only one legal order, made of interdependent international and domestic laws. An international agreement regularly ratified is therefore able to produce its effects at international and national levels at the same time.

It is easier to understand the likelihood of direct effect taking place in the monist system rather than in the dualist. However, the question is not so logical. As explained before, direct effect is a consequence of constitutional law rather than systemic legal approach. On the one hand, a monist country can exclude the prerogative of direct effect from treaties despite being valid in their legal order simply determining that they are not self executing. On the other hand, a dualist country can provide treaties with direct effect if allowing them to be self applicable once formally incorporated into its domestic legal order, e.g. by translating them into the local language and promulgating it with status of law. Direct effect, thus, is not an intrinsic element of the monist doctrine in the same way that it is not an incompatible feature of the dualistic one.<sup>5</sup>

The EC and US systems are good examples of the complexity facing the subject. In both systems, there are variable circumstances in which judges are permitted to decide whether international legal rules have direct effect or are self-executing while in others, they cannot (or refuse to do so).<sup>6</sup> That trend reflects another sensitive implication of the issue of direct effect, which concerns the balance of powers within a state: the granting or denying of direct effect means at the very end the delegation of major powers to the courts or the maintenance

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<sup>4</sup> Triepel (1899) *Volkerrecht und Landesrecht*, as cited in: Gomes, L. F. (1994) *A questão da Obrigatoriedade dos Tratados e Convenções no Brasil (Particular Enfoque da Convenção Americana sobre Direitos Humanos)*, in *Revista dos Tribunais*, RT n. 710, Sao Paulo: Dec. 1994, p. 21.

<sup>5</sup> Cottier (2001), loc. cit.

<sup>6</sup> Trachtman, loc. cit.

of them with the executive and the legislative in relation to the interpretation and implementation of an international agreement.

Finally, it is important to clarify that the possibility of invoking an international agreement before local courts is not incompatible with the existence of international dispute settlement mechanisms, a confusion that eventually may arise. There is no conflict of jurisdictions in such a case. On the contrary, the rulings of international bodies or arbitrators actually contribute to the enhancement of coherence and a consistent interpretation among domestic courts of members, and there is no legal impediment for the same occurring the other way around, even though less probable to occur.

Besides, international and national adjudications are not redundant as private parties and individuals only exceptionally have a standing before international courts. Eeckhout remarks on "(h)ow many of the questions of law raised in such domestic proceedings would ever reach WTO dispute settlement? Very few, one may suspect".<sup>7</sup> The possibility of domestic challenge to WTO unlawful acts, for instance, would overall improve compliance with WTO law and enhance the balance of rights and obligations among WTO members benefiting the international system as a whole.

## **2.2 General implications of “direct effect” in the context of WTO Agreements**

Many are the implications of granting (or denying) direct effect to international agreements. Primarily, it is an improvement in the role of international law, reflecting the importance of the principles of good faith and *pacta sunt servanda* in the international arena. To keep it simple, with the increasing economic integration between states, WTO members voluntarily enter into trade round negotiations and accept further restrictions to their sovereignty in exchange for the benefits of larger trade opportunities abroad. Given that logic, granting direct effect to WTO law is a reinforcement of the objectives aimed by multilateral liberalization.

In that sense, Trachtman explains that:

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<sup>7</sup> Eeckhout, P. (2004) *External Relations of the European Union: Legal and Constitutional Foundations*, Oxford: Oxford University Press, p. 308.

*"directly effective law, by virtue of its use of the domestic legal system to provide a kind of 'automatic' implementation, has greater binding effect than international law that is not directly effective. By invoking the domestic legal system, directly effective international law takes advantage of a 'traditional' sovereign, and its powers to make law binding, even against the domestic state itself, in its own court system. By comparison, international law that lacks direct effect must look to international legal mechanisms for binding effect. (...) direct effect shifts control to private litigants, while individuals have less formal access to international legal mechanisms".<sup>8</sup>*

From the domestic point of view, a deeper implementation of WTO law through the applicability of direct effect mechanisms leads to greater competition, gain of economic efficiency and improvement of the principle of 'justiciability'. Considering that politics on trade tend to prioritize predominant productive sectors better organized to seek protection, the prevalence of the rule of law and the strengthening of the role of courts will likely corroborate the legitimacy of the system towards the interests of weaker but efficient private parties. In parallel, it also fortifies governability and public institutions, which will have WTO direct applicable law to serve as a shield against counter-reform pressures.

On the reverse side, a lack of direct effect provides a certain 'political filter' on the degree and the rhythm of implementation that decision-makers will give to international agreements. Governmental authorities and the Legislative seize therefore greater control over the implementation of WTO agreements, which are increasingly complex and affect the most different aspects of domestic life. They become, at the same time, however, more susceptible to organized lobbies that may impose further difficulties against the compliance with international obligations to which the country is already bound.

As for the side of WTO law, although the conferral of direct effect would be advisable for the enhancement of the multilateral system, there is no legal obligation on the members to grant direct applicability to WTO provisions, as well as no impediment to do so, a matter left to the discretion of each member. The panel in *US - Sections 301-310 of the Trade Act of 1974* stated that:

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<sup>8</sup> Trachtman, op. cit. p. 659.

*"Neither the GATT nor the WTO has so far been interpreted by GATT/WTO institutions as a legal order producing direct effect", and, on footnote 661, noted that "(t)he fact that WTO institutions have not to date construed any obligations as producing direct effect does not necessarily preclude that in the legal system of any given Member, following internal constitutional principles, some obligations will be found to give rights to individuals".<sup>9</sup>*

Still, from a strictly legal perspective many WTO provisions are sufficiently clear and precise to be eligible to be directly effective, and this is particularly true in the case of the TRIPs agreement. The TRIPs provisions on terms of protection, just to mention, articles 12, 18 and 33,<sup>10</sup> for example, set down explicit minimum periods for the expiration of intellectual property rights that could be easily interpreted as of having self-executing nature.

On a different direction, the ECJ held that *"the provisions of TRIPs are not such as to create rights upon which individuals may rely directly before the courts by virtue of Community law"*,<sup>11</sup> but this interpretation must be put into context with the resistance of the ECJ to give direct effect to WTO laws in general rather than on the nature of some of the TRIPs Agreement provisions, which set down rules whose content is sufficiently clear and precise in order to confer rights on individuals, as in fact recognized by Brazilian federal courts.

Eeckhout seems to share this opinion:

*"if direct effect of WTO law were recognized there would be much domestic litigation in which parties would aim to rely on WTO law. Think only of TRIPs, with its potential impact on daily practice in intellectual property law".<sup>12</sup>*

<sup>9</sup> Report of the Panel, WT/DS152/R, 22 December 1999, para. 7.72.

<sup>10</sup> *COPYRIGHT AND RELATED RIGHTS - Article 12 - Term of Protection*

*Whenever the term of protection of a work, other than a photographic work or a work of applied art, is calculated on a basis other than the life of a natural person, such term shall be no less than 50 years from the end of the calendar year of authorized publication, or, failing such authorized publication within 50 years from the making of the work, 50 years from the end of the calendar year of making.*

*TRADEMARKS - Article 18 - Term of Protection*

*Initial registration, and each renewal of registration, of a trademark shall be for a term of no less than seven years. The registration of a trademark shall be renewable indefinitely.*

*PATENTS - Article 33 - Term of Protection*

*The term of protection available shall not end before the expiration of a period of twenty years counted from the filing date.*

<sup>11</sup> Cited in Cottier (2001), loc. cit.

<sup>12</sup> Eeckhout, loc. cit.

As a matter of fact, direct effect would be the most advisable way to achieve the objectives of Part III, of the TRIPs Agreement, on Enforcement of Intellectual Property Rights (Articles 41 to 50). Take Articles 41 (1) and 42, first sentence, for instance, by which members have the obligation to ensure enforcement procedures, including judicial, of any intellectual property right covered by the TRIPs Agreement.

*TRIPs Agreement, Article 41 (1):*

*1. "Members shall ensure that enforcement procedures as specified in this Part are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements. These procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse."*

*TRIPs Agreement, Article 42, first sentence (Fair and Equitable Procedures):*

*"Members shall make available to right holders civil judicial procedures concerning the enforcement of any intellectual property right covered by this Agreement. (...)"*

Notwithstanding, some of the major players in international trade deny direct effect to WTO law, as indeed is the reality in the US, the EC, China and Japan, just to mention some of the major players of the international trade arena.<sup>13</sup> It should be noted, however, that the lack of direct effect of WTO law does not necessarily mean that WTO law cannot play a role on domestic litigation. The use of the principle of consistent interpretation is, in this context, an important feature in the domestic rulings of WTO related cases in most countries that deny direct effect. This topic, however, despite relevant for the analysis of the compatibility of domestic rules with WTO law, falls outside the scope of this research, reason why will not be dealt thoroughly.

<sup>13</sup> See Bronckers, M. (2008) 'Private Appeals to WTO Law: An Update', *Journal of World Trade* 42(2), p. 255; Cottier (2005), *op. cit.* p. 209; Davies, A (2007) 'Connecting or Compartmentalizing the WTO and United States Legal Systems? The Role of the Charming Betsy Canon', *Journal of International Economic Law* 10(1), p. 134; George, C. Carol & Orava, Stephen J. (2002) *A WTO Guide for Global Business*. London: Cameron May.

Unfortunately, the common and general denial of direct effect to WTO law by a large number of WTO member states is also an expression of protectionist considerations. As most of WTO rules are targeted to trade liberalization, e.g. tariff and non-tariff trade barriers reduction, the benefits of compliance with WTO law by one member are primarily felt by the private parties of the other members. Despite the fact that consumers and importers within the implementing country gain from the increased access to imports, on a strictly mercantilist approach (not disregarded by most countries), the domestic production, on the one hand, will face higher competition from imports and, on the other, will not gain in terms of new trading opportunities unless the other countries implement their part of the liberalizing deal at home.

That explains in part the reluctance of WTO members to confer direct effect to WTO law, a circumstance aggravated by considerations of reciprocity (or lack of it), as clearly stated by the ECJ in *Portuguese Republic v. Council of the European Union: Commercial Policy*.<sup>14</sup> As admitted by the ECJ in this case, para. 44, when quoting the legal opinion from the Advocate General:

*"the fact that the courts of one of the parties consider that some of the provisions of the agreement concluded by the Community are of direct application whereas the courts of the other party do not recognise such direct application is not in itself such as to constitute a lack of reciprocity in the implementation of the agreement (Kupferberg, paragraph 18)".*

The more there are countries refusing to grant direct effect to WTO law, the more likely it is that other countries will feel compelled to do the same in face of the interests of their own constituencies (a pragmatic rather than legal consideration). Regrettably, that is a common feature in the utilitarian logic of WTO system in the practice of its members. Cottier and Oesch well summarized this approach:

*"In essence, this attitude and approach amounts to a strategy of combining the utmost effect of WTO law abroad with a view to fostering market access rights while leaving traditional constitutional allocations of power at home as unimpaired as possible by preserving de facto the predominance of national and regional rules in a domestic context".<sup>15</sup>*

<sup>14</sup> ECJ, *Portuguese Republic v. Council of the European Union: Commercial Policy*, Case C-149/96, 23 November 1999, paras. 42-46.

<sup>15</sup> Cottier (2001), loc. cit.

### **3. International agreements in the Brazilian legal system: the case of the TRIPs Agreement**

The present chapter will focus on the dynamics of the relationship between international agreements and the domestic legal order of Brazil, and, in this context, specifically the case of the TRIPs Agreement. The process of incorporation of treaties into the national legal system will be analysed in the first place, and the legal status of these incorporated treaties right after, especially in terms of their hierarchy as regards other laws and the constitution.

#### **3.1. The process of incorporation of international agreements in Brazil and the case of the TRIPs Agreement**

The ordinary and consuetudinary process of becoming bound by a treaty in Brazil follows these subsequent steps: negotiation, signature, approval by the Legislative, ratification, promulgation by the Executive and publication. The constitutional system of Brazil does not require, henceforth, the enactment of an ordinary law for the incorporation of international agreements in the Brazilian legal order as should be the rule on a strict dualistic approach country.

The adoption of a formal and subjectively complex proceeding of incorporation, based on congressional approval and executive promulgation of the text of the international agreement is enough to grant it with legal force, an approach that the Supreme Federal Court of Brazil (STF) named "moderate dualism".<sup>16</sup> Ratification, in this context, is considered a typical act of public international law (PIL) which is insufficient to promote the validity of a treaty domestically. As explained by Rezek, only the combination of the autonomous will of the National Congress and that of the President, in two separate and independent deliberations, is

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<sup>16</sup> STF - ADI 1.480-DF, Rel. Min. Celso de Mello

capable of producing the integration of the text of an international agreement into the law of the land.<sup>17</sup>

The Federative Constitution of Brazil (CF), in force since 1988, establishes in its article 49, I:

*"It is exclusively the competence of the National Congress: I - to decide conclusively on international treaties, agreements or international acts which result in charges or commitments that go against the national property;"*

and, in article 84, VII and VIII:

*"The President of the Republic shall have the exclusive power to: (...) VII - maintain relations with foreign States and to accredit their diplomatic representatives; VIII - conclude international treaties, conventions and acts, ad referendum of the National Congress."*

In this context, ratification (at international level) and promulgation (internally) are discretionary acts of the Executive power. The deposit of the instrument of ratification formalizes the consent of the country to become bound by the treaty as regards the other parties to that treaty in the sphere of PIL, while the the promulgation (with the respective subsequent publication) of the text of the agreement, translated into Portuguese, through Executive Decree by the President, is the final act of incorporation of the treaty in the Brazilian legal order.

Promulgation determines the coming into being of the international agreement domestically, and publication, the initial moment of the coming into force of the text of such agreement in the national legal system if the decree does not set forth a period of *vacatio legis*.<sup>18</sup> The Constitution establishes the competences and the roles of the Legislative and the Executive in the process of acceptance of an international treaty but does not set down clear rules on how that should be done neither the requirement of the act of promulgation and publication as a necessity for its coming into force domestically.

<sup>17</sup> REZEK, J. F. (1995) "Direito Internacional Público" Sao Paulo: Saraiva, 5th ed., p. 69.

<sup>18</sup> A few authors advocate that the Congressional approval of the text of the agreement is sufficient to provide it with legal validity for domestic purposes. However, this is a minor current of opinion in the doctrine and is not corroborated by the rulings of the Superior Court of Justice (STJ) and the Supreme Federal Court (STF). Take, for instance, the judgement of RE n. 70.356-MG, Rel. Min. Bilac Pinto, STF: RTJ 58/71, p.744-747.



As a matter of fact, these rules were consolidated through the uses since the times of Brazil Empire, after the independence in 1822,<sup>19</sup> and are well recognized by Brazilian courts up to the present days. The STF declared, during the judgement of a rogatory letter coming from Argentina, that the promulgation was an essential act for the validity of treaties inside Brazil and denied the possibility to comply with a treaty regularly ratified by Brazil on April 17 1997, but not promulgated at the time of the ruling. The case involved the Protocol of Preventive Measures, signed by Brazil in the context of Mercosur, in December 1994. Despite approved by the Congress, through Legislative Decree n. 192/95, it was only promulgated by Executive Decree n. 2.626 in 1998.<sup>20</sup>

Setting aside the academic discussions about monism and dualism, it is coherent with Brazilian legal system that an international act needs promulgation and publication in order to become officially valid and known by individuals and governmental authorities, among which the judiciary body. Promulgation and especially publicity are indeed essential conditions for the validity of laws in Brazil. Brazilian laws require the autonomous participation of the Legislative and the Executive to be performed, and, as a general rule, promulgation is an executive act just like in the case of treaties.

The TRIPs Agreement constitutes the Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization and its process of incorporation followed the ordinary *via crucis* of treaties in Brazil. It was incorporated in Brazil in the context of the promulgation of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations of GATT (signed in Marrakesh on April 12 1994), through Presidential Decree No. 1.355/94, of December 30 1994, published in the official press on December 31 1994, after the approval of its text given by the Brazilian Congress, through Legislative Decree No. 30/94, of December 15 1994. The instrument of Ratification of the Final Act was deposited by Brazil in Geneva in the period between Congress approval and Presidential promulgation, on December 21 1994.

The text of the Decree 1.355/94 read as follow:

*"The President of the Republic, in the use of his attributions, (...);*

*Considering that the referred Final Act comes into force for the Federative Republic of Brazil on January 1st 1995,*

<sup>19</sup> Rezek, J. F. (1984) *Direito dos Tratados*. Rio de Janeiro: Editora Forense, p. 385.

<sup>20</sup> STF: CR 8279 AgR, RTJ 174/2.

*DECREES:*

*Art. 1 The Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations of GATT, which copy is attached to the present decree, will be executed and complied with as entirely as it is.*

*Art. 2 This decree comes into force on the date of its publication, revoked the dispositions on the contrary."*

### **3.2. Hierarchy of international agreements in the Brazilian legal system and the case of the TRIPs Agreement**

Before entering the matter of direct effect of treaties in Brazil, it is relevant to clarify a subsidiary question related to the legal status of incorporated international agreements vis-à-vis other laws and the constitution. Except in relation to Human Rights,<sup>21</sup> the CF is silent regarding that subject, leaving it open for academic discussion and to the discretion of the courts to give the last word. The practical importance of this topic refers to the implications in situations of conflicts of laws. Namely, between national and international laws, a subject that national courts have dealt thoroughly along the years when applying incorporated international agreements domestically.

For the sake of clarity, it must be pointed out, as remarked by some authors in Brazil,<sup>22</sup> that the denomination of 'conflict between international law and domestic law' is not precise. Incorporated treaties are not considered "international law" from the point of view of the national legal system, and, therefore cannot raise an issue of concrete conflict between domestic and international law. In face of a conflict between an incorporated treaty and a domestic law it would be more accurate to speak of a conflict between a law originated by legislative process and a law originated from an international agreement, that is, an ordinary conflict of laws.

<sup>21</sup> See below in this section on the legal status of international treaties on Human Rights and tax disciplines.

<sup>22</sup> E.g. Velloso, C. M. S. (2005) *Tratados Internacionais na Jurisprudência do Supremo Tribunal Federal*. In: Amaral, A. C. R. Coord. *Tratados internacionais na ordem jurídica brasileira*. Sao Paulo: Lex Ed., Aduaneiras, p. 13.

All the same, from the perspective of PIL, however, taking into account that the incorporated treaty is at the reflection in the mirror of the international treaty itself, the conflict between its provisions and the law of the land represents at the very end a conflict between international and local law. Notwithstanding the dilemma of denomination, the answer to the question on what happens in case of such a conflict does not depend on the answer about the correct definition. What matters is the legal status of incorporated agreements within the legislative pyramid in Brazil.

The hierarchy of treaties formally incorporated into the Brazilian legal system is a subject that has evolved along the years especially between the first and the second halves of the XX Century. As explained by Araújo,<sup>23</sup> in one of the first reported cases (STF: AC 7.872, 1944) about the applicability of a treaty between Brazil and Uruguay in conflict with the dispositions of a law, the STF declared the prevalence of the treaty, without major explanations. Later on (STF: AC 9.587, 1953), the STF on a similar case affirmed that the treaty revoked laws earlier in time and could not be revoked by later laws if those did not expressly determined that revocation or the treaty was not denounced. The STF, according to the author, did not clarify, however, about the legal status of incorporated treaties in relation to ordinary laws.

Only in the 1970s, during the analysis of RE n. 70.356,<sup>24</sup> the question start to become better delineated, when the STF decided that the Geneva Convention Providing a Uniform Law for Cheques, approved by the National Congress and regularly promulgated, had immediate applicability, including when modifying the existent legislation, as was the case. The conflict between an 'international agreement' and an ordinary law was finally disciplined in the context of another important precedent of the Supreme Federal Court, in the ruling of the RE n. 80.004-SE<sup>25</sup> (1978). In this case, the conflicting law was later in time than the incorporated treaty, and for this reason the STF decided that the domestic provision prevailed.

The doctrine of legislative parity is still today the prevalent position in Brazilian courts, as clearly stated during the ruling of ADI 1.480 - STF:

*"the emergent legal force of international treaties within the Brazilian legal system (...) allows to situate these acts of public international law, as*

<sup>23</sup> Araújo, Nadia (2003) A Internalização Dos Tratados Internacionais no Direito Brasileiro e o Caso do Trips, Revista da ABPI nº 62.

<sup>24</sup> STF: RE n. 70.356, RTJ 58, p. 744.

<sup>25</sup> STF: RE n. 80.004-SE, Rel. Min. Cunha Peixoto, STF: RTJ 83, p. 809.

*regards the hierarchy of sources, on the same level and same degree of effectiveness of those occupied by internal laws".*

As a general rule, henceforth, international acts, once regularly incorporated into the law of the land, are on the same level of validity and applicability of infra-constitutional laws, i.e. have legal status of laws. For that reason, the precedence of international agreements over ordinary laws will only happen in face of a legal disposition which is earlier in time, not because of any hierarchic preponderance, which does not exist, but merely because of the chronological criteria *lex posterior derogat priori* valid for any law on the same hierarchical level,<sup>26</sup> and subsidiarily, when applicable, by the principle of speciality (*lex posterior generalis non derogat legi priori speciali*).

This is, in fact, the intelligence of article 2, paragraphs 1 and 2, of the Law of Introduction to the Brazilian Civil Code (LICC), Law-Decree n. 4.657/42, which reads:

*Article 2 - "If not destined to temporary validity, the law will be in force until the moment it will be modified or revoked by another one.*

*§ 1. The law which is later in time revoke the previous one when expressly declares so, when is incompatible with it or when regulates entirely the matter dealt by the previous law.*

*§ 2. The new law, which establishes general or specific dispositions in relation to those already existent does not revoke or modify the previous law."*

The situation of conflicting disposition between an incorporated treaty and a law at the same constitutional level, i.e. the level of Brazilian ordinary laws, does not offer greater controversy. They are treated almost like an ordinary conflict of laws in time if it, except for a detail that must be remarked. In the case of a conflict between a later treaty or later law with a previous law, this one is deemed automatically revoked. However, in the case of a later law conflicting with a previous incorporated treaty, it shall not be 'revoked', but rather have its applicability 'withdrawn'.

This is a difference of concepts that was conceived by Minister Leitão de Abreu, in his vote to RE 80.004. He oriented that a treaty cannot be revoked just like any law because it has a

<sup>26</sup> See STF: RTJ 70/333; RTJ 100/1030; RT 554/434; RE n.74.376-RJ.

proper way of revocation at international level. Therefore, the conflicting provision has its applicability withdrawn for the time during which the posterior law is in force, independently from any sort of denouncement at international level. If the posterior law is revoked later on, the previously withdrawn provisions of the treaty come back into force (*the so called 'efeito repristinatório'*), something that would not be possible had it been permanently revoked in the way it happens with ordinary laws.

In order to be exhaustive on the subject, two other situations must be briefly analyzed: the conflict with hierarchically inferior and superior laws. The conflict between an incorporated international agreement and an infra-legal norm (e.g. an Executive regulation) does not present difficulties. In this case, the treaty must always prevail in face of the principle of legality. A different proposition, however, happens in the case of a conflict between an incorporated treaty and a *supra*-legal law, as is the case of Complementary Laws (to the Constitution), which have in Brazil, a legal status between the Constitution and ordinary laws.

That was the case in the ruling of ADI 1.480 , which questioned the constitutionality of the Legislative Decree n. 068/92, approving the Convention n. 158, of the International Labor Organization, and the Executive Decree n. 1855/96, which promulgated its text. In this case, the STF exerting the abstract control of constitutionality of a law, through a Direct Plea of Unconstitutionality (ADI), decided that articles 004 to 010, of the Convention n. 158, were unconstitutional from the formal perspective because they could not be incorporated at the hierarchical level of a Complementary Law as they should out of a requirement of the Constitution in relation to the subject matter regulated by those provisions. The unconstitutionality was also present on the material criteria, for directly affronting certain constitutional rules.

In this case-law, the STF set forth clear borders to the formalistic approach of dualism adopted by Brazil:

*"the unquestionable supremacy of the constitutional legal order over the emergent prescriptions of any international treaty. (...) Also the treaty as well as any other law must be constitutional. (...) The exercise of the treaty-making power by the Brazilian state is subject to the observance of the legal limitations coming from the constitutional text."*

Accordingly, the STF recognized that the unconstitutionality of international treaties impeded the applicability of its rules in the domestic legal system even though resulting in an international illicit to which the country may be held responsible. In other words, the constitutional test overcame the principle of *pacta sunt servanda* of PIL. A treaty conflicting with a *supra*-legal law or the constitution itself should never have been concluded and can only be accepted in the domestic legal system after the change of the Constitution or its Complementary Laws.

In this direction, the STF declared the conditional constitutionality of the Convention n. 158/ILO, as some of its provisions depended for full implementation upon further enactment of competent legislation by the Brazilian Legislative body. In the words of the sentence, "under those circumstance, the treaty merely meant a legislative proposal directed to the domestic legislator", lacking henceforth legal force and any possibility of direct effect in relation to the provisions deemed incompatible with the Constitution.

It must be added that, exceptionally, Brazilian law confers legal supremacy to treaties in relation to ordinary laws. There are two basic exceptions to the principle of legislative parity of international treaties: in relation to Human Rights treaties and tax law treaties. The first case is a result of CF Article 5, paragraphs 2 and 3, reproduced below:

*Article 5, Paragraph 2 - "The rights and guarantees expressed in this Constitution do not exclude others deriving from the regime and from the principles adopted by it, or from the international treaties in which the Federative Republic of Brazil is a party.*

*Paragraph 3 - The international treaties and conventions on Human Rights which are approved, in each House of National Congress, in two rounds, by three fifths of votes of the respective members, will be equivalent to Constitutional Amendments."<sup>27</sup>*

The second case, on tax law matters, results from the determination of Article 98, of the National Tax Code (CTN - Law n. 5.172/66), which has legal status of Complementary Law, and reads as follow:

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<sup>27</sup> Obs. Paragraph 3 added by Constitutional Amendment n. 45, from December 8 2004 (Legislative Decree with legal status of Constitutional Amendment).

*Article 98, CTN - "Treaties and international conventions revoke or modify the domestic legislation on taxation, and will be observed by upcoming laws."*

This rule raises tax treaties (and conventions) to the level of Complementary Law, henceforth, prevailing over ordinary tax laws.<sup>28</sup> A complication that may arise in this context is the situation where a trade agreement, for instance, has tax provisions, as indeed is the case of most Free Trade Agreements and the GATT, which puts these agreements on a privileged position within the national legal system,<sup>29</sup> but does not affect the situation of the TRIPs Agreement as it does not touch upon tax legislation.

### **3.3. Relationship between the *TRIPs* Agreement and the domestic legislation on intellectual property rights**

Brazil has a long standing tradition of respect for international agreements on intellectual property. The country was one of the first to recognize the rights of patent holders, accepted since the first Constitution of Brazil of 1824. Protection of IPR is declared by the CF of 1988 among the fundamental individual rights and guarantees of Article 5, and was present in practically all Brazilian constitutions. These are the present constitutional provisions relating to IPRs, which are thus applicable to the TRIPs Agreement:

*Article 5 - "All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country are ensured of inviolability of the right to life, to liberty, to equality, to security and to property, on the following terms:*

*(...)*

*XXVII - the exclusive right of use, publication or reproduction of works rests upon their authors and is transmissible to their heirs for the time the law shall establish;*

<sup>28</sup> For more information, see Velloso, op. cit., p. 16-19; Rezek (1984), op. cit. p. 475.

<sup>29</sup> The jurisprudence is extensive on the prevalence of GATT over domestic taxation rules. See for instance: STJ, REsp 925166 and REsp 416077.

*XXVIII - under the terms of the law, the following are ensured: a) protection of individual participation in collective works and of reproduction of the human image and voice, sports activities included; b) the right to authors, interpreters and respective unions and associations to monitor the economic exploitation of the works which they create or in which they participate;*

*XXIX - the law shall ensure the authors of industrial inventions of a temporary privilege for their use, as well as protection of industrial creations, property of trademarks, names of companies and other distinctive signs, viewing the social interest and the technological and economic development of the country".*

It is worth mentioning that Brazil has also been an active participant in international forums on IPR since the Paris Convention of 1883, where it was among the original eleven signatory countries. Since then, Brazil has ordinarily signed and promulgated the texts of international agreements into its domestic legal system, even though, as argued by some authors, more as a result of foreign pressure than of national interests.<sup>30</sup> Just to illustrate, the Paris Convention of 1883 was incorporated through Decree 9.233/1884, and the full text of the Stockholm Act of 1967, of the Paris Convention for the Protection of Industrial Property, was promulgated by Decree 1.263 of 1994.

For that reason, the coming into being of the TRIPs Agreement, although subject to heated debate and some criticism, did not inaugurate any new IPR system in Brazil. On the contrary, the Brazilian government defended the domestic acceptance of the TRIPs Agreement as a positive instrument for the enhancement of Brazilian industrial policies directed to innovation, which led to the successful approval of its text by the Congress and its promulgation through Decree 1.355/94. Since then, apart from the discussions of immediate applicability of the incorporated TRIPs Agreement, Brazilian Congress has been editing new laws to fully implement the compromises under the agreement, with substantive changes in previous national laws.

The most significant among those, was Law 9.279/96, which expressly revoked the old Industrial Property Code of 1971 and entered into force on May 15 1997, years before the end

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<sup>30</sup> Barral, W., Pimentel, L. O. (2007) 'Direito de propriedade intelectual e desenvolvimento'. In: Barral, W., Pimentel, L. O. Propriedade intelectual e desenvolvimento. Florianópolis: Fundação Boiteux, p. 13-15.



of the transitional periods provided by TRIPs Agreement Article 65 (2) (January 1 2000), and 65 (4) (January 1 2001, for new technological areas), in favor of Developing Countries. Other important implementing legislation are: Law 9.456/97, establishing disciplines on the protection of IP rights connected with cultivations; Law 9.609/98, on software copyrights and commerce; Law 9.610/98, on copyrights and related rights.

As analyzed in the previous section, the relationship between the TRIPs Agreement and Brazilian ordinary laws on intellectual property rights follows the same general principles for the settlement of a conflict of laws on the same hierarchical level, namely, the chronological principle *lex posterior derogat priori*, and eventually *lex posterior generalis non derogat legi priori speciali*. Remembering that in relation to *infra*-legal provisions the TRIPs always prevail, and, as regards *supra*-legal provisions (in the hypothesis of appearing such a case), the incompatible TRIPs provisions would be void.

In general, however, the TRIPs Agreement is coherent with Brazilian constitutional model and practice and has been implemented in a way to give full applicability to its content. In principle, it is not only compatible but also supported by the CF, and apt, therefore, to revoke any previous disposition contrary to its terms. In relation to the upcoming legislation, there are no claims so far of a possible conflicting provision with the TRIPs Agreement, a situation that should be unlikely to happen as the later laws have been envisaged to materialize the TRIPs Agreement will rather than to contradict it.

Still, concrete situations reveal the dynamic and complexity of real world. The TRIPs Agreement raised a controversial issue as regards the time of its applicability because of the polemic interpretation of article 65 (1) and (2), which allows for the provisional suspension of the obligation to comply with the rules of the TRIPs Agreement for a period of one up to five years. As a result of that interpretation, the the date of entrance into force (immediately after publication, after one year or five years) reflected in different possible outcomes in terms of the conflict of the incorporated TRIPs Agreement and the previous incompatible laws on intellectual property rights. This is a subject to be dealt with in the next chapter.

#### **4. Direct effect of international agreements incorporated into the Brazilian legal system: the case of the TRIPs Agreement**

The subject of direct effect of international agreements in Brazil has been marginally depicted during the past Chapter to the extent that it was necessary to clarify the idea of incorporation and hierarchy of treaties in the national legal order. To understand the process of incorporation of treaties and to analyze their legal status into the domestic legal system of Brazil are fundamental introductory steps to enter the discussion on the possibility of granting direct effect to incorporated treaties in Brazil, which is the focus of this chapter, especially as regards the TRIPs Agreement.

##### **4.1. Direct effect of international agreements incorporated into the Brazilian legal system**

The issue of direct effect will now be analyzed in the light of the Brazilian legal system. But before entering the discussions of this section, the reader must be alerted to the fact that the comprehension of the idea of direct effect is not always captured in Brazil, probably stimulated by an incomplete interpretation given by Brazilian highest court, here reproduced, which can lead to the conclusion that Brazilian legal system does not envisage the possibility of direct effect of international agreements:

*"the Brazilian constitutional system does not recognize the principle of direct effect neither the postulation of immediate applicability of treaties or international conventions. (...) That means, de 'jure constituto', for the purpose of domestic law, that international treaties and integration agreements are not entitled of being invoked, right away, by private parties as regards rights and obligations provided by them (principle of direct effect) before the conclusion of the cycle of their transposition into domestic law".<sup>31</sup> (not underlined in the original)*

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<sup>31</sup> STF: CR 8279 AgR, RTJ 174/2.

For the sake of clearness even though assuming the risk of being repetitive, it is valid to touch again on the definition of the term direct effect. Direct effect does not necessarily mean the conferring of legal effects to a treaty as such, i.e. the international instrument which binds the signatory country internationally (while not yet internalized). What is important is the content expressed by the text of the treaty, which can be referred directly by individuals, and not the reliance on the original treaty which is valid at international level.

To that extent, when speaking of direct effect of an international agreement in Brazil, this research will always refer to the text of such agreement as incorporated by an executive decree. Furthermore, the fact that the government, through its executive authorities, does not comply autonomously with the treaty or does not recognize its applicability is also irrelevant as a measure for its degree of effectiveness. It is relevant that the Judiciary has the power to order its enforcement on behalf of individual provocation.

The statement of the Brazilian Supreme Federal Court must be read highlighting its last sentence, i.e. that Brazil does not grant direct effect to international agreements 'before the conclusion of the cycle of their transposition into domestic law'. Does that mean, as a result, that Brazil grants direct effect after the conclusion of the cycle of their transposition into domestic law? Ambiguities avoided, this is the relevant question to be answered hereafter and, taking into account the reverse interpretation of the above mentioned ruling, the answer is likely to be affirmative.

The premise that an incorporated treaty in Brazil has legal status of law is the basis for the granting of direct effectiveness to its rules. Legal effectiveness of laws is mandatory according to Article 6 of the Law of Introduction to the Brazilian Civil Code (LICC):

*"The law in force will have immediate and general effect, respected the fully performed legal act, the acquired right and the judged legal matter."*

As remarked by Maria Helena Diniz, the LICC is much more than an introductory law to the Brazilian Civil Code:

*"it is a law of introduction to all laws, because it contains the general principles on the laws, public or private. It is a preliminary law to the whole national legal order, (...) it is a body of provisions over legal*

*provisions, a law over the law, a coordinating law of the law. It disciplines not the relations of life but the relations of laws".<sup>32</sup>*

The rule of the LICC, henceforth, is the conferring of direct effect to any law which has been regularly come into force within the domestic legal system of Brazil, and that is also valid for incorporated treaties. In the already mentioned ruling of RE n. 70.356, the STF stated that undoubtedly since the entrance into force of an Executive Decree internalizing a treaty, the treaty must be executed in the country, including by revoking previous laws which are conflictive<sup>33</sup>. In the same direction, the ruling of RE n. 80.004, where, in the vote of Min. Cordeiro Guerra, referring to the teachings of Lélío Candiota de Campos:

*"Provided that legally approved, any Brazilian citizen can invoke the international treaty or convention before the STF, through extraordinary appeal (RE), in order to have the letter of its text respected, which means that its text is law as much as another one, because received in our legal internal order, obliging all judges and courts of the country, which are bound by it, similarly to what occurs in the United States".<sup>34</sup>*

In the same line, Professor (and judge) Luiz Flávio Gomes explains that:

*"The main constitutional proof of validity (and compulsion) of treaties in our legal order is expressed by article 102, III, b, of the CF, which says: 'Competes to the Supreme Federal Court... III - judge, through extraordinary appeal, the cases decided on single or last instance, when the appealed decision: b) to declare the unconstitutionality of treaty or federal law'. Treaty and federal law, as noticed, are in principle treated as equals".<sup>35</sup>*

The only exception to the full applicability of an incorporated treaty will be therefore in the face of a conflict with a *supra*-legal law (e.g. the Constitution and Complementary laws) as the international treaty, likewise any ordinary law, is always subject to the limitations coming from the constitutional text.<sup>36</sup>

<sup>32</sup> Diniz, M. H. (1999) Lei de Introdução ao Código Civil Interpretada. 5ª edição, São Paulo Saraiva, p. 03.

<sup>33</sup> RTJ 58, p. 746.

<sup>34</sup> Cited by Gomes, op. cit., p. 26.

<sup>35</sup> *ibid.* p. 29.

<sup>36</sup> See p. 17-18.

#### **4.2. Direct effect of the TRIPs Agreement within Brazil**

As already seen, Brazilian legal system and practice allow for the conferral of legal force to international agreements after its promulgation by a presidential decree. Accordingly, the TRIPs Agreement as well as all WTO Agreements regularly fulfilled all the steps to become fully effective after the promulgation of Decree 1.355/94, therefore, entitled to be conferred 'immediate and general effect' (LICC, article 6).

But the TRIPs Agreement, in particular, raised another issue related to the granting of direct effect: the dispute over the date of its entrance into force in Brazil. Given the fact the TRIPs Agreement was incorporated in the context of the promulgation of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations of GATT, through Presidential Decree No. 1.355/94, some lawyers raised the question whether the TRIPs Agreement had fully entered into force on January 1, 1995, together with all WTO Agreements. They contested the governmental assumption of its entrance into force only on January 1, 2000 for developing countries (TRIPs Agreement, Article 65 (2)) or, in any case, not before January 1, 1996 (Article 65 (1)).

Considering that the second question (when it started to be effective) depends on the affirmative answer to the first one (that it has been granted direct effect), but are not necessarily of the same nature, the issue will be analyzed in sequence: direct effect first, and date of entrance into force in the next section.

The main question regarding the full effectiveness of the TRIPs Agreement relates to the matter whether it is a self-executing treaty or not. Given the fact that most of its rules set forth minimal standards of protection to be granted by WTO members, there is no doubt that it requires a second implementation by the state, as set forth on its Article 1 (1), second sentence. But does the necessity to further law preclude the self-effectiveness of provisions that spell out sufficiently clear and precise rights apt to be directly available to individuals? Although subject to different interpretations, Agreement, article 1 (1) may provide some orientation:

*Article 1 - Nature and Scope of Obligations*

1. *"Members shall give effect to the provisions of this Agreement. Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement. Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice."*

The first sentence of paragraph 1, on a first glance, could appear to be an obligation to grant direct effect if right on the next sentence it was not contradicted by the reference to law implementation and the possibility of more extensive protection than required by the Agreement.

But the third sentence is determinant to the question presented. Members have the freedom to determine the appropriate method of implementation according to their own legal system and practice, that is, the granting of direct effect, apart from implementing laws, is an internal constitutional matter. That means, for instance, that the possibility or not to grant direct effect to the TRIPs Agreement is not to be found in the nature of the Agreement itself, but on the legal system of each country bound to it. And, in the case of the Brazilian 'legal system and practice', the rule is the conferral of direct effect.

This is the position of the majority of doctrine and the dominant jurisprudence. Although in relation to the date of entrance into force that group splits into different opinions, as regards the conferral of direct effect, the issue is relatively pacific in the sense that, just like any other treaty regularly incorporated, the TRIPs Agreement is perfectly entitled to be fully effective in the constitutional legal system of Brazil.<sup>37</sup>

Denis Barbosa, however, defends the opposite: that member states are the target of rights and obligations under the TRIPs Agreement, and individuals cannot be entitled to any subjective right arising from its coming into force. The text of the TRIPs Agreement article 1 (1) expressly determines that national legislation must implement the rules of the treaty, as there are no uniform rules, but minimal patterns to be followed by national laws. "The TRIPs Agreement requires a domestic law, but is not domestic law".<sup>38</sup>

<sup>37</sup> See: Albuquerque Mello, C. D. (1986) Curso de Direito Internacional Público, 8th ed., v. 1, Rio de Janeiro: Livraria Freitas Bastos; Amaral, A. C. R. Coord. (2005) Tratados internacionais na ordem jurídica brasileira. Sao Paulo: Lex Ed., Aduaneiras; Araújo, Borja, C. (1998) Patente de invenção - acodo internacional - vigência (parecer). Revista de Direito Administrativo 213/328, Rio de Janeiro: Ed. Renovar; Gomes, op. cit.; Rezek (1984), op. cit.

Barral adds to the protests, in the sense that the:

*"doctrinal problem of the TRIPs Agreement refers to the self-executing character of its rules or not. We understand, in the same reasoning proposed by Gómez Segade, that the agreement as a whole is not self-executing because the obligations are directly imposed on the members, that is, the signatory states".<sup>39</sup>*

In the same direction, Professor Luiz Olavo Baptista stated in 1996 that, just like other WTO Agreements, the TRIPs Agreement belongs to a modality of treaty-contract, which is not addressed to member states' citizens. Therefore, it has come into force in Brazil and must apply, but its effects are limited to the obligation of the government to implement its rules. The Trips cannot be claimed to be treated like an internal law because there is a risk that such a claim would be rejected by the courts.<sup>40</sup>

The government and the federal agency for matters concerning industrial property (INPI - National Institute of Industrial Property), defended that idea, considering that the TRIPs Agreement needs and requires implementing legislation in order to fully be applicable in the national legal system. They were also supported by some members of the Federal Court of Appeal of the 2nd Region, which declared that the TRIPs Agreement belongs to a modality of international treaties that have the characteristic of setting down programmatic rules which depend upon further legislative intervention in order to have full applicability domestically. The TRIPs Agreement, according to that group, establishes minimum standards for the protection of intellectual property rights rather than fixed normative rules.<sup>41</sup>

Notwithstanding the opposing opinions, the largest part of the rulings have followed the orientation of Brazilian Highest Courts that confer direct effect to international agreements formally incorporated into the national legal system and applying the same rule for the case of the TRIPs Agreement. These precedents will be analyzed in the following section.

<sup>38</sup> Barbosa, D. B. (2003). Propriedade Intelectual, a Aplicação do Acordo TRIPS. Rio de Janeiro: Lumen Juris. p. 49.

<sup>39</sup> Barral, Welber. O Brasil e a OMC: os interesses brasileiros e as futuras negociações multilaterais. Florianópolis: Diploma Legal, 2000, p. 72.

<sup>40</sup> Baptista, L. O. (1996) Seminar published in: Revista da ABPI: Anais do XVI Seminário Nacional de Propriedade Intelectual, quoted in: Silveira, N. (1999) Aplicação do Acordo TRIPs no Brasil. In: Revista de Direito Mercantil n. 115/66. Sao Paulo: Malheiros ed. p.71. It should be noted that by the time Prof. Baptista proffered this statement there was not any ruling on the subject yet.

<sup>41</sup> TRF-2: 2nd Group, Civil Appeal AC 2005.51.01.507229-7, Rel. LILIANE RORIZ.

### 4.3. Discussions on the date of entrance into force of the TRIPs Agreement: non-applicability of the Trips Agreement Article 65

The issue of direct effect became particularly relevant in the case of the TRIPS Agreement in Brazil because it further opened the possibility of using that prerogative as from January 1, 1995. Individuals sought not only to use rights conferred on them directly by the TRIPS Agreement, but also to use them as from January 1, 1995, the date right after the promulgation and publication of Presidential Decree No. 1.355/94, which incorporated WTO Agreements into the national legal system. The interest at stake was the possibility of extending the terms of IP protection in force on January 1, 1995, or granted right after that date, instead of having to wait for the implementation of those rights by law or for the coming into effectiveness of the TRIPS Agreement following the terms of the transitional arrangements of Art. 65 (1) or (2).

The number of related cases still under judgment in the federal courts of Brazil is fertile. They usually deal with the term of protection for patents, which was extended from 15 years, according to Article 24 of Law 5.772/71, to 20 years, the minimum period required by Article 33 of the TRIPS Agreement. This rule, combined with that of Article 70 (2) first part, from the TRIPS as well, conceived the possibility to generate effects 'in respect of all subject matter existing at the date of application of this Agreement'.

#### *Article 33 - Term of Protection (for Patents)*

*"The term of protection available shall not end before the expiration of a period of twenty years counted from the filing date. (...)*

#### *Article 70 - Protection of Existing Subject Matter*

1. (...)

2. *Except as otherwise provided for in this Agreement, this Agreement gives rise to obligations in respect of all subject matter existing at the date of application of this Agreement for the Member in question, and which is protected in that Member on the said date, or which meets or comes*



*subsequently to meet the criteria for protection under the terms of this Agreement."*

The issue of direct effect in these cases depended upon the exclusion of the rights of Brazil to make use of the transitional arrangements contained in Art. 65 (1) and (2), of the TRIPS Agreement, which did not oblige WTO members to apply the provisions of the TRIPS Agreement before January 1, 1996 (Art. 65 (1)) or, as a developing country, delayed the date of its application by January 1, 2000 (Art. 65 (2)).

*Article 65 - Transitional Arrangements:*

1. *"Subject to the provisions of paragraphs 2, 3 and 4, no Member shall be obliged to apply the provisions of this Agreement before the expiry of a general period of one year following the date of entry into force of the WTO Agreement.*
2. *A developing country Member is entitled to delay for a further period of four years the date of application, as defined in paragraph 1, of the provisions of this Agreement other than Articles 3, 4 and 5."*

Article 65 of the TRIPs Agreement was a result of the necessity to provide countries and, in particular, developing countries, with an extended period of adaptation for an Agreement which was rather complex and full of sensibilities especially for the later group. It should be read in connection with Article 1 (1), interpreted above, especially its third sentence, which allows the members to freely determine 'the appropriate method of implementing the provisions of this Agreement within their own legal systems and practice'.

The issue of direct effect of the TRIPs Agreement in Brazil turned here to the discussion over the date of entrance into force of the TRIPs Agreement within Brazilian legal system, a question to be answered by Brazilian federal courts. In the origin of the contention, complainants argued about the fact that the Decree n. 1.355/94<sup>42</sup> textually declared : a) that the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations of GATT was to come into force for Brazil on January 1st 1995; b) that it was to be 'executed and complied with as entirely as it was' (Article 1); and c) that the decree was to come into

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<sup>42</sup> See the text on pp. 17-18.

force 'on the date of its publication, revoking the dispositions on the contrary', which were all strong textual elements in favor of its immediate applicability.

As a general rule, in fact, article 1, of the LICC, determines a period of *vacatio legis* of 45 days for any law that is silent as regards its own entrance into force.

*LICC, Article 1 - Excepted a contrary disposition, the law starts its coming into force in the whole country forty-five days after being officially published.*

This norm is also valid for executive decrees internalizing treaties. Oscar Tenório<sup>43</sup> observed that "as treaties (...) are not simple administrative or executive acts, but real laws, the rule of *vacatio* is applicable also for them". If the government preventively wanted to avoid the immediate entrance into force of the TRIPs Agreement, he could have disciplined accordingly in the decree, argued patent holders. In fact, it is common that the promulgating decree of a treaty, as well as it happens with the promulgation of a law, establishes a future date for its entrance into force.<sup>44</sup>

Accordingly, patent holders claimed that in face of the freedom of implementation provided by the TRIPs Agreement Article 1, Brazil could either have postponed or applied immediately the date of its entrance into force. But as set forth by Decree 1.355/94, Brazil deliberately chose to bring the TRIPs Agreement into force on January 1 1995 and, likewise, its Article 33, which granted sufficiently clear and precise rights on individuals.

As regards the dispositions of Article 65 (1) and (2), which equally came into force domestically, it was argued that their rules were typically public international law, directed to the states within their capacity to legislate. Both provisions merely allowed member countries to delay the applicability of the provisions of the TRIPs but did not oblige that proceeding. Therefore, Article 65 could not be invoked by the state, within its own jurisdiction, against the legitimate claim of an individual with standing before domestic courts.

<sup>43</sup> Tenório, O. (1944) *Lei de Introdução ao Código Civil*, Rio de Janeiro: Liv. Jacinto Ed., p. 22, quoted in: Borja, op. cit. p. 331. See also Rezek (1984), op. cit., p. 386.

<sup>44</sup> See for instance Decree n. 70.391/72, from April 12 1972, incorporating the Convention on the equality of rights between Brazilians and Portuguese, which determined that in accordance with article 17 of the Convention, it would come into force on April 22 1972.

Those were among the basis of Célio Borja's legal opinion,<sup>45</sup> on behalf of American Cyanamid, a patent holder interested in the extension of its patent of invention initiated on June 1 1981. According to Article 24, of Law n. 5.772/71, the old Industrial Property Code, the patent should be granted for the period of 15 year of protection, ending thus on June 1 1996, when the new Law of Industrial Property, Law n. 9.279/96 was not yet in force. He defended that the TRIPs Agreement should apply during that period. According to him, Brazil failed to implement the options given by Article 65 of the TRIPs Agreement domestically, through an express disposition within Decree 1.355/94, which was the only law entitled to limit (or postpone) its own applicability outside the general *vacatio legis* rule of the LICC, Article 1.

In August 1997, the Ninth Federal Court of Rio de Janeiro, where the INPI is located, issued two injunctions in favor of American Cyanamid Company: the first one considering valid patents which had expired in 1996 in view of the 20-year term of the TRIPS Agreement, henceforth recognizing its applicability as from January 1, 1995, and the second, ordering a potential Brazilian infringer of these patents, to refrain from importing, exporting, manufacturing, selling or offering to sell products obtained according to the referred patents until a final decision was rendered by the court.<sup>46</sup>

Dissenting opinions, however, pledge the inapplicability of the TRIPs Agreement before January 1 2000 for Brazil. According to Denis Barbosa, the TRIPs agreement came into force for the purpose of PIL on January 1 1995, obliging as from January 1 1996 or January 1 2000 for countries like Brazil. After that date, if a country has not complied with its rules it is in violation of it before the WTO, but it is indifferent for private parties the number of rights that they have or not acquired because they lack legal standing before local courts.<sup>47</sup> According to him, both the TRIPs Agreement, under Article 70 (1),<sup>48</sup> and the Law 9.279/96, Articles 235<sup>49</sup>

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<sup>45</sup> Célio Borja is a former Minister of the STF and a former Minister of Justice. He acted here as a private counselor. Op. cit., pp. 332-340.

<sup>46</sup> Leonardos, G. S. TRIPs Agreement, Art. 65; Law No. 5.772/71, Art. 70 – "Zeneca" in: REPRINT I I C - International Review of Industrial Property and Copyright Law, Published by the Max-Planck-Institute for Foreign and International Patent, Copyright, and Competition Law, Munich. German Review "Gewerblicher Rechtsschutz und Urheberrecht". Available online at Momsen, Leonardos & Cia, from: <http://www.leonardos.com.br/Textos/htm/ZenecaComplete.htm> [Accessed 10 August 2008]

<sup>47</sup> Barbosa, loc. cit.

<sup>48</sup> Article 70 (1) This Agreement does not give rise to obligations in respect of acts which occurred before the date of application of the Agreement for the Member in question.

<sup>49</sup> Article 235 - The period in use conceded under the Law n. 5.772, from 21 December 1971, shall be respected.

and 243,<sup>50</sup> contain general provisions stating that they do not apply to facts occurring before they entered into force.<sup>51</sup>

The INPI as a defendant in such claims has consistently contested the entrance into force of the TRIPs Agreement before 2001. This is the official position of the federal government supported by the Ministry of Development, Industry and Foreign Trade (MDIC), to which the INPI is attached, and the Ministry of Foreign Relations. On the legal opinion numbered 24/97, Dr. José Mário Bimbato, legal advisor to the Minister of Industry, Trade and Tourism,<sup>52</sup> stated that:

*"despite being in force since January 1st 1995 in Brazil, therefore existent in the Brazilian legal order, with formal validity, the TRIPs Agreement itself would only be compulsory applicable in the country, for instance, acquire material effectiveness of law, entitled to create rights and impose obligations, after the passage of at least one year from that initial date of entrance into force, that is, only as from January 1st 1996."*

The legal opinion carries on explaining the difference between entrance into force and effectiveness of laws, as a result of the *vacatio legis*, whether originated domestically or internationally, as in the case of the TRIPs Agreement, and further defends the applicability of Article 65 (2) in order to delay the full effectiveness of the TRIPs Agreement for Brazil to January 1, 2000.<sup>53</sup>

The issue is not pacific also within the Judiciary. Some federal judges<sup>54</sup> consider that the TRIPs Agreement only became valid and applicable internally as from January 1, 2000. It is worth reproducing the sentence of Federal Judge Nizette Rodrigues, in the judgment of TRF-2: AMS 98.02.45839-2:

<sup>50</sup> Article 243 - This Law comes into force in the date of its publication as regards the subjects disciplined in Arts. 230, 231, 232 e 239, and 1 (one) year after its publication as regards the other articles.

<sup>51</sup> Barbosa, D. B. (1997) A note on the Term of Brazilian Patents under TRIPs [online]. Available from: <http://denisbarbosa.addr.com/papers.htm> [accessed 20 September 2008].

<sup>52</sup> That was the old denomination of MDIC until 1999.

<sup>53</sup> In the same direction: Legal Opinion from the Department of Patents of the National Institute of Industrial Property (INPI - March 18 1997) in: Silveira, op. cit., p.70-71. See also Soares, G. F. S. (1998) O tratamento da propriedade intelectual no sistema da organização mundial do comércio: uma descrição geral do acordo trips. In: Casella, P. B. & Mercadante, A. A., coord. Guerra Comercial ou Integração Mundial pelo Comércio? A OMC e o Brasil. São Paulo: Ed. LTR, p. 678-681.

<sup>54</sup> See for instance the following case-laws from TRF of the Second Region: 2nd Group, Civil Appeal AC 2005.51.01.507229-7, Rel. LILIANE RORIZ; 5ª Turma, AC 98.02.33886-9, Rel. Juíza Convocada Nizette Rodrigues, DJU 29-05-2003; 3ª Turma, AG 2000.02.01.016320-3, Rel. Des. Frederico Gueiros, DJU 23-04-2002.

*"(...) As expressly highlighted by the Counsel for TRIPs, 'Only the intention to renounce the benefit of the adjustable period must be formalised'. In the silence of the Member country, it should be considered himself automatically entrusted in the use of such transitional period. Because it is automatic and a result of the text of the Treaty, a country is not required to present to the WTO any manifestation or notification in order to be entitled to the period of transition. Brazil did not renounce to any of his prerogatives of developing country. (...) Accordingly, the TRIPs Agreement is valid for Brazil since January 1st 1995 and on that date started to be counted the transitional period provided on Article 65.2 (...). The Law number 9.279, in force since May 15 1997, which replaced the previous Industrial Property Code, does not characterize that Brazil has already and fully adapted himself to the dispositions of the TRIPs Agreement".*

Despite the friction within Brazilian courts, motivated to a great extent on the sensitiveness of the subjects involved (direct effect of trade agreements, on the one hand, and intellectual property rights, on the other), most of the jurisprudence adopted the thesis that Brazil did not make use of the transitional provisions under Article 65 (1) nor (2), thus applying the rules of the TRIPs Agreement as from January 1, 1995.<sup>55</sup>

Those rulings were confirmed, as a matter of fact, in instance of Special Appeal to the Superior Court of Justice (STJ) in two leading cases, where the Tribunal set its orientation in favor of the conferral of direct effect to the TRIPs Agreement in Brazil. INPI was the Appellant in both of them, after having lost the case before the first and second instances. The first one is REsp. n. 423.240 - RJ,<sup>56</sup> unanimously rejected by the Fourth Group of the STJ. An extract of the summary of the ruling reads as follow:

*"International. TRIPs. Reservations. Presentation. Moment. (...)*

*1. If the Brazilian state has not manifested in the appropriate moment any option for the postponement of the entrance into force of the TRIPs within*

<sup>55</sup> See for instance the following case-laws from TRF of the Second Region: *4a Turma, AC 2001.51.01.531698, Rel Des. Rogerio Carvalho, DJU 18-03-2004; 4a Turma, AMS 2002.02.01.024411-0, Rel.: Des. Benedito Gonçalves, DJU 06-05-2003;*

<sup>56</sup> STJ: REsp n. 423.240 - RJ (2002/0032733-9), Rel. Min. Fernando Gonçalves. Decision on 2nd March 2004.

*the internal legal order; it is understood to have renounced to the faculty offered by art. 65 of such agreement. (...)"*

The second ruling by the STJ is REsp 661.536 - RJ<sup>57</sup> (2004/0068155-5), repeated the previous ruling, as can be seen by the extract of the summary of the decision, also unanimously rejecting the Appeal:

*"TRIPS Agreement. Legal effect within Brazil. Precedent of the Court.*

*1. What sustains the period of transition is the will of the member-country. It is not obligatory, therefore, to postpone the date of applicability provided by the TRIPS Agreement. This Court has already pronounced in the sense that if Brazil has not manifested 'in the appropriate moment any option for the postponement of the entrance into force of the TRIPS within the internal legal order; it is understood to have renounced to the faculty offered by art. 65 of such agreement'. (Esp n. 423.240 - RJ, Rel. Min. Fernando Gonçalves. DJ 03/15/04)."*

Although subject to criticism, on a strictly positivist approach, which is the pattern in Brazil, it is comprehensible that the Judiciary tends to deny the applicability of Trips Agreement Article 65. As mentioned above, the government could have avoided the confusion by expressly determining the later entrance into force of the TRIPs Agreement according to the rule of Article 65 (1) or (2), and, henceforth, making explicit the option for the use of the transitional arrangements.

Notwithstanding, the TRIPs was one agreement among many others in the context of the Marrakesh Agreement Establishing the World Trade Organization and, apparently, this transitional arrangements provisions, as a specificity of the TRIPs Agreement only, passed unattended. Hard is the word of law also for the state, and the judiciary applied the general principle of law: *dormientibus non succurrit jus*<sup>58</sup> against the inaction of the government when it had the chance (and obligation) to be more precise.

In this sense, the two STJ case laws above mentioned are consistent with Brazilian PIL tradition of conferral of direct effect to incorporated international agreements within its

<sup>57</sup> STJ: REsp n. 661.536 - RJ (2004/0068155-5) Rel. Min. Carlos Alberto Menezes Direito. *Decision on 7 April 2005.*

<sup>58</sup> From the Latin, "the law does not help those who sleep", that is, the law is implacable against those who are ommissive to secure their rights.

domestic jurisdiction. The rulings can be interpreted to confirm the occurrence of direct effect to WTO Agreements in general and to the TRIPs Agreement in particular. The situation as regards the latter is furthermore emblematic because it shows the force of the institute of direct effect of treaties within Brazil. Direct effect of the TRIPs Agreement was not only granted by Brazilian courts, but also as from January 1 1995, that is, one year before the entrance into force of such agreement for developed countries, and five years before the same obligation was enforceable for developing countries.

#### **4.4 Direct effect of international agreements in Brazil: final considerations**

The conferral of direct effect to international agreements in Brazil has a long standing tradition and is generally welcome by Brazilian doctrine and governmental authorities. However, taking into account the examples of other WTO member countries that deny direct effect to GATT and WTO law, sometimes on exceptional grounds (i.e. denying only to GATT and WTO law and accepting to other international instruments to which they are bound), some authors in Brazil started to manifest concern over the lack of reciprocity in the disadvantage of Brazil.

Indeed, it is a legitimate unease that must be regarded more in detail by Brazilian academy and authorities. As alerted by Otto Licks, "(e)venthough sophisticated, Brazilian public international law did not assimilate the difference between 'classical' treaties with nature of public law and international trade agreements".<sup>59</sup> Talking about the practice of granting of legal force to incorporated treaties in Brazil, he adverts that this should not stand to trade agreements, for two reasons: first, because there is no mechanism of selective implementation by the Executive; secondly, because of the lack of control over the extension of the applicability of the agreement's measures.<sup>60</sup>

But is the fact that direct effect is in operation for "WTO agreements" (as if being a different category of PIL in comparison to other kind of agreements) reason enough to challenge the whole issue of the granting of direct effect in Brazil? And does that circumstance undermine

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<sup>59</sup> Licks, O. B. O Acordo sobre aspectos dos direitos de propriedade intelectual relacionados ao comércio (TRIPs Agreement), In: Casella, P. B. & Mercadante, A. A., coord. (1998). Guerra Comercial ou Integração Mundial pelo Comércio? A OMC e o Brasil. Ed. LTR, São Paulo, p. 643.

<sup>60</sup> Ibid, p. 644.

the balance of powers as a result of the reduction of freedom to implementation of WTO law by the Executive and the Legislative branches?

Probably not. At least, not so far. That fresh dilemma does not seem to bother the majority of the doctrine and the upper judicial bodies in Brazil (i.e. the STF and the STJ), which still thinks that WTO Agreements and other international agreements are two sides of the same coin and should continue to be disciplined in harmony with the long stand tradition of giving legal effectiveness to all treaties regularly incorporated and which do not affront the constitution.

Still, some authors and governmental authorities are voicing against the conferring of direct effect to WTO agreements. According to federal judge Zandavali, in line with some of the current theories applied by the ECJ, judicial intervention, directly applying WTO law, has the consequence of denying the Brazilian Executive of its legitimate right under the DSU to opt for compensation or retaliation in case of a WTO violation, without necessarily having to withdraw the measure considered to be incompatible by the DSB.

In his opinion, Brazilian tribunals violate Executive prerogatives within the DSU also because WTO rules do not confer rights on individuals, but rather obligations on Member states governments. Direct effect granted by Brazilian courts causes therefore an unbalance of rights and obligations of Brazil towards the other WTO Members that do not act likewise, attempting against the principle of reciprocity.<sup>61</sup>

It is true that direct effect of international trade agreements restricts the freedom of implementation of trade policies by the signatory countries and limits sovereign powers, but that is the price to be paid for increasing integration. Countries are not forced to be members of the WTO, and decisions in this forum are taken by consensus as a general rule. So, the use of the argument by some countries or group of countries that direct effect precludes the freedom of implementing questionable laws in the light of WTO rules, and that paying compensation, in case of a condemnation by the DSB, is a legitimate alternative right to 'full compliance' with WTO law seems to go against the PIL principles of good faith and *pacta sunt servanda*, turning the rule-oriented system of WTO law upside-down.

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<sup>61</sup> Opinions expressed during an interview held on October 7 2008, from his office in Bauru, Sao Paulo State, and also present in his dissertation: Zandavali, M. F. (2008) The Brazilian judge and the WTO law: The case of the importation of used vehicles. 2008. 106p. Dissertation (Master). Faculty of Law, University of São Paulo, São Paulo, p. 76, 90-91, 100. Obs. Zandavali is a federal judge, and his opinions do not necessarily reflect those of the body to which he belongs.



As regards the question of the balance of powers, this author believes that direct effect is actually salutary to the improvement of the balance of powers. It gives a voice to the Judiciary in the treaty-making process, in the same way as the Executive and the Legislative had their chance to be involved. By interpreting and applying international treaties in the light of Brazilian legal system and reality, direct effect brings more legitimacy in terms of the direct involvement of individuals with Brazilian PIL as well.

In addition, taking into account that the later law prevails even against incorporated agreements (with status of law), the Legislative, and indirectly the Executive (through law proposal), ultimately have the power to change a judicial unfortunate jurisprudence simply by the enactment of a new law disciplining the content of the earlier treaty or even by completely withdrawing the applicability of some of its provisions.

To think that the Judiciary will take the lead over trade policy initiatives means also to underestimate the composure of judges in the defense of national interests. Furthermore, the applicability of an international treaty formally incorporated should not come as a surprise for the Executive and the Legislative as they had a proper chance, respectively, to negotiate and deliberate on the convenience to sign such international act, in the case of the former, and to approve, reject or recommend reservations, in the case of the latter.

Besides, direct effect of WTO law improves compliance but is not enough to avoid the necessity to further implementation, as was the case of the TRIPs Agreement. Henceforth, it will not necessarily eliminate the vulnerability of the country to be challenged under the dispute settlement mechanism of the WTO. The judiciary applies WTO law in the context of national legislation as whole, including the implementing laws to WTO Agreements, and, from the perspective of other member-countries, may not be satisfactorily dealing with the interpretation of such matters. Take for instance the case of antidumping disciplines which cause so much difficulties in terms of a uniform interpretation to the Agreement on Implementation of Article VI of the GATT 1994.

Another issue related is the fact that direct effect does not preclude the Executive to discipline the entrance into force of international agreements in the moment of their promulgation through executive decree. As seen on the previous section, that was one of the debates underlying the decision of date of entrance into force of the TRIPs Agreement, that is, whether the promulgating executive decree n. 1.355/94, could have limited or anyhow conditioned the legal effectiveness of that agreement to a later date.

In this context another subject to be put on the table is whether the Executive (and the Legislative) could go a step further withdrawing the possibility of direct effect from an international treaty within the Brazilian legal system, as has been done by the US and the EC. The government could, for instance, instead of simply ordering that the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations of GATT was to be executed and complied with as entirely as it is, to state that the Final Act was not to have self-effective power, requiring to be fully implemented by domestic laws. An hypothesis even more extremist reaching the same result could be the indefinite postponement of the promulgation act by the Executive, which would entirely leave on the legislature the responsibility to internalize the rules of the Final Act.

This and other questions could not be addressed in detail during this work, and remain open to further discussion. The author of this research hopes, nonetheless, to have set forth a path towards the comprehension of the issues under analysis and to have stimulated the debate a step forward.

## **5. Conclusions**

The relevance of this research proposal relates to the need of better understanding and better assessing the conferral of direct effect to international trade agreements within the Brazilian legal system, in particular, for the case of the TRIPs Agreement, of the WTO. The lack of clear constitutional borders on the scope of direct effect of international agreements in general makes the subject disputable, especially, in relation to trade related agreements, as is the case of the TRIPs Agreement. Notwithstanding, the dominant jurisprudence and relevant position of the doctrine defend the granting of direct effect to any treaty regularly incorporated in the Brazilian legal order.

The ordinary process of incorporation of an international agreement in Brazil passes through the phases of negotiation, signature, approval by the Legislative, ratification, promulgation by the Executive and publication. The TRIPs Agreement in this context was incorporated in Brazil together with the promulgation of the Final Act Embodying the Results of the Uruguay

Round of Multilateral Trade Negotiations of GATT through Presidential Decree No. 1.355/94, of December 30 1994, published in the official press on December 31 1994.

International agreements regularly incorporated have legal status of laws. In this connection, the STF determined that incorporated treaties in general (excepted the cases of Human Rights or tax law treaties, which have constitutional and Complementary Law status respectively) follow the doctrine of legislative parity. As a consequence, the conflict between incorporated treaties and national laws will be settled by the chronological criteria *lex posterior derogat priori*, and, when applicable, by the principle of speciality (*lex posterior generalis non derogat legi priori speciali*). Accordingly, the treaty is also subject to the observance of the Constitution (and *supra*-legal laws). The TRIPs Agreement, on that regard, follows these same general principles, having legal status of ordinary law.

The ruling of RE n. 80.004, by the STF, formally settled the possibility of conferral of direct effect to international agreements incorporated into the national legal system, a rule valid also to the case of the TRIPs Agreement. The incorporation of the TRIPs Agreement in Brazil raised discussion on the use of the right to the extended period of implementation, set forth under Article 65, of TRIPs, by the Brazilian government. Despite the friction within Brazilian courts, most of the jurisprudence adopted the thesis that Brazil did not make use of the transitional provisions under Article 65 (1) nor (2), thus applying the rules of the TRIPs Agreement as from January 1, 1995.

In this sense, the case of the TRIPs Agreement confirmed the Brazilian tradition of granting direct effect to incorporated international agreements within its domestic jurisdiction. In fact, direct effect of the TRIPs Agreement has been granted by Brazilian courts as from January 1 1995, the date of entrance into force of Executive Decree n. 1.355/94. That means Brazil adopted the TRIPs Agreement with unprecedented celerity: one year before the obligation to apply such agreement at international level, and five years before the same obligation was enforceable for developing countries and for Brazil itself.

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