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BRAZIL AND ITALY: MEANINGS AND PROSPECTS OF A TWO-WAY RELATIONSHIP

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1. Introduction

It is commonplace to underline the close links between Italy and Brazil from a legal, economic and social point of view. Those links justify by themselves the strong interest in understanding the most recent developments in the two legal systems. However, the Conference that took place in Trento in November 2014 also aimed at exploring two additional aspects: firstly, to what extent the two legal systems share today a common approach to legal problems and how they reciprocally influence each other; secondly, to what extent the respective institutional environments create or reduce opportunities for cross-border trade between the two countries. The latter aspect is of crucial importance for Italian and Brazilian businesses wishing to increase international cooperation. At the end of the Conference, representatives of local research centres presented their point of view on how to improve the Italian-Brazilian trade relationships. While much has to be done in the political and economic domains, the Conference aimed at showing that the interactions between the two legal systems play a non-secondary role in fostering or hindering trade.

The next section discusses the broader institutional dynamics that are prompting legal changes in both systems. Section three turns to the example of trade regulation to explain how the comparative analysis

leading to identify the main components of each institutional environment is an important tool for both policymakers and the business sector. Section four proposes some concluding remarks.

2. What to compare: Brazil and Italy in multilevel regulatory systems

More than sixty years ago, Tullio Ascarelli underlined some features of the Brazilian legal system that exerted a lasting influence on its development. Firstly, the legal tradition of the seventeenth and eighteenth centuries had not completely lost its appeal and was still affecting legal practice. Secondly, the Brazilian system of sources of law did not impose barriers to the use of foreign doctrines. This institutional element fostered an anti-positivist stance and helped explain why strict adherence to legal rules played a lesser role. Thirdly, the Brazilian legal system was ideally placed to draw on both the civil law and the common law (in its American version) traditions. From this point of view, it was an interesting laboratory for mixed legal approaches[1]. But Ascarelli also warned about false or superficial assonances between the Brazilian and the Italian legal traditions. This is a common problem in any analysis of legal transplants. Even though transplants happen frequently, what matters is their extent and direction. With regard to the Italian models, measuring their actual impact in the Brazilian legal system might not be straightforward because two different levels have to be explored.

The first level relates to the influence of national legal traditions. This is the usual line of inquiry of the comparative law literature that explores the links between the Brazilian and the Italian legal systems. This literature shows an intense dialogue among scholars, the influence of Italian codifications on Brazilian codifications, and the use of Italian

[1] T. ASCARELLI, *Osservazioni di diritto comparato privato italo-brasiliano*, in ID., *Studi di diritto comparato e in tema di interpretazione*, Milan, 1952, p. 81 ff. (originally published as T. ASCARELLI, *Notas de direito comparado privado italo-brasileiro*, *Revista da Faculdade de Direito de São Paulo*, v. 44, n. 111, *maio/jun.*, 1947, p. 317); T. ASCARELLI, *Diritti dell'America Latina e dottrina italiana*, in ID., *Studi*, cit., p. 155 ff.

legal doctrine by Brazilian judges[2]. Many systemic factors explain these exchanges, including linguistic familiarity, the close links between the Brazilian academic world, the judiciary and the legal professions, as well as the high number of Brazilian scholars experiencing contacts with Italian law schools[3]. However, the real impact of the Italian legal tradition also depends on other two factors.

Firstly, several national legal traditions have an influence on the Brazilian legal system. Strong links can be detected with other civil law systems[4]. No less influential is the US legal system[5]. This means that

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[2] See, e.g., C. DE SOUSA ZANETTI, *Il modello giuridico italiano in Brasile: obbligazioni e contratti*, in S. LANNI, P. SIRENA (eds.), *Il modello giuridico – scientifico e legislativo – italiano fuori dell'Europa*, Napoli, 2013, p. 179; M.C. DE CICCO, *Una visione d'insieme sulla circolazione del modello giuridico italiano in Brasile*, *ibid.*, p. 187; A. CALDERALE, *La circolazione del modello italiano nelle codificazioni brasiliane del diritto privato*, *ibid.*, p. 199; S. LANNI, *La diffusione dell'esperienza giuridica italiana di tutela del consumatore in America Latina*, *ibid.*, p. 271; F. MOTTA, *Influência do direito administrativo italiano na construção das bases dogmáticas do direito administrativo brasileiro*, *Revista de direito administrativo contemporâneo*, v. 2, n. 6, *mar.* 2014, p. 11.

[3] According to Eurostat data, in 2013 44% of first residence permits granted to Brazilian citizens in EU-28 were for education reasons (only China, with 60%, had a higher score). In Italy Brazil is among the first ten countries receiving residence permits for education reasons, with a growing trend between 2006-2011 (see MINISTERO DELL'INTERNO (ed.), *Gli studenti internazionali nelle università italiane: indagine empirica e approfondimenti*, sixth report EMN Italia, May 2013, available at *www.emnitaly.org*). In the area of legal studies, between 2007 and 2015 Italian and Brazilian universities concluded 269 agreements, representing 35% of all agreements concluded between the university institutions of the two countries (data available at *http://accordi-internazionali.cineca.it/*).

[4] See, e.g., G. TEPEDINO, A. SCHREIBER, *Culture et droit civil – Brésil*, *Journées internationales 2008: Droit et Culture*, Association Henri Capitant, available at *http://www.henricapitant.org/node/50* (describing the influence of French and German codifications on Brazilian civil codes); M. STORCK ET AL. (eds.), *Les frontières entre liberté et interventionnisme en droit français et en droit brésilien*, Paris, 2010 (influence of French law).

[5] See, e.g., Y. DEZALAY, B.G. GARTH, *The Internationalisation of Palace Wars*, Chicago, Ill., 2010 (analysing the export strategies of US law and the domestic strategies of borrowing countries in Brazil and Latin America); J.K. KRISHNAN ET AL., *Legal Elites and the Shaping of Corporate Law Practice in Brazil: A Historical Study*, forth-

legal traditions compete among themselves, but the factors leading one of them to prevail in a specific case remain largely unexplored. As observed by Gambaro, foreign legislative solutions are usually borrowed when they are believed to be successful (according to whatever criterion), while doctrinal solutions are usually borrowed when they provide a useful theoretical framework[6]. With regard to Italy, legislative solutions are difficult to export (but see section three). Italian doctrinal ideas do travel, but to successfully compete with rivals they have to match local needs and be supported by extensive programs of scientific collaboration.

Secondly, and related to the first factor, the well-known links between the two systems do not exclude that in many cases Italian transplants stop at the surface level and do not affect the operational level. This may be true of the widely cited Mauro Cappelletti's studies on access to justice and of the widespread reference to the Italian doctrines on the constitutionalization of private law[7]. Even the frequent references to Italian doctrine in Brazilian judgments do not represent evidence of a deep impact at operational level. To identify such impact, a systematic analysis of a representative sample of Brazilian judicial opinions would be needed[8]. Of course, impact at surface level is not an

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coming *Law & Soc. Inqu.* (2015) (discussing the relationship between Brazilian and American legal elites).

[6] A. GAMBARO, *Il modello giuridico – scientifico e legislativo – italiano fuori dell'Europa. Riflessioni conclusive*, in S. LANNI, P. SIRENA, *Il modello giuridico*, cit., p. 462 f.

[7] The effectiveness of litigation in implementing social rights for the poor is hotly debated: see, e.g., V.A. DA SILVA, F.V. TERRAZAS, *Claiming the Right to Health in Brazilian Courts: The Exclusion of the Already Excluded?*, 36 *Law & Soc. Inqu.* 825 (2011); O.L.M. FERRAZ, *Harming the Poor Through Social Rights Litigation: Lessons from Brazil*, 89 *Texas L. Rev.* 1643 (2011). On whether the constitutionalization of private law rights has produced positive effects see the doubts expressed by I. DE AGUILAR VIEIRA, *Soggettivismo e oggettivismo nel diritto brasiliano dei contratti*, in S. LANNI (ed.), *Dez Anos. Contributi per il primo decennio del nuovo codice civile brasiliano*, Napoli, 2014, p. 153, 166.

[8] For discussions of methodological hurdles in identifying doctrinal influence on judicial opinions see, e.g., N. DUXBURY, *Jurists and Judges*, Oxford, 2001; B. MARKESINIS, J. FEDTKE, *Judicial Recourse to Foreign Law*, London, 2006; M. BOBEK, *Comparative Reasoning in European Supreme Courts*, Oxford, 2013.

exclusive concern of Italian transplants. It has been observed that the "Euro-Latin American Legal Space", consolidated since the nineteenth century, fosters the impression of a common language. But conversations take place at an abstract level and do not provide the technical knowledge needed to draft a contract or a lawsuit[9]. With regard to American transplants, the example of civil procedure reforms adopted in Brazil in the 2000s may be instructive. The reforms aimed at managing in a more efficient way the relationship between higher and lower courts. Even though they bear some resemblance to US doctrines, their goals and incentives are shaped by the Brazilian institutional context[10].

The second level where the transplant effects should be explored is the supranational one. The Italian and the Brazilian legal systems are embedded in regional and international regulatory systems. While the influence of national legal traditions and the influence of supranational regulatory systems are not mutually exclusive, their relative strength in driving legal change could be an important explanatory factor for recent developments. More specifically, two different supranational regulatory environments may displace or modify the influence of national legal traditions. The first regulatory environment is connected to projects of regional integration in Europe and Latin America. The second regulatory environment has to do with the participation of the two countries to international trade.

As far as regional integration is concerned, the last two decades have seen an increase of the breadth and number of initiatives in different parts of the world. Under some respects, the EU is the most advanced project. But it is not necessarily the benchmark against which other projects of regional integration should be assessed. The types of governance mechanisms chosen, or made possible, in the EU are not the only option for other regions. Studies of comparative regionalism in the political science literature show that there is no "global script" to be

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[9] See D. LÓPEZ-MEDINA, *The Latin American and Caribbean Legal Traditions*, in M. BUSSANI, U. MATTEI (eds.), *The Cambridge Companion to Comparative Law*, Cambridge, UK, 2013, p. 356.

[10] A. DE SANTA CRUZ OLIVEIRA, N. GAROUPA, *Stare Decisis and Certiorari Arrive to Brazil: A Comparative Law and Economics Approach*, 26 *Emory Int. L. Rev.* 555 (2013).

used as a reference point. Each project of regional integration may choose to select different governance standards and different instruments to ensure compliance with those standards. Local conditions drive the choice and lead to divergent understandings of concepts like the rule of law and human rights[11]. The practical implication of such divergences is that each regional project may develop its own peculiar version of 'good governance'. The initiatives of regional integration will then be deemed legitimate if they aim at achieving that particular kind of governance.

Brazil is involved in all the most important regional integration projects for South America. Shaping and steering those projects became one of the main aims of Brazilian foreign policy in the last decades[12]. However, their impact on national legal systems cannot be assessed with the same approach adopted for the EU. Supranational institutions are lacking or have a limited reach. Moreover, the processes for adopting common rules entail a higher degree of discretion for the Member States than is usually the case in the EU[13]. This is not to say that regional integration has no actual impact at national level. It only means that to detect the 'Latin Americanization process' induced by regional integration may be methodologically harder than in the parallel research on the Europeanization process[14]. However, a thorough analysis of regional processes of rule-making and enforcement is worth trying for several reasons. Those processes may prove a fertile ground for experimenting with solutions that increase the external influence of the Latin American, and primarily Brazilian, legal systems. Several studies doc-

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[11] See T.A. BÖRZEL, S. STAPEL, *Mapping Governance Transfer by 12 Regional Organizations: A Global Script in Regional Colors*, in T.A. BÖRZEL, V. VAN HÜLLEN (eds.), *Governance Transfer by Regional Organizations*, Basingstoke, 2015, 22.

[12] See S. GRATIUS, M.G. SARAIVA, *Continental Regionalism: Brazil's Prominent Role in the Americas*, CEPS Working Document, No. 374, February 2013.

[13] See, with reference to Mercosur, J.S.K. AIMAR, *L'atteinte des objectifs communautaires au sein du Mercosur: un défi face à sa structure institutionnelle*, *Rev. dr. int. et dr. comparé*, 2014, 277.

[14] Examples of regional influence on national bureaucracies and the formation of policy networks are discussed by A.C. BIANCULLI, *Regionalism in Latin America: Old, New, Post or Overlapping?*, forthcoming in T.A. BÖRZEL, T. RISSE (eds.), *The Oxford Handbook of Comparative Regionalism*, Oxford, 2016.

ument the EU's attempt to use its external trade policy to export EU law. The final outcome of this export policy is highly context-dependent and regulatory convergence to EU standards can only be observed in some cases[15]. Though, by developing new visions and approaches to global issues, the regional projects in Latin America might try to perform a role similar to EU standards[16]. Furthermore, taking into account the multilevel nature of Latin American systems might be needed to assess the real impact of the European legal traditions in the area[17].

With regard to the regulatory environment of international trade, several studies have documented Brazil's ability to exploit loopholes in existing regimes, while at the same time pursuing its own goals of economic policy[18]. Though, Brazil had to adapt its legal system to allow its companies to fully integrate into the global economy. A case in point is the ratification in 2013 of the Uncitral Convention on the International Sale of Mobile Goods (CISG). At least for the simplest export-import

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[15] See, e.g., A.R. YOUNG, *The European Union as a Global Regulator? Context and Comparison*, 22 *J. Eur. Pub. Policy* 1233 (2015); M. CREMONA, *Expanding the Internal Market: An External Regulatory Policy for the EU?*, in B. VAN VOOREN ET AL. (eds.), *The Legal Dimension of Global Governance*, Oxford, 2013, p. 163; A. BRADFORD, *The Brussels Effect*, 107 *Nw. U. L. Rev.* 1 (2012).

[16] This seems already to be the case with reference to the South American vision of human rights developed in the Mercosur framework and opposed to the one proposed by the Organization of American States: see A.R. HOFFMANN, *At Last – Protection and Promotion of Human Rights by Mercosur*, in T.A. BÖRZEL, V. VAN HÜLLEN, cit., p. 192.

[17] According to F. DUINA, *Making Sense of the Legal and Judicial Architectures of Regional Trade Agreements Worldwide*, forthcoming *Reg. & Gov.* (2015), national legal traditions affect the design of regional agreements, with common law countries preferring a minimalist design and civil law countries preferring a more interventionist design. This argument assumes that legal families are good proxies of institutional influence, something I doubt. But this kind of studies shows why the relationship between the national and supranational levels is worth investigating.

[18] See, e.g., A. SANTOS, *Carving Out Policy Autonomy For Developing Countries in the World Trade Organization: The Experience of Brazil and Mexico*, 52 *Va. J. Int. L.* 551 (2012) (arguing that Brazil built up a legal capacity strategically aimed at influencing rule interpretation in WTO litigation); N.A. WELSH ET AL., *Using the Theories of Exit, Voice, Loyalty, and Procedural Justice to Reconceptualize Brazil's Rejection of Bilateral Investment Treaties*, 45 *Wash. U. J. L. & Pol'y* 105 (2014) (explaining how Brazil chose to protect foreign investors with internal legal tools while at the same time rejecting international arbitration).

transactions, the CISG is one of the legal tools most widely used in global trade. In some countries, the CISG has been the model for reforming the national rules on sales contracts. Moreover, the projects on a European contract law draw inspiration from the CISG. With the decision to ratify it, Brazil reduced the costs of access to foreign markets for national companies. However, to be really useful the CISG has to build a working relationship with national contract law. This means for traders to learn how to adapt their contractual relationships to the CISG framework, for judges to avoid interferences between the international and the national contractual regimes[19]. Of course, it cannot be excluded that Brazil's entry into the group of CISG countries leads to new interpretative approaches for some provisions of the CISG. But for this to happen, a much deeper integration of Brazilian companies into the global economy will be required.

The last observation points to the role that the mega-agreements on trade between regional blocs could play in the near future. Both the agreements that are of direct concern to South America and those that could be concluded between its most important commercial partners will imply some degree of regulatory convergence or coordination. The reference here is to the ongoing negotiations on an EU-Mercosur agreement, a Transatlantic Trade and Investment Partnership (TTIP) and a Trans-Pacific Partnership agreement (TPP). The future of each of these mega-agreements is still uncertain[20]. But all of them are going to

[19] For a discussion of the relationship between the CISG and Brazilian contract law see the contributions collected in I. SCHWENZER ET AL. (eds.), *A CISG e o Brasil*, São Paulo, 2015.

[20] The reasons that led to the stagnation of the negotiations on the EU-Mercosur agreement are discussed in P.L. KEGEL, M. AMAL, *Mercosur and its Current Relationship to the European Union*, Center for European Integration Studies, Rheinische Friedrich-Wilhelms-Universität Bonn, Discussion Paper no. 209, 2012. The new regional investment programs announced in the EU-CELAC summit of June 2015 (MEMO/15/5152) can be interpreted as an attempt to overcome the gridlock on the broader trade agreement. With regard to the TTIP, as of August 2015 the negotiations seem to be moving toward a positive conclusion. For an assessment of its regulatory implications see M. BARTL, E. FAHEY, *A Postnational Marketplace: Negotiating the Transatlantic Trade and Investment Partnership*, in E. FAHEY, D. CURTIN (eds.), *A Transatlantic Community of Law*, Cambridge, UK, 2014, p. 210. The prospects for the TPP being

have a significant impact on Brazil's (and Italy's) trade relationships[21]. The mega-agreements imply that each regulatory choice made at national or regional level could be scrutinized for the impact it could have on international trade. Specific mechanisms could be put in place to ensure that regulatory choices are discussed at an early stage. It is easy to foresee an increasing pressure toward the adoption of legal rules and institutions thought to reduce the costs and risks borne by foreign investors. Such a pressure will not be confined to the parties to the agreements, but will be clearly felt on other regional blocs[22]. Therefore, the final outcome could well be a supranational level of international regulation much more constraining than the current WTO framework.

The foreseeable increase in the relevance of the supranational level of regulation does not mean that the traditional comparative analysis of the national legal traditions loses any relevance. But it does mean that any comparative analysis of the Brazilian and Italian legal systems has to deal with multiple external influences and use methodologies allowing to detect their real impact. Such an effort is most needed when the main purpose of the comparative analysis is to inform policymakers about the positive or negative effects of legal rules, or the business sector about the implications of legal differences for international trade. Some preliminary ideas on how to carry out such a comparative analysis are presented in the next section.

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concluded are more uncertain. On this agreement see B. MERCURIO, *The Trans-Pacific Partnership: Suddenly a 'Game Changer'*, *The World Economy*, 2014, 1558.

[21] An analysis of the positive and negative effects the TTIP could have for the Mercosur area is proposed by SELA, *Economic and Cooperation Relations Between the Latin America and the Caribbean and the European Union*, May 2015, available at *www.sela.org*. On the effects for Italy see PROMETEIA, *Stima degli impatti sull'economia italiana derivanti dall'accordo di libero scambio USA-UE*, June 2013, available at *www.sviluppoeconomico.gov.it*.

[22] Indeed, the EU is quite explicit in highlighting the benefits that the regulatory cooperation in the TTIP might have if its rules were to be extended to other countries: see EUROPEAN COMMISSION, *Detailed Explanation on the EU Proposal for a Chapter on Regulatory Cooperation*, 6 May 2015, available at *http://ec.europa.eu/trade/policy/in-focus/ttip/*.

3. Diagnosing institutional environments: the example of international commercial relationships

Both policymakers and the business sector usually look for comparative information that helps shed light on specific problems. This problem-oriented perspective calls for a diagnostic approach that, starting from the representation of the problem, identifies the role played by each component of the institutional environment and the interactions among them. Important examples of diagnostic approaches have been developed in the political science and economics literatures[23]. This section tries to describe the main steps of a comparative diagnostic approach, using the regulation of international commercial relationships in Brazil and Italy as an example. The goal is to show that this kind of analysis should be an integral part of the planning activities firms undertake before launching in international trade, as well as of the proposals made by policymakers who try to reduce barriers to trade.

The main steps of a comparative diagnostic approach can be summarized by means of a set of questions:

1) What kind of barriers to trade policymakers and firms in both legal systems do perceive? Where such perceptions come from?
2) Which institutional elements affect trade? What is the role of each element?
3) How do these institutional elements interact?
4) What is the relationship among different regulatory layers?

Let us consider each set of questions. Under 1) we find the questions related to the representation of the problem to be addressed. The comparative law literature has already pointed out that legal traditions are constantly "invented" and shaped by the selective use of ideas or insti-

[23] See, e.g., M.D. MCGINNIS, E. OSTROM, *Social-Ecological System Framework: Initial Changes and Continuing Challenges*, *Ecology and Society* (2014), Special Feature on *A Framework for Analyzing, Comparing and Diagnosing Social-Ecological Systems* (in progress), available at *www.ecologyandsociety.org*; OECD, *Towards Green Growth*, Paris, 2011, p. 125-31. Additional references can be found in G. BELLANTUONO, *Comparative Legal Diagnostics*, Working Paper, July 2012, available at *www.ssrn.com*.

tutions. Therefore, representations, or legal 'frames', have a prescriptive force because they constrain the range of acceptable solutions[24]. The task here is to identify the dominant frame and the constraints it imposes. With regard to trading with and from Brazil, information about potential barriers can be collected from the guides drafted by the public authorities in charge of supporting and regulating export-import activities[25]. These guides can be considered at the same time a description of how the other legal system is perceived by an external observer and an attempt to make it understandable for those coming from one's own legal system. Putting together the descriptions on both sides should provide focused information on dominant frames and possible differences. The World Bank's Doing Business reports can also be used to confirm the relevance of information included in the guides[26]. Although the synthetic indicators used in those reports may overlook important contextual information, they can contribute to the identification of prevalent perceptions on barriers to trade. Testing the accuracy of those perceptions is a task to be undertaken in the next steps of the diagnostic approach.

Drawing on the above mentioned sources, the following barriers to trade can be identified:

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[24] With reference to Latin America see, e.g., G. MARINI, *La costruzione delle tradizioni giuridiche e il diritto latinoamericano*, *Riv. critica dir. privato*, 2008, p. 183 f.

[25] See, on the Brazilian side, MINISTÉRIO DAS RELAÇÕES EXTERIORES, *Como Exportar: União Europeia*, 2012 (*www.brasilexport.gov.br*); MINISTÉRIO DAS RELAÇÕES EXTERIORES, *Como Exportar: Itália*, 2014 (*www.brasilexport.gov.br*). On the EU side see MINISTERO DELLO SVILUPPO ECONOMICO, *Dossier Brasile*, 2012 (*http://www.sviluppoeconomico.gov.it/index.php/it/commercio-internazionale/osservatorio-commercio-internazionale/altre-pubblicazioni*); AMBASCIATA D'ITALIA BRASILIA, *Modello di sviluppo industriale del Sistema Italia in Brasile*, 3rd ed., June 2013 (*http://www.ambbrasilia.esteri.it/Ambasciata_Brasilia/*). Useful information can also be found in U.S. COMMERCIAL SERVICE, *Doing Business in Brazil: 2014 Country Commercial Guide for U.S. Companies*, available at *www.export.gov*.

[26] See WORLD BANK, *Doing Business 2015: Going Beyond Efficiency, Regional Profile 2015, Latin America*, 12th ed., Washington, 2014; WORLD BANK, *Doing Business in Italy 2013*, Washington, 2013.

a) On the Brazilian side:
explicit and implicit costs related to differences in the legal system and to the way the national rules are applied locally. Examples are: compulsory licenses for patents, weak enforcement of intellectual property rights, need for local subsidiaries or local partners, logistics problems due to the lack of infrastructures, licensing requirements in the utilities sector, compliance with environmental laws, complexity of the tax system.

b) On the Italian (or EU) side:
different legal regimes across the EU, different packaging requirements, complexity of the import tariffs and tax structures.

Depending on sectors and types of products, these barriers may or may not be relevant for businesses. For example, the reference to weak enforcement of intellectual property rights may simply reflect the stereotyped view about the ineffectiveness of Latin American formal law[27]. More generally, barriers to trade with and from Brazil can belong to two categories: those that are a direct consequence of commercial policies and those that depend on differences among legal systems. Both act as a constraint on trade relationships. However, their meaning is rather different. Deliberate commercial policies to block imports can be tackled with bilateral or regional trade agreements. The WTO dispute settlement mechanisms can be used as well. The latter option was chosen by the EU in 2014 to challenge Brazilian tax measures giving an unfair advantage to domestic producers[28]. Conversely, differences among legal systems are not necessarily to be understood as constraints on trade relationships. In many cases they could be exploited to plan strategies that would not be possible in the home countries of the exporters. This could be true of innovation strategies and commercial dis-

[27] See J.L. ESQUIROL, *Writing the Law of Latin America*, 40 *Geo. Wash. Int. L. Rev.* 693, 708 ff. (2009).

[28] See case WT/DS 472 – Brazil (information available at *http://trade.ec.europa.eu/wtodispute/search.cfm*). The WTO Dispute Settlement Body agreed to establish a panel in December 2014.

tribution strategies[29]. Therefore, a diagnostic approach suggests to identify those dominant frames that really constrain trade relationships. Given that the EU is Brazil's second commercial partner and the first source of foreign direct investments, there is no reason to believe that dominant frames on both sides are incompatible. However, differences between the respective institutional environments do exist. This means that firms wishing to enter into each other's markets will have to understand how to adapt to those environments.

Such an understanding can be provided by the next step in the diagnostic approach. Questions under 2) aim at identifying the role of each institutional element affecting trade relationships. An example of a specific issue helps discuss the kind of analysis required for this step. It is well known that over 90% of Brazilian and EU firms belong to the classes of micro, small and medium enterprises (MSMEs)[30]. One of the most pressing problems faced by MSMEs is to increase their presence on foreign markets. However, limited productivity, lack of human resources, low rate of innovation and exclusion from global value chains prevent them from reaping the benefits of internationalization. A diagnostic approach should identify the effects produced by each measure supporting MSMEs' internationalization plans. More specifically, such measures should be assessed from the point of view of the reduction of the costs of accessing markets, of getting relevant information, of participating to global value chains and of obtaining a fair share of profits. To pick up one example among many, Italy introduced in 2009 an in-

[29] See G. JACKSON, R. DEEG, *Comparing Capitalisms: Understanding Institutional Diversity and Its Implications for International Business*, 39 *J. Int. Bus. Studies* 540 (2008).

[30] See ECLAC, *European Union and Latin America and the Caribbean: Investments for Growth, Social Inclusion and Environmental Sustainability*, January 2013, p. 100 (*www.eclac.org*). Note that definitions of MSMEs are different in Brazil and the EU. For the Brazilian definitions see the Brazilian Micro and Small Business Support Service (SEBRAE) (*www.sebrae.com.br*), the Brazilian Institute of Geography and Statistics (IBGE) (*www.ibge.gov.br*) and the Brazilian Development Bank (*www.bndes.gov.br*). For the EU definition see *http://ec.europa.eu/growth/smes/business-friendly-environment/sme-definition/index_en.htm*.

novative model of network contract[31]. With a lean governance structure, the network contract helps join together MSMEs which can develop projects they could not undertake individually. Besides strengthening their competitiveness in Italian markets, network contracts may represent the less costly way to participate to global value chains and enter foreign markets. A diagnostic approach should try to identify the institutional factors that foster or hamper the spread of international network contracts. The same kind of analysis should be carried out for all the other measures aimed at supporting MSMEs. Interestingly, a diagnostic approach could help understand when and how differences can be overcome and a "regulatory equivalence" be established among parties to a trade agreement[32].

The questions under 3) address the third step of the diagnostic approach. Once the main elements of the institutional environment have been identified, the theoretical challenge is to understand their interaction. More specifically, the goal is to identify complementarity relationships among the elements of the institutional environment. At the same time, the diagnostic approach should try to identify those conflicts that stem from divergent policies or pre-existing structures and legal provisions. Clearly, this kind of analysis requires methodological choices about the assessment of causal relationships between each institutional element and the outcome it produces. Several different theoretical frameworks could be usefully applied at this stage, including comparative law and economics and comparative institutional analysis. For instance, if the problem to be addressed is increasing Brazilian MSMEs' participation to global value chains, the diagnostic approach should

[31] See the discussion of legal aspects in F. CAFAGGI ET AL. (eds.), *Il contratto di rete per la crescita delle imprese*, Milan, 2012. As of August 2015, more than 2000 network contracts, involving almost 12000 firms, have been concluded (*http://contrattidirete.registroimprese.it/reti/*). However, only 7 network contracts included foreign parties from 8 EU and non-EU countries (UNIONCAMERE, *I contratti di rete: rassegna dei principali risultati quantitativi*, update to 31.12.2014).

[32] For discussion of the meaning of regulatory equivalence in trade agreements see, e.g., P. CHASE, J. PELKMANS, *This time It's Different: Turbo-Charging Regulatory Cooperation in TTIP*, CEPS Special Report No. 110, June 2015; B. HOEKMAN, *Trade Agreement and International Regulatory Cooperation in a Supply Chain World*, EUI Working Paper RSCAS 2015/04, January 2015.

help establish whether changes in industrial policies, innovation policies and credit policies are needed and how they should be implemented[33].

The last step in the diagnostic approach refers to the analysis of relationships among different layers of regulation. As already highlighted in section two, recent developments in the Brazilian and the Italian legal systems are largely influenced by the supranational layer. A diagnostic approach should try to identify the respective role of each layer and the links among them. The goal is to understand whether the distribution of regulatory competences among different layers allows to exploit the resources available to each layer. For example, it was observed that mega-agreements on trade could greatly reduce the barriers to integration of MSMEs into global value chains[34]. This means that measures to support MSMEs at national level should be coordinated, and made compatible, with negotiations of trade agreements at supranational level.

While more demanding in terms of data collection, the value added of a comparative diagnostic approach lies in moving from the description to the explanation of differences. The main limit of the information currently made available in the export guides drafted by supporting institutions is that they list relevant information, but do not provide businesses with an understanding of the relative weight and impact of each institutional element. Once the meaning and constraining force of each element is clearly spelled out, it might become easier to design sounder and more effective policies and business plans.

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[33] On limited integration of Brazilian firms in global value chains see, e.g., ECLAC, *Latin American and the Caribbean in the World Economy: Regional Integration and Value Chains in a Challenging External Environment*, October 2014, p. 55 ff. (*www.eclac.org*); O. CANUTO ET AL., *The Curious Case of Brazil's Closedness to Trade*, World Bank Policy Research Working Paper 7228, April 2015; EU-LAC FOUNDATION, *Reinforcing Production Cooperation and Dialogue Spaces: The Role of SMEs*, 2015 (*http://eulacfoundation.org/en*).

[34] See, e.g., A. GIOVANNINI, U. MARENGO, *Boosting TTIP Negotiations: A Value Chain Approach*, Istituto Affari Internazionali, Working Paper 15/18, May 2015; B. HOEKMAN, cit., p. 6 ff.

4. Conclusions

This chapter has argued that the main challenge in understanding the relationship between the Brazilian and the Italian legal systems lies in the exploration of the complex dynamics affecting their evolution. Social, economic and cultural links between the two countries are just a starting point, but cannot replace in-depth analysis of convergences and divergences, as well as of their reasons and consequences. For such task, it has been proposed to use a comparative diagnostic approach. It is just one among many possible analytic tools. Several different methodological perspectives in different branches of law are presented by the contributions collected in this volume. They shed light on the ideas, theories and institutions being debated on the two sides of the Atlantic. Much work still lies ahead, but an enhanced scientific cooperation between Brazilian and Italian universities and the creation of a common Transatlantic space for higher education seem the only ways to transform such challenges in an exciting and fruitful journey.