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Sumário

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Presidential constructive and deconstructive powers in foreign affairs: a study on unilateral withdrawal from international agreements in the Americas*

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Joao Victor Morales Sallani**

Abstract

This article explores the regulation of foreign affairs powers under international and constitutional law, with a focus on withdrawal from international agreements in presidential systems in the American continent. It seeks to demonstrate the existence of an imbalance between constructive and deconstructive powers in foreign affairs and to point out domestic and international effects arising from such imbalance. This exploration leads to the identification of different constitutional approaches to presidential foreign affairs powers in the American continent, with attention to the outcomes and challenges identified in each model. As most American countries do not establish clear constitutional provisions for parliamentary participation in the withdrawal and termination of international agreements, this study takes the U.S. and Brazil as case studies on how supreme courts have dealt with the issue. Finally, this article explores the constitutional consequences of the imbalance upon domestic separation of powers and the stability of the international order.

Keywords: presidentialism; foreign affairs; international law; international agreements; separation of powers.

Resumo

Este artigo explora a regulamentação dos poderes presidenciais sobre relações exteriores sob o direito internacional e constitucional, com foco na denúncia de acordos internacionais em sistemas presidenciais no continente americano. O artigo procura demonstrar a existência de um desequilíbrio entre os poderes "construtivos" e "desconstrutivos" nas relações exteriores e apontar os efeitos nacionais e internacionais decorrentes desse desequilíbrio. Ao final, o estudo leva à identificação de diferentes abordagens constitucionais dos poderes presidenciais em relações exteriores no continente americano, com atenção aos resultados e desafios identificados em cada modelo. Como a maioria dos países americanos não estabelece disposições constitu-

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cionais claras para a participação parlamentar na denúncia de acordos internacionais, este estudo toma os EUA e o Brasil como estudos de caso sobre como supremas cortes têm lidado com a questão. Por fim, este artigo explora as consequências constitucionais do desequilíbrio sobre a separação interna de poderes e a estabilidade da ordem internacional.

Palavras-chave: presidencialismo; relações exteriores; direito internacional; tratados internacionais; separação de poderes.

1 Introduction

In the last decade, the rise of governments that actively claimed to reject "internationalism" or "globalism" has fostered instability in the international order. The liberal ideal of an open, rules-based, progressive-minded international order started to be openly and directly attacked even by some of its traditional proponents and promoters worldwide[1]. In presidential systems, presidents have sought to embody such an argument, employing foreign policy to position themselves as representatives of the people against the "global elites". In the American continent, the United States and Brazil seem to represent this phenomenon well.

From 2017 to 2020, under the Trump administration, the U.S., usually considered the "first citizen" of the liberal order[2], decided to withdraw from many strategic international arrangements, such as the Paris Climate Agreement, the United Nations Human Rights Council, and the Trans-Pacific Partnership. Additionally, the U.S. started claiming for reviews of trade agreements, such as the North American Free Trade Agreement, and the Korea-United States Free Trade Agreement, while also stalling the functioning of the World Trade Organization's dispute settlement system and hinting at its intention to leave the North Atlantic Treaty Organization[3]. Traditionally understood as a major instrument of international projection of American power, a liberal order based on established international rules started to be presented as a threat to the U.S. and its people.

From 2019 to 2022, Brazil, a country that has traditionally linked its international identity to diplomacy and participation in the development of the international system through compliance and promotion of international norms[4], has also engaged in the backlash against liberal internationalism – under an "anti-globalist" narrative in opposition to the "elites" identified in international institutions[5]. While Bolsonaro's claims to withdraw Brazil from the World Health Organization or Mercosur did not result in any formal disengagement, his government still managed to carry out Brazil's withdrawal from the UN Global Compact for Migration.

Even if the actual outcomes of Trump and Bolsonaro's anti-internationalist agendas may be the object of discussion in the international relations literature[6], their administrations unveiled some crucial blind spots of presidential powers in international affairs overlooked in times of clearer sense of general adherence to the established beliefs of the international liberal order. Institutionally, the impetus for changing the international order through disengagement revealed the virtually unchecked powers of presidents to unilaterally withdraw states from international agreements.

The roots of those broad powers are found both in domestic and international law. While constitutions usually institute a clear set of requirements to regulate executive and legislative relations for the domestic approval of *adherence* to international agreements – what this article will call "constructive powers" –, less attention is usually paid to procedures for *withdrawal* from international agreements – which will be referred to as "deconstructive powers". International law, at the same time, provides specific provisions to the identification of domestic legitimacy to engage with international

1 IKENBERRY, Gilford John. The end of liberal international order? *International Affairs*, v. 94, p. 7-23, 2018. p. 10.

2 IKENBERRY, Gilford John. The end of liberal international order? *International Affairs*, v. 94, p. 7-23, 2018. p. 7.

3 KOH, Harold Hongju. Presidential Power to Terminate International Agreements. *The Yale Law Journal*, p. 433-434, 2018.

4 RICUPERO, Rubens. *A diplomacia na construção do Brasil*. São Paulo: Versal Editores, 2017. p. 7.

5 GUIMARÃES, Feliciano de Sá; SILVA, Irma Dutra Oliveira. Far-right populism and foreign policy identity: Jair Bolsonaro's ultra-conservatism and the new politics of alignment. *International Affairs*, v. 97, Issue 2, p. 345-363, 2021. p. 356.

6 For Brazil, see LOPES, Dawisson Belém; CARVALHO, Thales; SANTOS, Vinicius. Did the Far Right Breed a New Variety of Foreign Policy? The Case of Bolsonaro's More-Bar-Than-Bite Brazil. *Global Studies Quarterly*, v. 2, Issue 4, p. 1-14, 2022. p. 12; for the U.S., see LOCATELLI. Trump's Legacy and the Liberal International Order: Why Trump Failed to Institutionalise an Anti-global Agenda. *The International Spectator*, v. 58, n. 1, p. 92-108, 2023.

agreements but considers the procedures for withdrawal "not a question of international law"[7].

This article highlights the double-edged issue of unregulated foreign affairs powers related to the withdrawal from international agreements. It argues that, on a domestic level, unilateral presidential action to deconstruct international agreements carries the potential to curb parliamentary participation in a decision-making process that would otherwise (for adherence) demand its approval. On an international level, the centralization of foreign affairs powers on presidential figures may also potentially be a source of instability to international institutions, as in the absence of clear constitutional and international norms presidents have been able to unilaterally terminate their originating agreements[8].

This article limits its scope to the American continent for two main reasons: the prominence of presidential systems in the region, and the relevance of anti-internationalist discourse in the continent in the last decade. More specifically, it presents a general overview of express constitutional provisions of American constitutions on presidential withdrawal from international agreements, followed by the study of two specific systems – U.S. and Brazil – as case studies of solutions for constitutional unclarity on the issue. In the end, this regional focus may incentivize further explorations on the effects of unilateral withdrawal from international agreements in other systems of government and geographical regions.

To cover those issues, this article is divided into three sections. First, it focuses on international norms regulating withdrawals from international agreements, as well as different constitutional models for the regulation of the topic in American jurisdictions. Second, it explores U.S. and Brazil as two different models for judicial approaches to filling constitutional gaps in the regulation of procedures from withdrawal from international agreements. Third, it studies the international and domestic consequences of unregulated foreign affairs powers, focusing on the role of presidents as enablers of instability in the international order and as unilateral constitutional amenders in their own jurisdictions.

2 Presidential powers for withdrawal from international agreements in domestic and international law

Traditionally, foreign affairs authority has been centered in the figure of the head of state or head of government, either personally or through its direct subordinates[9], for the state to speak "in one voice"[10]. Allowing dissonance in foreign affairs could, from an international perspective, impair the stability of international treaties and, from a domestic perspective, harm states' international credibility, reducing their capacity to achieve foreign policy goals or even increasing the chances of conflicts between states[11].

In presidential systems, the deference of foreign affairs issues to the executive power relates to its capacity to conduct foreign policy through a specialized bureaucracy able to provide it with an informational advantage in comparison to the other branches of government[12]. The presidential office – and the executive power, more broadly – possesses the technical capability to assess the international landscape and develop a coherent foreign policy, while its centralization provides it the capacity to act quickly in a volatile international scenario. This centralization of foreign affairs powers usually attributes to the president the prerogative to negotiate, engage, and disengage in relations with other subjects of international law. The domestic regulation of each of these functions, however, may vary in diffe-

[7] CIAMPI, Annalisa. Invalidity and Termination of Treaties and Rules of Procedure. *In*: CANNIZARO, Enzo. *The Law of Treaties Beyond the Vienna Convention*. Oxford: Oxford University Press, 2011. p. 368.

[8] It must be stressed that the gap noted in international and domestic legal systems is not restricted to countries adopting presidential systems. The cases of the United Kingdom's withdrawal from the European Union, in 2016, and South Africa's attempted withdrawal from the International Criminal Court, in 2011, are two good examples of this issue in parliamentary systems. For references on parliamentary systems' approaches to these questions, see WOOLAVER, Hannah. From Joining to Leaving: Domestic Law's Role in the International Legal Validity of Treaty Withdrawal. *The European Journal of International Law*, v. 30, n. 1, p. 73-104, 2019.

[9] UNITED NATIONS. *Vienna Convention on the Law of Treaties*. 22 May 1969. Available at https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf. Art. 7.

[10] ABEBE, Daniel. One Voice or Many: The Political Question Doctrine and Acoustic Dissonance in Foreign Affairs. *Supreme Court Review*, v. 233, p. 233-254, 2012. p. 234.

[11] ABEBE, Daniel. One Voice or Many: The Political Question Doctrine and Acoustic Dissonance in Foreign Affairs. *Supreme Court Review*, v. 233, p. 233-254, 2012. p. 234.

[12] ABEBE, Daniel. One Voice or Many: The Political Question Doctrine and Acoustic Dissonance in Foreign Affairs. *Supreme Court Review*, v. 233, p. 233-254, 2012. p. 234.

rent constitutional settings. Whichever shape the regulation of presidential foreign affairs powers may take, it is certain that their exercise is simultaneously affected by domestic and international law.

On one level, constitutional and domestic provisions may choose to provide the president with more or less discretion and institutional barriers for the accomplishment of the state's foreign policy goals. On another, international law prescribes the specific requirements for the validity of a certain foreign action.

While some aspects of a state's international engagement, such as the procedures to adhere to a treaty, may find relatively clear regulations in treaties and customary international law – *e.g.*, the procedures to adhere to a treaty, internationally consolidated in the VCLT[13] and domestically usually regulated constitutionally –, others, such as the authority to withdraw from international agreements, remain in a gray area between international and domestic rules. As well put by Woolaver, both are "separately but concurrently" regulated by norms of domestic and international law[14].

In presidential systems, the processes of adherence to and withdrawal from an international agreement are mainly performed by the president as the head of the executive power – or by his direct subordinates[15]. However, while a president's constructive powers in foreign affairs are regulated in more detail by both international and domestic law, less attention is provided to their deconstructive powers in the withdrawal from international agreements. Hence, a clear delineation of the limits of presidential powers for the unilateral withdrawal of a state from international agreements demands an approach that encompasses international and domestic levels of legal constraints.

2.1 International law on withdrawal from international obligations

The Vienna Convention on the Law of Treaties ("VCLT") consolidates the norms of international law that regulate the adherence and denunciation of treaties, as well as the procedures applicable to each case. The Vienna Convention on the Law of Treaties Between States and International Organizations ("VCLT-SIO"), by its turn, reproduces most of the content of the VCLT to deal with relations between states and international organizations[16].

Part V of the VCLT presents the rules that govern the termination, suspension, and invalidity of international agreements[28]. Regular terminations, performed according to the will of the parties, are ruled by article 54 of the VCLT establishes that the termination of a treaty or a withdrawal from it may take place according to the provisions of the treaty in question, or by consent of the parties after consultation with the other contracting states[17].

In case a treaty presents no provision regarding its termination or withdrawal of a party from it, the VCLT provides that the possibility of denunciation will depend on the intention of the parties as well as the nature of the treaty[18]. The VCLT highlights, however, that the silence of a treaty regarding this topic means a presumption that the treaty is not subject to denunciation or withdrawal[19].

Articles 65 and 67 of the VCLT present the procedural aspects of denunciation or withdrawal from international agreements, establishing that only the head of state, head of government, or minister for foreign affairs may notify the other parties[20] or the depositary

[13] UNITED NATIONS. *Vienna Convention on the Law of Treaties*. 22 May 1969. Available at https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

[14] WOOLAVER, Hannah. From Joining to Leaving: Domestic Law's Role in the International Legal Validity of Treaty Withdrawal. *The European Journal of International Law*, v. 30, n. 1, p. 73-104, 2019. p. 74.

[15] See UNITED NATIONS. *Vienna Convention on the Law of Treaties*. 22 May 1969. Available at https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf. Art. 7.

[16] CIAMPI, Annalisa. Invalidity and Termination of Treaties and Rules of Procedure. *In*: CANNIZARO, Enzo. *The Law of Treaties Beyond the Vienna Convention*. Oxford: Oxford University Press, 2011. p. 360.

[17] UNITED NATIONS. *Vienna Convention on the Law of Treaties*. 22 May 1969. Available at https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf. Art. 57.

[18] UNITED NATIONS. *Vienna Convention on the Law of Treaties*. 22 May 1969. Available at https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf. Art. 56.

[19] CRAWFORD, James. *Brownlie's Principles of Public International Law*. Oxford: Oxford University Press, 2012. p. 390.

[20] UNITED NATIONS. *Vienna Convention on the Law of Treaties*. 22 May 1969. Available at https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf. Art. 67.

of the treaty about the withdrawal[21]. By limiting the list of competent authorities for communicating the depositary or other parties, art. 67 limits the general rule of representation presented in art. 7, making it harder to terminate than to engage in a treaty[22]. The VCLT does not establish, however, any provisions related to the verification of internal legitimacy of the competent state representative to communicate the withdrawal or termination according to domestic law.

As consent constitutes the fundamental part of the adherence of a state to a treaty obligation, the VCLT establishes that a state may not invoke invalidation of an international agreement based on a violation of domestic law[23] "unless that violation was manifest and concerned a rule of its internal law of fundamental importance"[24]. The VCLT-SIO, by its turn, establishes analogous norms regarding international organizations and their rules of organization[25].

Neither of the two Vienna Conventions, however, establishes any explicit provisions for the invalidity of a state's withdrawal from a treaty or international organization based on domestic law norms of fundamental importance[26]. State practice, by its turn, also doesn't seem to provide an analogous norm to the one established for adherence to treaties, in the lack of clarity of the Conventions for this specific issue[27].

The logic consolidated in the two conventions prioritizes treaty stability and legal security[28] over concerns regarding the legitimate internal allocation of powers for denunciation of a treaty[29]. In the view of the drafters of the VCLT, including exceptions of validity in case of inobservance of domestic norms of allocation of powers to enter or exit a treaty could create "a source of endless complications and disputes"[30].

Thus, there is in the level of international law a clear imbalance between the degree to which domestic norms may influence the validity of the adherence and the denunciation of an international treaty. While a violation of domestic norms of fundamental value may invalidate the consent required for the former, there are no equivalent norms in relation to the latter[31].

According to the two Vienna Conventions, international law leaves it up to each state to establish the authority and the procedures to be observed for the verification of competence to make the appropriate decision to adhere to or terminate an international treaty. Beyond the specific requirements set in article 67 of the VCLT, then, it is generally considered, as highlighted by Ciampi, "not a question of international law"[32].

A study of the terms consolidated in the VCLT, as well as of state practice and customary international law, presents a fundamental separation between domestic and international requirements for the validity of withdrawal from a treaty. While domestic provisions may foresee specific procedures to attribute validity to the withdrawal, under international law executive powers

[21] ROUGET, Didier. Article 67: Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty. *In*: DÖRR, Oliver; SCHMALENBACH, Kirsten. *Vienna Convention on the Law of Treaties:* a commentary. New York: Springer, 2012. p. 1556.

[22] ROUGET, Didier. Article 67: Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty. *In*: DÖRR, Oliver; SCHMALENBACH, Kirsten. *Vienna Convention on the Law of Treaties:* a commentary. New York: Springer, 2012. p. 1557.

[23] UNITED NATIONS. *Vienna Convention on the Law of Treaties*. 22 May 1969. Available at https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf. Art. 27.

[24] UNITED NATIONS. *Vienna Convention on the Law of Treaties*. 22 May 1969. Available at https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf. Art. 46.

[25] UNITED NATIONS. *Vienna Convention on the Law of Treaties*. 22 May 1969. Available at https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf. Art. 46.

[26] WOOLAVER, Hannah. From Joining to Leaving: Domestic Law's Role in the International Legal Validity of Treaty Withdrawal. *The European Journal of International Law*, v. 30, n. 1, p. 73-104, 2019. p. 94.

[27] WOOLAVER, Hannah. From Joining to Leaving: Domestic Law's Role in the International Legal Validity of Treaty Withdrawal. *The European Journal of International Law*, v. 30, n. 1, p. 73-104, 2019. p. 95.

[28] KRIEGER, Heike. Article 67: Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty. *In*: DÖRR, Oliver. *Vienna Convention on the Law of Treaties*: a commentary. New York: Springer, 2012. p. 1167.

[29] WOOLAVER, Hannah. From Joining to Leaving: Domestic Law's Role in the International Legal Validity of Treaty Withdrawal. *The European Journal of International Law*, v. 30, n. 1, p. 73-104, 2019. p. 97.

[30] WOOLAVER, Hannah. From Joining to Leaving: Domestic Law's Role in the International Legal Validity of Treaty Withdrawal. *The European Journal of International Law*, v. 30, n. 1, p. 73-104, 2019.

[31] WOOLAVER, Hannah. From Joining to Leaving: Domestic Law's Role in the International Legal Validity of Treaty Withdrawal. *The European Journal of International Law*, v. 30, n. 1, p. 73-104, 2019. p. 74.

[32] CIAMPI, Annalisa. Invalidity and Termination of Treaties and Rules of Procedure. *In*: CANNIZARO, Enzo. *The Law of Treaties Beyond the Vienna Convention*. Oxford: Oxford University Press, 2011. p. 368.

seem to possess absolute authority, "unlimited by any checks that may exist in domestic law"[33].

Once international law seems hesitant to enter the domain of domestic law to confirm the validity of acts for the withdrawal of a state from an international treaty, it becomes necessary to verify how internal legal systems deal with this issue.

2.2 Constitutional provisions on withdrawal from international obligations in American presidential systems

Globally, constitutional requirements and procedures for withdrawal from international obligations vary highly. While most constitutions establish clear legislative oversight upon the adherence to international obligations, only a few provide explicit rules for the regulation of the termination of international treaties[34].

In the American continent, there are currently twenty-one countries that adopt presidential systems of government. In foreign relations issues, all their constitutions institute specific provisions regulating presidents' powers for engaging internationally in treaty-making, treaty-accession, and adherence to international organizations and international obligations. Only a third of those constitutions, however, expressly regulate presidential powers to terminate a treaty or withdraw from an international agreement[35] - notably, Mexico, Paraguay, Ecuador, Bolivia, Chile, and Argentina.

There are, nevertheless, relevant differences even among these states. Among all American presidential systems, constitutional provisions for withdrawal from international agreements may be divided into three main categories: mirrored procedures for adherence to and withdrawal from international agreements; specific varied forms of regulation for adherence and withdrawal depending on a treaty's nature or subject; or complete constitutional silence regarding the procedures for withdrawal from international agreements.

(a) Mirrored procedures for adherence and withdrawal in Latin America

First, there are the states whose constitutions prescribe a mirrored application of dispositions for adherence and withdrawal from treaties, establishing a "parity of authority" between the executive and legislative powers for adhering to and exiting international obligations, borrowing the terms employed by Koh[36]. In those cases, constitutions provide that the procedure observed for ratifying a treaty must be analogously applied for its termination. Under that framework, whenever adherence to an international agreement demands parliamentary approval, it shall also be considered an indispensable requirement for its termination. In the Americas, this logic is observed directly in the constitutions of Mexico and Peru, while other countries like Ecuador, Bolivia, and Chile depart from that logic to add their own peculiarities to it.

In Mexico, article 76 of the 1917 Constitution attributes to the Senate the exclusive authority to approve both the adherence and the denunciation of an international agreement, including with relation to reservations and interpretative declarations[37]. This broad congressional oversight of international agreements is linked by the Constitution to the authority of the Senate to analyze the foreign policy enforced by the executive power[38].

In Peru, article 56 of the 1993 Constitution establishes a requirement for parliamentary approval of international agreements concerning human rights, sovereignty, territorial integrity, national defense, and financial obligations of the state, before their ratification by the president[39]. Agreements not related to those topics, on the other hand, may be concluded by the

[33] WOOLAVER, Hannah. From Joining to Leaving: Domestic Law's Role in the International Legal Validity of Treaty Withdrawal. *The European Journal of International Law*, v. 30, n. 1, p. 73-104, 2019. p. 95.

[34] WOOLAVER, Hannah. From Joining to Leaving: Domestic Law's Role in the International Legal Validity of Treaty Withdrawal. *The European Journal of International Law*, v. 30, n. 1, p. 73-104, 2019. p. 76.

[35] More specifically, only Mexico, Ecuador, Bolivia, Paraguay, Chile, and Argentina provide specific provisions regulating or limiting presidential powers for unilateral withdrawal from international obligations.

[36] KOH, Harold Hongju. Presidential Power to Terminate International Agreements. *The Yale Law Journal*, p. 455, 2018.

[37] MEXICO. [Constitution (1917)]. *Constitución Política de Los Estados Unidos Mexicanos*. Ciudad de Mexico: Camara de Diputados, Art. 76, I. Available at https://www.diputados.gob.mx/pdf/CPEUM.

[38] MEXICO. [Constitution (1917)]. *Constitución Política de Los Estados Unidos Mexicanos*. Ciudad de Mexico: Camara de Diputados, Art. 76, I. Available at https://www.diputados.gob.mx/pdf/CPEUM.

[39] PERU. [Constitution (1993)]. *Constitución Política Del Peru*. Lima: Gobierno del Perú. Available at https://www.gob.pe/institucion/presidencia/informes-publicaciones/196158-constitucion-politica-del-peru.

Peruvian president without congressional approval[40]. Treaties that may affect provisions of the Peruvian Constitution, by their turn, shall follow the same procedure established for constitutional amendments before presidential ratification. On the denunciation of international agreements, article 57 of the Peruvian Constitution establishes that the denunciation of international agreements subject to congressional approval shall be also approved by Congress before the denunciation by the president[41].

In Ecuador, article 419 of the 2008 Constitution establishes the requirement of legislative approval both for the ratification and the denunciation of international treaties related to a set of topics presented in its text[42]. The adherence to the mirrored logic is also identified in article 420, which establishes that the withdrawal from a treaty ratified after a referendum specifically called for its approval shall demand a call for an analogous new referendum[43].

One point of attention in the Ecuadorian case is that article 438 of the 2008 Constitution establishes that the Constitutional Court shall analyze the constitutionality of a treaty before its approval by the National Assembly[44]. There is no specific provision, however, requiring the analysis of the constitutionality of a denunciation of a treaty by the Constitutional Court before its approval by the National Assembly[45].

Bolivia, by its turn, provides the clearest provision for legislative participation in the withdrawal from a treaty among American countries. Article 260, II, of the 2009 Bolivian constitution institutes a clear and general provision establishing that the denunciation of an international treaty shall always demand previous approval by the Plurinational Legislative Assembly[46]. For some specific themes[47], on the other hand, the Bolivian Constitution establishes that the ratification of international treaties shall be approved by binding popular referendums. Their denunciation, consequently, shall mirror the procedure for adherence and only be formalized after popular approval in a new referendum specifically called for the termination of the international agreement[48].

Like in Ecuador, the Bolivian Constitution also establishes the requirement of constitutional review by the Supreme Court before the ratification of a treaty by the Plurinational Legislative Assembly[49] but provides no parallel provision for judicial participation before the denunciation of a treaty.

On a different approach, Chile's 1980 Constitution establishes a "softened" role for parliament in the procedure for withdrawal from a treaty. Article 54(1) of the Chilean constitution provides that both houses of Congress must vote on the denunciation of any treaties originally ratified by them[50]. This congressional intervention, however, has a mainly advisory character, not binding to the president[51], as it is to the president that the constitution clearly provides the "exclusive faculty

40 PERU. [Constitution (1993)]. *Constitución Política Del Peru*. Lima: Gobierno del Perú. Available at https://www.gob.pe/institucion/presidencia/informes-publicaciones/196158-constitucion-politica-del-peru.

41 PERU. [Constitution (1993)]. *Constitución Política Del Peru*. Lima: Gobierno del Perú. Available at https://www.gob.pe/institucion/presidencia/informes-publicaciones/196158-constitucion-politica-del-peru.

42 ECUADOR. [Constitution (2008)]. *Constitución de La República Del Ecuador*. Quito: Asamblea Nacional, Art. 419. Available at http://www.asambleanacional.gob.ec/sites/default/files/documents/old/constitucion.pdf.

43 ECUADOR. [Constitution (2008)]. *Constitución de La República Del Ecuador*. Quito: Asamblea Nacional, Art. 420. Available at http://www.asambleanacional.gob.ec/sites/default/files/documents/old/constitucion.pdf.

44 ECUADOR. [Constitution (2008)]. *Constitución de La República Del Ecuador*. Quito: Asamblea Nacional, Art. 438. Available at http://www.asambleanacional.gob.ec/sites/default/files/documents/old/constitucion.pdf.

45 MARÍN, Daniela Salazar. La Denuncia de Tratados Internacionales de Derechos Humanos. *Iuris Dictio*, v. 15, p. 107-108, 2017.

46 BOLIVIA. [Constitution (2009)]. *Constitución Política Del Estado Plurinacional de Bolívia*. La Paz: Tribunal Constitucional Plurinacional, Art. 260, II. Available at https://tcpbolivia.bo/tcp/sites/default/files/pdf/normas/cpe/Constitucion1826.pdf.

47 BOLIVIA. [Constitution (2009)]. *Constitución Política Del Estado Plurinacional de Bolívia*. La Paz: Tribunal Constitucional Plurinacional, Art. 257, II. Available at https://tcpbolivia.bo/tcp/sites/default/files/pdf/normas/cpe/Constitucion1826.pdf.

48 BOLIVIA. [Constitution (2009)]. *Constitución Política Del Estado Plurinacional de Bolívia*. La Paz: Tribunal Constitucional Plurinacional, Art. 260, III. Available at https://tcpbolivia.bo/tcp/sites/default/files/pdf/normas/cpe/Constitucion1826.pdf.

49 BOLIVIA. [Constitution (2009)]. *Constitución Política Del Estado Plurinacional de Bolívia*. La Paz: Tribunal Constitucional Plurinacional, Art. 202(9), III. Available at https://tcpbolivia.bo/tcp/sites/default/files/pdf/normas/cpe/Constitucion1826.pdfConstitución Política Del Estado Plurinacional de Bolívia, 2009.

50 CHILE. [Constitution (1980)]. *Constitución Política de la República de Chile*. Santiago: Cámara de Diputadas y Diputados, Art. 54 (1). Available https://www.camara.cl/camara/doc/leyes_normas/constitucion_politica.pdf.

51 VIÑAS, Miriam Henrique. Los tratados internacionales em la constitución reformada. *Revista de Derecho Público*, v. 69, p. 313-324, 2007. p. 321.

to denounce a treaty or withdraw from it"[52]. Under this framework, the Chilean constitution preserves the requirement for legislative participation in the denunciation, but ultimately leaves a higher level of discretion for the presidential office, making it easier for the president to denounce an international agreement than to adhere to it.

(b) Specific procedures depending on a treaty's theme or nature

Following, some Latin American constitutions establish explicit provisions regulating presidential powers for withdrawal from international obligations but institute specific procedures depending on the subject-matter related to the international agreement in question.

That is the case of Paraguay, where the constitution only deals with the procedures for the termination of international agreements if related to human rights. According to article 142, the denunciation of international human rights treaties requires legislative approval by a majority equal to the one demanded by the constitution for constitutional amendments[53]. Through this requirement, the Paraguayan constitution seems to establish a thematic check on presidential discretion on unilateral withdrawal from human rights treaties. Other kinds of treaties, however, are not regulated by specific procedures for withdrawal in the constitutional text.

Argentina, by its turn, also departs from a thematic distinction for establishing different procedures for withdrawal from treaties. According to article 75 (24) of the Argentinian constitution, the participation of the legislative power in the denunciation of an international obligation is only expressly required for the withdrawal from "treaties of integration which delegate competence and jurisdiction to supranational organizations under conditions of reciprocity and equality"[54]. For those cases, the Argentinian constitution establishes that the denunciation shall be approved by an absolute majority of the members of both houses of Congress. Certain human rights treaties to which Argentina has adhered, by their turn, may only be denounced by the executive power with the approval of two-thirds of both houses of Argentinian Congress, according to article 75 (22) of the constitution, those are attributed the same hierarchy as constitutional norms[55].

3 Constitutional gaps on presidential powers for withdrawal from international agreements

While the American countries presented above use their constitutional text to institute limits and provide specific procedures for the domestic regulation of presidential powers in foreign affairs, they still represent only a third of all states in the continent ruled by a presidential system of government. In most of the American continent, there are no clear constitutional prescriptions intended to fill the blank left by international law on checks on presidential powers for unilateral withdrawal from international agreements.

In general, constitutions seem willing to carefully regulate presidential authority to build or adhere to international obligations, requiring parliamentary approval for ratification, but they rarely provide specific textual constraints on presidential authority to unilaterally terminate or withdraw from international agreements. Where constitutions are silent regarding presidential powers for unilateral withdrawal from treaties, the issue creates, borrowing the words of Justice Jackson of the U.S. Supreme Court, a "twilight zone" where the distribution of power between the president and the legislative power is uncertain[56].

That uncertainty has historically generated controversies in the two biggest presidential states in the Americas: United States and Brazil. In each of those countries, the constitutional silence was eventually examined by the judiciary power. U.S. and Brazilian supreme courts, however, have adopted different approaches to the problem presented to them, either by enhancing

[52] CHILE. [Constitution (1980)]. *Constitución Política de la República de Chile*. Santiago: Cámara de Diputadas y Diputados, Art. 54 (1). Available https://www.camara.cl/camara/doc/leyes_normas/constitucion_politica.pdf.

[53] PARAGUAY. [Constitution (1992)]. *Constitución de La República de Paraguay*. Assunción: Congresso Nacional, Art. 142. Available at https://www.bacn.gov.py/leyes-paraguayas/9580/constitucion-nacional-.

[54] ARGENTINA. [Constitution (1853)]. *Constitución de La Nación Argentina*. Buenos Aires: Congreso de La Nación, Art. 75 (24). Available at https://www.congreso.gob.ar/constitucionNacional.php.

[55] ARGENTINA. [Constitution (1853)]. *Constitución de La Nación Argentina*. Buenos Aires: Congreso de La Nación, Art. 75 (24). Available at https://www.congreso.gob.ar/constitucionNacional.php.

[56] UNITED STATES. Supreme Court. *Youngstown Sheet & Tube Co. v. Sawyer* 343 U.S. 579, 1952.

deference to the executive power or by filling the constitutional gap left through constitutional interpretation.

3.1 A "political question" in the United States

Article II, Section 2, of the U.S. Constitution, empowers the president "by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur"[57]. The U.S. Constitution is silent, however, on the president's power to unilaterally order the withdrawal from international agreements, as well as regarding a requirement of consent by the legislative power for such an act[58].

That unclarity has produced different institutional understandings throughout U.S. history. While in the nineteenth century there was a general understanding that the termination of a treaty by the president required congressional approval, contemporarily there is a "general wisdom"[59] suggesting that the president possesses almost autonomous power for unilateral termination of international agreements[60].

Presidential power to terminate a treaty, as pointed out by Bradley[61], "provides a vivid illustration of how constitutional understandings can change"[62] through time. That transformation, however, "did not occur overnight or in response to one particular episode but rather was the product of a long accretion of Executive Branch claims and practice in the face of congressional inaction"[63]. On one hand, generally delegating foreign affairs authority to the executive for entering and leaving international agreements allowed members of Congress to dedicate themselves to matters closer to their reelection prospects[64]. On the other, each small choice for delegation, throughout decades, made Congress "unable to reclaim what it had lost, in part because of the difficulty of mobilizing members of Congress around issues of international law that already had been ceded to the executive branch"[65].

Initially, the delegation of authority by Congress was narrow and carefully constrained. Later, it became "increasingly vague and open-ended, allowing the president to negotiate and enforce international agreements without any further congressional approval"[66]. Even if unintentional, that delegation over time created an imbalance of power over international lawmaking, shifting it towards presidential unilateralism in international lawmaking[67].With the spread of executive unilateralism in foreign affairs, presidents have increasingly engaged the U.S. in international obligations through "executive agreements" concluded unilaterally by the president either through congressional authorization provided by statutes or prior treaties[68] or through a mere presumption of presidential independent constitutional authority[69].

When neither the Constitution nor executive-legislative relations in the U.S provided a clear or general rule for presidential authority for unilateral withdrawal from international agreements, the matter eventually came to the appreciation of the judiciary. Judicial reasoning, however, did not seem to settle the question.

Those who advocate for the existence of presidential authority for unilateral withdrawal usually base their

57 UNITED STATES. [Constitution (1776)]. *Constitution of the United States*. Washington: United States Senate, Art. II. Available at: https://www.senate.gov/about/origins-foundations/senate-and-constitution/constitution.htm.

58 KOH, Harold Hongju. Could the President Unilaterally Terminate All International Agreements? Questioning Section 313. *In*: STEPHAN, Paul; CLEVELAND, Sarah. *The Restatement and Beyond:* The Past, Present, and Future of U.S. Foreign Relations Law. Oxford: Oxford University Press, 2020. p. 69.

59 KOH, Harold Hongju. Could the President Unilaterally Terminate All International Agreements? Questioning Section 313. *In*: STEPHAN, Paul; CLEVELAND, Sarah. *The Restatement and Beyond:* The Past, Present, and Future of U.S. Foreign Relations Law. Oxford: Oxford University Press, 2020. p. 73.

60 See *Restatement of the Law Fourth: The Foreign Relations Law of the United States* (2018), Section 313; and *Restatement (Third) of Foreign Law of the United States* (1988), Paragraph 339.

61 BRADLEY, Curtis A. Treaty Termination and Historical Gloss. *Texas Law Review*, v. 92, n. 4, p. 778-835, 2014. p. 826.

62 BRADLEY, Curtis A. Treaty Termination and Historical Gloss. *Texas Law Review*, v. 92, n. 4, p. 778-835, 2014. p. 826.

63 BRADLEY, Curtis A. Treaty Termination and Historical Gloss. *Texas Law Review*, v. 92, n. 4, p. 778-835, 2014. p. 826.

64 HATHAWAY, Oona. Presidential Power over International Law: Restoring the Balance. *The Yale Law Journal*, v. 119, n. 2, p. 140-168, 2009. p. 146.

65 HATHAWAY, Oona. Presidential Power over International Law: Restoring the Balance. *The Yale Law Journal*, v. 119, n. 2, p. 140-168, 2009.

66 HATHAWAY, Oona. Presidential Power over International Law: Restoring the Balance. *The Yale Law Journal*, v. 119, n. 2, p. 140-168, 2009. p. 145.

67 HATHAWAY, Oona. Presidential Power over International Law: Restoring the Balance. *The Yale Law Journal*, v. 119, n. 2, p. 140-168, 2009. p. 146.

68 HATHAWAY, Oona. Presidential Power over International Law: Restoring the Balance. *The Yale Law Journal*, v. 119, n. 2, p. 140-168, 2009. p. 144.

69 BRADLEY, Curtis A.; GOLDSMITH, Jack; HATHAWAY, Oona A. The Rise of Nonbinding International Agreements: An Empirical, Comparative, and Normative Analysis. *University of Chicago Law Review*, v. 90, p. 1281-1364, 2023. p. 3.

claims on a "general wisdom"[70] established by the U.S. Supreme Court on 1979 *Goldwater v. Carter*[71], which dealt with the unilateral denunciation of the 1954 U.S.-Taiwan Mutual Defense Treaty.

In that case, the U.S. Supreme Court issued a *per curiam* decision considering the topic nonjusticiable[72]. While Supreme Court judges were divided among different rationales, the most famous opinion issued at that judgment found that the merits should not be appreciated by the Court, as it amounted to a "political question" – a doctrine intended to insulate the Court "from adjudicating cases that implicate issues that the Court views as properly resolved by the political branches"[73]. As the U.S. Constitution is silent regarding the Senate's participation in the abrogation of a treaty, the matter should be controlled by political standards[74]. Despite the unclarity of the *per curiam* decision, *Goldwater v. Carter* has been generally understood as setting the "general wisdom" for presidential unilateral withdrawal from international agreements[75]. Since then, the "political question" doctrine has been generally raised by the U.S. Supreme Court in cases involving foreign policy matters opposing the President and Congress[76]. That understanding, however, has still raised criticism by some authors.

For Koh, *Goldwater v. Carter* only set grounds for the non-reviewability of a single specific episode of treaty termination[77]. In his view, that logic was applied by the Supreme Court in a time of stability and foreseeability in foreign affairs, where there was a "presumption of basic foreign policy continuity"[78]. These assumptions, however, according to Koh, longer stood in the post-Cold War era and its "radical foreign policy discontinuities"[79].

Franck, by his turn, pointed out that most cases that built the "political question" doctrine employed in *Goldwater v. Carter* had nothing to do with foreign affairs[80]. The general judicial deference of foreign affairs to the executive power, according to him, could be hurtful to the U.S. legal system and U.S. foreign interests. For Franck, the absence of judicial review on foreign affairs could result in a "moral disarmament" of U.S. foreign policy, damaging the country's reputation in the international system[81].

Other authors propose specific understandings of how that constitutional norm should be interpreted in the U.S. For some, historical practice should imply the recognition of a general understanding of the existence of a presidential authority to unilaterally terminate international agreements[82] - an understanding consolidated on Restatement (Third) of Foreign Relations Law of the United States and Restatement (Fourth) of Foreign Relations Law of the United States[83]. Alternatively, some argue that presidential powers in foreign affairs would derive from a delegation of plenary authority through law by the legislative power, giving Congress virtual authority over all aspects of foreign policy[84]. Under that perspective, one could argue against judicial interference in foreign affairs as presidential powers in this realm would enjoy the authority of the executive branch and also of Congress, through delegation[85]. Beyond possible interpretations of that unconstitutional uncertainty, some authors have also proposed alternative models to settle the question.

70 KOH, Harold Hongju. Presidential Power to Terminate International Agreements. *The Yale Law Journal*, p. 432-481, 2018. p. 437.

71 KOH, Harold Hongju. Presidential Power to Terminate International Agreements. *The Yale Law Journal*, p. 432-481, 2018. p. 437.

72 KOH, Harold Hongju. Presidential Power to Terminate International Agreements. *The Yale Law Journal*, p. 432-481, 2018. p. 439.

73 ABEBE, Daniel. One Voice or Many: The Political Question Doctrine and Acoustic Dissonance in Foreign Affairs. *Supreme Court Review*, v. 233, p. 233-254, 2012. p. 234.

74 UNITED STATES. U.S. Supreme Court. *Goldwater v. Carter*, 444 U.S. 996 (1979). Justice Rehnquist opinion.

75 KOH, Harold Hongju. Presidential Power to Terminate International Agreements. *The Yale Law Journal*, p. 432-481, 2018. p. 437.

76 ABEBE, Daniel. One Voice or Many: The Political Question Doctrine and Acoustic Dissonance in Foreign Affairs. *Supreme Court Review*, v. 233, p. 233-254, 2012. p. 236.

77 KOH, Harold Hongju. Presidential Power to Terminate International Agreements. *The Yale Law Journal*, p. 432-481, 2018. p. 450.

78 KOH, Harold Hongju. Presidential Power to Terminate International Agreements. *The Yale Law Journal*, p. 432-481, 2018. p. 450.

79 KOH, Harold Hongju. Presidential Power to Terminate International Agreements. *The Yale Law Journal*, p. 432-481, 2018. p. 450.

80 FRANCK, Thomas M. *Political Questions/Judicial Answers:* Does The Rule Of Law Apply To Foreign Affairs?. Princeton: Princeton University Press, 1992. p. 159.

81 FRANCK, Thomas M. *Political Questions/Judicial Answers:* Does The Rule Of Law Apply To Foreign Affairs?. Princeton: Princeton University Press, 1992. p. 159.

82 BRADLEY, Curtis A. Treaty Termination and Historical Gloss. *Texas Law Review*, v. 92, n. 4, p. 778-835, 2014. p. 822

83 Restatement (Third) of Foreign Law of the United States. Philadelphia: American Law Institute, 1988, paragraph 339; Restatement of the Law Fourth: The Foreign Relations Law of the United States. Philadelphia: American Law Institute, 2018, Section 313.

84 TRIMBLE, Phillip R. The President's Foreign Affairs Power. *American Journal of International Law*, v. 83, Issue 4, p. 750, 1989.

85 TRIMBLE, Phillip R. The President's Foreign Affairs Power. *American Journal of International Law*, v. 83, Issue 4, p. 750, 1989.

Koh suggests the establishment of a mirrored application for procedures of adherence and termination of international agreements[86]. Under that framework, "the degree of congressional participation legally necessary to exit an agreement should mirror the degree of congressional and executive participation that was required to enter that agreement in the first place"[87]. In his proposal, two factors should guide the determination of the need of legislative participation in the termination of an international agreement: the competence prescribed by the constitution according to the subject matter of a treaty (*i.e.*, which branch of government has substantive constitutional prerogative regarding an area of foreign policy), and the degree of congressional participation constitutionally required for the approval of the agreement[88]. Demanding for termination the same degree of legislative participation required for adherence to an international agreement would provide, according to Koh, a desirable degree of flexibility according to the subject matter[89].

Hathaway, by her turn, suggests focusing on congressional-executive agreements to overcome the procedure established by Art. II of the U.S. Constitution. According to her, congressional-executive agreements could offer stronger democratic legitimacy if made through the establishment of statutory authority to the president (*ex-ante* congressional-executive agreements), or through direct participation of both houses of Congress (*ex-post* congressional-executive agreements)[90]. On *ex-ante* congressional-executive agreements, Congress could settle down through statute the conditions for its consent to a treaty to be negotiated by the president. On *ex-post* agreements, on the other hand, both houses of Congress would have the authority to approve the agreement reached by the president. According to Hathaway, those agreements would be easier to implement and harder to be unilaterally undone[91]. Unlike treaties concluded under the framework of Art. II, congressional-executive agreements would be "limited in scope by the powers enumerated in Article I"[92]. For Hathaway, this model could overcome constitutional uncertainty by bringing the regulation of international agreements closer to domestic law, circumventing Art. II and fostering statutory internalization of the content of international treaties concluded by the executive power. While under international law the president could still have the authority to unilaterally denounce a congressional-executive agreement, domestically they would not have the power to "unmake the legislation on which the agreement rests"[143].

A more heterodox proposal is proposed by Abebe, who claims that the degree of deference of foreign affairs powers to the executive branch should vary with the influence of external geopolitical factors upon U.S. interests[93]. A multipolar international scenario, in which informational asymmetries between branches of government are higher, demanding more from the executive's specialized agencies, should foster the concentration of foreign affairs powers in the president, for the country to speak in "one voice"[94]. Conversely, a unipolar international scenario led by the U.S., in which would informational asymmetry between branches of government would be smaller and the executive's specialized foreign affairs skills would be less demanded, should lead to tighter internal constraints on presidential powers, making presidential foreign affairs policies accountable to legislative and judicial scrutiny[95]. Abebe's model would be operationalized through the recourse to "prudential doctrines" of constitutional interpretation by the judiciary, who would assess the most qualified branch of government to deal with the issue in question at a given time. For Abebe, determining polarity would not require courts to make foreign affairs decisions; it

86 KOH, Harold Hongju. Presidential Power to Terminate International Agreements. *The Yale Law Journal*, p. 432-481, 2018.

87 KOH, Harold Hongju. Presidential Power to Terminate International Agreements. *The Yale Law Journal*, p. 480-481, 2018.

88 KOH, Harold Hongju. Presidential Power to Terminate International Agreements. *The Yale Law Journal*, p. 432-481, 2018. p. 472.

89 KOH, Harold Hongju. Presidential Power to Terminate International Agreements. *The Yale Law Journal*, p. 432-481, 2018. p. 463.

90 HATHAWAY, Oona. Treaties' End: The Past, Present, and Future of International Lawmaking in the United States. *The Yale Law Journal*, v. 117, n. 8, p. 1305-1309, 2008.

91 HATHAWAY, Oona. Treaties' End: The Past, Present, and Future of International Lawmaking in the United States. *The Yale Law Journal*, v. 117, n. 8, p. 1236-1372, 2008. p. 1307.

92 HATHAWAY, Oona. Treaties' End: The Past, Present, and Future of International Lawmaking in the United States. *The Yale Law Journal*, v. 117, n. 8, p. 1236-1372, 2008. p. 1339.

93 See ABEBE, Daniel. The Global Determinants of US Foreign Affairs Law. *Stanford Journal of International Law*, v. 49, n. 1, p. 3-53, 2013. See also ABEBE, Daniel. One Voice or Many: The Political Question Doctrine and Acoustic Dissonance in Foreign Affairs. *Supreme Court Review*, v. 233, p. 233-254, 2012.

94 ABEBE, Daniel. One Voice or Many: The Political Question Doctrine and Acoustic Dissonance in Foreign Affairs. *Supreme Court Review*, v. 233, p. 233-254, 2012. p. 254.

95 ABEBE, Daniel. The Global Determinants of US Foreign Affairs Law. *Stanford Journal of International Law*, v. 49, n. 1, p. 3-53, 2013. p. 39.

would only provide a variable background to inform the appropriate level of internal constraints applicable to the presidential authority[96].

All those models seek to fill a constitutional gap that none of the U.S. branches of government has been able to fill. As the *Goldwater v. Carter* precedent seems still insufficient to create a consensual approach to the powers of the president to unilaterally withdraw the U.S. from international agreements, one can expect this issue to resurge from time to time whenever U.S. foreign policy becomes less stable or foreseeable, or the relationship between branches becomes more contentious.

3.2 A long-awaited judicial solution in Brazil

Differently from the U.S., the 1988 Brazilian Constitution presents clearer provisions to regulate foreign affairs, not only in its procedural aspects and in relation to the division of powers among political branches, but also in its material content, establishing principles and objectives to be pursued by the Brazilian foreign policy. While previous Brazilian constitutions instituted few specific limitations on foreign affairs[97], the 1988 Constitution constitutionalized principles of international relations to consciously institute political control by the legislative and broaden the possibility of review by the judiciary[98].

In the division of foreign affairs powers, article 84 of the Brazilian constitution attributes to the president the exclusive competence to adhere to international agreements, with approval by Congress[99]. Article 49, by its turn, narrows the scope of congressional role in the approval of international commitments, by establishing that congressional approval shall only be required for international agreements entailing "charges or commitments encumbering the national treasury"[100]. Traditionally, however, there is a general understanding that article 49 shall be interpreted extensively to require that all international commitments, regardless of a burden on the national patrimony, shall be submitted to approval by Congress[101]. After the approval of a treaty in Congress, the president may proceed to its ratification, guaranteeing its domestic validity[102]. This approval, nevertheless, has only the power of *authorizing* ratification, without obliging the president[103]. Only after presidential ratification a treaty is valid under Brazilian domestic law.

Beyond the procedure established by Articles 49 and 84, executive-legislative practice has admitted the establishment of international executive agreements[104] by the president[105] despite the absence of express constitutional provisions for such. Under the 1988 constitution, executive agreements have been usually employed for introducing complementary adjustments to treaties, as well as issues related to "diplomatic routine"[106], understood as situated under exclusive executive authority[107].

Just like in the U.S., the constitutionality of executive agreements resides in a grey zone in Brazilian constitutional law. The joint interpretation of articles 49 and 84 suggests the existence of a general congressional prerogative for oversight of international commitments assumed by the executive branch[108]. In practice, nevertheless, while many executive agreements have been

96 ABEBE, Daniel. The Global Determinants of US Foreign Affairs Law. *Stanford Journal of International Law*, v. 49, n. 1, p. 3-53, 2013.

97 BRASIL. 1891 Constitution, Art. 88; 1934 Constitution, Art. 4; 1946 Constitution, Art. 4; 1967 Constitution, Art. 7. No corresponding provision was found in the 1937 Constitution.

98 GALINDO, George R. B. A Construção do Direito Internacional Público pelas Constituições Brasileiras. *Cadernos de Política Exterior do Instituto de Pesquisa de Relações Internacionais da FUNAG*, v. 8, n. 11, p. 101-126, 2022. p. 111.

99 BRASIL. [Constitution (1988)]. *Constituição da República Federativa do Brasil*. Brasília: Presidência da República. Art. 84, VIII. Available at https://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm.

100 BRASIL. [Constitution (1988)]. *Constituição da República Federativa do Brasil*. Brasília: Presidência da República. Art. 49, I. Available at https://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm.

101 MEDEIROS, Antônio Paulo Cachapuz. *Pareceres dos Consultores Jurídicos do Itamaraty:* (1990-2000). Brasília: FUNAG, 2009. p. 263.

102 MAZZUOLI, Valerio de Oliveira. *Direito dos Tratados*. Rio de Janeiro: Forense, 2014. p. 417.

103 MAZZUOLI, Valerio de Oliveira. *Direito dos Tratados*. Rio de Janeiro: Forense, 2014. p. 417.

104 In the Brazilian context, "executive agreements" refer uniquely to what in the U.S. would be called "sole executive agreements", concluded by the President without participation of Congress.

105 GABSCH, Rodrigo D'Araújo. *Aprovação de tratados internacionais pelo Brasil:* possíveis opções para acelerar o seu processo. Brasília: FUNAG, 2010. p. 167.

106 GABSCH, Rodrigo D'Araújo. *Aprovação de tratados internacionais pelo Brasil:* possíveis opções para acelerar o seu processo. Brasília: FUNAG, 2010. p. 167.

107 GALINDO, George R. B. A Construção do Direito Internacional Público pelas Constituições Brasileiras. *Cadernos de Política Exterior do Instituto de Pesquisa de Relações Internacionais da FUNAG*, v. 8, n. 11, p. 101-126, 2022. p. 113.

108 MAZZUOLI, Valerio de Oliveira. *Direito dos Tratados*. Rio de Janeiro: Forense, 2014. p. 443.

concluded without raising controversy, in some cases Congress has required to participate in its approval[109]. Despite this uncertainty, the constitutionality of executive agreements has never been taken to the Supreme Court. Thus, the existence of executive agreements in Brazil seems largely attributable to a tacit deference of foreign affairs power by Congress to the executive[110].

The Brazilian constitution is silent, however, on the authority to withdraw the state from a treaty. This normative void corresponds to a historical issue that executive, legislative, and judicial branches have historically avoided addressing, and that has not been addressed by the framers of the 1988 Constitution.

The first time this issue was recorded in Brazil dates to 1926, when Brazilian president Artur Bernardes decided to unilaterally withdraw Brazil from the League of Nations[111]. Since the 1891 constitution made no reference to the authority for withdrawal from international agreements, the executive power asked for an advisory opinion from the Ministry of Foreign Affairs, which argued for the existence of a presidential prerogative for unilaterally ordering withdrawals from international agreements, as the text of the 1891 Constitution would provide Congress only the authority on the *adherence* to a treaty[112]. As the Ministry's understanding did not raise further discussions at the time, that episode established a "general wisdom" attributing to the executive the authority to unilaterally denunciate international agreements[113].

Nevertheless, since then while most of the time Congress has refrained from challenging the executive power's authority on foreign affairs, at certain moments it has sought to ascertain its oversight[114]. The perdurance of uncertainty over the matter, as later recognized by a Brazilian Supreme Court judge, may be attributed not to the conscious establishment of a firm and legal doctrine, but rather to a certain indifference from legislative and judicial branches of government regarding the topic[115].

Academically, some authors have advocated for a revision of the 1926 understanding. Rezek, for example, based on legislative practice from the early twentieth century, argued that the adherence to international agreements in Brazil is built upon a communion of wills between government and parliament[116]. The disappearance of support from any of those branches should result in withdrawal from an international agreement[117]. While the president would hold the authority to unilaterally withdraw the state from an international agreement, Congress would also have the power to order the termination of a treaty through the enactment of ordinary legislation containing such commandment[118]. Mazzuoli, by his turn, follows the same logic but highlights that international human rights treaties approved by Congress according to the procedure established in Art. 5, §3, of the Brazilian Constitution could not be unilaterally denounced by the president, as they have acquired the status of constitutional norms[119].

The 1926 "general wisdom" was judicially challenged for the first time only in 1997, when the Direct Action of Unconstitutionality n. 1625 ("ADI 1625") was brought to the Brazilian Supreme Court[120]. In that case, workers' associations challenged the constitutionality of a presidential decree unilaterally withdrawing Brazil from Convention n. 158 of the ILO[121], originally ap-

109 GABSCH, Rodrigo D'Araújo. "*Aprovação de tratados internacionais pelo Brasil: possíveis opções para acelerar o seu processo*". Brasília: FUNAG, 2010, p. 178.

110 MEDEIROS, Antônio Paulo Cachapuz. *Pareceres dos Consultores Jurídicos do Itamaraty:* (1990-2000). Brasília: FUNAG, 2009. p. 264.

111 MEDEIROS, Antônio Paulo Cachapuz. *Pareceres dos Consultores Jurídicos do Itamaraty:* (1990-2000). Brasília: FUNAG, 2009. p. 354.

112 BEVILAQUA, Clovis. Parecer: Denúncia de Tratado e Saída do Brasil da Sociedade das Nações. *In*: MEDEIROS, Antonio Paulo Cachapuz. *Pareceres dos Consultores Jurídicos do Itamaraty:* Volume II (1913 – 1934). Brasília: FUNAG, 1926. p. 353-354.

113 MEDEIROS, Antônio Paulo Cachapuz. *Pareceres dos Consultores Jurídicos do Itamaraty:* (1990-2000). Brasília: FUNAG, 2009. p. 354.

114 MAZZUOLI, Valerio de Oliveira. *Direito dos Tratados*. Rio de Janeiro: Forense, 2014. p. 443.

115 BRASIL. Supremo Tribunal Federal. *ADI 1625*. Vote issued by Justice Teori Zavascki. Brasília, DF: Supremo Tribunal Federal, 2016.

116 REZEK, Francisco. *Direito Internacional Público:* curso elementar. São Paulo: Saraiva Jur, 2022. p. 54. See also VARELLA, Marcelo Dias. *Direito Internacional Público*. São Paulo: Saraiva Jur, 2019. p. 63.

117 REZEK, Francisco. *Direito Internacional Público:* curso elementar. São Paulo: Saraiva Jur, 2022. p. 54.

118 REZEK, Francisco. *Direito Internacional Público:* curso elementar. São Paulo: Saraiva Jur, 2022. p. 54.

119 MAZZUOLI, Valerio de Oliveira. *Direito dos Tratados*. Rio de Janeiro: Forense, 2014. p. 358.

120 GALINDO, George R. B. A Construção do Direito Internacional Público pelas Constituições Brasileiras. *Cadernos de Política Exterior do Instituto de Pesquisa de Relações Internacionais da FUNAG*, v. 8, n. 11, p. 101-126, 2022p. 114.

121 BRASIL. *Decreto n. 2.100/1996*. Brasília: Brazilian Presidential Office, 1996. Available at https://www.planalto.gov.br/ccivil_03/decreto/1996/d2100.htm.

proved by Congress in 1992[122] and promulgated by the president in 1996[123].

The dispute before the Brazilian Supreme Court took over 25 years to be concluded. Only in June 2023 all eleven Supreme Court judges finished delivering their opinions. None of those, however, was supported by the majority of the Court, as most judges disagreed especially on the procedural effects of the judgment upon the application of Convention n. 158 of the ILO in Brazilian domestic law – i.e., whether the declaration of unconstitutionality could or not have retroactive effects regarding labor relations affected by Convention n. 158.

Despite those divergences, ten out of the eleven Brazilian Supreme Court judges concurred that the withdrawal from an international agreement by the president shall require approval by Congress. Throughout the judgment, three streams of thought were presented by the judges.

Early in the judgment, in 2003, judge Correa, joined by judge Ayres Britto, suggested that the denunciation of a treaty should require approval by Congress. However, the presidential decree under discussion would not be unconstitutional *a priori*. Rather, they argued that the decree itself was lawfully issued under the president's constitutional authority over foreign affairs, but that it could only have effect over domestic law after being approved by Congress[124].

A second approach was proposed by judge Barbosa, later joined by judges Weber and Lewandowski. According to Barbosa, adherence to a treaty under Brazilian domestic law would require the "conjugation of two homogeneous wills" between executive and legislative powers[125]. Hence, Congressional participation in the withdrawal from a treaty was required by the Constitution. In his words, "it is up to the Executive to decide which treaties shall be denounced and the moment to do so. It is up to Congress to authorize the denunciation of the treaty [...] also at the moment it deems more opportune"[126]. Barbosa's opinion diverged from Correa's mainly by affirming that the presidential decree withdrawing from Convention n. 158 should be considered unconstitutional until approved by Congress[127].

A third approach was put forward by judge Zavascki and later complemented by judge Dias Toffoli, to which judges Mendes, Mendonça, and Nunes Marques have adhered. According to Zavascki, while the 1988 Constitution prescribes to the president the authority to bind the Brazilian state internationally, whenever such an act may alter the domestic normative order, there is a requisite of authorization by Congress[128]. In his vote, he proposed the establishment of an understanding that "*the denunciation of international treaties by the President of the Republic depends on the authorization of the National Congress*" and suggested the application of *ex nunc* effects for such an understanding, not to jeopardize previous agreements unilaterally denounced by Brazilian presidents without congressional approval[129].

Judge Dias Toffoli, by his turn, while adhering to the position proposed by Zavascki, suggested a different wording for the proposed thesis. In his words, "*the denunciation, by the President of the Republic, of international treaties approved by the National Congress, for it to produce effects in the domestic legal system, requires approval by the Congress*"[188]. Dias Toffoli also suggested that the proposed thesis should only be applied prospectively, not to affect previous denunciations that were not explicitly authorized by Congress[130]. At the end of his vote, Dias Toffoli suggested that Congress should develop a clearer constitutional discipline for the procedure for the denunciation of international treaties in Brazil, according to the

122 BRASIL. *Decreto Legislativo n. 68/1992*. Brasília: Brazilian National Congress, 1992. Available at https://www2.camara.leg.br/legin/fed/decleg/1992/decretolegislativo-68-16-setembro-1992-358557-publicacaooriginal-1-pl.html.

123 BRASIL. *Decreto n. 1855/1996*. Brasília: Secretaria-Geral da Presidência da República, 1996. Available at https://www.planalto.gov.br/ccivil_03/decreto/1996/d1855.htm.

124 BRASIL. Supremo Tribunal Federal. *ADI 1625*. Vote issued by Justice Maurício Correa and Justice Ayres Britto. Brasília, DF: Supremo Tribunal Federal, 2003.

125 BRASIL. Supremo Tribunal Federal. *ADI 1625*. Vote issued by Justice Joaquim Barbosa. Brasília, DF: Supremo Tribunal Federal, 2009. p. 11.

126 BRASIL. Supremo Tribunal Federal. *ADI 1625*. Vote issued by Justice Joaquim Barbosa. Brasília, DF: Supremo Tribunal Federal, 2009. p. 13.

127 BRASIL. Supremo Tribunal Federal. *ADI 1625*. Vote issued by Justice Joaquim Barbosa. Brasília, DF: Supremo Tribunal Federal, 2009. p. 17.

128 BRASIL. Supremo Tribunal Federal. *ADI 1625*. Vote issued by Justice Teori Zavascki. Brasília, DF: Supremo Tribunal Federal, 2015. p. 17.

129 BRASIL. Supremo Tribunal Federal. *ADI 1625*. Vote issued by Justice Joaquim Barbosa. Brasília, DF: Supremo Tribunal Federal, 2009. p. 18-19.

130 BRASIL. Supremo Tribunal Federal. *ADI 1625*. Vote issued by Justice Joaquim Barbosa. Brasília, DF: Supremo Tribunal Federal, 2009. p. 18-19.

understanding established by the Supreme Court at the judgment of ADI 1625[131].

The sole opinion diverging from that understanding was issued by judge Jobim, who claimed that the constitutional silence should imply the primacy of the executive power in the process of withdrawal from international agreements[132]. In his view, the legislative approval for adherence to a treaty would implicitly attribute to the executive the authority to exercise all possible acts related to that agreement, including its denunciation[133]. Congressional authority to approve a withdrawal from an international agreement, for Jobim, could only be established through an amendment to the text of the Brazilian Constitution[134].

In the end, despite procedural divergences put forward by Brazilian Supreme Court judges, the judgment of ADI 1625 established a clear consensus on Congress' constitutional authority to approve presidential decrees for withdrawal from international agreements. After almost 100 years since the issue was first discussed in Brazil in 1926, the Supreme Court settled the matter, establishing a general understanding that both the adherence to and the withdrawal from an international agreement require approval by Congress.

4 Constitutional and international consequences arising from the imbalance of norms on presidential unilateral withdrawal from international agreements

As evidenced in the previous chapters, international and constitutional norms on states' engagements and disengagements with international agreements have given rise to a clear imbalance in the regulation of the powers of the executive branch in foreign affairs. In practice, constructing and entering into international agreements has seemed harder than deconstructing and withdrawing from them[135].

The consequences of this imbalance are twofold. On a domestic level, it may generate a source of controversies in the relationship between branches of government. Internationally, the centralization of deconstructive foreign affairs powers in the hands of the executive may introduce a degree of instability in the international order, as impactful decisions may be made without announcement and by just a handful of actors – or, more radically, solely by presidents themselves.

4.1 Presidents as unilateral constitutional amenders?

Supporters of unilateral presidential authority for withdrawal from international agreements usually argue that when parliament approves the engagement of a state in an international agreement, it also delegates to the executive power the authority to determine an eventual withdrawal whenever it sees fit. In practice, however, accepting the existence of a broad presidential power for unilaterally denunciating international agreements could imply attributing to the president the authority to unilaterally alter the domestic legal order. Those powers may become even broader where international agreements have become embedded in the constitution – a common feature in Latin America regarding human rights treaties[136]. In those cases, allowing a president to unilaterally withdraw the state from international agreements that integrate a country's constitutional bloc could essentially mean attributing to the president the power to unilaterally alter the constitutional order.

That was the issue in 2012 when Venezuelan president Hugo Chavez unilaterally ordered the country's withdrawal from the American Convention on Human

131 BRASIL. Supremo Tribunal Federal. *ADI 1625*.Vote issued by Justice Joaquim Barbosa. Brasília, DF: Supremo Tribunal Federal, 2009. p. 24-25.

132 BRASIL. Supremo Tribunal Federal. *ADI 1625*.Vote issued by Justice Nelson Jobim. Brasília, DF: Supremo Tribunal Federal, 2006. p. 29-30.

133 BRASIL. Supremo Tribunal Federal. *ADI 1625*.Vote issued by Justice Nelson Jobim. Brasília, DF: Supremo Tribunal Federal, 2006. p. 29-30.

134 BRASIL. Supremo Tribunal Federal. *ADI 1625*.Vote issued by Justice Nelson Jobim. Brasília, DF: Supremo Tribunal Federal, 2006. p. 29-30.

135 See ROUGET, Didier. Article 67: Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty. *In*: DÖRR, Oliver; SCHMALENBACH, Kirsten. *Vienna Convention on the Law of Treaties:* a commentary. New York: Springer, 2012. HATHAWAY, Oona. Treaties' End: The Past, Present, and Future of International Lawmaking in the United States. *The Yale Law Journal*, v. 117, n. 8, p. 1236-1372, 2008.

136 HELFER, Laurence R. Treaty Exit and Intrabranch Conflict at the Interface of International and Domestic Law. *In:* BRADLEY, Curtis A. (ed.) *The Oxford Handbook of Comparative Foreign Relations Law*. Oxford: Oxford University Press, 2019. p. 363.

Rights ("ACHR")[137]. In Venezuela, the constitution attributes to the National Assembly the authority to approve international agreements before their ratification by the president[138]. It is silent, however, regarding the participation of parliament in the denunciation of an international agreement. Human rights treaties, by their turn, according to the Venezuelan constitution, are vested with constitutional status and enjoy supremacy over domestic law[139].

The denunciation of the ACHR was thus complex not only due to the constitutional uncertainty regarding presidential powers to unilaterally withdraw from an international agreement but also because human rights norms are embedded in the Venezuelan constitutional system[140]. Human rights treaties are referenced throughout the text of the 1999 Venezuelan constitution[141] and the ACHR, more specifically, is expressly mentioned by the constitution as the source of limitations to presidential decrees instituting a state of exception in the country[142]. Individual access to international organs for the protection of human rights included in the Venezuelan bloc of constitutionality also amounts to a right expressly recognized by the Constitution, adding yet another layer of complexity to the withdrawal from the ACHR[143].

Facing those issues, in 2012 activists and non-governmental organizations presented a claim to the Venezuelan Supreme Court for the unconstitutionality of the denunciation of the ACHR[144]. Until this point, however, the result of the judgment is uncertain, as no decision has been yet issued by the Court[145].

In 2020, the issue reached the inter-American level when Colombia requested the Interamerican Court of Human Rights ("IACtHR") an advisory opinion on Venezuela's 2012 denunciation of the ACHR and later 2017 withdrawal from the Charter of the Organization of American States ("OAS Charter")[146]. On that occasion, the IACtHR scrutinized denunciation clauses contained in the ACHR and the OAS Charter, as well as the VCLT and customary international law[147]. On the authority for withdrawal from international agreements, the IACttHR suggested the adoption of mirrored procedures for adherence to and withdrawal from international agreements ("*paralelismo de las formas*")[148].

The mirrored application suggested by the IACtHR, however, doesn't seem to amount to a solution sufficiently apt to capture all the complexity of the effects of increasingly close interactions between constitutional and international law – especially in Latin America. In a region where the relationship between constitutional and international human rights norms has become

137 MEJÍA-LEMOS, Diego Germán. *Venezuela's Denunciation of the American Convention on Human Rights*. 2013. Available at https://www.asil.org/insights/volume/17/issue/1/venezuelas- denunciation-american-convention-human-rights.

138 VENEZUELA. [Constitution (1999)]. *Constitución de La República Bolivariana de Venezuela*. 1999, Art. 154; Art. 187(18).

139 VENEZUELA. [Constitution (1999)]. *Constitución de La República Bolivariana de Venezuela*. 1999, Art. 23.

140 CORAO, Carlos Ayala. Inconstitucionalidad de la denuncia de la Convención Americana sobre Derechos Humanos por Venezuela. *Anuario de Derecho Constitucional Latinoamericano*, Año XIX, p. 43-79, 2013.

141 VENEZUELA. [Constitution (1999)]. *Constitución de La República Bolivariana de Venezuela*. 1999. Preamble, Articles 2, 19, 23, 27, 31, 74, 280, 339.

142 VENEZUELA. [Constitution (1999)]. *Constitución de La República Bolivariana de Venezuela*. Caracas: Tribunal Superior de Justicia, Preamble; Article 339. Available at http://historico.tsj.gob.ve/legislacion/crv.html.

143 VENEZUELA. [Constitution (1999)]. *Constitución de La República Bolivariana de Venezuela*. Caracas: Tribunal Superior de Justicia, Preamble; Article 31. Available at http://historico.tsj.gob.ve/legislacion/crv.html.

144 CORAO, Carlos Ayala. Inconstitucionalidad de la denuncia de la Convención Americana sobre Derechos Humanos por Venezuela. *Anuario de Derecho Constitucional Latinoamericano*, Año XIX, p. 74, 2013.

145 HELFER, Laurence R. Treaty Exit and Intrabranch Conflict at the Interface of International and Domestic Law. *In:* BRADLEY, Curtis A. (ed.) *The Oxford Handbook of Comparative Foreign Relations Law*. Oxford: Oxford University Press, 2019. p. 364.

146 CORTE INTERAMERICANA DE DIREITOS HUMANOS. La denuncia de la Convención Americana sobre Derechos Humanos y de la Carta de La Organización de los Estados Americanos y sus efectos sobre las obligaciones estatales en matéria de derechos humanos. *Opinión Consultiva OC-26/20*. Advisory Opinion issued on November 9th, 2020. Available at https://www.corteidh.or.cr/docs/opiniones/seriea_26_esp.pdf.

147 CORTE INTERAMERICANA DE DIREITOS HUMANOS. La denuncia de la Convención Americana sobre Derechos Humanos y de la Carta de La Organización de los Estados Americanos y sus efectos sobre las obligaciones estatales en matéria de derechos humanos. *Opinión Consultiva OC-26/20*. Advisory Opinion issued on November 9th, 2020. Available at https://www.corteidh.or.cr/docs/opiniones/seriea_26_esp.pdf. paragraphs 44-58.

148 CORTE INTERAMERICANA DE DIREITOS HUMANOS. La denuncia de la Convención Americana sobre Derechos Humanos y de la Carta de La Organización de los Estados Americanos y sus efectos sobre las obligaciones estatales en matéria de derechos humanos. *Opinión Consultiva OC-26/20*. Advisory Opinion issued on November 9th, 2020. Available at https://www.corteidh.or.cr/docs/opiniones/seriea_26_esp.pdf. paragraph 64.

increasingly intertwined, the Venezuelan case looks like a cautionary tale.

As the embeddedness of international human rights agreements in Latin American constitutions is still a relatively recent issue, a mere mirrored application for withdrawal from international agreements would still seem like an insufficient measure or even a potential source of legal uncertainty. It fails to adequately address, for example, the question of denunciation of treaties originally approved by parliamentary simple majorities but later incorporated into a state's constitutional bloc. In those cases, as the withdrawal would mean, in practice, an amendment to the constitution, a procedure that merely mirrored the one followed for an agreement's approval before its incorporation into the constitution (*e.g.*, through a simple parliamentary majority) would still create a *de facto* imbalance between the construction and the deconstruction of the international agreement in the domestic legal system.

Possibly clearer solutions may take inspiration from constitutional experiences from other Latin American countries[149]. One approach to safeguard the separation of powers and international human rights embedded in the constitution could take inspiration from the constitutions of Paraguay[150] or Argentina[151], which prescribe that the denunciation of human rights treaties that compose the constitutional bloc shall follow the same requirements established for the amendment of the constitution. By establishing that increased threshold, constitutional systems would not only guarantee parliamentary participation in the withdrawal from international agreements but would also equalize the political costs of treaty termination to amendments to the constitution.

Thus, the establishment of a requirement of "constitutional-amendment-like" parliamentary majorities for withdrawal from human rights treaties embedded in the constitutional bloc seems to address the issue better than simply a mirrored proceeding. By requiring "constitutional-amendment-like" majorities for withdrawal from international agreements, constitutions would be better equipped to provide legal security in cases of human rights treaties that compose the constitutional bloc but were originally approved through other types of procedures, preventing the transformation of the constitution by the president alone or by parliament through a simple majority.Brazil may serve as an example of the utility of the proposed solution. Implementing a clear constitutional requirement for a constitutional-amendment-like parliamentary majority for the termination of human rights treaties that enjoy constitutional status according to Art. 5, §3, of the Constitution[152], would provide better legal security for human rights agreements originally approved by simple majorities in parliament, before paragraph 3 was added to the constitutional text – as it was adopted by Brazilian Congress only in 2004.

The relevance of establishing such a clearer and more specific provision may be also seen in systems that require that certain international agreements are approved by a popular referendum, as in Ecuador[153] and Bolivia[154]. In those cases, the implementation of a requirement of a constitutional-amendment-like parliamentary majority for the withdrawal from an international agreement incorporated in the constitutional bloc, as an alternative or a pre-requisite for bringing the issue to popular consultation, could add a layer of political check against the deconstruction of an agreement embedded in the constitution – inexistent under a simple application of a mirrored procedure.

In essence, the adoption of clearer constitutional requirements for constitutional-amendment-like parliamentary majorities seems like a necessary adjustment to accompany the constitutionalization of international law and human rights in Latin America. By introducing such a procedure, constitutions would be able to prevent tensions between branches of government in proceedings for *de facto* amendment of constitutions throu-

149 BOGDANDY, Armin von. Ius Constitutionale Commune en America Latina: Observations on Transformative Constitutionalism. *AJIL Unbound*, v. 109, p. 109-114, 2017. p. 113.

150 PARAGUAY. [Constitution (1992)]. *Constitución de La República de Paraguay*. Assunción: Congresso Nacional, Art. 142. Available at https://www.bacn.gov.py/leyes-paraguayas/9580/constitucion-nacional-.

151 ARGENTINA. [Constitution (1853). *Constitución de La Nación Argentina*. Buenos Aires: Congreso de La Nación, Art. 75 (22). Available at https://www.congreso.gob.ar/constitucionNacional.php.

152 BRASIL. [Constitution (1988)]. *Constituição da República Federativa do Brasil*. Brasília: Presidência da República. Art. 5, §3º. Available at https://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm.

153 ECUADOR. [Constitution (2008)]. *Constitución de La República Del Ecuador*. Quito: Asamblea Nacional, Art. 420. Available at http://www.asambleanacional.gob.ec/sites/default/files/documents/old/constitucion.pdf.

154 BOLIVIA. [Constitution (2009)]. *Constitución Política Del Estado Plurinacional de Bolívia*. La Paz: Tribunal Constitucional Plurinacional, Art. 257, III. Available at https://tcpbolivia.bo/tcp/sites/default/files/pdf/normas/cpe/Constitucion1826.pdf.

gh engagement and disengagement with international agreements, while also increasing the political costs of withdrawing from them, enhancing treaty stability and the protection of the values prescribed by them.

4.2 Presidents as a factor of instability in the international order?

While the backlash against internationalism has not been restricted to presidential countries[155], some features of presidential systems seem to make them prone to becoming a potential source of instability to the international order.

The deference of foreign affairs issues to the executive power in presidential systems is usually justified by a series of factors. First, presidents have the ability and the bureaucratic apparatus to act quickly in the international scenario, giving them "first-mover advantages"[156]. Second, a specialized bureaucracy offers presidents an informational asymmetry in the evaluation of foreign affairs issues[157]. Third, presidents face distinctive political and electoral incentives when dealing with foreign issues, if compared to the legislative power[158]. While foreign issues may seem far from legislators' agendas for reelection[159], presidents are usually directly attached to foreign policy successes or failures, either rewarded or blamed for their outcomes[160].

In presidential systems, unilateralism can also be enhanced by the possibility of insulation of the executive branch, which may formulate and execute foreign policy without necessarily gathering support or insights from parliament. While parliamentary systems would tend to include more political actors in the decision-making process for the termination of international agreements, presidential systems without constitutional provisions for parliamentary participation could leave decision-making ultimately to only one agent: the president himself, as head of state and international state representative according to international law[161]. In this scenario, presidents may justify the unilateralism on plebiscitary claims, recurring to the electoral majoritarian origin of their mandate.

Once a decision for termination or withdrawal is formalized by the president and the conditions established by the international agreement for the denunciation – if existent – are met, it becomes increasingly harder for parliament or future presidents to undo it and return to the *status quo ante*. While the denunciation may have been unilaterally made by the president, an eventual later re-engagement in the same agreement will again demand the observance of long and possibly politically costly proceedings for a new parliamentary approval before ratification.

Thus, the imbalance between presidents' constructive and deconstructive powers seems to generate a potential source of instability in the international order, as unchecked presidents may suddenly and virtually independently deconstruct international agreements or even withdraw their states from international organizations.

5 Conclusion

In the last decade, the backlash against internationalism has evidenced the existence of a clear imbalance in the regulation of states' engagement and disengagement in international agreements. While international law and constitutions are usually careful in detailing the procedures for the establishment and engagement with an international agreement, their dispositions regarding the termination or withdrawal from international agreements are often much more uncertain.

155 WOOLAVER, Hannah. From Joining to Leaving: Domestic Law's Role in the International Legal Validity of Treaty Withdrawal. *The European Journal of International Law*, v. 30, n. 1, p. 73-104, 2019.

156 CANES-WRONE, Brandice; HOWELL, William G.; LEWIS, David E. Toward a Broader Understanding of Presidential Power: A Reevaluation of the Two Presidencies Thesis. *The Journal of Politics*, v. 70, n. 1, p. 1-16, 2008. p. 4.

157 CANES-WRONE, Brandice; HOWELL, William G.; LEWIS, David E. Toward a Broader Understanding of Presidential Power: A Reevaluation of the Two Presidencies Thesis. *The Journal of Politics*, v. 70, n. 1, p. 1-16, 2008. p. 5.

158 CANES-WRONE, Brandice; HOWELL, William G.; LEWIS, David E. Toward a Broader Understanding of Presidential Power: A Reevaluation of the Two Presidencies Thesis. *The Journal of Politics*, v. 70, n. 1, p. 1-16, 2008.

159 HATHAWAY, Oona. Presidential Power over International Law: Restoring the Balance. *The Yale Law Journal*, v. 119, n. 2, p. 184, 2009.

160 CANES-WRONE, Brandice; HOWELL, William G.; LEWIS, David E. Toward a Broader Understanding of Presidential Power: A Reevaluation of the Two Presidencies Thesis. *The Journal of Politics*, v. 70, n. 1, p. 1-16, 2008. p. 5.

161 UNITED NATIONS. *Vienna Convention on the Law of Treaties*. 22 May 1969. Available at https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf. Art. 67.

On one hand, executive branches' constructive powers in foreign affairs are usually subject to detailed constitutional norms that prescribe close parliamentary scrutiny and require legislative approval for the validity of those agreements under domestic law. Those powers are also object of a broader set of provisions under the international law of treaties, allowing for the invalidation of an international commitment due to the inobservance of domestic norms of fundamental importance[162]. On the other hand, deconstructive powers are often overlooked not only by constitutions and domestic norms but also by international law.

Internationally, a possible solution for the establishment of checks on the executive power's discretion for unilateral withdrawal from international agreements could be found in the analogical application of the manifest violation exception provided by the VCLT for the process of adherence to an international agreement[230]. As suggested by Woolaver[163], the development of such an understanding would offer a solution able to balance the imperatives of legal security that guide the international law of treaties while still guaranteeing states' sovereign equality.

On a domestic level, establishing clearer rules for parliamentary participation in the withdrawal from international agreements could add a layer of democratic accountability to foreign affairs decisions, reducing the discretion of executive powers to terminate agreements originally approved with parliamentary participation. In states where international agreements have become embedded in the constitutional system, the provision for parliamentary participation in their denunciation may ideally be accompanied by constitutional-amendment-like majority requirements for its approval. By adopting such an enhanced threshold, constitutions could be apt to stop the executive power from unilaterally altering the constitutional order.

Ensuring legislative participation in the adherence and termination of international agreements, with attention to different thresholds according to the influence of the international agreement upon the domestic legal order, could tend to increase legal certainty and avoid conflicts among branches of government, while also potentially adding a layer of protection to rights contained in human rights treaties. Internationally, those measures would tend to increase a country's credibility before other states, suggesting a higher likelihood of future compliance with international agreements[164].

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[162] UNITED NATIONS. *Vienna Convention on the Law of Treaties*. 22 May 1969. Available at https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf. Art. 46.

[163] WOOLAVER, Hannah. From Joining to Leaving: Domestic Law's Role in the International Legal Validity of Treaty Withdrawal. *The European Journal of International Law*, v. 30, n. 1, p. 73-104, 2019. p. 96.

[164] COPE, Kevin L.; VERDIER, Pierre-Hughes; VERSTEEG, Milla. The Global Evolution of Foreign Relations Law. *The American Journal of International Law*, v. 116, p. 1, 2022.

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