CENTRAL EUROPEAN UNIVERSITY

Presidential powers for unilateral withdrawal from international agreements in the Americas

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ABSTRACT

This thesis explores the regulation of foreign affairs powers under constitutional and international law, with a focus on the termination of and withdrawal from international agreements in presidential systems in the American continent. It demonstrates the existence of an imbalance between constructive and deconstructive foreign affairs powers, and points to the effects of 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 work takes the United States and Brazil as case studies on the development of institutional mechanisms for overcoming constitutional uncertainty. Finally, this thesis explores the constitutional consequences of the imbalance upon domestic separation of powers and its effects on the stability of the international order.

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

ACKNOWLEDGMENTS

This thesis marks the end of a long and at times troubled cycle that started in 2019 at Pontifical Catholic University of São Paulo, led me to the University of São Paulo, and finally brought me to Central European University (CEU). Along the way, I became indebted to so many people that it would be impossible to list them all individually in these short acknowledgments.

First and foremost, I thank my parents and my family for absolutely everything. Every opportunity I had and will have, I owe to their support and encouragement. I also thank Alana for accompanying me in life, making it brighter, always being there.

I thank my supervisor, Prof. Markus Böckenförde, for believing in my work throughout this year and, together with Prof. Renata Uitz and Prof. Tommaso Soave, for making this a truly enjoyable and intellectually transformative experience. I also thank Prof. András Sajó, Prof. Michael Ignatieff, and Prof. Juliana Cesário Alvim Gomes – who helped me identify essential aspects explored in this thesis. Much of my great experience at CEU is also due to an exceptional cohort in the Comparative Constitutional Law program, with Ludovic, Borana, Farhan, Harsha, Ragib, Chernor, and Timi, as well as to my Brazilian friends at CEU and my friends at the Public Policy Department.

I must also register my thanks to Prof. Clarisse Laupman Ferraz Lima, as well as Fabrizio Jacobucci, and Julia Macedo, for their friendship and for their thorough academic support that allowed me to reach this point. In Brazil, fortunately, the list of friends I am indebted to is too long for such a short acknowledgment note. To all of them I extend my most sincere gratitude.

Finally, I thank CEU and its alumni community for providing me with the scholarships that made this whole opportunity possible.

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INTRODUCTION

From the middle of the 2010s, discourses and ideas that would have seemed like outcasts under the 1990s liberal universalism started to take over the debates on foreign affairs. The liberal ideal of an open, rules-based, progressively oriented international order started to be openly and directly attacked even by some of its traditional proponents and promoters[1].

From 2016 to 2020, the United States, usually considered the "first citizen" of the liberal order[2], decided to withdraw from many strategic international arrangements, such as the Paris Climate Agreement[3], the United Nation's Human Rights Council[4], and the Trans-Pacific Partnership[5]. 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[6]. 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.

In roughly the same period, from 2019 to 2022, Brazil, a country that has traditionally linked its international identity to diplomacy and participation in the development of the international

[1] Ikenberry, Gilford John. "The end of liberal international order?". International Affairs, Vol. 94, 1 (2018), Jan. 2018, p. 10.
[2] Ibid., p. 7.
[3] U.S. State Department, "On the U.S. Withdrawal from the Paris Agreement". Press Statement of November 4th, 2019, available at <https://2017-2021.state.gov/on-the-u-s-withdrawal-from-the-paris-agreement/index.html>.
[4] "U.S. withdraws from U.N. Human Rights Council over perceived bias against Israel". June 19th, 2018, available at <https://www.washingtonpost.com/world/national-security/us-expected-to-back-away-from-un-human-rights-council/2018/06/19/a49c2d0c-733c-11e8-b4b7-308400242c2e_story.html>.
[5] Office of the United States Trade Representative. "The United States Officially Withdraws from the Trans-Pacific Partnership". January 30th, 2017. Available at < https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/january/US-Withdraws-From-TPP>.
[6] Koh, Harold Hongju. "Presidential Power to Terminate International Agreements". The Yale Law Journal, Nov. 2018, pp. 433-434.

system through compliance and promotion of international norms[7], has also engaged in the backlash against liberal internationalism (or "globalism", in the words of the Brazilian Foreign Ministry at that time [8]). Although Brazilian formal disengagement with international institutions in the period has been in reality more modest than the U.S.', the country opted to withdraw from the UN Global Compact for Migration[9], while there were suggestions on the country leaving Mercosur[10], the World Health Organization[11].

Both in Brazil and in the US, one element seems to justify the radical turn against internationalism: the rise of presidents with authoritarian tendencies aligned with a contemporary stream of illiberalism[12] averse to the principles of the international liberal order, as part of a broader phenomenon not limited to these countries[13].

While Trump and Bolsonaro were ousted from office after electoral losses in their re-election bids in 2020 and 2022, their anti-internationalist shadow will probably influence domestic and international politics for the foreseeable future. Their administrations unveiled some crucial blind spots of presidential powers in international affairs that were overlooked in past times of "normality" of the adherence to the established beliefs of the international liberal order. One essential aspect explored by these presidents was the virtually unchecked powers of presidents

[7] Ricupero, Rubens. "A diplomacia na construção do Brasil", São Paulo: Versal Editores, 1th edition, 2017, p. 7.
[8] Casarões, Guilherme. "Making Sense of Bolsonaro's Foreign Policy at Year One". Americas Quarterly, Dec. 2019. Available at https://www.americasquarterly.org/article/making-sense-of-bolsonaros-foreign-policy-at-year-one/.
[9] "Bolsonaro Pulls Brazil from U.N. Migration Accord". The New York Times, January 9th, 2019. Available at < https://www.nytimes.com/2019/01/09/world/americas/bolsonaro-brazil-migration-accord.html>.
[10] "Brazilian president says country may leave Mercosur if problems arise with Argentina". Reuters, August 16th, 2019, available at < https://www.reuters.com/article/brazil-mercosur-idINE6N22K041>.
[11] "Bolsonaro diz que Brasil pode sair da OMS". Agência Brasil, June 5th, 2020. Available at < https://agenciabrasil.ebc.com.br/politica/noticia/2020-06/bolsonaro-diz-que-brasil-pode-sair-da-oms>.
[12] The term "illiberalism" is employed here to refer to the phenomenon of rise of a particular anti-internationalist authoritarian wave of governments and politicians that gained momentum from the 2010's to 2020's. "Illiberalism" is employed here instead of "populism", since, as presented by Rodilles, Latin America has shown that "populism" seems an insufficient concept to describe the contemporary backlash against internationalism - see Rodilles, Alejandro. "Is There a 'Populist' International Law (in Latin America)?". Netherlands Yearbook of International Law, Vol. 49, 2019.
[13] Posner, Eric Andrew. "Liberal Internationalism and the Populist Backlash". University of Chicago Public Law & Legal Theory Paper Series, No 606 (2017), p. 1.

unilaterally withdrawing their states from international agreements. The roots of these broad powers enjoyed by Presidents are found both in international and domestic law.

As suggested by Posner, the international community has seemed unprepared for the backlash against internationalism [14]. This argument resonates maybe even more strongly when considering how both international and domestic legal orders, as it will be demonstrated in this work, have failed to provide clear and complementary regulations for the establishment of checks on presidential foreign affairs powers.

While constitutions usually present a clear set of requirements to be followed by the executive and legislative powers for the domestic approval of international agreements – what I will call in this work "constructive powers" –, usually less attention is paid by constitutional texts to the procedures for withdrawal from international agreements. In the absence of clear regulations, withdrawals have been historically performed autonomously by the executive power – which will be referred to in this work as "deconstructive powers".

It must be stressed that this 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 the identification of this issue in parliamentary systems [15]. This work, nevertheless, will focus exclusively on presidential systems, due both to their relevance in the context of the American continent (where most countries adopt a presidential form of government), and to the relevant degree of centralization enjoyed by presidents in foreign affairs issues.

[14] Ibid.
[15] 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, Vol. 30, No. 1, 2019, pp. 73-104.

To explore this topic, this work will be divided into four parts. Chapter 1 will present an introduction to the international norms that govern withdrawal from international agreements, as well as an overview of presidential foreign affairs powers in the American continent, considering internal and external legal constraints that regulate presidential discretion in the denunciation of treaties. Chapters 2 and 3 will then explore how presidential powers for unilateral withdrawal from international obligations have been developed and understood in the United States and Brazil, considering executive-legislative practices, as well as judicial understandings. Finally, Chapter 4 will focus on the implications of current presidential discretion on foreign affairs, at times unregulated by domestic and international law, with attention to the destabilizing role played by the unchecked authority of presidents in the withdrawal from international obligations.

While the different American countries studied in Chapter 1 provide interesting models and constitutional experiences that will influence the conclusions of this work, three reasons guide the choice for focusing more closely on the U.S. and Brazil. Firstly, these are the two most prominent international actors in the American continent, respectively as global and regional actors in the politics of the region. Secondly, both countries present a recent history that evidences the potential impact of unregulated deconstructive presidential powers in foreign relations. Thirdly, both the U.S. and Brazil have, until recently, presented constitutional uncertainty regarding the limits of presidential power for withdrawal from international agreements. Each of them, however, has seemed to approach the issue in different manners.

In the U.S., the scope and limits of presidential powers in foreign affairs, in particular regarding the competence to order a unilateral withdrawal from an international agreement, resides in a gray area. As the U.S. Constitution is silent on limitations of presidential powers for unilateral withdrawal from international obligations, traditional literature points to the understanding of

the U.S. Supreme Court in the 1979 *Goldwater v. Carter* case as a corroboration of broad presidential powers for unilateral termination of international agreements. In that case, the U.S. Supreme Court considered that the issue referred fundamentally to a political question and was therefore "nonjusticiable"[16]. Contemporarily, however, some authors claim that the *Goldwater* precedent does not seem to settle the debate, as it did not provide a precedent on the merits providing the president a "general unilateral right" to denounce or terminate international agreements unilaterally[17].

In Brazil, the question of whether a president has the power to unilaterally withdraw the state from an international obligation remained unresolved until very recently. While the constitutional unclarity on Presidential deconstructive powers in foreign affairs has been discussed at least since Brazil's withdrawal from the League of Nations in 1926[18], only in 2023 the Brazilian Supreme Court ("STF") issued a decision settling the debate and establishing an understanding that requires congressional approval of the denunciation of an international agreement.

In the end, this work will seek to demonstrate the existence of an imbalance between presidential powers to adhere to and withdraw from international agreements, addressing the tensions between domestic and international legal norms, as well as its impacts on the development of constitutional law and the stability of international relations.

[16] Supreme Court of the United States of America, Goldwater v. Carter, 444 US 996 (1979).
[17] Koh, Harold Hongju. "Presidential Power to Terminate International Agreements". The Yale Law Journal, 2018, pp. 440.
[18] Medeiros, Antônio Paulo Cachapuz. "Pareceres dos Consultores Jurídicos do Itamaraty: Vol. IX (1990-2000)". Brasília: FUNAG, 2009, p. 264.

CHAPTER ONE – PRESIDENTIAL POWERS IN FOREIGN AFFAIRS: INTERNAL AND EXTERNAL LEGAL CONSTRAINTS

1.1. Presidential powers in foreign affairs: an overview

Traditionally, the executive power is considered the sole or at least the leading voice of a state in international relations. While legislators and judges may indirectly impact a state's external affairs, it is the head of state or head of government – personally or through its direct subordinates in the executive power – who, according to international law, possesses the power to bind the state to an international obligation[19].

This concentration of external powers is tied to the belief that a state should speak in "one voice" [20]. Allowing dissonance in foreign affairs could impair a state's international credibility, reducing its capacity to achieve its foreign policy goals and even increasing the chances of conflicts with other states [21]. To avoid overlap among different domestic authorities, constitutions in presidential systems usually attribute to the president broad powers to plan and conduct the state's foreign affairs.

The deference of foreign affairs issues to the president relates to its capacity to conduct foreign policy through the employment of a specialized bureaucracy able to provide it with an informational advantage in comparison to the other branches of government[22]. The presidential office – and the executive power, more broadly – enjoys the technical capability to assess the

[19] See Articles 7 and 67 of the Vienna Convention on the Law of Treaties, 1969.
[20] Abebe, Daniel. "One Voice or Many: The Political Question Doctrine and Acoustic Dissonance in Foreign Affairs". Supreme Court Review, Vol. 233, 2012, p. 234.
[21] *Ibid*.
[22] *Ibid*.

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 different constitutional settings. While presidentialism may be theoretically considered a "package deal"[23], in practice some institutions and solutions identified in countries taken as "models" for the system are not necessarily found in others that reproduce or are inspired by their structures[24].

Whatever 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 legal 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 demands attention to specific requirements for the validity of a certain foreign action.

While some aspects of a state's international engagement may find relatively clear regulations in treaties and customary international law – e.g., the procedures to adhere to a treaty, as consolidated in the VCLT[25] –, others remain in a gray area between international and domestic rules.

The accession and the withdrawal of a state from international agreements are "separately but concurrently" regulated by norms of internal and international law[26]. In presidential systems,

[23] Ginsburg, Tom; Cheibub, Jose Antonio; Elkins, Zachary. "Latin American Presidentialism in Comparative and Historical Perspective". Texas Law Review, Vol. 89, 2010, p. 1713.
[24] Ibid., p. 1714.
[25] See Part II of the Vienna Convention on the Law of Treaties, 1969.
[26] Woolaver, Hannah. "From Joining to Leaving: Domestic Law's Role in International Legal Validity of Treaty Withdrawal". European Journal of International Law, Vol. 30, No. 1, 2019, p. 74.

both the processes of adherence to an international agreement and withdrawal from it are mainly performed by the president as the head of the executive power. There are, however, as it will be presented forward, clear differences in the legal regulation of each of these actions.

While a president's constructive powers in foreign affairs are regulated in more detail both by 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.

1.2. 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 but regarding the relations between states and international organizations[27].

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

[27] Ciampi, Annalisa. "Invalidity and Termination of Treaties and Rules of Procedure". In Cannizzaro, Enzo. "The Law of Treaties Beyond the Vienna Convention". Oxford: Oxford University Press, 2011, p. 360.
[28] Crawford, James. "Brownlie's Principles of Public International Law". Oxford: Oxford University Press, 2012, p. 387.

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[29].

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[30]. 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[31].

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 are capable of notifying the other parties[32] or the depositary of the treaty about the withdrawal[33]. 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[34]. 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[35] "unless that violation was manifest and concerned a rule

[29] Art. 57, Vienna Convention on the Law of Treaties, 1969.
[30] Art. 56, Vienna Convention on the Law of Treaties, 1969.
[31] Crawford. "Brownlie's Principles of Public International Law" (2012), p. 390.
[32] Art. 67, Vienna Convention on the Law of Treaties, 1969.
[33] 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.
[34] *Ibid.*, p. 1557.
[35] Art. 27, Vienna Convention on the Law of Treaties, 1969.

of its internal law of fundamental importance"[36]. The Vienna Convention on the Law of Treaties Between States and International Organizations, by its turn, establishes analogous norms regarding international organizations and their rules of organization[37].

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[38]. 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[39].

The logic consolidated in the two Vienna Conventions on the Law of Treaties prioritizes treaty stability and legal security[40] over concerns regarding the legitimate internal allocation of powers for adherence or denunciation of a treaty[41]. 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"[42].

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[43].

[36] Art. 46, Vienna Convention on the Law of Treaties, 1969.
[37] Art. 46, Vienna Convention on the Law of Treaties Between States and International Organizations, 1986.
[38] Woolaver. "From Joining to Leaving: Domestic Law's Role in International Legal Validity of Treaty Withdrawal" (2019), p. 94.
[39] *Ibid.*, p. 95.
[40] Krieger, Heike. "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. 1167.
[41] Woolaver "From Joining to Leaving: Domestic Law's Role in International Legal Validity of Treaty Withdrawal" (2019), p. 97.
[42] *Ibid*.
[43] *Ibid.*, p. 74.

According to the two Vienna Conventions, international law leaves it up to each state the establishment of the authority and the procedures to be observed for the verification of who is competent to make the appropriate decision to adhere to or terminate an international treaty. Beyond the specific requirements set forward on Article 67 of the VCLT, then, this seems to denote, as affirmed by Ciampi, "not a question of international law"[44].

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 seems to possess absolute authority, "unlimited by any checks that may exist in domestic law"[45].

1.3. Constitutional norms on withdrawal from international obligations in the Americas

Once international law seems hesitant in entering 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.

Globally, constitutional requirements and procedures for withdrawal from international obligations vary highly. While most constitutions establish clear legislative oversight upon the

[44] Ciampi. "Invalidity and Termination of Treaties and Rules of Procedure". In Cannizzaro, Enzo. "The Law of Treaties Beyond the Vienna Convention" (2011), p. 368.
[45] Woolaver. "From Joining to Leaving: Domestic Law's Role in International Legal Validity of Treaty Withdrawal" (2019), p. 95.

adherence to international obligations, only a few provide explicit rules for the regulation of the termination of international treaties[46].

In the American continent, there are currently twenty-one countries that adopt presidential systems of government. In the field of foreign relations, 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 in a more general sense. Only a third of these constitutions, however, expressly regulate presidential powers to terminate or order the withdrawal from those international agreements[47] - notably, Mexico, Paraguay, Ecuador, Bolivia, Chile, and Argentina. There are, however, clear differences even among these countries.

1.3.1. Mirrored procedures for adherence and withdrawal in Latin America

Firstly, 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[48]. In these cases, constitutions provide that the procedure observed for ratifying a treaty must be analogously required in its termination. Under this 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 in the

[46] *Ibid.*, p. 76.
[47] See Annex I – more specifically, only Mexico, Ecuador, Bolivia, Paraguay, Chile, and Argentina provide specific provisions regulating or limiting presidential powers for unilateral withdrawal from international obligations.
[48] Koh. "Presidential Powers to Terminate International Agreements" (2018), p. 455.

constitutions of Mexico and Peru, while other countries like Ecuador, Bolivia, and Chile depart from that logic to add their own peculiarities to it[49].

In Mexico, Art. 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[50]. 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[51].

In Peru, the 1993 Constitution establishes a requirement for parliamentary participation in the approval of international agreements concerning human rights, sovereignty, territorial integrity, national defense, and financial obligations of the state, before the ratification by the president[52]. Agreements not related to those topics, on the other hand, may be concluded by the Peruvian president without congressional approval[53]. Treaties that may affect provisions of the Constitution of Peru, by their turn, shall follow the same procedure required for constitutional amendments before presidential ratification[54].

On the denunciation of international agreements, article 57 of the Peruvian Constitution mirrors the functioning of its predecessor, establishing that the denunciation of international agreements subject to congressional approval shall be also approved by Congress before the denunciation by the president[55].

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

[49] See Annex I.
[50] Constitución Política de Los Estados Unidos Mexicanos, 1917, Art. 76, I.
[51] *Ibid*.
[52] Constitución Política Del Peru, 1993, Art. 56.
[53] *Ibid*.
[54] *Ibid*.
[55] Constitución Política Del Peru, 1993, Art. 57.

of topics presented in its text[56]. 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[57].

One particular 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[58]. 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[59].

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[60].

For some specific themes[61], on the other hand, the Bolivian Constitution establishes that the ratification of international treaties shall be approved by binding popular referendums. Their

[56] Constitución de La República Del Ecuador, 2008, Art. 419: "The ratification or denunciation of international treaties shall require previous approval by the National Assembly in the following cases: 1. When referring to territorial or border delimitation matters. 2. When forging political or military alliances. 3. When they involve a commitment to enact, amend, or repeal a law. 4. When they refer to the rights and guarantees provided for in the Constitution. 5. When they bind the State's economic policy in its National Development Plan to conditions of international financial institutions or transnational companies. 6. When they commit the country to integration and trade agreements. 7. When they attribute powers of a domestic legal nature to an international or supranational organization. 8. When they compromise the country's natural heritage and especially its water, biodiversity, and genetic assets".
[57] *Ibid*., Art. 420.
[58] *Ibid*., Art. 438.
[59] Marín, Daniela Salazar. "La Denuncia de Tratados Internacionales de Derechos Humanos". Iuris Dictio, Vol. 15, 2017, pp. 107-108.
[60] Constitución Política Del Estado Plurinacional de Bolívia, 2009, Art. 260, II: "The denunciation of ratified treaties shall be approved by the Plurinational Legislative Assembly before being executed by the President of the State".
[61] *Ibid.*, Art. 257, II: "International treaties that involve any of the following matters shall require prior approval by binding popular referendum: 1. Questions of borders. 2. Monetary integration. 3. Structural economic integration. 4. Grant of institutional authority to international or supra-national organisms, in the context of process of integration".

denunciation, as a consequence, 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[62].

Similarly to 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 [63] 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[64]. This congressional intervention, however, has a mainly advisory character, not binding to the president[65], as it is to the president that the constitution clearly provides the "exclusive faculty to denounce a treaty or withdraw from it"[66]. 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.

[62] *Ibid.*, 2009, Art. 260, III.
[63] *Ibid.*, 2009, Art. 202 (9).
[64] Constitución Política de la República de Chile, 1980, Art. 54 (1).
[65] Viñas, Miriam Henrique. "Los tratados internacionales em la constitución reformada". Revista de Derecho Público, Vol. 69, 2007, p. 321.
[66] Constitución Política de la República de Chile, 1980, Art. 54 (1).

1.3.2. Specific procedures depending on a treaty's subject 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 shall require legislative approval by a majority equal to the one demanded by the constitution for constitutional amendments[67]. 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"[68]. In these cases, the 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[69], by their turn, may only be denounced by the executive power with the approval of two-thirds of both houses of

[67] Constitución de La República de Paraguay, 1992, Art. 142.
[68] Constitución de La Nación Argentina, 1853, Art. 75 (24).
[69] The list of all human rights treaties subject to constitutional hierarchy may be found on Art. 75(22) of the Argentinian Constitution.

Argentinian Congress, according to article 75 (22) of the Constitution, as the constitutional text attribute them the same hierarchy as constitutional norms[70].

While all the Latin 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 American states ruled by a presidential system of government. In the majority of American states, there are no clear constitutional dispositions to fill the blank left by international law on checks on presidential powers for unilateral withdrawal from international agreements.

In practice, constitutions seem generally willing to carefully regulate presidential authority to build or adhere to international obligations, requiring parliamentary approval for ratification, but rarely provide specific textual constraints on presidential authority to unilaterally terminate or exit international agreements. On states where constitutions are silent regarding presidential powers for unilateral withdrawal from treaties, this issue seems to reside in what Justice Jackson, from the U.S. Supreme Court, has called a "twilight zone" where the distribution of power between the president and the legislative power is uncertain[71].

This uncertainty has historically generated controversies in the two biggest presidential states in the Americas: the United States and Brazil. In each case, the unclarity of constitutional provisions has led the discussion to the judiciary power, which has answered in opposite ways

[70] Constitución de La Nación Argentina, 1853, Art. 75 (22): "The following [international instruments], under the conditions under which they are in force, stand on the same level as the Constitution, [but] do not repeal any article in the First Part of this Constitution, and must be understood as complementary of the rights and guarantees recognized therein: The American Declaration of the Rights and Duties of Man; the Universal Declaration of Human Rights; the American Convention on Human Rights; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights and its Optional Protocol; the [International] Convention on the Prevention and Punishment of Genocide; the International Convention on the Elimination of all Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination Against Women; the Convention Against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment; and the Convention on the Rights of the Child. They may only be denounced, if such is to be the case, by the National Executive Power, after prior approval by two thirds of the totality of the members of each Chamber".

[71] Justice Robert H. Jackson, "Youngstown Sheet & Tube Co. v. Sawyer," 343 U.S. 579 (1952).

– either by immediate deference to the executive power or by the employment of constitutional interpretation to fill the gap left by the constitution.

CHAPTER TWO – PRESIDENTIAL POWERS IN FOREIGN AFFAIRS IN THE UNITED STATES OF AMERICA

2.1. Constitutional provisions and executive-legislative relations

Historically, the U.S. is considered the "archetypical presidential system in the sense that it is the model that represents, often implicitly, discussions of separation-of-powers systems"[72]. In the division of foreign affairs powers and the authority to terminate international agreements, however, the U.S. Constitution is just as unclear as most of its Latin American counterparts. As recognized by the U.S. Supreme Court, the wording of the Constitution creates a "zone of twilight" where the president and Congress "may have concurrent authority, or in which its distribution is uncertain"[73].

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"[74]. The constitution is silent, however, regarding the president's power to unilaterally withdraw the state from international agreements, or the requirement of consent by the legislative power for this procedure[75].

This constitutional uncertainty 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 the

[72] Ginsburg; Cheibub; Elkins. "Latin American Presidentialism in Comparative and Historical Perspective" (2010), p. 1714.
[73] U.S. Supreme Court, "Youngstown Sheet & Co. v. Sawyer", 343 U.S. 579, 1951.
[74] Constitution of the United States, 1776, Art. II.
[75] 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.

"general wisdom" [76] suggests that the president possesses almost autonomous power for unilateral termination of international agreements[77].

In practice, as pointed out by Bradley[78], the exercise of presidential power to terminate a treaty "provides a vivid illustration of how constitutional understandings can change"[79] through time. According to him, this transformation "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"[80].

While in the early twentieth-century Congress seemed more interested in participating in the denunciation of treaties (e.g., by intervening to guarantee a protectionist trade policy, or to reject the Versailles Treaty after World War I), at the end of the twentieth-century congressional deference of foreign affairs to the executive coincides with the rise of the U.S. as a superpower[81].

Hathaway suggests that this shift in the twentieth century derived from a combination of "institutional myopia and political incentives"[82]. By delegating foreign affairs authority to the executive for entering and leaving most international agreements, members of Congress could dedicate themselves to matters closer to their reelection prospects[83]. Each small choice for delegation, however, cumulated throughout decades, making Congress "unable to reclaim what

[76] *Ibid*., p. 773.
[77] See Restatement of the Law Fourth: The Foreign Relations Law of the United States (2018), Section 313: "according to established practice, the President has the authority to act on behalf of the United States in suspending or terminating U.S. treaty commitments and in withdrawing the United States from treaties"; Restatement (Third) of Foreign Law of the United States (1988), Paragraph 339: "the President has the unilateral authority to terminate treaties when such termination is permitted under international law and is not disallowed either by the Senate in its advice and consent to the treaty or by Congress in a statute".
[78] Bradley, Curtis A. "Treaty Termination and Historical Gloss". Texas Law Review, Vol. 92, Issue 4, 2014, p. 826.
[79] *Ibid*.
[80] *Ibid*.
[81] Ibid., p. 801.
[82] Hathaway, Oona. "Presidential Power over International Law: Restoring the Balance". The Yale Law Journal, Vol. 119, No. 2, 2009, p. 184.
[83] *Ibid.*, p. 146.

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"[84].

Initially, the delegation of authority by Congress was narrow and carefully constrained. Later, in the words of Hathaway, it became "increasingly vague and open-ended, allowing the president to negotiate and enforce international agreements without any further congressional approval"[85]. Over time, this delegation, even if unintentional, created an imbalance of power over international lawmaking, shifting it towards presidential unilateralism in international lawmaking[86].

Hathaway and Bradley even argue that these changes may have put the procedures established by Article II of the U.S. Constitution "on a path to obsolescence"[87]. 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[88]or through a mere presumption of presidential independent constitutional authority[89].

Executive agreements have been historically concluded by U.S. Presidents in three specific models. Firstly, there are the so-called "*ex-ante* congressional-executive agreements", concluded by the President without the need for subsequent congressional approval, due to a previous delegation of authority made by Congress usually through a statute[90]. "*Ex post*-congressional-executive agreements", by their turn, are concluded by the President and later

[84] *Ibid*.
[85] *Ibid.*, p. 145.
[86] *Ibid.*, p. 146.
[87] Hathaway, Oona A.; Bradley, Curtis A.; Goldsmith, Jack. "The Failed Transparency Regime for Executive Agreements: An Empirical and Normative Analysis". Harvard Law Review, Vol. 134, No. 2, 2020, p. 632.
[88] See Hathaway. "Presidential Power over International Law: Restoring the Balance" (2009), p. 144.
[89] 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, Vol. 90, 2023, p. 3.
[90] Hathaway, Oona A. "Presidential Power over International Law: Restoring the Balance" (2009), p. 144.

presented to Congress for approval by both houses through the normal legislative process, rather than the procedure established in Art. II of the U.S. Constitution[91]. Finally, presidents have also concluded executive agreements without any involvement of Congress[92], solely based on a presumed presidential constitutional authority for such[93].

In a scenario where the historical practice has increasingly presented different forms of international engagement to be ordered unilaterally by the U.S. president, beyond the original constitutional scope established by Art. II the U.S. Constitution, ascertaining the division of powers in the withdrawal from international agreements becomes correspondently complicated[94].

As the relationship between the executive and legislative powers in the U.S. throughout the twentieth-century evidence a progressive extension of unilateral presidential powers in foreign affairs, it still provides no clear or general rule for presidential authority for unilateral withdrawal from international obligations.

The establishment of a general presidential authority for unilateral withdrawal from treaties would demand assuming that the delegation of foreign affairs powers by Congress to the president, considering the absence of opposition to unilateral presidential foreign action, have acquired a certain level of cogency in American law – which seems far from being ascertained**.** In such a scenario, one might look for clarity under the jurisprudence of the U.S. Supreme Court, which will be presented below.

[91] Hathaway. "Presidential Power Over International Law: Restoring the Balance" (2009), p. 144.
[92] *Ibid*.
[93] Bradley; Goldsmith; Hathaway. "The Rise of Nonbinding International Agreements: An Empirical, Comparative, and Normative Analysis" (2023), p. 3.
[94] Galbraith, Jean. "The President's Power to Withdraw the United States From International Agreements At Present And The Future". American Journal of International Law Unbound, Vol. 111, 2018, p. 447.

2.2. Judicial developments: foreign affairs as a "political question"?

Amidst the uncertainty on the division of powers in the termination or withdrawal from international agreements, those who advocate for the existence of a presidential authority for unilateral withdrawal usually base their claims on a "general wisdom"[95] established by the U.S. Supreme Court on 1979 *Goldwater v. Carter*[96].

In the 1970s, the negotiations for the establishment of diplomatic relations between the U.S. and the People's Republic of China ("PRC") had to solve the question of American support to Taiwan, which included the 1954 Mutual Defense Treaty between the United States and Taiwan. At the time, a pre-requisite established by the PRC for this approximation was the termination of the 1954 Treaty[97].

In the middle of the negotiations, U.S. Congress approved in 1978 the International Security Assistance Act, which expressly required that the executive power consulted Congress prior to any changes affecting the continuation of the 1954 Treaty. Despite having already signed the Act approved in Congress, in 1978 President Jimmy Carter announced his plans to unilaterally terminate the 1954 Mutual Defense Treaty between the United States and Taiwan[98].

The presidential announcement immediately raised controversy in Congress, leading Senators and members of the House of Representatives to bring the dispute to the judiciary power, suing the President for declaratory and injunctive relief preventing the president from unilaterally terminating the treaty[99].

[95] Koh. "Presidential Power to Terminate International Agreements" (2018), p. 437.
[96] *Ibid*.
[97] Bradley; Deeks; Goldsmith. "Foreign Relations Law: Cases and Materials". Frederick: Aspen Publishing, 2020, p. 123.
[98] *Ibid*.
[99] *Ibid*.

Initially, the federal district court held that the unilateral termination was ineffective without either the consent of a two-thirds majority in the Senate, or a majority vote in both houses of Congress[100]. When the case reached the U.S. Supreme Court in 1979, Justices were pressed to decide before the termination date of the Treaty, due January 1st, 1980[101]. In December 1979, the Court issued a *per curiam* decision dismissing the complaint without oral arguments, considering the topic nonjusticiable[102].

The opinions of the judges of the Supreme Court were divided among different rationales[103]. In the most famous opinion issued at that judgment, Justices Burger, Rehnquist, Stewart, and Stevens found that the merits of the case should not be appreciated by the Court, as it amounted to a "political question"[104].

A "political question", according to the U.S. Supreme Court in 1962 *Baker v. Carr*[105], may be identified among six different criteria. Whenever one of them is found in a case, the Court shall consider it nonjusticiable: i) if there is a textually demonstrable constitutional commitment of the issue to a branch of government other than the judiciary; ii) if there is a lack of judicially discoverable or manageable standards for deciding it; iii) if it is impossible for the judiciary to decide without an initial policy determination of nonjudicial discretion; iv) if the case can't be decided by the judiciary without expressing lack of respect to other branches of government; v) the issue deals with an already made political decision; or vi) the decision has potential to

[100] *Ibid.*
[101] Koh. "Presidential Power to Terminate International Agreements" (2018), p. 437.
[102] *Ibid.*, p. 439.
[103] *Ibid.*, p. 439.
[104] *Ibid.*, p. 438.
[105] While *Baker v. Carr* represents the most well-known case where the U.S. Supreme Court addresses the political question doctrine more comprehensively and presents the criteria for its identification, the tradition of judicial abdication in foreign affairs has older roots. According to Henkin, it derives from a tradition of the British monarchical system, introduced "bit by bit" in the U.S. legal system "in cases where [foreign affairs] was irrelevant to the matters being litigated, and thus was introduced in the American law essentially without benefit of genuine adversary process, let alone profound jurisprudential reflection" – see Franck, Thomas M. "Political Questions/Judicial Answers: Does The Rule Of Law Apply To Foreign Affairs?". Princeton: Princeton University Press, 1992, p. 21 and p. 158.

promote embarrassment from multiple pronouncements from various departments on a same question[106].

In *Goldwater v. Carter*, Justice Rehnquist's opinion argued that as the U.S. Constitution is silent regarding the Senate's participation in the abrogation of a treaty, the matter at stake would "surely be controlled by political standards"[107]. The denunciation of the US-Taiwan Treaty would amount fundamentally to a matter of foreign affairs "entirely external to the United States", and it involved a dispute between coequal branches of government, "each of which has resources available to protect and assert its interests". According to Abebe, by establishing the "political question doctrine", the U.S. Supreme Court sought to insulate itself "from adjudicating cases that implicate issues that the Court views as properly resolved by the political branches"[108].

Since 1979, 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[109], with Goldwater v. Carter setting the "conventional wisdom" for presidential unilateral withdrawal from international agreements[110]. Other foreign affairs themes, on the other hand, have seemed to lead the U.S. Supreme Court to present more flexible approaches to the "political question" doctrine, allowing itself to rule on certain matters involving foreign affairs issues[111]. As it was

[106] Stone et. al., "Constitutional Law" (2018), p. 146.
[107] U.S. Supreme Court, Goldwater v. Carter, 1979, Justice Rehnquist opinion.
[108] Abebe, "One voice or many? The political question doctrine and acoustic dissonance in foreign affairs", 2012, p. 234.
[109] Ibid., p. 236.
[110] Koh, "Presidential Power to Terminate International Agreements" (2018), p. 437.
[111] In "*Japan Whaling Association v. Cetacean Society*" (1986), the U.S. Supreme Court affirmed that the political question doctrine would be limited to excluding from judicial review "controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive branch". In "*Boumediene v. Bush*" (2008), the Supreme Court affirmed that while sovereignty constituted a political question, this term should be taken in its narrow and legal sense, defined on Restatement (Third) of Foreign Relations Law as implying "a state's lawful control over its territory generally to the exclusion of other states, authority to govern in that territory, and authority to apply law there". In that case, while the Court refrained from determining who held sovereignty over Guantanamo Bay, it stated that nothing refrained it from dealing with the "objective degree of control" exercised by the U.S. over the region, leading it to affirm its jurisdiction over a claim presented by a prisoner at Guantanamo. In "*Zivotofsky v. Clinton*" (2011), the U.S.

previously affirmed in *Baker v. Carr*, "it is an error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance"[112]. All those cases reviewed by the U.S. Supreme Court[113], however, deal with other matters of foreign affairs.

On a narrower approach, restricted to the judicial understanding around the authority of the President of the United States to unilaterally terminate an international obligation, *Goldwater v. Carter* still seems to set the "general wisdom" that guides the discussion. This understanding, however, has raised some criticism in the academic realm.

Koh, for example, argues that *Goldwater v. Carter* only sets grounds for the non-reviewability of one specific episode of treaty termination, related to the 1954 US-Taiwan Mutual Defense Treaty. In his view, the functionalist logic applied by the U.S. Supreme Court in *Goldwater v. Carter* was established in a time of stability and foreseeability in foreign affairs, where there was a "presumption of basic foreign policy continuity"[114]. These assumptions, however, according to Koh, would no longer stand in the post-Cold War era, as it has been marked by "radical foreign policy discontinuities"[115].

For Koh, the precedent established in *Goldwater v. Carter* "tells us little about what would happen if Congress were to actively *contest* a withdrawal[116]. In his view, rather than being an established historical practice in constitutional law, the *Goldwater v. Carter* logic could at best be understood as a "'quasi-constitutional custom' that is 'perennially subject to revision'"[117].

Supreme Court affirmed its powers to verify whether Congress or the Executive was "aggrandizing its power at the expense of another branch". As the case involved not the "determination of what United States policy toward Jerusalem should be", but solely the constitutionality of a statute passed by Congress, and the duty of enforcement by the Executive, its merits could be reviewed by the Court.

[112] U.S. Supreme Court, "Baker v. Carr", 369 U.S., 186 (1962).

[113] See Note n. 113.

[114] Koh. "Presidential Power to Terminate International Agreements" (2018), p. 450.

[115] *Ibid.*

[116] *Ibid.*, p. 447.

[117] *Ibid.*, pp. 451-452.

Franck, by his turn, claims that the current understanding of general judicial deference of foreign affairs issues to the executive is hurtful to the U.S. legal system and its foreign interests. Drawing from the experiences of the German Federal Republic, he argues that allowing judicial review upon foreign affairs topics would not necessarily result in great changes in inter-branch relations, but rather foster a more "clearly discernible pattern of judicial concern for the governmental perspective and respect for the prerogatives of political power in the conduct of foreign affairs"[118]. Additionally, he points out that absence of the judicial power on foreign affairs issues could result in a "moral disarmament" of U.S. foreign policy, damaging the country's reputation in the international system[119].

As pointed out by Franck, most of the cases that built the "political question" doctrine guiding, which has guided the judicial deference to the executive since *Goldwater v. Carter*, have nothing to do with foreign affairs[120].

As a result, the presidential authority for unilaterally terminating a treaty in the U.S. seems to still reside in a "twilight zone", as there is a persistent absence of a clear and consensual judicial understanding of the scope prescribed by Article II of the U.S. Constitution. In this context, Bradley suggests that a study of constitutional and historical practice composes the best prediction of likely future practice in this area[121].

[118] Franck, Thomas M. "Political Questions/Judicial Answers: Does The Rule Of Law Apply To Foreign Affairs?" (1992), p. 159.
[119] *Ibid.*
[120] *Ibid.*, p. 161.
[121] Bradley, Curtis A. "Treaty Termination and Historical Gloss". Texas Law Review, Vol. 92, Issue 4, 2014, p. 826.

2.3. Delimitating presidential powers for withdrawal from international agreements

The textual uncertainty of constitutional provisions on presidential powers for withdrawal from international agreements, combined with the judicial branch's avoidance of direct delineation has made unilateral presidential termination of treaties a longstanding practice in the U.S.[122]. The difficulty of establishing a consensual interpretation of Article II may even be seen in the absence of a clear identification of the intent of the framers of the U.S. Constitution[123]. Beyond the disagreements on the authoritativeness of this historical practice, the longer the issue remains unclear, the more entrenched it becomes in U.S. constitutional practice [124].

Facing this dilemma, some authors have proposed specific understandings of how this constitutional norm should be interpreted in the U.S., or even on which changes should be enforced by the political branches to make the question clearer.

For some, historical practice, as well as the refusal of judicial review by the U.S. Supreme Court, should result in the recognition of a general understanding of the existence of a presidential authority to unilaterally terminate international agreements[125]. This seems to be the understanding consolidated on Restatement (Third) of Foreign Relations Law of the United States and Restatement (Fourth) of Foreign Relations Law of the United States[126].

Others have suggested that as the expansion of presidential powers in foreign affairs has derived not from inter-branch battles but rather from a mere delegation of plenary authority through law, under a narrowly legal analysis, Congress would have virtual authority over all

[122] Bradley. "Treaty Termination and Historical Gloss" (2014), p. 822.
[123] Henkin, Louis. "Foreign Affairs and the Constitution". Foreign Affairs, Vol. 66, No. 2 (Winter, 1987), p. 288.
[124] Bradley. "Treaty Termination and Historical Gloss" (2014), p. 822.
[125] *Ibid.*, p. 823.
[126] See Note 76.

aspects of foreign policy[127]. Consequently, while Congress could interfere in all acts of foreign affairs, one possible argument against judicial interference in foreign affairs could be founded in the fact that presidential powers in this realm enjoy both the authority of the executive branch and the legislative branch, through delegation[128].

Koh, by his turn, suggests an alternative approach would by the establishment of a mirrored application for the procedures of adherence and termination of international agreements[129]. For him, the absence of a clear and general jurisprudential commandment under the *Goldwater v. Carter* logic would still demand the development of a general understanding regarding the division of powers in the topic. According to Koh, under the U.S. Constitution "[t]he President possesses no general unilateral power of treaty termination"[130]. Thus, "[i]f the President cannot enact or repeal a statute alone, why should he be able to repeal the duly enacted law of the land – and its deeply internalized domestic law – just because the initiating judicial act happened to be in a treaty form?"[131].

For the establishment of a clearer doctrine regulating the denunciation of international agreements, Koh suggests that "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"[132]. Under this framework, two factors would guide the determination of the required legislative participation in the termination of an international agreement: the analysis of the subject matter of the treaty (i.e., the identification of the competent branch upon the matter according to the constitution) and the degree of

[127] Trimble, Phillip R. "The President's Foreign Affairs Power". American Journal of International Law, Vol. 83, Issue 4, 1989, p. 750.
[128] *Ibid.*
[129] See Koh. "Presidential Power to Terminate International Agreements" (2018), pp. 432-481.
[130] *Ibid.*, p. 481.
[131] *Ibid.*, p. 458.
[132] *Ibid.*, pp. 480-481.

congressional participation in the approval of the agreement[133]. Requiring, for termination of a treaty, the same degree of legislative participation demanded for adherence to it would provide, according to Koh, a desirable degree of flexibility according to the subject matter[134].

Under Koh's framework, the termination of international agreements concluded with no legislative participation (i.e., "sole executive agreements") would remain under the president's exclusive authority, as long as Congress remained silent on the matter[135]. Agreements concluded with considerable legislative participation (i.e., treaties, congressional-executive agreements), approved by both houses of Congress, by their turn, would require comparable legislative participation for their denunciation[136].

In sum, the proposal put forward by Koh seems to correspond to an implementation in the U.S. constitutional system of a logic already practiced in other countries adopting presidential systems – as seen in Chapter One.

A different approach is presented by Hathaway, who argues for privileging commitments assumed through congressional-executive agreements rather than the procedure established in Art. II, as the former would hold stronger democratic legitimacy – through the statutory authority to the president in *ex-ante* congressional-executive agreements, or direct participation of both houses of Congress in *ex-post* congressional-executive agreements[137]. According to Hathaway, while these agreements would be more easily implemented, it would be also harder

[133] Koh, "Presidential Power to Terminate International Agreements", 2018, pp. 472.
[134] *Ibid.*, p. 463.
[135] *Ibid.*, p. 464.
[136] *Ibid.*, p. 465.
[137] Hathaway's conception of "congressional-executive agreements" encompasses both ex-ante congressional-executive agreements (derived from statutory authority granted by Congress to the president) and ex-post congressional-executive agreements (which would require approval by both houses of Congress) – see Hathaway, Oona. "Treaties' End: The Past, Present, and Future of International Lawmaking in the United States". The Yale Law Journal, Vol. 117, No. 8, 2008, pp. 1305-1309.

for presidents to unilaterally undo them[138]. On *ex-ante* congressional-executive agreements, Congress could settle down in a specific 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[139].

When presenting her argument, Hathaway recognizes the absence of constitutional clarity for the limits of presidential unilateralism in the denunciation of international agreements, suggesting that "the case for congressional control over withdrawal from congressional-executive agreements is much stronger than the case for congressional control over withdrawal from treaties"[140].

In Hathaway's perspective, the strength of statutory implementation of treaties would derive from the origin of the constitutional authority provided to congressional-executive agreements. According to her, a more intense participation of Congress in the construction of a statutory permission for a treaty, or alternatively its adoption through the majority of both houses of Congress, would imply their authority arising from Art. I of the U.S. Constitution. Unlike treaties concluded under the framework of Art. II, congressional-executive agreements would then be "limited in scope by the powers enumerated in Article I"[141].

Hence, while the constitution provides the President the authority to unilaterally withdraw the U.S. from international agreements, this act could not be made without the cooperation of

[138] Hathaway, Oona. "Treaties' End: The Past, Present, and Future of International Lawmaking in the United States" (2008), p. 1307.
[139] In this issue, Hathaway recurs to the U.S. Supreme Court ruling in *INS v. Chadha* (1983), affirming that "[t]he President is not able to terminate a statute unilaterally, and hence cannot terminate the statutory enactment that gives rise to a congressional-executive agreement. And insofar as the statute specifies a course of action by the United States, the President is required to execute it unless and until the underlying statute is repealed or superseded". Hathaway, Oona. "Treaties' End: The Past, Present, and Future of International Lawmaking in the United States" (2008), p. 1335.
[140] Hathaway, "Treaties' End: The Past, Present, and Future of International Lawmaking in the United States" (2008), p. 1323.
[141] *Ibid.*, p. 1339.

Congress[142]. While under international law the president would have the authority to unilaterally denounce a congressional-executive agreement, domestically it would not have the power to "unmake the legislation on which the agreement rests"[143]. Under Hathaway's argument, if the president has no power to unilaterally terminate a statute, it therefore does not have the authority to terminate the statutory enactment that gave rise to a congressional-executive agreement[144].

Hathaway's proposal seeks to overcome constitutional uncertainty by bringing the regulation of international agreements closer to domestic law, mainly through the adoption of a clearer and more participative role for Congress, circumventing Art. II and fostering statutory internalization of the content of international treaties concluded by the executive power.

Other authors, by their turn, propose more heterodox solutions to the unclearness of the scope of these deconstructive presidential powers. These approaches suggest the implementation of new general dynamics to the relationship between branches of government, ultimately affecting the presidential authority for unilaterally withdrawing from international obligations.

Abebe, for example, suggests that the degree of deference of foreign affairs powers to the executive branch should depend on the consideration of the influence of external geopolitical factors upon U.S. interests[145].

[142] Hathaway, "Treaties' End: The Past, Present, and Future of International Lawmaking in the United States" (2008), p. 1334.
[143] *Ibid.*
[144] *Ibid.*
[145] See Abebe, Daniel. "The Global Determinants of US Foreign Affairs Law". Stanford Journal of International Law, Vol. 49, No. 1, 2013, pp. 3-53. See also Abebe, Daniel. "One Voice or Many? The Political Question Doctrine and Acoustic Dissonance in Foreign Affairs". The Supreme Court Review, Vol. 2012, No. 1, 2013, pp. 233-254.

According to Abebe, a multipolar international scenario should foster the concentration of foreign affairs powers in the U.S. president, in order for the country to speak in "one voice"[146]. Conversely, a unipolar international scenario, which presents decreased informational asymmetries between branches of government as well as the decreased value of the executive's specialized foreign affairs skills, should lead to stronger internal constraints on presidential powers, making it more accountable to legislative and judicial scrutiny[147]. Under this view, "polarity" would function as a proxy for "external constraints", establishing a metric for the complexity of the international landscape[148].

Abebe's proposed method for the identification of the desired level of presidential autonomy in foreign affairs would fluctuate according to the country's national and external interests[149]. The operationalization of this ideal would be made through the recourse to "prudential doctrines" of constitutional interpretation to assess the most qualified branch of government to deal with the issue in question at a given time[150]. According to him, determining polarity would not require courts to make foreign affairs decisions, but it would only provide a variable background to inform the appropriate level of internal constraints to be applied to the presidential authority[151].

In Abebe's general propositions for the innovation of the relationship between the branches of government embraces the uncertainty of presidential powers not as a factor of unpredictability, but as a tool of flexibility of the U.S. Constitutional system regarding foreign affairs. Under this framework, one could infer that the presidential power to unilaterally withdraw from international treaties would fluctuate according to international politics: whenever external

[146] Abebe, Daniel. "One Voice or Many? The Political Question Doctrine and Acoustic Dissonance in Foreign Affairs". The Supreme Court Review, Vol. 2012, No. 1, 2013, pp. 254.
[147] See Abebe, Daniel. "The Global Determinants of US Foreign Affairs Law" (2013), pp. 39.
[148] *Ibid., pp. 28*.
[149] *Ibid.*, pp. 50.
[150] *Ibid.*, pp. 49.
[151] *Ibid.*, pp. 50.

constraints were higher, the presidential unilateral authority would rise; conversely, whenever external constraints were diminished, that authority would be subject to greater scrutiny of the other branches of government. In his view, shifting the presumption of centralization of foreign affairs powers depending on conditions of international politics would represent an improvement on the current state of uncertainty of presidential powers in the U.S.[152].

In the end, all the models suggested by the authors seek to fill a clear constitutional gap that none of the 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.

[152] Abebe. "One Voice or Many? The Political Question Doctrine and Acoustic Dissonance in Foreign Affairs" (2012), pp. 253-254.

CHAPTER THREE – PRESIDENTIAL POWERS IN FOREIGN AFFAIRS IN BRAZIL

3.1. Executive-legislative relations under constitutionally guided foreign affairs

Differently from the U.S., the 1988 Brazilian Constitution deals directly with issues involving foreign affairs, not only in its procedural form, related to the division of powers among political branches, but also in its material content, establishing principles and objectives to be pursued by the Brazilian state in its foreign policy.

The 1988 Brazilian constitution, currently in force, differently from previous Brazilian constitutions, which established only a few specific limitations guiding the state's foreign affairs (e.g., the prohibition of participation of the Brazilian state in conquest wars[153]), institutes extensive references that dialogue with international law principles[154].

Art. 4 of the Brazilian Constitution institutes, as guiding principles of the Federal Republic of Brazil, national independence, the prevalence of human rights, self-determination, non-intervention, equality among states, defense of peace, peaceful settlement of disputes, repudiation to terrorism and racism, cooperation of peoples for human progress, and the concession of political asylum. Additionally, Art. 4 prescribes in a separate paragraph that the

[153] 1891 Constitution, Art. 88: "The United States of Brazil, in any case, shall engage in a war of conquest, directly or indirectly, by itself nor by alliance with another nation". 1934 Constitution, Art. 4: "Brazil shall only declare war if it is not possible or unsuccessful the recourse to arbitration; and it shall not ever engage in a war of conquest, directly or indirectly, by itself or in alliance with a foreign nation. 1946 Constitution, Art. 4: "Brazil may only recur to war if it not possible or if it fails to recur to arbitration or peaceful means of dispute resolution, regulated by an international security organ that it may be a part of; and in any case it will engage in a war of conquest, directly or indirectly, by itself of in alliance with another State". 1967 Constitution, Art. 7: "The international conflicts shall be settled through direct negotiations, arbitration and other peaceful means of dispute resolution, with the cooperation of international organizations of which Brazil is a part. Sole Paragraph: wars of conquest are forbidden". No corresponding provision was found in the 1937 Constitution.

[154] 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, Vol. 8, No. 11, 2022, p. 111.

Federal Republic of Brazil shall seek the economic, political, social, and cultural integration of peoples of Latin America, seeking the formation of a Latin American community of nations.

As presented by Galindo, by constitutionalizing principles of international relations, the Brazilian constitution sought to reinforce the possibilities of political control of foreign affairs by the legislative power, as well as to broaden the possibilities of review by the judicial branch[155].

In the division of foreign affairs powers, Article 84 of the Brazilian constitution attributes to the president the exclusive competence to celebrate treaties, conventions, and international acts, subject to approval by Congress[156]. Article 49, by its turn, narrows the scope of congressional role in the approval of international commitments, by establishing that Congress' competence to approve international commitments shall only be required whenever such commitments entail "charges or commitments encumbering the national patrimony"[157]. Traditionally, however, it is understood that the wording of Article 49 gives rise to an extensive interpretation that demands that all international commitments – regardless of a burden on the national patrimony – shall be submitted to congressional approval[158].

After the approval of a treaty in Congress, the president may subsequently proceed to its ratification, guaranteeing its domestic validity[159]. This approval, it is worth mentioning, has only the power of *authorizing* the president to ratify it. Congressional approval of a treaty does

[155] *Ibid.*, p. 112.
[156] Constituição da República Federativa do Brasil, 1988, Art. 84, VIII.
[157] Constituição da República Federativa do Brasil, 1988, Art. 49, I.
[158] Medeiros, Antônio Paulo Cachapuz. "Pareceres dos Consultores Jurídicos do Itamaraty: Vol. IX (1990-2000)". Brasília: FUNAG, 2009, p. 263.
[159] Mazzuoli, Valerio de Oliveira. "Direito dos Tratados". Rio de Janeiro: Forense, 2014, p. 417.

not oblige the president to proceed to its ratification[160]. Only after presidential ratification a treaty is considered to be valid under Brazilian domestic law[161].

Beyond the procedure established by Articles 49 and 84, Brazilian diplomatic practice has historically admitted the establishment of international executive agreements [162] by the president[163]. Under the 1988 constitution, executive agreements have been usually employed for introducing complementary adjustments to treaties, as well as issues related to "diplomatic routine"[164], situated under exclusive executive authority[165].

Given the broad scope established by the language of Article 49 (encompassing "international treaties, agreements or acts"), the constitutionality of executive agreements seems to reside in a grey zone: while many executive agreements have been concluded without raising controversy in Congress, for others Congress has demanded participation for its approval[166]. The Brazilian Supreme Court, by its turn, has never been presented any case related to the constitutionality of executive agreements. In practice, the existence of executive agreements in

[160] Mazzuoli. "Direito dos Tratados" (2014), p. 417.
[161] Domestically, there are academic disagreements on the act that provides validity to a treaty under Brazilian law. For authors more closely related to public and administrative law, ratification would not be sufficient for the validity of a treaty, which would also require promulgation of a presidential decree publicizing the act. The jurisprudence of the Brazilian Supreme Court, international law authors, and diplomatic tradition of the executive power, however, point to the absence of requirement of promulgation for the internal validity of the terms of a treaty – see Mazzuoli (2014), p. 419.
[162] 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.
[163] Gabsch, Rodrigo D'Araújo. "Aprovação de tratados internacionais pelo Brasil: possíveis opções para acelerar o seu processo". Brasília: FUNAG, 2010, p. 167.
[164] Gabsch. "Aprovação de tratados internacionais pelo Brasil: possíveis opções para acelerar o seu processo". (2010), p. 167.
[165] Galindo. "A Construção do Direito Internacional Público pelas Constituições Brasileiras" (2022), p. 113.
[166] Examples of this unclarity may be seen in relation to executive agreements related to visa waivers. While agreements with Croatia (2000), Cuba (2002), India, Gabon, Honduras, Vietnam (2004), Cameroon, Senegal (2005), Jamaica (2007), and Haiti (2008) have been concluded solely by the executive power, agreements of the same nature with Angola (1999) and Armenia (2002) have been submitted to congressional approval. See Gabsch (2010), p. 178.

Brazil, in resemblance to the U.S. model, seems largely attributable to a tacit deference of foreign affairs power by Congress to the executive[167].

The joint interpretation of Article 49 and Article 84 points to the existence of a general congressional prerogative for oversight of any kind of international commitment assumed by the executive branch – treaties (in any form), international agreements (including executive agreements), any international acts that may entail charges or commitments encumbering to the national patrimony[168].

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

The first controversy around this matter dates to 1926, when President Artur Bernardes decided to unilaterally withdraw Brazil from the League of Nations[169]. As the 1891 constitution made no reference to the authority for withdrawal from international agreements, the main legal argument for the presidential unilateral withdrawal was made by the legal advisory body of the Brazilian Ministry of Foreign Affairs. As such understanding did not raise further discussions at the time, hat episode established a general wisdom that the authority to denunciate an international agreement would reside exclusively with the executive power[170]. According to that understanding, the 1891 constitution would attribute to Congress solely the authority to approve or reject a treaty by the executive power. Its denunciation, as well as all other

[167] Medeiros, Antônio Paulo Cachapuz. "Pareceres dos Consultores Jurídicos do Itamaraty: Vol. IX (1990-2000)". Brasília: FUNAG, 2009, p. 264.
[168] Mazzuoli (2014), p. 443.
[169] Mazzuoli (2014), p. 354.
[170] Mazzuoli (2014), p. 354.

formalities related to its conclusion and execution, would be exclusively attributed to the executive power[171].

That understanding has since then guided the practice of the denunciation of treaties by the executive power in Brazil. As later recognized by Supreme Court's Minister Teori Zavascki, even if one was not to conclude for the existence of a clear legislative consent to this practice, there has existed at least "a certain indifference from the other constituted branches in relation to these episodes of presidential extroversion"[172]. In other words, just like in the U.S., while there is little certainty on the limits of the president's constitutional authority to unilaterally denounce a treaty in Brazil, there seems to exist a historical practice of deference – or at least indifference - by Congress in most cases.

Academically, some authors have advocated for a revision of the "general wisdom" established in 1926. Rezek, for example, founded in legislative practice from the early twentieth century, argues that the adherence to an international agreement is built upon a communion of wills between government and parliament[173]. As a consequence, the disappearance of support among any of these branches should be able to give effect to a withdrawal from an international agreement[174]. According to Rezek, while the President would hold the authority to unilaterally withdraw the state from an international agreement, Congress could also order the repudiation of a treaty through the enactment of ordinary legislation containing such commandment, to be subsequently followed and enforced by the President[175].

[171] Bevilaqua, Clovis. "Parecer: Denúncia de Tratado e Saída do Brasil da Sociedade das Nações", issued on July 5th, 1926. In Medeiros, Antonio Paulo Cachapuz. "Pareceres dos Consultores Jurídicos do Itamaraty: Volume II (1913 – 1934). Brasília: FUNAG, pp. 353-354.
[172] Brazilian Supreme Court. "Ação Direta de Inconstitucionalidade 1625", vote issued by Justice Teori Zavascki, September 14th, 2016.
[173] Rezek, Francisco. "Direito Internacional Público: Curso Elementar". São Paulo: Saraiva Jur, 2022, p. 54.
[174] *Ibid*.
[175] Under Brazilian legislative procedure, after the approval of the ordinary legislation by Congress, the President would still have the authority to reject its promulgation. Thus, the denunciation of a treaty by Congress would

Historically, Brazilian legislative practice seems not to settle a clear pattern related to the oversight of adherence and termination of international agreements. Most of the time, Congress has seemed not to challenge the executive power's authority on foreign affairs, but at certain moments it has clearly sought to ascertain its oversight[176]. A clearer request for an approach to this question may be found in the judiciary branch.

3.2. Judicial developments: a "political question" in Brazil?

In the judicial realm, the "general wisdom" of the presidential authority to unilaterally withdraw the Brazilian state from international agreements has been challenged before the Brazilian Supreme Court in the Direct Action of Unconstitutionality n. 1625[177] ("ADI 1625").

In that case, workers' associations challenged the constitutionality of Decree n. 2.100/96, issued by Brazilian President Fernando Henrique Cardoso to unilaterally order the denunciation of Convention n. 158 of the ILO[178], which had been approved by Congress in 1992[179] and promulgated by the President earlier in 1996[180].

According to the executive power at the time, the denunciation of the Convention was necessary due to the instability that the content of the Convention could bring to Brazilian internal labor law. In the words of Celso Lafer, Brazilian ambassador in Geneva at the time, the Convention "would open the possibility of a broad possibility of layoffs that would not be

demand Congress a two steps approach: first by approving the legislation, and later by overcoming the presidential veto. See Mazzuoli (2014), p. 358; and Gabsch (2010), p. 62.

[176] See Note 168.

[177] 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, Vol. 8, No. 11, 2022, p. 114.

[178] Brazilian Presidential Office. "Decreto n. 2.100/1996".

[179] Brazilian National Congress. "Decreto Legislativo n. 68/1992".

[180] Brazilian Presidential Office. "Decreto n. 1855/1996".

compatible with the (…) [government's] program of socio-economic reforms and modernization"[181].

The dispute brought before the Brazilian Supreme Court has taken over 25 years to be concluded. Only in June 2023 all the eleven Supreme Court Justices finished delivering their opinions on the judgment. None of the opinions, however, was supported by a majority of the Court for the establishment of a clear and definitive understanding of the theme in dispute, as most Justices disagreed especially regarding the prospective effects of the judgment upon the application of Convention n. 158 of the ILO in Brazilian domestic law.

Despite these divergences, ten out of the eleven Supreme Court Justices concurred that the withdrawal from an international agreement by the president requires prior approval by Congress. Throughout the judgment, three main streams of thought were put forward by them to justify that position.

Early in the judgment, in 2003, Justice Maurício Correa, joined by Justice Ayres Britto, suggested that the denunciation of a treaty requires approval by Congress. In his view, however, the Decree n. 2.100/96, issued by the President, would not be unconstitutional *a priori*. Rather, the Justices argued that the Decree itself was lawfully issued under the presidential authority over foreign affairs guaranteed by the Brazilian constitution, but the denunciation of the treaty would only have effect over domestic law after approval by Congress[182].

A second approach to the matter was presented by Justice Joaquim Barbosa, later joined by Justices Rosa Weber and Ricardo Lewandowski. According to Justice Barbosa, the adherence

[181] Denunciation of ILO Convention n. 158 presented by Brazilian Ambassador in Geneva, November 1996. In Message n. 59/2008 of the Brazilian House of Representatives' Commission on External Affairs and National Defense. Available at https://www.camara.leg.br/proposicoesWeb/prop_mostrarintegra?codteor=571982.
[182] Brazilian Supreme Court, Judgment of ADI 1625. Votes issued by Justices Maurício Correa, and Justice Ayres Britto, October 02nd, 2003.

to a treaty under Brazilian domestic law requires the "conjugation of two homogeneous wills" of the executive and legislative power[183]. As a consequence, the intervention of Congress in the process of withdrawal from a treaty would amount to an imperative requirement established 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"[184]. Justice Barbosa's opinion, however, diverged from Justice Correa by affirming that the Decree issued by the president would be unconstitutional until it received approval from Congress[185].

Following, a third approach to the question was presented by Justice Teori Zavascki and later complemented by Justice Dias Toffoli, to which Justices Gilmar Mendes, André Mendonça, and Nunes Marques have adhered.

According to Justice Zavascki, while the constitution prescribes to the president the authority to bind the Brazilian state internationally, whenever such an act may alter the domestic normative reality, there is the requisite of authorization by Congress[186]. In his vote, he proposed the fixation of a thesis that "the denunciation of international treaties by the President of the Republic depends on the authorization of the National Congress" and suggested that the Court ordered an *ex nunc* effect upon this understanding, in order not to jeopardize previous commitments unilaterally denounced by Brazilian presidents[187].

Justice Dias Toffoli, by his turn, adhered to the position proposed by Justice Zavascki, but suggested a different wording for the proposed thesis. In his vote, Justice Dias Toffoli

[183] Brazilian Supreme Court. Judgment of ADI 1625. Vote issued by Justice Joaquim Barbosa on June 06th, 2009, p. 11.
[184] *Ibid.*, p. 13.
[185] *Ibid.*, p. 17.
[186] Brazilian Supreme Court. Judgment of ADI 1625. Vote issued by Justice Teori Zavascki on November 11th, 2015, p. 17.
[187] *Ibid.*, pp. 18-19.

suggested that the Court established a thesis that "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]. In his vote, Justice Dias Toffoli also suggested that the proposed thesis should only be applied prospectively, in order not to affect previous denunciations that were not explicitly authorized by Congress, maintaining, in practice, the validity of Decree n. 2.100/1996.

At the end of his vote, Justice Dias Toffoli still claimed Congress to develop a clearer constitutional discipline for the procedure for the denunciation of international treaties in Brazil, according to the understanding established by the Supreme Court at the judgment of ADI 1625[189].

In sum, while the final judgment of ADI 1625 may still take a while due to the necessity of establishing a final position on its effects upon Decree n. 2100/1996, there is a clear consensus on the Brazilian Supreme Court regarding the constitutional authority of Congress to approve the presidential decision for withdrawal from international agreements.

The only vote contrary to this understanding was issued in 2006 by Justice Nelson Jobim, who claimed that the constitutional silence on the process for withdrawal from international agreements would imply the primacy of the executive power on the denunciation process[190]. In his view, the authorization provided by the legislative power for the adherence to a treaty would provide the executive the authority to exercise all functions related to that treaty, including its denunciation[191]. Consequently, Justice Jobim argues that any different understanding would

[188] Brazilian Supreme Court. Judgment of ADI 1625. Vote issued by Justice Dias Toffoli on October 28th, 2022, pp. 24-25.
[189] *Ibid.*, pp. 24-25.
[190] *Ibid.*, p. 29.
[191] Brazilian Supreme Court. Judgment of ADI 1625. Vote issued by Justice Nelson Jobim on March 29th, 2006, pp. 29-30.

demand an amendment of the constitutional text providing for congressional authority over the withdrawal from international agreements[192].

Nevertheless, the conclusion of the main topic discussed on ADI 1625 seems to have been resolved. In its judgment, the Brazilian Supreme Court seems to have finally settled a long-standing question in Brazilian constitutional law, establishing a general norm that both the adherence to and the withdrawal from an international agreement require approval by Congress.

[192] *Ibid.*, p. 30.

CHAPTER FOUR – THE IMBALANCE IN CONSTRUCTIVE AND DECONSTRUCTIVE FOREIGN AFFAIRS POWERS

4.1. Constitutional consequences of the imbalance in constructive and deconstructive foreign affairs powers

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[193].

On a domestic level, this imbalance may become a source of controversy in the relationship between branches of government. The rationale for domestically regulating the engagement of a state in an international agreement departs from a basic assumption: if the adherence to an international agreement implies a transformation in the domestic legal order, then the legislative power shall participate by providing its approval before ratification by the President. If that understanding holds true for engaging the state in international obligations, it should certainly also be applied to the withdrawal from international obligations, as the latter also refers, in practice, to a transformation of the domestic legal order. As suggested by Hathaway, assuming unilateralism in the denunciation of international agreements, under a general absence of cooperation between branches in lawmaking through international law, would be fundamentally inconsistent with the principle of separation of powers[194].

[193] See Rouget. "Article 67: Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty". In Dörr et. al. "Vienna Convention on the Law of Treaties: A Commentary" (2012). Hathaway. "Treaties' End: The Past, Present, and Future of International Lawmaking in the United States" (2008).
[194] Hathaway, Oona. "Presidential Power over International Law: Restoring the Balance" (2009), p. 146.

Authors who support a more unilateralist approach 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 from when it sees fit[195]. In practice, however, accepting the existence of a broad presidential power for unilaterally denunciating international agreements could imply attributing to the President an authority for unilaterally altering the domestic legal order through unchecked foreign affairs powers.

The presidential authority to introduce changes in the domestic legal order through its deconstructive foreign affairs powers becomes even more complex in cases where certain international agreements become embedded in the constitution – a common feature in Latin America regarding human rights treaties[196]. In those cases, allowing a president to unilaterally withdraw the state from international agreements that integrate a country's constitutional bloc would essentially mean attributing to the president the power to unilaterally alter the constitutional order.

That issue was raised in 2012 by Venezuela's withdrawal from the American Convention on Human Rights ("ACHR"), ordered by President Hugo Chávez[197]. In Venezuela, the constitution attributes to the National Assembly the authority to approve international agreements prior to their ratification by the President[198], but it is silent regarding the participation of parliament in the denunciation of an international agreement. Human rights

[195] In Brazil, see Rezek. "Direito Internacional Público: Curso Elementar" (2022), p. 55. In the U.S., see Bradley. "Treaty Termination and Historical Gloss" (2014), p. 822.
[196] 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.
[197] Mejía-Lemos, Diego Germán. "Venezuela's Denunciation of the American Convention on Human Rights". ASIL Insights, January 09th, 2013. Available at < https://www.asil.org/insights/volume/17/issue/1/venezuelas-denunciation-american-convention-human-rights>.
[198] Constitución de La República Bolivariana de Venezuela, 1999, Art. 154; Art. 187(18).

treaties, by their turn, according to the Venezuelan constitution, are vested with constitutional status and enjoy supremacy over domestic law[199].

The denunciation of the ACHR was therefore complex not only due to the uncertainty of constitutional norms regarding presidential powers to unilaterally withdraw from an international agreement but also, as presented by Corao[200], due to the fact that human rights norms – and the ACHR, more specifically – are embedded in the Venezuelan constitutional system. Human rights treaties are referenced throughout the text of the 1999 Venezuelan constitution[201] 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[202]. 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[203].

Facing these issues, in 2012 activists and non-governmental organizations presented a popular action of nullity on grounds of unconstitutionality against the presidential act of denunciation of the ACHR before the Venezuelan Supreme Court [204]. Until this point, however, the result of the judgment is uncertain, as no decision has been yet issued by the Court[205]. On a regional level, the denunciation of the ACHR and the Charter of the Organization of American States

[199] Constitución de La República Bolivariana de Venezuela, 1999, Art. 23.
[200] Corao, Carlos Ayala. "Inconstitucionalidad de la denuncia de la Convención Americana sobre Derechos Humanos por Venezuela". Anuario de Derecho Constitucional Latinoamericano, Año XIX, 2013, pp. 43-79.
[201] See Constitución de La República Bolivariana de Venezuela, 1999, Preamble, Articles 2, 19, 23, 27, 31, 74, 280, 339.
[202] *Ibid.*, Art. 339: "The Decree declaring a state of exception, which shall provide for regulating the right whose guarantee is restricted, shall be submitted within eight days of promulgation for consideration and approval by the National Assembly, or Delegated Committee and for a ruling by the Constitutional Division of the Supreme Tribunal or Justice on its constitutionality. The Decree must be in compliance with the requirements, principles and guarantees established in (…) the American Convention on Human Rights".
[203] *Ibid.*, Art. 31.
[204] Corao. "Inconstitucionalidad de la denuncia de la Convención Americana sobre Derechos Humanos por Venezuela" (2013), p. 74.
[205] Helfer. "Treaty Exit and Intrabranch Conflict at the Interface of International and Domestic Law" (2019), p. 364.

("OAS Charter") by Venezuela were analyzed by the Interamerican Court of Human Rights ("IACtHR") in 2020 on an advisory opinion requested by Colombia[206].

On that occasion, the IACtHR scrutinized the specific international legal requirements for the withdrawal from the ACHR and the OAS Charter, according to the denunciation causes contained in them, as well as the VCLT and customary international law[207]. On the authority for withdrawal from international agreements, the IACtHR, after recognizing the different domestic approaches to parliamentary participation in the denunciation of international agreements, suggested the adoption of mirrored procedures for adherence to and withdrawal from international agreements ("*princípio del paralelismo de las formas*")[208].

The mirrored application suggested by the IACHR, however, doesn't seem to amount to a solution sufficiently apt to capture all the complexity of the effects of the 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 increasingly intertwined, the Venezuelan case looks like a cautionary tale of the complexity of a challenge that may arise in Latin American countries.

As the embeddedness of international human rights agreements in Latin American constitutions is still a relatively recent phenomenon, a mere mirrored application for withdrawal from international agreements would still seem like an insufficient measure, with the potential of becoming a source of legal uncertainty. This application would not adequately address, for example, the question of the denunciation of treaties approved by a parliamentary simple

[206] Corte Interamericana de Derechos Humanos. Opinión Consultiva OC-26/20, "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". Advisory Opinion issued on November 9th, 2020. Available at https://www.corteidh.or.cr/docs/opiniones/seriea_26_esp.pdf.
[207] *Ibid.*, paragraphs 44-58.
[208] *Ibid*., paragraph 64.

majority but later incorporated into a state's constitutional bloc. In these cases, as the withdrawal would mean, in practice, an amendment to the constitution, a procedure that merely mirrored the procedure of an agreement's approval before its incorporation into the constitution (*e.g.*, through a simple parliamentary majority) still would 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[209].

A possible approach to safeguard separation of powers and international human rights embedded in the constitution could take inspiration from the constitution of Paraguay[210] or Argentina[211], 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 this increased threshold, constitutional systems would not only be able to guarantee parliamentary participation in the withdrawal from an international agreement but would also equalize the political costs of termination to the ones faced in the amendment of the constitution – as the termination of an international agreement, just like the adherence to it, will amount to a transformation in the constitutional order.

Thus, the establishment of a requirement of "constitutional-amendment-like" parliamentary majorities for the withdrawal from human rights treaties embedded in the constitutional bloc seems to address the issue better than a simple adoption of a mirrored proceeding. By establishing a specific requirement for a "constitutional-amendment-like" majority 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

[209] Bogdandy, Armin von. "Ius Constitutionale Commune en America Latina: Observations on Transformative Constitutionalism". AJIL Unbound, Vol. 109, 2017, p. 113.
[210] Constitución de La República de Paraguay, 1992, Art. 142.
[211] Constitución de La Nación Argentina, 1853, Art. 75(22).

originally approved through other types of procedures, preventing the transformation of the constitution by the president alone or by parliament through a simple majority originally required for the approval of the agreement, for example.

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, paragraph 3 of the Constitution[212], 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, such as Ecuador[213] and Bolivia[214]. In these 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, would add an additional layer of political check against the deconstruction of an agreement embedded in the constitution – inexistent under a mere application of a mirrored procedure.

In essence, the adoption of clearer constitutional requirements for constitutional-amendment-like parliamentary majorities seems a necessary adjustment to accompany the constitutionalization of international law and human rights, as seen in Latin America. By introducing such a procedure, constitutions would be able to prevent possible disputes between

[212] Constituição da República Federativa do Brasil, 2008, Art. 5, §3º: International treaties and conventions on human rights approved by both houses of the National Congress, in two different voting sessions, by three-fifths votes of their respective members, shall be equivalent to Constitutional Amendments".
[213] Constitución de La República Del Ecuador, 2008, Art. 420.
[214] Constitución Política Del Estado Plurinacional de Bolívia, 2009, Art. 257.

branches of government regarding the proceedings for *de facto* amendment of constitutions through engagement and disengagement in human rights international agreements, while also increasing the political costs of withdrawing from those agreements, enhancing treaty stability and the protection of the rights prescribed by them.

4.2. Presidential unilateral powers as a factor of international instability?

In 1966, Aaron Wildavsky famously argued that the U.S. had, in practice, not one but two presidencies: one for domestic affairs, and another for defense and foreign policy[215]. While on domestic matters the president's biggest challenges are to both elaborate good policies and find support among Congress, internationally its struggle is solely to identify a viable policy, as institutional settings advantage congressional deference to the executive power[216].

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"[217]. Second, the possession of a specialized bureaucracy creates an informational asymmetry favoring the president in the evaluation of foreign affairs issues[218]. Third, presidents face distinctive political and electoral incentives when dealing with foreign issues, if compared to the legislative power[219]. While foreign issues may seem far from legislators' agendas for

[215] Wildavsky, Aaron. "The Two Presidencies". Trans-action 4, 1966, p. 23.
[216] Ribeiro, Pedro Feliú; Pinheiro, Flávio. "Presidents, Legislators, and Foreign Policy in Latin America". Contexto Internacional, Vol. 38, No. 1, 2016, p. 471.
[217] 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, Vol. 70, No. 1, 2008, p. 4.
[218] *Ibid.*, p. 5.
[219] *Ibid.*

reelection[220], presidents are usually directly attached to foreign policy successes or failures, either rewarded or blamed for their outcomes[221].

As a result of these factors and aided by the imbalance in the regulation of constructive and deconstructive powers in foreign affairs, unilateral withdrawal from international agreements or organizations has also been employed by presidents as a political tool aimed at domestic audiences[222]. Withdrawal, in these cases, has been employed also as a means to offer the perception of materialization of a discourse for the "restoration of national sovereignty"[223].

While the backlash against internationalism has not been restricted to presidential countries[224], some features of presidential systems seem to attribute a higher degree of unchecked autonomy to presidents that may originate a particular source of instability to the international order. In presidential systems, unilaterality can be enhanced by the possibility of insulation of the executive branch in presidential systems, which may formulate and execute foreign policy without necessary 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 left to only one agent: the president himself, as the head of state and international state representative according to

[220] Hathaway. "Presidential Power over International Law: Restoring the Balance" (2009), p. 184
[221] Canes-Wrone et al. "Toward a Broader Understanding of Presidential Power: A Reevaluation of the Two Presidencies Thesis" (2008), p. 5.
[222] On a more specific approach related to withdrawal from international organizations, see Borzywoski, Inken von; Vabulas, Felicity. "When do Withdrawal Threats Achieve Reform in International Organizations?" Global Perspectives, Vol. 4, Issue 1, 2023, p. 13.
[223] Woolaver. "From Joining to Leaving: Domestic Law's Role in the International Legal Validity of Treaty Withdrawal" (2019), p. 73.
[224] *Ibid.*, pp. 73-104.

international law[225]. In this scenario, presidents may justify the unilaterality of their actions on plebiscitarian arguments, reminding the electoral majoritarian origin of their mandate[226]

The "first-movement advantage" enjoyed by the president seems especially relevant both domestically and internationally in the unilateral withdrawal from an international agreement. 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 to the international 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[227].

[225] Art. 67, Vienna Convention on the Law of Treaties, 1969.
[226] Linz, Juan J. "The Perils of Presidentialism". Journal of Democracy, Vol. 1, No. 1, 1990, p. 53.
[227] Cope, Kevin L.; Verdier, Pierre-Hughes; Versteeg, Milla. "The Global Evolution of Foreign Relations Law". The American Journal of International Law, Vol. 116:1, 2022, p. 10.

If the international order has seemed unprepared to face the backlash observed in the last decade[228], part of it may be attributed to the absence of domestic and international checks on deconstructive powers in foreign affairs. When leaders adopt unilateral actions and international agreements, institutions, and organizations are consequently disarranged, returning to a *status quo ante* that demanded decades of institutional construction may become harder or even impossible.

[228] Posner, Eric Andrew. "Liberal Internationalism and the Populist Backlash" (2017), p. 1.

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.

On one hand, executive branches' constructive powers in foreign affairs – *i.e.*, their ability to order the engagement of a state in international agreements – 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[229]. On the other hand, deconstructive powers – *i.e.*, the powers of disengagement of a state in international agreements – 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[231], the

[229] Art. 46, Vienna Convention on the Law of Treaties, 1969.
[230] Woolaver, Hannah. "From Joining to Leaving: Domestic Law's Role in International Legal Validity of Treaty Withdrawal" (2019), p. 96.
[231] *Ibid.*, p. 96.

development of such an understanding would offer a solution able to balance the imperatives of legal security that guides the international law of treaties while still guaranteeing states' sovereign equality.

On a domestic level, establishing clearer rules for parliamentary participation in the process of withdrawal from international agreements would add a layer of democratic accountability to foreign affairs decisions, reducing the degree of unilateral discretion of executive powers to terminate agreements that originally demanded parliamentary participation. In states where international agreements have become embedded in the constitutional system, the provision for parliamentary participation in their denunciation should ideally be accompanied by constitutional-amendment-like majorities requirements for its approval. By adopting this enhanced threshold, as presented on Chapter 4, constitutions would be apt to stop the executive power from unilaterally altering the constitutional order.

Internationally, expanding the number of domestic actors involved in the decision to terminate an international agreement or withdraw from an international organization would ultimately contribute to the establishment of a higher degree of stability and foreseeability in international affairs. Guaranteeing the engagement of the legislative power in the denunciation of international agreements would favor states' foreign engagements by boosting their credibility as international agents.

In conclusion, this work intended to highlight that both the processes of adherence and withdrawal from international agreements amount to forms of law-making that result in transformations of the international and domestic legal systems. The persistence of a gap in the regulation of constructive and deconstructive foreign affairs powers, therefore, seems to result in the maintenance of a potential source of instability of internal and international systems.

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ANNEX I

Presidential Powers for Unilateral Withdrawal from International Obligations in the Americas				
Country	**Is there a provision for legislative participation in treaty approval?**	**Article**	**Is there a provision for legislative participation in treaty withdrawal?**	**Article**
United States of America	Yes.	Art. II, Section 2: "He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur;" - Approval by the Senate.	No.	
Mexico	Yes.	Art. 76, I: "The Senate shall have the power to approve the international treaties and conventions subscribed by the President of the Republic, as well as his decision to end, condemn, suspend, modify, amend, withdraw reservations and make interpretative declarations related such treaties and conventions" - Approval by the Senate (exclusive power).	Yes.	Art. 76, I: "The Senate shall have the power to approve the international treaties and conventions subscribed by the President of the Republic, as well as his decision to end, condemn, suspend, modify, amend, withdraw reservations and make interpretative declarations related such treaties and conventions" - Senate has to approve President's decision to "end" a treaty.
Guatemala	Yes.	Art. 171, I: "I. To approve, before their ratification, the treaties, agreements, or any international settlement when:1. They affect the existing laws where this Constitution may require the same majority of votes; 2. They affect the power of the Nation, establish the economic or political union of Central America, whether partially or totally, or attribute or transfer competences to organs, institutions, or mechanisms created, within a communitarian juridical order to realize regional and common objectives in the Central American area [ámbito]; 3. They obligate the State financially, in proportion that it exceeds one percent of the Budget of the Ordinary Revenues or when the amount of the obligation is indeterminate; 4. They constitute a commitment to submit any matter to an international judicial or arbitration decision; 5. They contain a general arbitration	No.	

		clause or one for submission to an international jurisdiction;" + Presidential duty to get Congress' approval: art. 183, "j'" + "o" (presidential power to denounce treaties).		
Honduras	Yes.	Art. 16: "All international treaties must be approved by the National Congress before their ratification by the Executive branch". *Obs.: treaties involving exclusive competence of the Executive do not require Congressional approval (art. 21). Art. 205, (30): Congress' power to "approve or disapprove international treaties signed by the executive branch";	No.	
El Salvador	Yes.	Art. 131, 7th: the Legislative Assembly shall have the prerogative to "ratify the treaties or pacts made (celebre) by the Executive with other States or international organisms, or to refuse their ratification;"	No.	
Nicaragua	Yes.	Art. 150 (8): Presidential authority to "direct the international affairs of the Republic. To negotiate, conclude and sign treaties, covenants, or agreements and other instruments provided for in section 12 of Article 138 of the Political Constitution, [and submit them] to the National Assembly for approval".	No.	
Costa Rica	Yes.	Art. 7: The public treaties, the international agreements and the concordats, duly approved by the Legislative Assembly, will have from their promulgation or from the day designated by them, authority superior to that of the laws. Art. 121: "it corresponds exclusively to the Legislative Assembly: (...) 4. To approve or to disapprove the international agreements, public treaties and concordats.	No.	

Panama	Yes.	Art. 159 (3): the National Assembly has the function "To approve or disapprove, before ratification, treaties and international agreements negotiated by the Executive Branch;" Art. 184: "The following functions shall be exercised by the President of the Republic with the participation of the respective Minister: (...) 9. To direct foreign relations, to negotiate Treaties and international Agreements, which shall be submitted to the consideration of the Legislative Branch and authorize and to assign and receive diplomatic and consular agents";	No.	
Haiti	Yes.	Art. 98-3 (3): The attributions of the National Assembly are: (...) "3 - to approve or to reject the international treaties and conventions;" Art. 276: "The National Assembly may not ratify any international treaty, convention or agreement containing clauses contrary to this Constitution".	No.	
Dominican Republic	Yes.	Art. 93, "l": "The National Congress legislates and supervises in representation of the people. Consequently, it corresponds to it: (...) l. To approve or disapprove the international treaties and conventions that the Executive Power endorses;" Art. 128 (presidential powers): "1. In his condition as Chief of State it is his responsibility: (...) To make and sign international treaties and conventions and to submit them for the approval of the National Congress, without which they will neither be valid nor carry obligations for the Republic".		

Colombia	Yes.	Art. 150, (16): "It is the responsibility of Congress to enact laws. Through them, it exercises the following functions: (...) 16. To approve or reject treaties that the Government makes with other states or entities in international law". Art. 189, (2): It is the responsibility of the President of the Republic, as the chief of state, head of the government, and supreme administrative authority to do the following (...) 2. Direct international relations; appoint the members of the diplomatic and consular corps; receive the corresponding foreign officials; and make international treaties or agreements with other states and international bodies to be submitted to the approval of Congress. Art. 224. In order to be valid, treaties shall be approved by Congress. However, the President of the Republic may give temporary effect to treaties of an economic or commercial nature agreed upon in the context of international organizations which so provide. In such a case, as soon as a treaty enters into force provisionally, it shall be sent to Congress for its approval. If Congress does not approve the treaty, its application shall be suspended.	No.	

Venezuela	Yes.	Art. 154: "Treaties agreed to by the Republic must be approved by the National Assembly prior to their ratification by the President of the Republic, with the exception of those which seek to perform or perfect pre-existing obligations of the Republic, apply principles expressly recognized by the Republic, perform ordinary acts in international relations or exercise powers expressly vested by law in the National Executive"; Art. 187, (18): "It shall be the function of the National Assembly: (...) To approve by law any international treaties or agreements entered into by the National Executive, with the exceptions set forth in the present Constitution. Art. 236: "The following are attributions and duties of the President of the Republic: (...) 4. To direct the international relations of the Republic and sign and ratify international treaties, agreements or conventions".	No.	
Suriname	Yes.	Art. 103: "Agreements with other powers and with organizations based on international law shall be concluded by, or by authority of, the President and shall be, insofar as the agreements require, ratified by the President. These agreements shall be communicated to the National Assembly as soon as possible; they shall not be ratified and they shall not enter into force until they have received the approval of the National Assembly".	No.	
Brazil	Yes.	Art. 49, I: "The National Congress shall have exclusive powers: I. to decide definitively on international treaties, agreements or acts that result in charges or commitments encumbering the national patrimony"; Art. 84, VII: "The President of the Republic has the exclusive powers to: (...) VIII. conclude international treaties,	No.	Judicial discussion - ADI 1625 (STF).

		conventions and acts, subject to the approval of the National Congress;"		
Ecuador	Yes.	Art. 120, (8): "The National Assembly shall have the following attributions and duties, in addition to those provided for by law: (...) 8. To adopt or turn down international treaties in those cases whenever appropriate". Art. 147, (1): "The following are the attributions and duties of the President of the Republic, in addition to those stipulated by law: (...) 1. To observe and enforce the Constitution, laws, international treaties, and other legal regulations within the scope of his/her competency; (...) 10. To draw up the country's foreign affairs policy, to sign and ratify international treaties, and to remove from office ambassadors and heads of mission. Art. 418: "The President is responsible for signing or ratifying treaties and other international instruments. The President of the Republic shall inform the National Assembly immediately of all the treaties he/she signs, with a precise description of its nature and content. A treaty can only be ratified for its subsequent clearance or deposit, ten days after the Assembly has been notified of it".	Yes.	Art. 419: "The ratification or denunciation of international treaties shall require prior approval by the National Assembly in the following cases: 1. When referring to territorial or border delimitation matters. 2. When forging political or military alliances. 3. When they involve a commitment to enact, amend or repeal a law. 4. When they refer to the rights and guarantees provided for in the Constitution. 5. When they bind the State's economic policy in its National Development Plan to conditions of international financial institutions or transnational companies. 6. When they commit the country to integration and trade agreements. 7. When they attribute powers of a domestic legal nature to an international or supranational organization. 8. When they compromise the country's natural heritage and especially its water, biodiversity and genetic assets". Art. 420: "The ratification of treaties can be requested by referendum, citizen initiative or the President of the Republic. Denunciation of a treaty that has been adopted shall pertain to the President of the Republic. In the event of denunciation of a treaty adopted by the citizenry in a referendum, the same procedure that adopted the treaty shall be required".

Peru	Yes.	Art. 56: "Treaties must be approved by the Congress before their ratification by the President of the Republic, provided that they concern the following matters: Human rights. Sovereignty, dominion, or integrity of the State. National defense. Financial obligations of the State. Treaties that create, modify, or eliminate taxes that require modification or repeal of any law, or that require legislative measures for their application, must also be approved by the Congress." Art. 57: The President of the Republic may formalize or ratify treaties or accede to them without previous approval by the Congress in matters not contemplated in the preceding article. In all such cases, the President must notify the Congress. When a treaty affects constitutional provisions, it must be approved by the same procedure established to reform the Constitution prior to its ratification by the President of the Republic. Denunciation of treaties is within the power of the President of the Republic, who has the duty to notify the Congress. In the case of treaties subject to approval by Congress, such denunciation requires its previous approval.	Yes.	Art. 57: The President of the Republic may formalize or ratify treaties or accede to them without previous approval by the Congress in matters not contemplated in the preceding article. In all such cases, the President must notify the Congress. When a treaty affects constitutional provisions, it must be approved by the same procedure established to reform the Constitution prior to its ratification by the President of the Republic. Denunciation of treaties is within the power of the President of the Republic, who has the duty to notify the Congress. In the case of treaties subject to approval by Congress, such denunciation requires its previous approval.
Bolivia	Yes.	Art. 158, I, (14): legislative approval. Art. 258: "The procedures for approval of international treaties shall be regulated by the law." Art. 259: "I. Any international treaty shall require approval by popular referendum when it is requested by five percent of the citizens registered on the voting rolls, or thirty five percent of the representatives of the Pluri-National Legislative Assembly. These initiatives can be used also to request that the Executive Organ sign a treaty. II. The announcement of the	Yes.	Art. 260: "I. The repudiation of the international treaties shall follow the procedures established in the same international treaty, the general norms of international law, and the procedures established in the Constitution and the law for its ratification. II. The repudiation of ratified treaties must be approved by the Pluri-National Legislative Assembly before being executed by the President of the State. III. The treaties approved by referendum must be submitted to a new referendum prior to their repudiation by the President of State.

		convocation of a referendum shall suspend, according to the time periods established by law, the process of ratification of the international treaty until the results are obtained".		
Paraguay	Yes.	Art. 141: "International treaties validly celebrated, approved by [a] law of the Congress, and whose instruments of ratification were exchanged or deposited, are part of the internal legal order with the hierarchy determined in Article 137". Art. 202: "[The following] are duties and attributions of the Congress: (...) 8. to approve or to reject the treaties and other international agreements signed by the Executive Power";	Yes.	Art. 142: "The international treaties relative to human rights may only be denounced by the procedures that govern for the amendment of this Constitution" (thus, demanding approval by Congress only for human rights treaties).
Uruguay	Yes.	Art. 85: "The General Assembly is competent: (...) 7. To declare war and to approve or disapprove, by an absolute majority of the full membership of both Chambers, the treaties of peace, alliance, commerce, and conventions or contracts of any nature which the Executive Power may make with foreign powers". Art. 168, (20): "The President of the Republic, acting with the respective Minister or Ministers, or with the Council of Ministers, has the following duties: (...) 20. To conclude and sign treaties, the approval of the Legislative Power being necessary for their ratification".	No.	

Argentina	Yes.	Art. 75, (22): "The Congress shall have power: (...) To approve or reject treaties entered with other nations and with international organizations, and concordats with the Holy See. Treaties and concordats have higher standing than laws". Art. 99, (11): "The President of the Nation has the following powers: (...) 11.He concludes and signs treaties, concordats, and other negotiations required for the maintenance of good relations with international organizations and foreign nations, and receives their Ministers and admits their consuls".	Yes.	Art. 75, (24): To approve treaties of integration which delegate competence and jurisdiction to international organizations under conditions of reciprocity and equality, and which respect the democratic order and human rights. Any rules enacted pursuant thereto have higher standing than laws. The approval of these treaties with Latin American States shall require the absolute majority of the totality of the members of each Chamber. In the case of treaties with other States, the National Congress, by an absolute majority of the members present in each Chamber, shall declare the desirability of approving the treaty, and it shall only be approved by an absolute majority vote of the totality of the members of each Chamber, one hundred and twenty days after the declaratory act. Denunciation of any of the treaties mentioned in this clause shall require the prior approval of an absolute majority of the totality of the members of each Chamber.
Chile	Yes.	Art. 54, (1): "The powers of the Congress are: "To approve or reject the international treaties presented by the President of the Republic prior to their ratification.	Yes.	Art. 54 (1): "The powers of the Congress are: (...) It corresponds to the President of the Republic the exclusive power to denounce a treaty or withdraw from it, for which he shall ask for the opinion of both branches of the Congress, in the case that the treaties have been approved by it. Once the denunciation or withdrawal has produced its effects in conformity with the provisions of the international treaty, it shall cease to have effect in the Chilean legal system. In the case of the denunciation or withdrawal from a treaty that was approved by Congress, the President of the Republic shall inform of that to it within fifteen days of effecting the denunciation or withdrawal. The withdrawal of a reservation that has been made by the President of the Republic and that the National Congress took into account at the time of approving a treaty, will require previous agreement of it, pursuant to the provisions of the respective constitutional organic law. The National Congress shall pronounce itself within thirty days counted from the reception of the request in which the corresponding agreement is required. If it does not pronounce itself within this period, it shall be deemed to have approved the withdrawal of the reservation".

All constitutions listed on Annex I have been originally consulted by the Author in their original language. To ensure publicity of the sources of this thesis beyond language barriers, the translations to English language presented in Annex I have been borrowed from the database of the Comparative Constitutions Project - https://www.constituteproject.org/.