INTERNATIONAL DECISIONS

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Treaty withdrawal—Brazilian practice—Brazilian judicial decisions—Brazilian Supreme Court—Domestic Application of International Law—Congressional participation in international law acts

DECLARATORY ACTION OF CONSTITUTIONALITY N. 39 OF BRAZILIAN SUPREME COURT. *At* https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=769924148. Supremo Tribunal Federal, August 18, 2023.

On August 18, 2023, the Brazilian Supreme Court (Supremo Tribunal Federal or STF) resolved a long-standing debate[1] over the need for parliamentary approval for the Brazilian withdrawal from international treaties. In its decision on Declaratory Action of Constitutionality N. 39 (ADI N. 39), the Brazilian Supreme Court determined that the denunciation by the president of the republic of international treaties that have been approved by the National Congress, in order to produce effects in the domestic legal system, must also be approved by Congress.[2] In setting the precedent for Brazil's internal practice for withdrawal from treaties, the decision contributes to a broader regional discussion, which has also taken place in other national jurisdictions[3] and at the Inter-American Court of Human Rights, about the withdrawal from treaties and the democratic participation in international acts.[4]

[1] MARCIO PEREIRA PINTO GARCIA, TERMINAÇAO DE TRATADO E O PODER LEGISLATIVO À VISTA DO DIREITO INTERNACIONAL, DO DIREITO COMPARADO E DO DIREITO CONSTITUCIONAL INTERNACIONAL BRASILEIRO (1st ed. 2011) observes that historically the question divided scholarship: "Clóvis Beviláqua, Pereira de Araújo, Sette Câmara and Francisco Rezek believe that preliminary congressional preliminary congressional consultation is unnecessary, while Pontes de Miranda, Albuquerque Mello, Arnaldo Süssekind and Pedro Dallari believe that it is imperative" (translation my own).

[2] Declaratory Action of Constitutionality N. 39 (Supremo Tribunal Federal Aug. 18, 2023) (Braz.), *at* https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=769924148 (translation my own).

[3] *See, e.g.*, Hannah Woolaver, *From Joining to Leaving: Domestic Law's Role in the International Legal Validity of Treaty Withdrawal*, 30 EUR. J. INT'L L. (2019); Edward T. Swaine, *International Foreign Relations Law: Executive Authority in Entering and Exiting Treaties*, *in* ENCOUNTERS BETWEEN FOREIGN RELATIONS LAW AND INTERNATIONAL LAW: BRIDGES AND BOUNDARIES (Helmut Philipp Aust & Thomas Kleinlein eds., 2021); Laurence R. Helfer, *Treaty Withdrawals in a Turbulent World: A Retrospective on Exiting Treaties*, *in* LEADING WORKS IN INTERNATIONAL LAW (Donna Lyons ed., 2023); Ntombizozuko Dyani-Mhango, *South Africa's (Unconstitutional) Withdrawal from the Rome Statute: A Note on* Democratic Alliance v. Minister of International Relations and Cooperation, 34 S. AFR. J. HUM. RTS. 268 (2018).

[4] Lucas C. Lima, *Should I Stay or Should I Go? The Effects of Denunciation of the American Convention and the Inter-American Court of Human Rights' Advisory Opinion 26/2020*, 80 QUESTIONS INT'L L. 1 (2021).

The 2023 decision on the ADI N. 39 focuses on Presidential Decree No. 2100 of December 20, 1996,[5] which formalizes within the domestic legal order Brazil's denunciation of International Labour Organization (ILO) Convention No. 158 on the Termination of the Employment Relationship at the Initiative of the Employer.[6] The denunciation was publicly contested for allegedly diminishing labor rights,[7] which prompted the applicants, the National Confederation of Trade in Goods, Services and Tourism (CNC), and others to pursue a declaratory action of constitutionality requiring the Supreme Court to determine whether the denunciation was legally valid.

The Supreme Court's decision emphasizes the need for democratic participation in the conduct of foreign policy,[8] which is advanced by requiring parliamentary approval for the withdrawal from treaties. If in the past there was doctrinal disagreement as to whether the president of the republic had to submit their decision to parliament in order to denounce a treaty, this was not the issue that divided the Court. No concurring or dissenting opinion opposed the need for congressional approval. The point that led to disagreement instead concerned the application of this principle to the treaty at issue. To avoid uncertainty regarding past instances of treaty denunciation, the Court imposed this requirement only for future denunciations of international treaties. As a consequence, the STF affirmed that the Decree No. 2100 was valid—even though this denunciation had not been approved by parliament. The decision is yet another example of the growing practice of the Brazilian judiciary addressing foreign relations,[9] insofar as it imposes, in the name of democratic participation, a new requirement on the exercise of the powers of the executive branch.

At first glance, the ADI N. 39 judgment can be understood as merely a domestic decision interpreting a state's internal procedures in relation to the withdrawal of treaties. Yet it is also possible to discern several implications of the decision for the national, regional, and global spheres.

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Like many national constitutions, the Brazilian Constitution does not expressly regulate the procedural requirements for withdrawing from international treaties. Article 49(I) of the 1988 Constitution prescribes only that "the National Congress has exclusive power to decide conclusively on international treaties, agreements or acts that result in charges or commitments that are onerous to the national property."[10] The doctrinal debate about the

[5] Decreto No. 2100, Presidente da República, 20 de Dezembro de 1996.

[6] The issue had previously been discussed in Direct Action of Unconstitutionality 1.625, decided in June of 2023. However, the decision was not final and there were still some aspects of the case that would only be finally decided in ADC 39.

[7] On the question, see Daniel Damasio Borges, *E se o Supremo Tribunal Federal (STF) restabelecer a vigência da Convenção n. 158 da Organização Internacional do Trabalho (OIT) na ordem jurídica brasileira?: Sobre uma possível reviravolta, pela via do direito internacional, das leis trabalhistas brasileiras*, 15 Rev. Direito Int'l 137 (2018).

[8] *See* Dawisson Belém Lopes, Política externa e democracia no Brasil (2013); Michelle Ratton Sanchez Badin, Elaini CG da Silva, Evorah L. Cardoso & Priscila Spécie, *Política externa como política pública: Uma análise pela regulamentação constitucional brasileira (1967–1988)*, 27 Revista de Sociologia Política (2006).

[9] M. R. Sanchez Badin & Cassio França, *Análises e propostas: A inserção internacional do poder executivo federal brasileiro*, Friedrich Ebert Stiftung (2010); Daniel Damásio Borges, *Sobre o controle jurisdicional da política externa - notas acerca do caso Battisti no STF*, 10 Rev. Direito GV 221 (2014).

[10] Federal Supreme Court, Constitution of the Federative Republic of Brazil, Art. 49(I), *at* https://www.stf.jus.br/arquivo/cms/legislacaoConstituicao/anexo/brazil_federal_constitution.pdf.

interpretation of this provision has centered upon the interpretation of the term "to decide conclusively." In delimiting executive power, the Constitution (Art. 84, VIII) provides that "the President of the Republic shall have the exclusive power . . . to conclude international treaties, conventions and acts, *ad referendum* of the National Congress." While both the Constitutional text and Brazilian practice are clear in the sense of requiring parliamentary approval for the ratification of treaties, the Constitutional text is silent about whether congressional approval is also required for withdrawing from treaties.[11] Brazilian settled practice was to recognize the president's powers to withdraw unilaterally from a treaty. This happened, for instance, in relation to the treaty establishing the League of Nations and fourteen other ILO Conventions. Thus, the ADI N. 39 decision reverses the previous understanding of Brazilian practice.

To reach its conclusion, Justice Dias Toffoli, who delivered the majority opinion, based their reasoning on two principles of the Brazilian legal system: first, the principle of legality (Art. 5, II of the Brazilian Constitution); and, second, the principle of legal certainty (Art. 5, XXXVII of the Brazilian Constitution).

According to the Brazilian Supreme Court, the principle of legality authorizes the creation of new obligations only when the government follows appropriate legal procedures, and one of these procedures is the coordinated action between the president and the parliament for assuming new international obligations. In the words of the Court, "Article 49 of the Constitution prescribes that a combination of wills is necessary for the Brazilian State to adhere to the terms of an international treaty." "[I]n other words, it requires convergence of the powers of the President of the Republic, who is responsible for concluding the agreement, and the National Congress, which controls and oversees it, authorizing its ratification by the head of the Executive Power."[12] The principle of legal certainty imposes a duty on public authorities not to undermine acquired rights and situations already established in the legal system. Thus, for the STF to recognize the unconstitutionality of Decree No. 2.100 "would mean opening up the possibility of invalidating all acts of unilateral termination practiced to date in various periods of national history,"[13] which would constitute an offense to the principle of legal certainty.

Justice Dias Toffoli seemed to attach importance to the fact that, on the international stage, the denunciation had already been completed in accordance with the procedures set out in the Convention. He argued that, because of the president's denunciation in 1996, "for the International Labor Organization and for the other member states that have ratified the document, Brazil is no longer bound by the terms of the Convention." Thus, the remaining question was the legal effects of such a denunciation within Brazilian legal order. Invalidating the Decree could produce the odd result of the treaty's obligations being terminated internationally but remaining in place domestically (at least, until the parliament acts to terminate the treaty domestically, as the parliament did with the ILO Convention 158). In such cases, Brazil may have obligations that flow (indirectly) from the treaty, but not enjoy any treaty rights (as withdrawal on the international level was already perfected). Justice Dias Toffoli

[11] *Id.* Art. 84(VIII) (emphasis in original). On the question, see: GEORGE RODRIGO BANDEIRA GALINDO, TRATADOS INTERNACIONAIS DE DIREITOS HUMANOS E CONSTITUIÇÃO BRASILEIRA (2002); JOSÉ CARLOS DE MAGALHÃES, O SUPREMO TRIBUNAL FEDERAL E O DIREITO INTERNACIONAL (2000); PEDRO B. A. DALLARI, CONSTITUIÇÃO E TRATADOS INTERNACIONAIS (2003); JOSÉ FRANCISCO REZEK, DIREITO DOS TRATADOS (1984).

[12] Declaratory Action of Constitutionality N. 39, *supra* note 2, at 23.

[13] *Id.* at 41.

wrote that the revocation of the treaty in the Brazilian legal system "must be effected by an equivalent and subsequent norm."[14] This means that, if the norm flows from a treaty, its repeal must follow the same procedures as required for the incorporation of treaties. Because international treaties become Brazilian legislation when they are incorporated, a special legal act is required for their effects to cease.

Arguments sounding in democratic theory and "the democratic principle" played a pivotal role in the Court's reasoning. Applying an argument of parallelism of forms, the Court found that "the possibility of unilateral denunciation of treaties violates the democratic principle and popular sovereignty, because, as the international treaty entered the domestic legal order through a referendum of the National Congress, its suppression also presupposes the popular seal through elected representatives."[15] Therefore, the principles of legality and democratic system of government, would require that any denunciation of a treaty by Brazil should follow the same procedure for its incorporation.

However, the Court decided that this reasoning should not be applied to the 2100 Decree. While the approval of parliament is required for *future* treaty denunciations, in the present case, the Court understood that the principle of legal certainty creates an exception to the general rule. In this regard, the separate dissenting opinions of Justice Fachin and Justice Weber converged. Both argued that, since the principle of legality required parliamentary approval to denounce a treaty, Presidential Decree No. 2100 would be invalid for not having respected this procedure. Their basic argument went to the risk of undermining internationally protected human rights, a principle also enshrined in the Constitution.[16] However, this argument did not convince the majority, which preferred to create an exception for Decree No. 2.100 in the interest of legal certainty.

Despite having resolved the longstanding jurisprudential controversy, the Brazilian Supreme Court also made an appeal to the Brazilian parliament "to draw up rules on the denunciation of international treaties, providing for the approval of the National Congress as a condition for them to produce effect in the domestic legal order, since this would be a democratic imperative and a requirement of the principle of legality." To date, parliament has not initiated any such procedure to regulate the denunciation of international treaties. It remains to be seen whether it will do so.

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Three implications arise from the decision of the Brazilian Supreme Court on the practice relating to the denunciation of international treaties. Firstly, there is a risk of ineffectiveness with regard to the Brazilian practice of denunciation. Secondly, it can be read as a judicial decision dealing with the notion of "full powers" to denounce a treaty in the terms of the Vienna Convention on the Law of Treaties. Thirdly, the decision contributes to a certain trend in the regional practice of requirement of parliamentary approval for withdrawal from international treaties.

[14] *Id.* at 31

[15] *Id.* at 32.

[16] To Justice Fachin, the prevalence of human rights, a guiding principle of the constitution (Art. 4o. II), should play a role. He also mentioned Art. 5o. para 2, which prescribes: "the rights and guarantees expressed in this Constitution do not exclude others arising from . . . international treaties to which the Federative Republic of Brazil is a party" in Declaratory Action of Constitutionality N. 39, *supra* note 2, Voto do Ministro Fachin at 6.

Domestically, the Brazilian Supreme Court judgment has the inherent risk of being ineffective in shaping presidential practices on denunciation. The decision of the Brazilian Supreme Court does not impose a clear obligation on the president of the republic to consult the legislative branch before denouncing a treaty. Indeed, a denunciation made by the executive branch without the approval of Congress would be considered valid in the international sphere. Consequently, in looking forward, it may be desirable, in order to avoid inconsistent situations, to require the two acts (the international denunciation and the repeal of domestic law) to be carried out together. Within the Brazilian legal system, a lawsuit can seek only to remove the internal effects of the decision, as occurred in ADI N. 39. As Justice Dias Toffoli observed in relation to the ILO Convention No. 159, "Brazil is no longer bound by the terms of the Convention, in view of the recognition of the effects of the denunciation at the international level, which can be confirmed by a simple search on the ILO website."[17] A subsequent judicial remedy to declare any denunciation invalid would only have *a posteriori* effects and could not be taken into consideration internationally. If the Supreme Court had specified that denunciation of an international treaty *depends* on congressional approval, the efficacy of the Brazilian Supreme Court's decision would likely increase. As it now stands, the president may continue to denounce treaties internationally and then rely on the principle of legal certainty to claim their domestic effects must also cease.

An interesting move made by ADI N. 39 to tackle the potential ineffectiveness is to call on the legislative branch to regulate the matter. On the one hand, it is possible to read this appeal as an attempt to legitimize the Court's conclusion by some elements of representative democracy. The Court makes an important decision on the future of the president's powers in the international sphere, but also calls on the legislative branch to regulate this restriction of power—on the condition that it does not disagrees with the conclusion that parliamentary approval is required for denunciation of treaties. To a certain extent, it is the Brazilian Supreme Court paying tribute to the balance of powers in the context of foreign relations law. On the other hand, the appeal seems to reveal the Court's awareness of the potential consequences of its decision. In this sense, the appeal to Congress can be read as an act of coherence on the part of the Supreme Court: if the participation of the legislative power is necessary to determine the withdrawal of treaties, it is also its function to regulate this power and not to the judicial branch to decide it in the case law.

The decision also has international implications. Because the 1969 Vienna Convention on the Law of Treaties does not regulate domestic procedures for acceding to or withdrawing from an international treaty, one can speculate whether it contributes to the interpretation of the notion of "full powers" to withdraw from a treaty. The Vienna Convention regulates the withdrawal from treaties by requiring that any notification be made in writing (Art. 65) and with the full powers of the state (Art. 67). In particular, Article 67.2 of the Convention prescribes that "if the instrument [of notification] is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers."[18] Article 67 presumes that the full powers for denunciation exist for certain state officials within the executive branch. The ADI N. 39

[17] Declaratory Action of Constitutionality N. 39, *supra* note 2, at 17.

[18] Vienna Convention on the Law of Treaties, Art. 67.2, May 23, 1969, 1155 UNTS 331, *at* https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

decision could be read as a practice that refutes this presumption at least in relation to the Brazilian legal system since one might argue that, given the need for legislative approval, the notion of "full powers" requires both executive and parliamentary action—at least from the domestic side of the story. However, the Brazilian Supreme Court did not seem to dwell on questions regarding the validity of denunciation on the international level. It simply ruled that presidential action alone is sufficient to terminate the treaty's effects on the domestic level.

Regionally, the ADI N. 39 decision brings Brazil into line with a series of Latin American states that also require legislative consent for treaty denunciation. This trend was noted in *Advisory Opinion No. 26 of 2020*[19] of the Inter-American Court of Human Rights, which was called upon to analyze, *inter alia*, the procedures and effects of the denunciation of the American Convention on Human Rights. According to the Inter-American Court, "in countries where the domestic procedure for denouncing treaties is regulated by the Constitution, there is a marked tendency to require the participation of the legislative branch as a necessary condition for a democratic society."[20] It seems relevant to note that the Inter-American Court spoke of a "marked tendency" and not an "emerging practice"—perhaps to avoid any inferences regarding customary international law. In view of these observations by the Inter-American Court—which identified a similar trend in other[21] states parties to the American Convention—it is possible to read the ADI N. 39 decision as yet another element of practice confirming the need for congressional approval. To the extent that this practice is relevant, one could argue for the emergence of a regional trend on the denunciation of treaties. The Inter-American Court seems to welcome this practice insofar as it understands that the denunciation of a human right treaty "must be subject to a pluralistic, public and transparent debate within the States, as it is a matter of great public interest because it implies a possible curtailment of rights and, in turn, of access to international justice."[22] Although in the ADI N. 39 there is no direct mention of the Inter-American Court of Human Rights' (IACtHR) opinion, the emphasis on human rights is reflected in the dissenting opinions of Justice Fachin and Justice Weber.

The growing trend of requiring parliamentary approval for the denunciation of treaties, which can be perceived as a limitation on presidential powers, may also have political implications. If the American continent is going through a period of turbulence in relation to the internal political divisions of its states, which often manifests itself in clashes between distinct branches of government, the consolidation of the need for agreement between the legislative and executive branches could mean greater difficulty in achieving this goal. Future practice regarding the denunciation of treaties in Brazil and Latin America, if any, will reveal the extent to which democratic values, the principle of legal

[19] Advisory Opinion OC-26/20, Denunciation of the American Convention on Human Rights and the Charter of the Organization of American States and the Consequences for State Human Rights Obligations, Inter-Am. Ct. H.R. (Ser. A) No. 26 (Nov. 9, 2020).

[20] *Id.*, para. 62.

[21] The IACtHR pointed out that Argentina, Bolivia, Chile, Ecuador, Mexico, Paraguay, and Peru have domestic constitutional provisions requiring the approval of the legislative body to denounce a treaty and Brazil, Colombia, Costa Rica, El Salvador, Haiti, Honduras, Nicaragua, Panama, Dominican Republic, Suriname, Uruguay, and Venezuela have domestic constitutional provisions the approval of international treaties by the legislative branch prior to the action of the executive branch, or else through a subsequent referendum.

[22] Advisory Opinion OC-26/20, *supra* note 19, para 64.

certainty and the competition between the powers of government will be weighed up in this complex political context.

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African Court on Human and Peoples' Rights—environment—corporate accountability—human rights—business and human rights—corporate liability—corporate responsibility—African Charter on Human and Peoples' Rights

Ligue Ivorienne des Droits de L'Homme and Others v. Cote D'Ivoire. App. No. 041/2016. *At* https://www.african-court.org/cpmt/storage/app/uploads/public/64f/ebd/f77/64febdf77f811512395983.pdf.
African Court on Human and Peoples' Rights, September 5, 2023.

On September 5, 2023, the African Court on Human and Peoples' Rights rendered its judgment in *Ligue Ivorienne des Droits de l'Homme and Others v. Cote d'Ivoire* before the African Court on Human and Peoples' Rights (ACtHPR, African Court). The case was initiated due to highly toxic waste dumped at several sites in Abidjan, Ivory Coast, by the ship Probo Koala, which was chartered by Trafigura limited, one of the largest independent traders of oil and petroleum products in the world. The incident led to the death of seventeen people from toxic gas inhalation, as well as numerous health issues and serious consequences to the environment. The case went to the ACtHPR after failed efforts to secure justice through Ivory Coast's domestic courts. It is particularly noteworthy for its developments of corporate accountability for human rights violations. Indeed, this is the first decision rendered by the ACtHPR regarding the obligation of state parties relating to corporate activities.

The three plaintiffs, the organizations *Ligue Ivoirienne des Droits de l'Homme* (LIDHO), *Mouvement Ivoirien des Droits Humains (*MIDH), and International Federation for Human Rights (FIDH), alleged the violation of five principal rights by Ivory Coast (para. 16).[1] The African Court concluded that the Ivory Coast had violated all five.

First, the African Court found that the Ivory Coast violated the right to an effective remedy (para. 163). It reasoned that, given the magnitude of the disaster, "the domestic courts had the obligation to extend the scope of the investigations in order to take into account the cases of all the victims and award them the reparations as necessary"

[1] These were the right to an effective remedy (Article 7(1)(a) read in conjunction with Article 26 of the Charter; Article 2(3) of the International Covenant on Civil and Political Rights (ICCPR); Article 2(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR); Article 4(1) and 4(4)(a) of the Convention on the Ban of the Import into Africa of Hazardous Wastes and the Control of Transboundary Movements of Hazardous Wastes Within Africa (Bamako Convention)); the right to respect for life and physical and moral integrity of the person (Articles 4 of the Charter and 6(1) of the ICCPR); the right to enjoy the best attainable state of physical and mental health (Articles 16 of the Charter and 11(1), and 12(1) and (2)(b) and (d) of the ICESCR); the right of peoples to a general satisfactory environment favorable to their development (Article 24 of the Charter); and the right to information (Articles 9(1) of the Charter and 19(2) of the ICCPR).