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**Incorporation proceedings of international agreements into the Brazilian legal framework:
an introductory study aiming at the enhancement of the Brazilian legislation**

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Introduction

The main objective of this work is to identify how the Brazilian legislation can be modified in order to speed up the process of incorporation, into the internal legal framework, of agreements related to Brazil's association to international organizations which involve the payment of contributions. This research relies on the author's working experience in the Legal Advisory Department of the Brazilian Ministry of Planning, Budget and Management.

The first chapter analyses the necessary proceeding for the making of international agreements and their incorporation into the Brazilian legal framework through a thorough examination of the norms of the 1969 Vienna Convention on the Law of Treaties. The chapter also examines the norms established by the 1988 Brazilian Constitution. In Brazil, such proceeding can be divided in four phases: (a) negotiation and signature; (b) approval by the National Congress; (c) ratification; and (d) promulgation by the President and publication by the official press. Special attention is given to the phase of approval of international agreements by the National Congress, including the controversy concerning the existence of executive agreements within the Brazilian Law (agreements made only by the President).

Chapter two focuses on consultations made by the Secretariat of International Issues of the Ministry of Planning, Budget and Management to the Legal Advisory Department of the same Ministry, since the beginning of 2009. These consultations were related to the payment of contributions to international organizations and other transnational institutions. The Secretariat enquired about the possibility of making payments to international organizations, particularly, in situations where it considered that some of the indispensable phases for the incorporation of the international agreement into the Brazilian legal framework had not been complied. Special attention is given to the analysis of the arguments raised by the Legal Advisory Department of the Ministry of Planning, Budget and Management.

Chapter three studies the proceedings of the US treaty-making model. The evolution of the US model is examined, as well as its peculiarities, with the aim of defining if it is a feasible model or if the adoption of any feature of this model for the improvement of the Brazilian Law on this matter is desirable.

Chapter four is conclusive and presents two alternatives aiming at the enhancement of the model of incorporation, into the country's internal legal framework, of agreements of Brazil's association to organizations which foresee the payment of contributions.

1. The making of international agreements and their incorporation into the internal legal framework: a study of the Brazilian legislation

1.1 International phases: negotiation, signature and ratification

In Brazil, the making of international agreements assume, in general, the adoption of a series of formalities which can be grouped in four phases: phase one, negotiation and signature; phase two, approval of the text by the Legislative Power; phase three, ratification; and, phase four, promulgation and publication of the text by the official press. The first and third phases take place at the international level, whereas the second and the fourth follow the rules of the internal law of each State. For didactical reasons, this work will examine first the international phases.

In relation to the international phases, the making of agreements between States is regulated by the Vienna Convention on the Law of Treaties from May 23, 1969 (UNITED NATIONS, 2005a). In Brazil, the Convention was approved by the Congress through the Legislative Decree N. 496, dated July 17, 2009 (DIÁRIO OFICIAL DA UNÃO, 2009a), and promulgated by the President through the Decree N. 7030, dated December 14, 2009 (DIÁRIO OFICIAL DA UNÃO, 2009b). It is worth mentioning that, although the 1969 Vienna Convention was only formally incorporated to the Brazilian legal framework in 2009, the rules of this Convention always oriented the country's government in matters concerning international agreements.

As for the agreements between States and international organizations or between international organizations, the issue was subject of intense negotiations at international level and resulted in the signature of the Vienna Convention on the Law of Treaties between States and international organizations, or between international organizations, on March 21, 1986. However, this Convention has not been internationally enforced, since the minimal number of ratifications of its text has not been achieved yet¹.

¹ Article 85
Entry into force

It is necessary to emphasize that the two Conventions are very similar, in such a way that, practically, all the analysis of the 1969 Vienna Convention on the Law of Treaties can be used for the study of treaties concluded between States and international organizations and between international organizations.

The objective of this research work is to analyze the Brazilian proceedings of association to international organizations (agreements signed between Brazil and other States with the aim of creating an international organization or agreements signed between Brazil and already existing international organizations). This would require the study of the two Conventions. However, due to the similarities of the Conventions and considering that the 1986 Convention has not been enforced yet internationally, the analysis will concentrate on the proceedings of the 1969 Vienna Convention since it has already been incorporated to the Brazilian legal framework.

The procedure for the making of treaties starts with the negotiations between the subjects of Public International Law. Within the State, normally, the one who has the power to conduct the negotiations is the head of State. According to José Francisco Rezek:

A autoridade do chefe de Estado no domínio da celebração de tratados internacionais não conhece limites: ele ostenta, em razão do cargo, idoneidade para negociar e firmar o acordo, e ainda para exprimir – desde logo, ou mediante ratificação ulterior – o consentimento estatal definitivo. ² (REZEK, 1984, p. 205)

The 1988 Constitution of the Brazilian Federal Republic establishes in Article 21, I, the competence of the Union regarding the relationship with other States, as well as the participation in international organizations. It is worth noticing that the Union, when exercising the responsibility defined in Article 21, does not act in its name, but in the name of the Federative Republic of Brazil. Article 21, I, determines that:

Art. 21. Compete à União:

1. The present Convention shall enter into force on the thirtieth day following the date of deposit of the thirty-fifth instrument of ratification or accession by States or by Namibia, represented by the United Nations Council for Namibia.

[...]. (UNITED NATIONS, 2005b)

² “The authority of the head of State in the realm of conclusion of international treaties has no limits: due to his position, he is entitled to negotiate and sign the agreement, and even to express – right away, or through posterior ratification – the definitive state consent.”

I - manter relações com Estados estrangeiros e participar de organizações internacionais; ³
(DIÁRIO OFICIAL DA UNIÃO, 1988)

In Article 84, VIII, the constitutional text defines the competence of the President in relation to the making of international agreements.

Art. 84. Compete privativamente ao Presidente da República:

[...]

VIII – celebrar tratados, convenções e atos internacionais, sujeitos a referendo do Congresso Nacional; ⁴ (DIÁRIO OFICIAL DA UNIÃO, 1988)

According to this Article, the President is the sole responsible for the negotiations and signature of international agreements, but this competence is not exclusive since it can be delegated. Normally, this delegation is accomplished with the issuance of a “full powers” document, which gives to its holder - also called plenipotentiary – powers to negotiate with other subjects of Public International Law, in name of the State and within the limits imposed by the State. However, the presentation of the referred document is not necessary when the authority involved is the Minister of Foreign Affairs or the Head of a diplomatic mission (ambassador or a negotiating commissioner) for the purpose of adoption of the text of a treaty between the accrediting State and the State in relation to whom they are accredited. Article 7 of the 1969 Vienna Convention reads as follows:

Art. 7

[...]

2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State:

(a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty;

(b) heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited; (UNITED NATIONS, 2005a)

The negotiations which precede the signature of an international agreement vary according to the number and type of participants. When the situation involves two States, the negotiations start in an informal way, whereby one of the States sends a diplomatic note to the

³ “Art. 21. the Union’s responsibility is:

I – to maintain relations with foreign states and take part in international organizations.”

⁴ “Art. 84. The President of the Republic is sole responsible:

[...]

VIII – to make treaties, conventions and international acts, subject to a referendum of the National Congress;”

other. In the hypothesis of agreements between a State and an international organization, the talks normally take place in the headquarters of the organization. By last, negotiations of multilateral agreements usually occur within an international organization or in an international conference specially organized for this purpose (MAZZUOLI, 2010). However, as it was well observed by the Brazilian jurist José Francisco Rezek,

Não há regras, ainda que costumeiras, neste domínio. A decisão de pactuar, a aproximação, a iniciativa de propor o entendimento com vistas a um tratado, tudo isso se deixa reger pelo acaso, pela variedade circunstancial.⁵ (REZEK, 1984, p. 186)

At the end of the negotiations, but before the signature of a treaty, the participants work towards the adoption of the text, according to Article 9 of the Vienna Convention on the Law of Treaties. It is important to highlight that adoption of the text is not to be confounded with its signature. Article 9 of the 1969 Vienna Convention reads:

Article 9

Adoption of the text

1. The adoption of the text of a treaty takes place by the consent of all the States participating in its drawing up except as provided in paragraph 2.
2. The adoption of the text of a treaty at an international conference takes place by the vote of two thirds of the States present and voting, unless by the same majority they shall decide to apply a different rule. (UNITED NATIONS, 2005a)

The signature does not imply the State's obligatoriness of approving the content of the international agreement (this activity, normally, is a responsibility of the Legislative Power), nor ratifying it. The signature represents the authentication of the text of the treaty and also the State's intention in going on with the proceedings initiated with the negotiations. Article 10 of the 1969 Vienna Convention states that:

Article 10

Authentication of the text

The text of a treaty is established as authentic and definitive:

- (a) by such procedure as may be provided for in the text or agreed upon by the States participating in its drawing up; or
- (b) failing such procedure, by the signature, signature ad referendum or initialling by the representatives of those States of the text of the treaty or of the Final Act of a conference incorporating the text. (UNITED NATIONS, 2005a)

⁵ *"there are no rules, even if they are usual, in this domain. The decision to make a pact, the approximation, the initiative of proposing the understanding aiming at a treaty, all these are left to be ruled by hazard, by the circumstantial variety"*.

In fact, according to Valério de Oliveira Mazzuoli, the signature “significa apenas o aceite precário e formal ao tratado, não acarretando (salvo a exceção do art. 12 da Convenção de 1969) efeitos jurídicos vinculantes.”⁶ (MAZZUOLI, 2010, p. 189)

The other international phase is the definitive expression of the State’s consent in submitting itself to the international agreement. In general, this expression of consent is officially made after the international agreement’s approval by the institution which is appointed by the Constitution of each State as being responsible for its analysis (in Brazil, the National Congress).

Even though the definition of the institution or authority responsible for expressing the State’s consent is a constitutional matter of each State, other proceedings which are undertaken during this phase are submitted to the rules of the Public International Law.

In Brazil, according to the Article 84, VIII, of the 1988 Constitution, such incumbency is the President’s as the head of State (DIÁRIO OFICIAL DA UNIÃO, 1988). However, this incumbency can be delegated with the issuance of a “full powers” document.

In relation to the means of expressing the State’s consent to be bound by a treaty, one has to observe the content of Article 11, of the 1969 Vienna Convention:

Article 11

Means of expressing consent to be bound by a treaty

The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed. (UNITED NATIONS, 2005a)

Although the Convention apparently deals with different possible forms of expressing this consent, in fact, there are basically three: signature, ratification and adhesion. The acceptance and the approval are equivalent to the ratification. As such, they cannot be understood as different means to proceed towards the consent to be bound by a treaty.

According to José Francisco Rezek:

afora a hipótese de adoção do procedimento breve, em que a assinatura já importa vínculo firme, não sobram mais que *duas* situações possíveis: ou o Estado que manifesta em definitivo a vontade de pactuar já exprimira antes, com a assinatura, sua propensão a fazê-lo – e neste caso estará havendo *ratificação* –, ou não se manifestara, e neste segundo caso estará ocorrendo *adesão*.⁷ (REZEK, 1984, p. 256)

⁶ “means only the precarious and formal acceptance of the treaty, not causing (apart from the exception of Article 12 of the 1969 Convention) obligatory legal effects”.

⁷ “except for the hypothesis of adopting the brief proceeding, in which the signature already demonstrates a strong link, there are no more than two possible situations: either the State, which expresses in a definitive way the will to

The 1969 Vienna Convention, in determining that the State's definitive consent to be bound by a treaty can be expressed with the signature, seems to admit the existence of the so-called simplified agreements (also known as executive agreements)⁸. These are agreements whose ratification and incorporation to the State internal legal framework do not depend upon the Legislative Power (institution which, in general, is responsible for the analysis of international agreements). Thus, in this case, the signature of the text represents already the State's consent to be bound by a treaty. The aforementioned exchange of instruments of constituting a treaty is also used for treaties concluded by the abridged procedure, but, it is not properly another means of expressing the State's consent (REZEK, 1984)

The ratification is the most common means of expressing the State's consent. According to Valério de Oliveira Mazzuoli, it consists of an:

Ato administrativo unilateral por meio do qual o Poder Executivo, devidamente autorizado pelo órgão para isso designado, confirmando a assinatura do acordo, exprime definitivamente, no plano internacional, a vontade do Estado em obrigar-se pelo tratado.⁹ (MAZZUOLI, 2010, p. 194)

The ratification is considered a discriminatory act, as the head of the Executive Power is not legally obliged to give his consent, even if the Legislative Power has approved the terms of the international agreement negotiated and signed by him. The head of the Executive Power might understand, at the time of the ratification, that a given international agreement is no longer tuned with the State's interests. In this situation, he will not be, in any case, compelled to express his consent to be bound by a treaty.

In fact, if the State were subject to a penalty in case of no ratification, this phase would lose its sense, since the signature itself would already represent the definitive commitment. According to Valério de Oliveira Mazuolli's observation:

pactuate, has already expressed the purpose of doing it by signature – and in this case a ratification will occur -, or it has not expressed it, and in this second situation an adhesion will occur." In relation to this point it is interesting to see also MAZZUOLI (2010).

⁸ The simplified agreements will be dealt with in detail later in this work, during the analysis of the approval of international treaties by the Legislative Power.

⁹ "Unilateral administrative act, through which the Executive Power, duly authorized by the designated institution, confirms the signature of the agreement, expresses, definitively, at international level, the State's will to be bound by the treaty."

A não-ratificação do tratado, ademais, é ato legítimo e permitido pelo Direito Internacional, não acarretando a responsabilidade internacional do Estado, sem embargo de poder dar ensejo a retaliações de caráter político.¹⁰ (MAZZUOLI, 2010, p. 203)

However, it is worth to highlight that the ratification is irrevocable. Therefore, when a treaty is ratified, the State cannot withdraw its ratification even if the treaty has not been enforced yet. Thus, in case the State wishes to withdraw the ratification of a treaty, it should provide for denunciation or withdrawal, which is a prerogative foreseen in Article 56 of the 1969 Vienna Convention on the Law of Treaties.

Article 56

1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:
 - (a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or
 - (b) a right of denunciation or withdrawal may be implied by the nature of the treaty.
2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1. (UNITED NATIONS, 2005a)

Due to its importance, the ratification should be formally done. Thus, it is not possible to talk about the existence of an implied ratification, even if the State adopts a coherent attitude regarding the terms of the agreement (REZEK, 1984). In order to ensure the security of the international relations, the 1928 Havana Convention on Treaties stated in Article 6 the following:

Article 6. Ratification must be unconditional and must embrace the entire treaty. It must be made in writing pursuant to the legislation of the State. (AMERICAN JOURNAL OF INTERNATIONAL LAW, 1935)

The 1969 Vienna Convention does not mention that the ratification must be written (UNITED NATIONS, 2005a). However, it is not to be understood that informality is the rule. Therefore, in general, the ratification is made with the exchange or deposit of the ratification instruments or through formal communication of the head of the Executive Power.

The exchange is proper to bilateral agreements, whereas the deposit is typical of multilateral agreements. In the latter case, there is the role of the depositary, which is the State or international organization responsible for the custody of the ratification instruments.

¹⁰ “the non ratification of the treaty, furthermore, is a legitimate act permitted by the International Law and does not lead to the responsibility of the state at international level. However, it can lead to retaliations of political character.”

Finally, it should be mentioned that there is no rule in International Law which says that a State has a deadline to proceed with the ratification of international agreements. This peculiarity of the ratification seems to be closely related to its discretionary character. However, the parties which are negotiating an agreement can establish a deadline for its ratification.

The accession has the same legal nature of the ratification as it also represents the State's consent to be bound by a given international agreement. Is by means of the accession that a State which did not take part of the negotiations of an international agreement, or yet which had taken part of the negotiations and had signed it, but did not ratify the agreement before, decides to take part of the agreement. Obviously, the accession is only possible if it is foreseen in the treaty. In this case, the treaty is usually referred to as an open treaty. Further, by logic, one also concludes that the accession is proper of multilateral agreements (MAZZUOLI, 2010)

It is interesting to observe that, in principle, the accession represents already the definitive expression of the State to take part in an international agreement. However, in international practice, the possibility of accession subject to ratification has been allowed, particularly when the State's consent depends on the approval of any domestic institution constitutionally responsible for the evaluation of the agreement.

In relation to this, Valério de Oliveira Mazzuoli states:

A doutrina, de um modo geral, tem declarado que a ratificação é estranha à adesão. A mesma resposta, entretanto, não se encontra na prática internacional, que tem consagrado a possibilidade de ratificação na adesão, talvez por reconhecer que o Executivo muitas vezes não aguarda o referendun do Poder Legislativo e se apressa em aderir ao texto do tratado anteriormente firmado por outros Estados.¹¹ (MAZZUOLI, 2010, p. 208)

It should be highlighted that the final expression of a State's consent, represented by the signature, ratification, or accession (the last two being materialized by the exchange or deposit of the ratification instruments or formal communication of the head of the Executive Power) results in the enforcement of the international agreement, except if the parts have stated the matter in a different way. However, other formalities have to be adopted within each State in order to enforce the international agreement. These formalities will be analyzed later, in item 1.2.

¹¹ *“The doctrine, in general, has declared that ratification is not linked to adhesion. The same answer, however, is not found in international practice, which has accepted the possibility of ratification at the time of adhesion to the treaty, perhaps because it acknowledges that, frequently, the Executive Power does not wait for the referendum of the Legislative Power and speeds up the adhesion to the text which was previously signed by other States.”*

1.2 Internal phases: approval of the Legislative Power and promulgation and publication by the official press

When the negotiations are over and the international agreement is signed, the next phase is the approval by the State's institution constitutionally responsible for the analysis of the terms of the international agreement. In the majority of the States, including Brazil, this task is conferred upon the Legislative Power.

The first Brazilian Constitution, dated March 25, 1824, was the only one which expressly admitted the existence of international agreements made without the participation of the Legislative Power. As such, during the enforcement of this Constitution, international agreements did not need to have prior approval of the Legislative Power, except for rare hypotheses determined in that Constitution. Article 102, VIII, of the 1824 reads as follows:

Art. 102. O Imperador é o Chefe do Poder Executivo, e o exercita pelos seus Ministros de Estado. São suas principaes attribuições

[...]

VIII. Fazer Tratados de Alliança offensiva, e defensiva, de Subsidio, e Commercio, levando-os depois de concluidos ao conhecimento da Assembléa Geral, quando o interesse, e segurança do Estado permitirem. Se os Tratados concluidos em tempo de paz envolverem cessão, ou troca de Territorio do Imperio, ou de Possessões, a que o Imperio tenha direito, não serão ratificados, sem terem sido approvados pela Assembléa Geral.

[...] ¹² (Livro 4º de Leis, Alvarás e Cartas Imperiaes)

When Antônio Paulo Cachapuz de Medeiros analyzed this legal device, he concluded that:

Ressalvado, pois, o caso de cessões ou trocas territoriais, a Constituição de 1824 não conferiu à Assembléa Legislativa competência para aprovar ou rejeitar os tratados. Esses eram apenas levados ao conhecimento do Legislativo, depois de concluídos pelo Imperador, e ainda somente quando o interesse e a segurança do Estado o permitissem. ¹³ (MEDEIROS, 1995, p 85)

¹² "Art. 102. The emperor is the Head of State, and he exercises his responsibilities through his State Ministers. His main responsibilities are:

[...]

VIII. To promote offensive and defensive Alliance Treaties, Subsidies and Commerce Treaties, and after their conclusion, to inform the General Assembly on these Treaties, when permitted by the State interest and security. If the Treaties concluded in times of peace are concerned with cession or exchange of the Empire Territory, or of Possessions, which are Empire properties, they will not be ratified without being approved by the General Assembly."

¹³ "Thus, except for the case of cessions or exchange of territories, the 1824 Constitution did not give the Legislative Assembly the competence to approve or reject treaties. These were only brought to the knowledge of the Legislative after their conclusion by the Emperor, and only even when permitted by the State interest and security."

With the 1891 Constitution - the first Constitution of the Brazilian Republic – the Brazilian proceedings concerning the making of international agreements and their incorporation to the internal legal framework started taking into account the collaboration between the Executive and Legislative Powers. Since then the matter has not been subject to profound alterations. The 1891 Constitution established that (bald in the original): :

Art 34 - Compete privativamente ao Congresso Nacional:

[...]

12º) Resolver definitivamente sobre os tratados e convenções com as relações estrangeiras.

Art 48 - Compete privativamente ao Presidente da República:

[...]

16º) Entabular negociações internacionais, celebrar ajustes, convenções e tratados, **sempre** ad referendum do Congresso [...].

[...] ¹⁴ (DIARIO OFICIAL DA UNIÃO, 1946)

It is worth mentioning that the 1891 Constitution was the only one where the adverb “always” appeared, probably aiming at stressing the inexistence of exceptions concerning the need of submitting international agreements to the approval of the Legislative Power. The inexistence of the expression in the later constitutions seems to have reinforced the arguments of the doctrine which admits the possibility of making simplified international agreements, in other words, without the participation of the national Congress.

However, it was under the 1946 Constitution that the controversy related to the inexigibility of the parliamentary approval became more evident, especially after the famous controversy between Haroldo Valladão and Hildebrando Accioly. The 1946 Constitution determines the following:

Art 66 - É da competência exclusiva do Congresso Nacional:

I - resolver definitivamente sobre os tratados e convenções celebradas com os Estados estrangeiros pelo Presidente da República;

[...]

Art 87 - Compete privativamente ao Presidente da República:

¹⁴ “Art. 34 – It is an exclusive National Congress competence:

[...]

12º) To definitively resolve treaties and conventions related to foreign affairs.

Art. 48 – It is an exclusive competence of the President of the Republic:

[...]

16º) To initiate international negotiations, conclude adjustments, conventions and treaties, **always** ad referendum of the Congress [...].

[...]”

[...]

VII - celebrar tratados e convenções internacionais *ad referendum* do Congresso Nacional; ¹⁵
(DIÁRIO OFICIAL DA UNIÃO, 1946)

According to Hildebrando Accioly (ACCIOLY *apud* REZEK, 2004), Brazil could become a party in some international agreements without necessarily having the approval of the National Congress. His point of view was based on the US Law, which admits that some international agreements (known as executive agreements), do not need the Senate's approval.¹⁶

Hildebrando Accioly explains that the so-called executive agreements could be accepted in the following situations: (a) when they deal with matters of exclusive competence of the Executive Power; (b) in the hypothesis of being concluded by agents or officials formally designated to deal with such matter, as long as the subject of the agreement is of local interest or of restricted importance; (c) when the aim of the agreement consists of the interpretation of clauses of a prior international agreement already enforced; (d) in case they are addressed to complement another international agreement already enforced; or (e) when they intend to establish the bases for future negotiations (also denominated "*modus vivendi*" agreements).

Haroldo Valladão, acting as Legal Advisor of the Ministry of Foreign Affairs, in response to a consultation made by the Minister, repudiated Hildebrando Accioly's thesis. He stated that the possibility of the Executive Power to make international agreements without the participation of the National Congress was not in accordance with the tradition of the Brazilian constitutional texts, nor in accordance with the national doctrine and jurisprudence. For Haroldo Valladão, the Brazilian republican constituents "quiseram subordinar o Executivo ao Legislativo em material de política exterior, não permitindo assumam o Brasil quaisquer responsabilidades, na ordem internacional, sem o consentimento do Congresso".¹⁷ (VALLADÃO *apud* REZEK, 2004, p. 128)

¹⁵ "Art. 66 – It is an exclusive competence of the National Congress:

I – to resolve, definitely, the treaties and conventions concluded with foreign States by the President of the Republic;
[...]

Art. 87 – It is an exclusive competence of the President of the Republic:

[...]

VII – to conclude treaties and international conventions ad referendum of the National Congress."

¹⁶ As it is going to be seen in Chapter Three, in the United States of America international treaties negotiated by the Executive Power are analyzed only by the Senate.

¹⁷ "wanted to subordinate the Executive to the Legislative in matters of foreign policy, not allowing Brazil to assume any responsibility in the international scene without the Congress' consent."

Later, Hildebrando Accioly replied saying that even under the 1891 Constitution, whose text was much more severe in relation to the need of the National Congress' consent, several international agreements were made without its approval. On the other hand, he said that Haroldo Valladão's declaration needed evidence so as to support his arguments that the republican constituents wanted to subordinate the Executive to the Legislative Power. (ACCIOLY *apud* REZEK, 2004)

The controversy persisted with the advent of the Brazilian 1967 Constitution, once no major changes were made to the text regarding the proceedings for the making of international agreements (DIÁRIO OFICIAL DA UNIÃO, 1967).

The issue was subject of many debates in the Brazilian 1987-1988 Constituent Assembly, probably because many of the constituents were very much concerned in clarifying the matter. Several jurists and even the Ministry of Foreign Affairs sent to the constituents suggestions on procedures of incorporation of international agreements to the Brazilian legal framework.

After exhaustive debates on the matter, the new Constitution was promulgated on October 5, 1988, and a new text to regulate international agreements was set:

Art. 49. É da competência exclusiva do Congresso Nacional:

I – resolver definitivamente sobre tratados, acordos ou atos internacionais que acarretem encargos ou compromissos gravosos ao patrimônio nacional;

[...]

Art. 84. Compete privativamente ao Presidente da República:

[...]

VIII – celebrar tratados, convenções e atos internacionais, sujeitos a referendo do Congresso Nacional;¹⁸ (DIÁRIO OFICIAL DA UNIÃO, 1988)

Instead of improving the proceedings, it seems that the new text brought about even more doubts in relation to the possibility of the Executive Power to make some international agreements without the participation of the National Congress.

¹⁸ “Art. 49. It is an exclusive competence of the National Congress:

I – to resolve, definitively the treaties, agreements or international acts which result in onerous duties or commitments which could affect the national patrimony;

[...]

Art. 84. It is an exclusive competence of the President of the Republic:

[...]

VIII – to conclude treaties, conventions and international acts, subject to a referendum of the National Congress.”

In fact, one can observe the existence of an apparent antinomy between the two constitutional devices. Article 84, VIII, determines that the President is responsible for making agreements with the referendum of the National Congress. On the other hand, Article 49, I, whose text is more restrictive, establishes the National Congress' competence to evaluate treaties, agreements or international acts which can generate onerous duties or commitments to the national patrimony.

Some jurists say that the purpose of the 1988 constituents, when making reference to those acts which can generate onerous duties or commitments to the national patrimony, was solely to reinforce the need to submit these acts to the approval of the National Congress, the same way it is done with all other international agreements. This point of view is supported by Valério de Oliveira Mazzuoli (MAZZUOLI, 2001).

Antônio Paulo Cachapuz de Medeiros has a similar opinion on the celebration of international agreements under the 1988 Constitution. He concludes that:

A única interpretação razoável para o artigo 49, inciso I, da Constituição, é a extensiva. Forçoso admitir que se trata de caso em que o legislador constituinte disse menos do que pretendia: *lex minus dixit quam voluit*.¹⁹ (MEDEIROS, 2008, p. 123)

However, other jurists consider that the 1988 Constitution, which follows the tradition of the previous constitutional texts, has acknowledged the existence of international agreements whose proceeding do not require the National Congress' approval. According to José Francisco Rezek (REZEK, 2004), it is possible to justify the existence of the executive agreements in the present Constitution.

The fact is that instead of resolving the controversy, the 1988 Constitution has contributed even further to the debate regarding the admissibility of the simplified agreements by the Brazilian Law. Anyhow, practice reveals that, in Brazil, the making of such agreements is more and more common as a result of the country's increasing participation in the international scene.

Leaving aside the controversy related to the existence or not of simplified agreements, the work will now focus on how international agreements signed by the Executive Power are analyzed by the National Congress.

¹⁹ "The only reasonable interpretation for article 49, I, of the Constitution is the extensive one. One is forced to admit that this is the case when the constituent legislator said less than he meant to: *lex minus dixit quam voluit*."

The analytical process by the Legislative power starts in the Federal Chamber of Deputies. Article 64 of the 1988 Brazilian Constitution reads as follows:

Art. 64. A discussão e votação dos projetos de lei de iniciativa do Presidente da República, do Supremo Tribunal Federal e dos Tribunais Superiores terão início na Câmara dos Deputados. ²⁰ (DIÁRIO OFICIAL, 1988)

First, an official communication of the President is sent to the Chamber of Deputies together with an explanatory memorandum prepared by the Ministry of Foreign Affairs and the text of the international agreement. Upon receipt of the communication, a notification is given to the Deputies in a plenary session (MAZZUOLI, 2001). Then, the process is sent to the Foreign Affairs and National Defense Committee. ²¹

The Foreign Affairs and National Defense Committee should propose a text for a legislative decree. This text, together with the legal opinion, is then sent to the Constitution, Justice and Citizenship Committee. This Committee is responsible for examining the constitutional, legal, juridical, regulatory matters and matters of legislative technique aspects of the text. Finally, the process is sent to the plenary for voting, where only a simple majority voting is necessary for the approval of the text. However, it is required that the absolute majority of the Federal Deputies is present in this voting session. ²² (DIÁRIO OFICIAL DA UNIÃO, 1989)

²⁰ Art. 64. *The debate and voting of bills, which are proposed by the President of the Republic, of the Supreme Court and of the Superior Courts, will start in the Chamber of Deputies*”

²¹ Art. 32. São as seguintes as Comissões Permanentes e respectivos campos temáticos ou áreas de atividade:

[...]

XV – Comissão de Relações Exteriores e de Defesa Nacional:

[...]

c) tratados, atos, acordos e convênios internacionais e demais instrumentos de política externa; (DIÁRIO OFICIAL DA UNIÃO, 1989)

“Art. 32. *The Permanent Committees and their respective thematic fields or areas of activity are the following:*

[...]

XV – *Foreign Affairs and National Defense Committee:*

[...]

c) *international treaties, acts and agreements and other instruments of foreign policy;*”

²² The 1988 Constitution establishes that, in general, decisions of the two Houses of the National Congress are made by means of simple majority. It is interesting to see the text of the Article 47:

“Art. 47. Salvo disposição constitucional em contrário, as deliberações de cada Casa e de suas Comissões serão tomadas por maioria dos votos, presente a maioria absoluta de seus membros.” (DIÁRIO OFICIAL DA UNIÃO, 1989)

“Art. 47. *Unless is determined by the constitution, the decisions of each one of the Houses and of their Committees will be taken considering the majority of votes, and taking into account that the absolute majority of their members are present in the voting session.*”

Upon approval, the project of the legislative decree is sent to the Federal Senate where it is initially analyzed by the Foreign Affairs and National Defense Committee. Then, the project, together with the legal opinion issued by the Committee, is sent to the plenary for voting. Similarly to what happens in the Chamber of Deputies, the simple majority of votes is required for project approval in the Senate, as long as the absolute majority of its members is in plenary.

However, it is worth observing that the Internal Regulation of the Federal Senate determines in Article 91, paragraph 1, I, that its President, after hearing the House leaders, can delegate competence to the Committees to evaluate international agreements and express a conclusive decision on them. Article 91, paragraph 1, I, reads as follows:

Art. 91. [...]

§ 1º O Presidente do Senado, ouvidas as lideranças, poderá conferir às comissões competência para apreciar, terminativamente, as seguintes matérias:

I – tratados ou acordos internacionais (Const., art, 49, I); ²³ (DIÁRIO OFICIAL DA UNIÃO, 2011)

After that, the legislative decree is promulgated and published by the official press. Upon approval of the text, the Executive Power is, then, authorized to proceed with the ratification of the international agreement.

After the ratification, in order to terminate the procedure of the international agreement's incorporation into the internal legal framework, it should be promulgated by the President and published by the official press. According to Valério de Oliveira Mazzuoli, the promulgation and publication phase “é apenas complementar às demais e visa dar aplicabilidade interna ao compromisso internacionalmente firmado.” ²⁴ (MAZZUOLI, 2010, p.180)

²³ “Art. 91. [...]

§ 1º The President of the Senate, after hearing the House leaders, will confer competence to the committees to conclusively evaluate the following matters:

I – international treaties or agreements (Const. art.49, I);”

²⁴ “is only complementary to the others and aims at giving internal applicability to the commitment which was internationally made.”

2. International agreements for Brazil's association to international agencies: the implementation is independent of their prior incorporation into the internal legal framework

In the previous chapter, an analysis was done of the proceedings which are necessary to make an international agreement. This chapter will examine the cases which were submitted by the Secretariat of International Issues (which is a Department within the organizational structure of the Ministry of Planning, Budget and Management)²⁵ to the Legal Advisory Department of the same Ministry²⁶. In all cases the Secretary asked for advice as whether or not it could authorize the payment of contributions to international organizations.

The Budgetary Law for the 2009 fiscal year, Law No. 11897, dated December 30, 2008, has centralized in the Ministry of Planning, Budget and Management, more specifically in the Secretariat of International Issues, the payment of contributions to international organizations and other types of transnational institutions. (DIÁRIO OFICIAL DA UNIÃO, 2008)

In 2008, the Secretariat of International Issues, for the first time, inquired the Legal Advisory Department of the Ministry of Planning, Budget and Management, as for the necessity to follow the provisions of Articles 49, I, and 84, VIII, both from the 1988 Federal Constitution, in relation to Brazil's association to international organizations.

On that occasion, the report of the Legal Advisory Department referred to the existence of an apparent antinomy between the two articles and to the controversy on the admissibility of executive agreements. However, it was concluded that the country's association to international organizations would require the approval of the National Congress, that is, the agreement could not be made in a simplified manner. In that legal report, observations were made on the phases which should be followed concerning Brazil's association to international organizations. An excerpt of the report is transcribed here:

a) a adesão ou associação brasileira a organismos internacionais deve ser negociada pelo Poder Executivo através do Presidente da República, do Ministro das Relações Exteriores, ou de representante nacional a quem tenham sido conferidos poderes para tanto;

²⁵ Available in: <http://www.planejamento.gov.br/secretarias/upload/Arquivos/seain/a_seain/4pagamentos.pdf>. Access on March 22, 2011.

²⁶ The Legal Advisory Department of the Ministry of Planning and Management is a sectorial agency of the Office of the Attorney General.

b) o acordo de adesão ou associação a uma organização internacional deve ser obrigatoriamente submetido ao referendo do Congresso Nacional, na forma do art. 49, I, da Constituição da República, uma vez que não se caracteriza como mero ajuste complementar para a execução de um tratado já vigente;

c) após a aprovação do acordo pelo Congresso Nacional, compete ao Presidente da República a atribuição de ratificá-lo, o que deve ser acompanhado da sua promulgação interna através de Decreto Executivo.²⁷ (MP, 2008)

However, from 2009 onwards, due to a large number of demands for the payment of contributions to international organizations and other transnational institutions, the Secretariat of International Issues started sending a series of consultations to the Legal Advisory Department of the Ministry of Planning, Budget and Management. In these consultations, the Secretariat inquired about the possibility of making payments to international organizations, particularly in situations where the Secretariat understood that some of the indispensable phases for the incorporation of the international agreement to the Brazilian legal framework had not been complied.

It is necessary to mention that, in principle, the Ministry of Foreign Affairs is the institution that has the final word for expressing the need to submit international agreements to the National Congress and is also responsible for helping the President in matters of international policy, according to the Article 27, XIX, *a*, Law N. 10683, dated May 28, 2003 (DIÁRIO OFICIAL DA UNIÃO, 2003).

However, in order to be able to analyze the legal feasibility of making payments of contributions to international organizations - which is a field of Financial Law - it is indispensable to examine issues of Public International Law, such as the legal nature of the organization to whom the financial resources are to be transferred to, as well as the proper existence of this obligation. (MP, 2009e)

Considering the objective of this research, the analysis comprises only the consultations which have involved payments of contributions to international organizations

²⁷ *“a) the Brazilian adhesion or association to international organizations must be negotiated by the Executive Power through the President of the Republic, the Minister of Foreign Affairs or a national representative upon whom the powers to deal with the matter have been conferred;*

b) The agreement on accession or association to an international organization must be, obligatorily, submitted to the approval of the National Congress, under Article 49, I, of the Constitution of the Republic, as it is not a simple complementary adjustment for the implementation of an already existing treaty;

c) after the treaty’s approval by the National Congress, its ratification is under the responsibility of the President of the Republic and should be accompanied by its internal promulgation through an Executive Decree”.

(legal entities of Public International Law) derived from some sort of association that Brazil had with these organizations, and in relation to which the approval phase of the international agreement was not complied. Therefore, the consultations relating to cases in which the procedure of Brazil's association to international organizations presented irregularities in relation to other aspects, as well as the ones which involved the payment of contributions to transnational non-governmental organizations were excluded from the analysis. The latter were excluded from the analysis because the Legal Advisory Department of the Ministry of Planning, Budget and Management understood that, in these cases, the international agreement did not need the approval of the National Congress (MP, 2009c and 2009d).

The research considered the period between the beginning of 2009, when the payment of contributions to international organizations was centralized in the Ministry of Planning, Budget and Management and the end of 2010. Among the nine selected consultations, eight received a similar answer. In these answers, it was admitted that the payments could exceptionally be made, even considering that the approval phase of the international agreement by the National Congress had not been complied. The main argument was that the existence of a specific budget provision in the Annual Budget Law or the existence of an additional credit provision, both expense items already approved by the National Congress, would presume the interest of Brazil's participation in the international organization.

Among the selected consultations, the first involved the International Criminal Police Organization – INTERPOL. According to the website of that Institution²⁸:

INTERPOL is the world's largest international police organization, with 188 member countries. Created in 1923, it facilitates cross-border police co-operation, and supports and assists all organizations, authorities and services whose mission is to prevent or combat international crime. INTERPOL aims to facilitate international police co-operation even where diplomatic relations do not exist between particular countries. Action is taken within the limits of existing laws in different countries and in the spirit of the Universal Declaration of Human Rights. INTERPOL's constitution prohibits 'any intervention or activities of a political, military, religious or racial character.

The Secretariat of International Issues affirmed that Brazil joined INTERPOL in 1953, having suspended its participation in this organization only during the period 1980-1986. Besides, it added that Brazil always made the payment of the contributions and was considered

²⁸ Available in <<http://www.interpol.int/public/icpo/default.asp>>. Access on March 25, 2011.

by INTERPOL as a country member, even though the country's association to INTERPOL's constitutive instrument has not been approved by the National Congress, nor ratified by the President. The National Congress' approval was also required by the 1946 Constitution, which was in force at the time the international agreement was signed.

The difficulty in providing an answer to this consultation was, particularly, due to the importance of the services rendered by INTERPOL for the activities concerning public national security, which would certainly be suspended in case Brazil failed in paying the contributions.

The Legal Advisory Department of the Ministry of Planning, Budget and Management, very much concerned with this situation, stated the following:

12. É possível, então, em caráter excepcional, fundamentar juridicamente a possibilidade de pagamento de contribuição enquanto são adotadas as providências necessárias para regular a adesão do país. Os fundamentos jurídicos são basicamente dois.

13. Em primeiro lugar, (i) o reconhecimento da própria INTERPOL de que o Brasil possui a qualidade de país-membro, (ii) a importância dos seus serviços para as atividades nacionais de segurança pública e (iii) o fato de que as contribuições vem sendo pagas há anos com a devida anuência do Congresso Nacional em relação às respectivas previsões na legislação orçamentária geram a presunção de que há um interesse nacional legítimo na adesão do Brasil à entidade.

14. Em segundo lugar, o princípio da continuidade dos serviços públicos também justifica o pagamento da contribuição, já que a interrupção do pagamento poderia trazer prejuízos qualitativos e quantitativos em relação à prestação, pelo Estado brasileiro, dos serviços essenciais de segurança pública.²⁹ (MP, 2009a)

Thus, the Legal Advisory Department stood for admitting the payment to INTERPOL, exceptionally, while Brazil's association is not regularized.

In a later consultation, a different understanding was adopted in relation to the legal feasibility of paying a contribution to the Mechanism for Follow-Up on the Implementation of the Inter-American Convention against Corruption (MESICIC). MESICIC is an inter-

²⁹ "12. It is possible, exceptionally, to legally support the possibility of paying a contribution, while the necessary arrangements to regulate the accession are adopted. The legal reasons are basically two:

13. Firstly, (i) the recognition by INTERPOL that Brazil has the quality of a country member (ii) the importance of their services for the national public security services (iii) the fact that the contributions have been paid for years with the due approval of the National Congress in relation to the respective provisions of the budget legislation, generate the assumption that there is a legitimate national interest concerning Brazil's accession to the organization.

14. Secondly, the principle of the continuity of public services also justifies the payment of the contribution, since the interruption of the payment could cause qualitative and quantitative damages concerning essential public security services provided by the Brazilian State."

governmental body established within the framework of the Organization of American States (OAS).

When making the consultation, the Secretariat of International issues informed that Brazil signed the Inter-American Convention against Corruption, which was approved by the National Congress through the Legislative Decree N. 152, dated June 25, 2002, and promulgated by the Decree N. 4410, dated October 7, 2002 (DIÁRIO OFICIAL DA UNIÃO, 2002a and 2002b).

According to the Office of the Comptroller General's website ³⁰ (bald in the original):

Os países membros da OEA expressaram, durante a Terceira Cúpula das Américas, realizada na cidade de Québec, em 2001, seu compromisso de fortalecer o combate à corrupção e, no Plano de Ação então aprovado, acordaram em apoiar a criação de um **Mecanismo de Acompanhamento da Implementação da Convenção Interamericana contra a Corrupção (Mesicic)** pelos Estados Partes.³¹

Thus, during the First Conference of the States Parties of the Inter-American Convention against Corruption, held in Buenos Ayres, in May 2001, a resolution called the Buenos Ayres Report was prepared for the creation of the MESICIC as a result of the consensus among the OAS country members.

However, the Secretariat of International Affairs added that the Buenos Ayres Report, which foresees the payment of contributions to finance the MESICIC activities, had not been approved by the National Congress, in agreement with Article 49, I, of the 1988 Federal Constitution.

The Legal Advisory Department of the Ministry of Planning, Budget and Management concluded that the approval of the Buenos Ayres Report by the Congress was indispensable, since this document could not be considered as a simple adjustment of the Inter-American Convention against Corruption. Thus, that Convention did not foresee the creation of any kind of mechanism with this function, neither the obligation of the States Parties to

³⁰ Available in <<http://www.cgu.gov.br/oea/mecanismo/info/index.asp>>. Access on March 24, 2011.

³¹ “During the Third Summit of the Americas, held in Quebec in 2001, the OAS country members expressed their commitment to strengthen the fight against corruption and, in the approved Action Plan, they agreed to support the creation of a *Mechanism for Follow-Up on the Implementation of the Inter-American Convention against Corruption (MESICIC)* by the States Parties.”

contribute for its operation. Moreover, the Legal Advisory Department highlighted Article 1, paragraph 1, of the Legislative Decree N. 152, dated 2002, which reads as follows:

Art. 1º Fica aprovado o texto final, após modificações de cunho vernacular, em substituição àquele encaminhado pela Mensagem 1.259, de 1996, da Convenção Interamericana contra a Corrupção, concluída originalmente em Caracas, em 29 de março de 1996, com reserva para o art. XI, c.

Parágrafo único. Ficam sujeitos à aprovação do Congresso Nacional quaisquer atos que alterem a referida Convenção, assim como quaisquer ajustes complementares que, nos termos do inciso I do art. 49 da Constituição Federal, acarretem encargos ou compromissos gravosos ao patrimônio nacional.³² (DIÁRIO OFICIAL DA UNIÃO, 2002a)

With these considerations, the Legal Advisory Department of the Ministry of Planning, Budget and Management understood that the case was not similar to the INTERPOL's, since there was no information on the existence of previous payments or Brazil's recognition as a member of the Convention. As such, the payment was not recommended and the Legal Advisory Department concluded that a prior submission of the Buenos Ayres Report to the Congress was needed (MP, 2009b).

In another consultation, the Secretariat of International Issues inquired the Legal Advisory Department about the possibility of paying a contribution to the Center for Information and Advisory Services on Trading of Fish Products in Latin America and the Caribbean - INFOPECA.

Brazil's accession to the INFOPECA's constitutive act took place on October 28, 1994. However, until the date of the consultation, the accession had not been approved by the National Congress, as required by Article 49, I, of the 1988 Federal Constitution. Nevertheless, according to information annexed to the consultation, the Federative Republic of Brazil has an active participation in the activities of this international organization. It had already held the presidency of the organization three times and was appointed as a member of the Consulting Council in 2009.

Even considering that the accession should have been approved by the National Congress, the Legal Advisory Department of the Ministry of Planning, Budget and Management admitted the payment of the contribution, once there was a budget credit assigned to such

³² "Art. 1. The final text has been approved, after modifications of vernacular nature, replacing the one sent through Communication 1259, dated 1996, of the Inter-American Convention against Corruption, originally concluded in Caracas on March 29, 1996, with restriction to Article XI, c. Paragraph one. Acts which alter the mentioned Convention are subject to the National Congress approval, as well as any complementary adjustment which, under Article 49, I, of the Federal Constitution, result in onerous duties or commitments to the national patrimony."

objective. This budget credit was interpreted as signal of the National Congress' interest concerning Brazil's association to INFOPECA (MP, 2009f). Besides, the Legal Advisory Department's opinion took into consideration the role Brazil had played in the aforementioned international organization.

On another occasion, the Secretariat of International Issues consulted the Legal Advisory Department about the legal feasibility of authorizing the payment of a contribution for the Organization for Cooperation and Economic Development (OCED), due to Brazil's participation in some of its subsidiary groups.

It was understood that the approval by the National Congress regarding Brazil's participation in those OCED subsidiary groups would be necessary, since the acceptance of the invitation to join these groups would configure a true international agreement. Brazil's participation in one of these groups (the Steel Committee) had already had the approval of the National Congress in accordance with what is required by Article 49, I, of the 1988 Constitution.

However, in accordance with arguments held in similar situations, the Legal Advisory Department of the Ministry of Planning, Budget and Management concluded as to the possibility of paying the contributions to OCED, as long as there was a specific budget credit in the Federal Government Budget Law (MP, 2009g).

Still in 2009, the Secretariat of International Issues inquired the Legal Advisory Department of the Ministry of Planning, Budget and Management about the possibility of authorizing the payment of a contribution to the Pan-American Institute of Geography and History (PAIGH), a specialized entity of the Organization of American States (OAS). The PAIGH was created in Havana on February 7, 1928, during the Sixth International Conference of American States³³. However, until the time the consultation was made, Brazil's association to the PAIGH had not been approved by the National Congress.

Due to the fact that the international agreement was signed under the 1891 Constitution, the norms of this Constitution are the ones that rule the matter. As analyzed in chapter one, the 1891 Constitution, in Article 34, 12, determined that the National Congress was responsible for definitely deciding about treaties and conventions.

Thus, the Legal Advisory Department of the Ministry of Planning, Budget and Management understood that Brazil's association to PAIGH would not dispense the National

³³ Available in <<http://www.ipgh.org>>. Access on March 27, 2011.

Congress' approval. However, considering that the international agreement was signed more than eighty years ago and that the Brazilian Government has been complying with it since then, the Legal Advisory Department concluded for the possibility of exceptionally paying the contribution, as long as there was a specific budget credit for that. (MP, 2009h)

In 2010, the Legal Advisory Department of the Ministry of Planning, Budget and Management was asked about the possibility of paying a contribution to the Bureau International des Expositions (BIE). The Brazilian Government signed the Convention on International Exhibitions on November 22, 1928. The Convention was approved by the National Congress through the Decree-Law No. 816, dated September 4, 1969, and promulgated through the Decree No. 67696, dated December 3, 1979. (DIÁRIO OFICIAL DA UNIÃO, 1969 and 1970) The Convention, which was regularly incorporated to the Brazilian legal framework, foresaw in Article 14³⁴ a fixed budget of £ 4,000.00 (four thousands Sterling Pounds), to be shared among the members of the organization.

The text of the Convention was altered in the part related to financial contributions. According to the new text, the BIE budget would be defined by its General Assembly. However, such modification had not been approved by the National Congress, neither had been promulgated through Decree by the President. For this reason the Secretariat of International Issues inquired the Legal Advisory Department about the legal feasibility of the payment.

The Legal Advisory Department concluded that the Protocol which modified the International Exhibitions Convention should be submitted to the National Congress, under Article 49 of the 1988 Constitution. Nevertheless, once more, though exceptionally, the Legal

³⁴ Artigo 14

O orçamento da Repartição será fixado em 4.000 libras esterlinas. As despesas da Repartição serão pagas pelos Estados Contratantes cujas atribuições serão determinadas do seguinte modo: a parte dos países membros da Liga das Nações será determinada proporcionalmente à contribuições que esses países pagarem à Liga das Nações. Salvo em caso de aumento de orçamento acima fixado, a parte dos países que mais contribuem não poderá ultrapassar 500 libras esterlinas. Os países que não forem membros da Liga das Nações designarão, levando em conta seus desenvolvimento, um país membro da Liga das Nações e sua parte será igual àquela paga pelo país designado.

“Article 14

The Office's budget will be fixed in 4,000 Sterling Pounds. The Office's expenses will be paid by the Contracting States whose responsibilities will be determined as follows: the share of the League of Nations country members will be determined proportionally to the contributions that these countries would pay to the League of Nations. Except in case of increase of the budget fixed above, the share of the countries which contribute the most cannot exceed 500 Sterling Pounds. Countries which are not members of the League of Nations will designate, taking into account their development stage, a League of Nations country member and its share will be equal to the one paid by the designated country.”

Advisory Department concluded by the payment, provided there was a budget provision for that purpose. (MP, 2010a)

Again, the Secretariat of International Issues made an inquiry to the Legal Advisory Department about the possibility of paying the contribution to the International Committee of Military Medicine (ICMM) related to the 2009 fiscal year. On July 21, 1921, Belgium, Brazil, France, Italy, Spain, Switzerland and the United States of America founded the Committee of International Congresses of Military Medicine and Pharmacy (ICMPM). Its name was changed into International Committee of Military Medicine and Pharmacy in 1938. Finally, on April 28, 1990, the international organization modified its name into International Committee of Military Medicine (ICMM)³⁵. Furthermore, there were records that Brazil had been paying the contributions until 2008.

It was concluded that Brazil's association to the referred international organization could not dispense the National Congress approval. However, it was understood that the payment would be allowed, exceptionally, as long as there was a specific budget provision within the Budget Law or an additional credit. The arguments adopted to support this case are reproduced as follows:

16. No caso em análise, o Brasil, além de estar entre os membros fundadores, tem sido reconhecido como membro do CIMM e vem realizando contribuições à instituição, as quais permitem sua participação ativa nos Congressos Mundiais, Grupos de Trabalho, entre outras atividades.

17. O fato de o Congresso Nacional ter aprovado o pagamento dessas contribuições, mediante previsão nas Leis Orçamentárias Anuais ou em créditos adicionais, faz presumir que existe um legítimo interesse na adesão do Brasil ao Comitê Internacional de Medicina Militar, mormente tendo em vista as missões do CIMM, dentre as quais se destaca a cooperação durante as intervenções humanitárias realizadas pelas Forças Armadas em decorrência de desastres de larga escala.³⁶ (MP, 2010b)

On another occasion, the Secretariat of International Issues made an inquiry to the Legal Advisory Department of the Ministry of Planning, Budget and Management about the

³⁵ Available in <<http://www.cimm-icmm.org/page/anglais/historicTxte.php>>. Access on March 27, 2011.

³⁶ "16. In the case under analysis, Brazil, besides being among the founder members, has been acknowledged as a member of the ICMM and has been paying contributions to the institution, which enable it to take part actively in World Congresses, Working Groups, among other activities.

17. The fact that the National Congress had approved the payment of these contributions, through Annual Budget Law estimates or additional credits, leads one to presume that there is a legitimate interest in Brazil's association to the International Committee of Military Medicine, particularly when ICMM missions are taken into consideration. Among these missions, one can highlight the cooperation during humanitarian interventions undertaken by the Army due to large scale disasters."

legal feasibility of paying a financial contribution to the Regional Cooperation System on Safety Oversight (RCSSO), created by a memorandum of understanding signed between the Latin American Civil Aviation Commission (LACAC) and the International Civil Aviation Organization (ICAO), on October 1, 1998.

Brazil is a member of LACAC, whose statute was drafted in Mexico City, on December 14, 1973, was approved by the Brazilian National Congress through the Legislative Decree No. 86, dated December 25, 1974, and promulgated by the President through the Decree No. 77076, dated January 23, 1976. Moreover, Brazil is part of ICAO, created by the Convention on International Civil Aviation, signed on December 7, 1944, in Chicago, and approved by the Brazilian Executive Power³⁷ through Decree-Law No. 7952 dated September 11, 1945 and promulgated by President through the Decree No. 21713 on August 27, 1946. (DIÁRIO OFICIAL DA UNIÃO, 1974, 1976, 1945 and 1946a)

Nevertheless, considering that RCSSO is a distinct international organization, the international agreement which created this organization could not be considered a simple complementary amendment to LACAC or to ICAO. For this reason, the Legal Advisory Department of the Ministry of Planning, Budget and Management understood that the memorandum of understanding which originated the RCSSO should be approved by the National Congress on the basis of Article 49, I, of the 1988 Constitution.

However, the Legal Advisory Department came to the conclusion that it was possible to pay the contribution, exceptionally, using the argument that:

O fato de o Congresso Nacional ter aprovado o pagamento dessas contribuições, mediante previsão nas Leis Orçamentárias Anuais ou em créditos adicionais, faz presumir que existe um legítimo interesse na adesão do Brasil ao Sistema Regional para a Vigilância da Segurança Operacional, mormente tendo em vista as missões do SRVSOP, dentre as quais se destaca a promoção da harmonização e atualização das regras e procedimentos de segurança operacional da aviação civil na América do Norte, na América Central, na América do Sul e no Caribe.³⁸ (MP, 2010c)

³⁷ Under the 1937 Constitution, when the International Civil Aviation Convention was signed, the President of the Republic had the power for editing decree-laws on matters related to the Union's legislative competence, while the national Parliament was not in session. As the Parliament did not work during the period 1937-1945, the treaties signed at that time did not need its approval.

³⁸ *"The fact that the National Congress had approved the payment of these contributions, through Annual Budget Law estimates or additional credits, makes one presume that there is a legitimate interest in Brazil's association to the Regional Cooperation System on Safety Oversight, particularly considering the RCSSO missions. The promotion of the harmonization and updating of the operational security rules and procedures in North America, in Central America, in South America and in the Caribbean can be distinguished among these missions."*

At the end of 2010, the Secretariat of International Issues made an inquiry to the Legal Advisory Department of the Ministry of Planning, Budget and Management about the possibility of paying a contribution to the Group of 77 (G-77). The Group was established at the end of the First Session of the United Nations Conference on Trade and Development (UNCTAD) in Geneva, with the signature of the “Joint Declaration of the Seventy-Seven Countries”, by seventy-seven developing countries, including Brazil ³⁹.

The understanding was that Brazil’s association to the G-77 had to be approved by the National Congress. Nonetheless, the Legal Advisory Department concluded that the payment could be made, although exceptionally, as long as there was a specific budget provision for that (MP, 2010d).

The analysis of the consultations lead to the conclusion that, in practice, Brazil has been acting in the sphere of some international organizations before formally incorporating the international agreements into the internal legal framework. Consequently, when acting in the international community as a member of a given organization, Brazil assumes the commitment, at least politically, of contributing financially for the maintenance and operation of that organization.

In this respect, it is worth highlighting an important rule of Public International Law. It says that a State cannot evade itself from complying with obligations assumed with other subjects of International Law, under the allegation that it would violate its internal legal framework, except in very particular cases. It is important to recall Article 46 of the 1969 Vienna Convention on the Law of Treaties:

Article 46

Provisions of internal law regarding competence to conclude treaties

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith. (UNITED NATIONS, 2005a).

For all these reasons and, especially, for being aware of the need to maintain a good image of the Federative Republic of Brazil within the international scene, the Legal

³⁹ G-77 website. Available in: <<http://www.g77.org/doc/>>. Access on March 27, 2011.

Advisory Department of the Ministry of Planning, Budget and Management's opinion was to admit, exceptionally, the payment of contributions to international organizations with whom Brazil has decided to be associated to, even though the regular constitutional proceeding had not been fully complied with.

The arguments of the Legal Advisory Department for allowing the payment of some of the financial contributions to international organizations are the result of a thorough research on the matter and are based on well built legal arguments. Nevertheless, as it was discussed in chapter one, there are controversies on the matter. As such, there is always the possibility that these arguments be questioned. For this reason, a review of this issue is urgent as a way to give more support to the arguments of the public lawyers who reckon the admissibility of these payments and the public managers who authorize them.

3. The US legislation: incorporation proceedings of international agreements into the US legal framework

This chapter presents a brief study of the US legislation concerning the making of international agreements and their incorporation into the US internal legal framework.

Since the period which preceded the independence of the thirteen British colonies, there was already a concern in relation to the making of international agreements, particularly regarding the condition in which these colonies would introduce themselves to other foreign States.

It is worth mentioning that, during this period, there were already some public institutions which were common to the thirteen colonies, such as the Continental Congresses. In 1776, the following responsibilities were given to the Continental Congress: to draft the project of the declaration of independence, to establish the contours of a confederation to be formed by the new States, and to draft a plan of treaties to be proposed to foreign States (MEDEIROS, 1995).

Thus, in an early stage, just after the declaration of independence, on July 4, 1776, the Congress was responsible for making collective decisions on behalf of the colonies. These colonies would be later converted into States. According to Antônio Paulo Cachapuz de Medeiros, “[...] dessa autoridade decorria logicamente o poder correlativo de celebrar a paz e outros acordos internacionais, como ocorreu no caso do tratado de amizade e comércio com a França”⁴⁰ (MEDEIROS, 1995, p. 41).

Between 1781 and 1788, the United States of America was a confederation which was ruled by a pact entitled Articles of Confederation. Under these Articles, the Congress of the United States of America had exclusive power to make treaties.

However, in the long run, the model implemented by the Articles of Confederation appeared to be outdated, and the Congress decided to convoke a convention with the aim of revising the Articles.

⁴⁰ *“From this authority, resulted logically the correlate power of concluding peace and other international agreements, as was the case of the friendship and commerce treaty with France.”*

This convention was held between May 25, and September 17, 1787, at the Pennsylvania State House, Philadelphia. However, instead of revising the Articles of Confederation, the Constitutional Convention wrote the Constitution of the United States of America, through which the federal State was created and the separation of powers supported by the system of checks and balances was established.

It is worth highlighting that the debate on the competence of the President concerning the making of treaties was brought into scene only at the end of the works of the Convention. Until then, this power was, to a certain extent, considered as being inherent to the Legislative Power (MEDEIROS, 1995).

As a result of these debates, the approved text foresaw the competence of the President to negotiate treaties with the Senate's consent (a quorum of two-thirds for approval was established, as long as the majority of the Senators is present at the voting session). As for the President's competence regarding matters on treaties, Article II, Section 2, Clause 2, of the US Constitution reads as follows:

He [the president] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; [...]⁴¹

Similarly to the 1988 Constitution of the Federative Republic of Brazil, the US Constitution is very concise concerning the making of treaties. Thus, the text of Article II, Section 2, Clause 2, transcribed above, is the sole explicit reference to this matter.

It is worth noting that also in the United States of America, and probably due to the concise constitutional discipline, the making of treaties generated intense debates since the beginning of the country's constitutional history. According to Elbert M. Byrd Jr., in principle, the reading of the US Constitution does not enable one to reach a simple conclusion on the limits of the President's competence and that of the Senate in relation to international affairs. He demonstrates the controversy:

The President, it is observed, can "make" treaties, *if* two-thirds of the Senators present so advise, so consent, and so concur. Nothing is said of *when* the Senators must do these things, whether separately or all at once, whether before, during or after negotiation. Perhaps the only answer to be given on this problem is that the Senators must do these things at *any* time, separately or all at once, if they so designate these things as what they are doing. As to the President's power to

⁴¹ Available in: <http://www.archives.gov/exhibits/charters/constitution_transcript.html>. Access on April 11, 2011.

“make” treaties, does it mean to negotiate or to approve, or both? If it includes final approval, the advice, consent and concurrence must precede the final approval, for it is not found that the Senate can “make” a treaty. (BYRD JR, 1960, p. 8)

As history has revealed, at the early stages of the US federation, international affairs were under the exclusive responsibility of the Legislative Power. However, since the enforcement of the US Constitution, the role of the President concerning the making of treaties has always been substantial. Hollis Barber summarizes with precision the extension of the President’s responsibility:

It is on his initiative and responsibility that the treaty-making process is undertaken; he determines what provisions the United States wishes to have embodied in the treaty; he decides whether reservations or amendments that the Senate attaches to a draft treaty are acceptable to him and should be submitted to the other parties to the treaty; and, even if the Senate by two-thirds vote approves a treaty that he has negotiated, he may, influenced by change of heart or political conditions, decide not to ratify it and at the last minute file it in his wastebasket. (BARBER *apud* JOHNSON, 1984, p. 4)

It is the President’s competence to conduct the negotiations towards the conclusion of treaties. Nevertheless, this responsibility can be delegated. In fact, generally, the negotiations are made by the Secretary of State. In relation to this matter, Samuel Crandall says that: “treaties are signed by the Secretary of State, as also by other agents, and the ratifications are exchanged, by virtue of special powers conferred by the President.” (CRANDALL, 1916, p. 93)

It is interesting to highlight that according to the US Constitution, it is possible for the President to consult the Senate, before proceeding with negotiations with other States or international organizations. However, such prerogative was more utilized at the beginning of the US constitutional history. According to Samuel Crandall, “these first attempts of the Executive to follow out the clear intention of the framers of the Constitution, in consulting the Senate prior to the opening of negotiations, have been followed only in exceptional instances”. (CRANDALL, 1916, p. 70)

Once the negotiations are finished, for the President to ratify the treaty, it has to be approved by the Senate, through two-thirds vote of the total number of Senators present in the voting session. In relation to the Senate’s approval, Samuel Crandall says that it “is a condition precedent to the validity of the treaty, and is regularly given after its negotiation in the form of a resolution advising and consenting to the ratification”. (CRANDALL, 1916, p. 94)

A treaty can be rejected by the Senate. However, differently from the case of the approval, only the simple majority of the Senators present in the voting session is required. Samuel Crandall adds that “all motions in the Senate in the consideration of a treaty, except to postpone indefinitely and to give its final advice and consent to the ratification, both of which require a two-thirds vote, are decided by a majority.” (CRANDALL, 1916, p. 82)

The Senate can approve the treaty exactly as submitted by the President, or propose amendments. In the hypothesis of approval with amendments, the President has to submit it again for appreciation of the other international parties involved. If these parties agree with the amendments made by the Senate, the President can proceed directly with the ratification of the treaty.

In the United States of America, upon the Senate approval of a treaty, the President is able to ratify it. Similarly to what happens in Brazil, the President is not obliged to do so. Samuel Crandall explains that “the resolution of the Senate advising and consenting to the ratification of a treaty, while a condition precedent to its validity is not mandatory”. (CRANDALL, 1916, p. 97)

According to the US Law, the ratification is an act of exclusive competence of the President. As Samuel Crandall explains, “the final act of ratification of a treaty is not delegated, but is performed by the President [...]” (CRANDALL, 1916, p. 94)

The proclamation of the treaty follows the exchange or deposit of the ratification instruments. The proclamation act is made solely by the President and it cannot be delegated. This phase “[...] serves as a public announcement as well of the terms of the treaty as of the fact of its due ratification.” (CRANDALL, 1916, p. 94-95)

As one may observe, a peculiarity of the US Constitution resides in the fact that the competence to approve treaties signed by the President was conferred only to the Senate. When analyzing this issue, Antônio Paulo Cachapuz de Medeiros mentions that:

A tese da participação exclusiva do Senado teve a seu favor o sentimento arraigado entre os constituintes de que as negociações diplomáticas requerem certo grau de segredo e celeridade, só factível quando sujeitas ao exame de pequeno corpo político, comparável a um conselho privado, integrado por indivíduos escolhidos para períodos longos de permanência.⁴² (MEDEIROS, 1995, p. 45)

⁴² “The thesis of the exclusive participation of the Senate had in its favor the feeling among the constituents that diplomatic negotiations require a certain level of secrecy and speed, which are only possible when they are subject

Nevertheless, it seems that the US treaty-making procedure is closely related to the type of State adopted by the Constitution as well as to the composition of the Legislative Power.

In the United States of America, the Legislative Power is formed by two houses: the House of Representatives, which represents the people; and the Senate, which represents the States. This type of organization of the Legislative Power ensures that, to a greater or lesser extent, each one of the Houses works as a reviewer of the work of the other. It is worth highlighting that the bicameral Legislative Power is proper of the federations.

In the United States of America, the federation resulted from the intention of sovereign States in being together, while transferring some of their competences to the central power. For this reason, the American States have always been concerned themselves with the maintenance of a certain level of autonomy. Thus, one can understand the reason why the Senate has the responsibility for the conduction of the federation's international affairs, once in its composition, each State has the same number of representatives, independently of the size of the State, the size of its population or its economic importance. Contrarily to what happened in the United States, the Brazilian federation was a result of the fragmentation of a unitary State.

Elbert M. Byrd Jr. explains that:

Since the states had equality of representation in the Senate, however, they felt that the states' position was fairly well protected, resting as it did in the hands of the Senators who were to be chosen by the state legislatures. (BYRD JR., 1960, p. 35)

However, it is necessary to highlight that the exclusion of the House of Representatives from the treaty-making procedure was not easily accepted by its members. The issue was subject of intense debates within that House between March and April 1976, as a result of discussions on the Jay Treaty, an international agreement to be made between the United States and Great Britain.

On that occasion, a member of the House of Representatives presented to the plenary a resolution which foresaw the President's obligation of submitting to that House the

to examination of a small political body, comparable to a private council, composed by individuals chosen to be council members for long periods of time."

instructions given to John Jay, to whom power was conferred to negotiate the terms of that treaty, as well as other relevant documents for its conclusion. There was a concern that the Senate and the President, in exercising their competence for making treaties, could usurp legislative functions from the Congress, since, apparently, there would be no limits imposed upon them. However, those who opposed the approval of the aforementioned resolution were always careful in making it very clear that the competence of making treaties was limited by the Constitution itself.

The resolution was finally approved, but the request was rejected under the allegation that the House of Representatives would not perform any formal role concerning the treaty-making procedure. Anyhow, some members of the House of Representatives were careful in formally expressing their dissatisfaction in relation to the adopted model. Elbert M. Byrd Jr. observed that:

The resolution requesting the papers was passed 62 to 37, and Washington refused the request, using arguments of the opponents to the resolution as the basis for this refusal. The proponents then moved that the House enter on the journal the reasons for their disagreement with the President, lest posterity assume that their silence meant assent, and this resolution passed 63 to 36. (BYRD JR, 1960, p. 58)

Another interesting issue in the US Law was the development of the idea that apart from treaties, there would be other types of international agreements. And the emergence of these other types of international agreements was a result, particularly, of the dynamics of the international relations themselves.

In the foreword of Elbert M. Byrd's book, Elmer Plischke explains that in the years which preceded the publication of Byrd's work, the Government of the United States had started using the so-called executive agreements (exclusively made by the President) with several objectives, including the association of the country to international organizations. For him, the emergence of the executive agreements was a result of the Executive Power reaction to the troublesome treaty-making procedure, as stated by the Constitution. In Elmer Plischke's words:

Because of constitutional restrictions respecting the treaty process, the Government of the United States has evolved a number of practices to facilitate its participation in international affairs. The chief of the devices that has come to be relied upon is the employment of the executive agreement.

While the latter may be viewed as being distinguishable from the treaty externally, it is differentiated from the formal treaty internally. (BYRD JR., 1960, p. V-VI)

A peculiarity of the adoption of executive agreements in the United States of America resides in the very fact that the Supreme Court effectively acknowledged its validity when it analysed the agreement between the United States and the Union of the Socialist Soviet Republics (USSR), signed on November 16, 1933. According to that agreement, the United States of America acknowledged the existence of the Soviet Union and foresaw the transference to the US of deposits which were made in a private bank in New York before the Russian revolution.

On that occasion, the Supreme Court reported:

That the negotiations, acceptance of the assignment and agreements and understandings in respect thereof were within the competence of the President may not be doubted. ... [I]n respect of what was done here, the Executive had authority to speak as the sole organ of... [the] government. The assignment and the agreement in connection therewith did not, as in the case of treaties, as that term is used in the treaty making clause of the Constitution (Article II, # 2) require the advice and consent of the Senate. ... There are many such compacts, of which a protocol, a modus Vivendi, a postal convention, and agreements like that now under considerations are illustrations. ... Within the field of its powers, whatever the United States rightfully undertakes, it necessarily has warrant to consummate. (BYRD. Jr., 1960, p. 117)

Even though it had acknowledged the existence of other types of international agreements besides treaties, the Supreme Court has never considered that they could deal, indistinctly, with any matter. Elbert M. Byrd Jr. states:

The Court has never held or asserted, however, that international agreements other than treaties may be as extensive in scope as treaties, i. e., that they are entirely interchangeable with treaties, but merely that they are "similar" for purpose of adjudication. Unless and until such a development occurs, there will be a special role for the treaty process in the United States. (BYRD Jr., 1960, p. 122)

After these considerations, it is possible to conclude that the procedure regarding the making of international agreements established by the 1988 Constitution of the Federative Republic of Brazil is very similar to the one adopted by the US Law. In fact, the main difference resides in the phase of approval by the Legislative Power.

In Brazil, an international agreement must be approved by both Houses of the National Congress. And the approval must be done by both Houses, separately, through voting of

the simple majority of the Houses' members present in the voting sessions. In the United States of America, however, the approval is a sole and exclusive responsibility of the Senate, by means of two-thirds vote of the total number of Senators present in the voting session.

4. Conclusion: a proposal for changes in the Brazilian legislation

A reasonable interpretation of Article 49, I, of the 1988 Brazilian Constitution, may enable one to conclude that, according to the present model, agreements concerning Brazil's association to international organizations which foresee the payment of contributions for their maintenance and operation need the National Congress' approval.

Even though there is an interpretation that the 1988 Constitution of the Federative Republic of Brazil permits the making of simplified agreements, that is, without the participation of the National Congress, this interpretation could not be applied to agreements related to Brazil's association to international organizations which involve the payment of contributions.

As mentioned in chapter one, Article 49, I, of the 1988 Constitution determines that the National Congress has the competence to definitively decide about international agreements that generate onerous duties or commitments which affect the national patrimony. Thus, there is no doubt that the payment of financial contributions fits within the concept of duties.

One can argue that, in some situations, the contributions do not affect significantly the national patrimony due to their low value. However, an interpretation in a sense that agreements which involved the payment of low value financial contributions could be concluded and implemented without being submitted to the National Congress approval would generate more confusion instead of bringing about more clarification to the matter.

Notwithstanding, one cannot minimize the importance of establishing relations with other subjects of Public International Law, whether they are States or international organizations and, particularly, one cannot minimize the dynamics of these international relations, which, very often, require more rapid incorporation proceedings of international agreements to the States' internal legal framework.

As pointed out in chapter two, the Legal Advisory Department of the Ministry of Planning, Budget and Management dealt with several cases whereby agreements of association to international organizations had not been approved by the National Congress. However, the Executive Power acted as if these agreements had already been enforced and even

made the payment of the due contributions foreseen for the maintenance and operation of those international organizations.

One of the most emblematic cases involved the International Criminal Police Organization (INTERPOL), in relation to which Brazil decided to become member in 1953 and it had already been contributing for its operation for years. Interrupting the payment of the contributions to INTERPOL would not only represent the cessation of relevant services to national public security, but, probably, would also jeopardize Brazil's image in the international scene. Although there are no foreseen sanctions concerning the non ratification of an international agreement previously signed, the State could be subject to retaliations of political nature.

These considerations have led to the undertaking of this research work, whose aim is to provide some subsidies which could help in the design of a new model of incorporation of these international agreements into the Brazilian legal framework.

Chapter three focused on the US treaty-making procedure. There is no evidence that the US model is faster than the one adopted in Brazil, under the 1988 Constitution. In the United States, even though treaties need to be approved only by the Senate, this approval has to be achieved through two-thirds vote of Senators who are present in the voting sessions. It is worth reminding that the Senate's exclusive participation is grounded in the history of the United States, where the formation of the federation resulted from the union of sovereign States, which have always been - and still are - concerned with the preservation of their political autonomy.

Therefore, evidence seems to indicate that there is no point in replicating in Brazil the model of incorporation of international agreements adopted by the United States. In this respect, it is worth highlighting that the emergence of executive agreements in the United States seems to indicate that even the US model does not fully satisfy the country's needs concerning the incorporation of international agreements.

One possible alternative would involve changes in the manner both Congress Houses work in Brazil. The Chamber of Deputies and the Federal Senate internal regulations determine that international agreements should be submitted to their respective plenary for voting.

The procedure, however, could be simplified, so that international agreements could be examined and approved only by the Committees in both Houses, similarly to what is already done for the analysis and approval of some bills.

In this respect, it is worth examining Article 24 and Article 132, Paragraph 2, of the Federal Chamber of Deputies' Internal Regulation as well as Article 91 of the Federal Senate's Internal Regulation:

Art. 24. Às Comissões Permanentes, em razão da matéria de sua competência, e às demais Comissões, no que lhes for aplicável, cabe:

- I – discutir e votar as proposições sujeitas à deliberação do Plenário que lhes forem distribuídas;
- II – discutir e votar projetos de lei, dispensada a competência do Plenário, salvo o disposto no § 2º do art. 132 e excetuados os projetos:
 - a) de lei complementar;
 - b) de código;
 - c) de iniciativa popular;
 - d) de Comissão;
 - e) relativos a matéria que não possa ser objeto de delegação, consoante o § 1º do art. 68 da Constituição Federal;
 - f) oriundos do Senado ou por ele emendados, que tenham sido aprovados pelo Plenário de qualquer das Casas;
 - g) que tenham recebido pareceres divergentes;
 - h) em regime de urgência;

Art. 132. [...]

§ 2º Não se dispensará a competência do Plenário para discutir e votar, globalmente ou em parte, projeto de lei apreciado conclusivamente pelas Comissões se, no prazo de cinco sessões da publicação do respectivo anúncio no *Diário da Câmara dos Deputados* e no avulso da Ordem do Dia, houver recurso nesse sentido, de um décimo dos membros da Casa, apresentado em sessão e provido por decisão do Plenário da Câmara. (DIÁRIO OFICIAL DA UNIÃO, 1989)

Art. 91. Às comissões, no âmbito de suas atribuições, cabe, dispensada a competência do Plenário, nos termos do art. 58, § 2º, I, da Constituição, discutir e votar:

- I – projetos de lei ordinária de autoria de Senador, ressalvado projeto de código;
- [...]

§ 2º Encerrada a apreciação terminativa a que se refere este artigo, a decisão da comissão será comunicada ao Presidente do Senado Federal para ciência do Plenário e publicação no *Diário do Senado Federal*.

§ 3º No prazo de cinco dias úteis, contado a partir da publicação da comunicação referida no § 2º no avulso da Ordem do Dia da sessão seguinte, poderá ser interposto recurso para apreciação da matéria pelo Plenário do Senado. ⁴³ (DIÁRIO OFICIAL DA UNIÃO, 2011)

⁴³ Art. 24. *The Permanent Committees, considering their competence, and the other Committees, considering what is applicable to them, are liable to:*

I – discuss and vote the propositions subject to Plenary decision, which are delivered to them;

II- discuss and vote bills, exempted the competence of the Plenary, except for what is established in Paragraph 2, Art. 132, and except for the following projects:

- a) of complementary law;*
- b) of codes;*
- c) of popular initiatives;*
- d) from Committees;*

Thus, the Committees of both Federal Chamber of Deputies and Senate, which are responsible for the analysis of international agreements, could approve (or reject) them right away, with no need to submit the matter to the plenary. Nevertheless, the possibility of analysis of the matter by the plenary would be ensured as long as an appeal is made by one-tenth of the members of both Houses, as already occurs with the examination and voting of some bills.

In fact, the Senate's Internal Regulation already admits that its President delegates responsibilities to the Internal Committees for evaluating and ultimately approving international agreements, after consulting the House leaders. However, under the proposed model, this possibility would become a rule.

With these small changes, a faster proceeding to incorporate international agreements into the Brazilian internal legal framework could be ensured, maintaining their approval by the Congress, as determined by the 1988 Brazilian Constitution.

However, one cannot say, precisely, whether this modification of the internal regulation of both Federal Chamber of Deputies and the Federal Senate would be sufficient to ensure a quick approval of international agreements. Therefore, it is recommended that additional research on the matter should be undertaken in order to better clarify the idea.

Another alternative which could possibly speed up the process of incorporation of international agreements to the Brazilian legal framework would be to exempt the National

e) related to a matter which cannot be delegated, according to Paragraph 1, Article 68, of the Federal Constitution;
f) originated from the Senate or amended by the Senate, which have been approved by the Plenary of any of the two Houses;

g) which have been given diverging legal opinions;

h) of urgent matters.

Art. 132. [...]

§ 2. The Plenary will not be exempted from its competence to discuss and vote, totally or in part, a bill analyzed conclusively by the Committees if, within a span of 5 sessions starting from the publication of the respective announcement in the Chamber of Deputies Official Press, and in the complementary list of topics of the Daily Agenda, an appeal is made in session by one-tenth of the members of the House and, provided through decision of the Plenary of the Chamber.

Art. 91. The Committees, within their scope of competence, are responsible for discussing and voting, exempted the competence of the Plenary:

I – bills, whose author is a Senator, with exception of a code project;

[...]

§ 2 Upon finishing the conclusive analysis to which this article refers to, the committee's decision will be informed to the President of the Federal Senate, for the Plenary acknowledgement and publication in the Senate Official Press.

§ 3 – Within a span of five working days, starting from the publication of the communication referred to in § 2, in the complementary list of topics of the Daily Agenda of the following session, an appeal might be made so that the Plenary of the Senate analyzes the matter.

Congress from evaluating and approving international agreements concerning Brazil's association to international organizations which would involve the payment of contributions up to a previously set value. This could be done by adding a new paragraph to article 49 of the 1988 Constitution, with a new regulation on the matter.

Obviously, this solution would require an amendment in the 1988 Constitution, which could only be done according to what is determined by Article 60 of the Constitution. The text of the new paragraph should be taken to both Houses to be discussed and voted in two rounds in each House. The proposal would only be approved if it gets, at least, three-fifths of the votes of the total number of each one of the Houses' members.⁴⁴

Defining an upper limit value for the contributions would require additional research. This limit should neither be too high, so as not to completely exclude the participation of the Congress in the international agreement making procedure, nor too low, so as to include a large number of international agreements.

Aiming at maintaining the historical collaboration which exists in Brazil, between the Legislative and Executive Power, concerning the making of international agreements, it would be possible to establish, in the same paragraph, or even in another one, the President's obligatoriness of communicating to the Congress the conclusion of agreements, whose incorporation to the internal legal framework would be exempted from the Congress' approval.

Furthermore, the National Congress could also be given the possibility of rejecting the international agreements made by the President through voting of a qualified majority of each House. The rejection would work as a resolute condition. Therefore, as soon as the international agreement is signed it would be immediately incorporated to the internal legal framework and it would be immediately enforced. On the other hand, an eventual rejection of the international agreement by the National Congress would oblige the President to proceed with the denunciation of the agreement.

The alternative proposal to be chosen depends upon the political choice to be made, and this choice is related to the flexibility to be given to the Executive Power concerning

⁴⁴ Art. 60. A Constituição poderá ser emendada mediante proposta.

§ 2º - A proposta será discutida e votada em cada Casa do Congresso Nacional, em dois turnos, considerando-se aprovada se obtiver, em ambos, três quintos dos votos dos respectivos membros.

"Art. 60. The Constitution can be amended through a proposal.

§ 2º - The proposal will be discussed and voted in each House of the National Congress, in two rounds, and it will be approved if it gets three-thirds of the votes of their respective members."

the matter. The first alternative would involve only changes in the internal regulation of the two Brazilian Congress Houses. Although it is easier to be implemented than the second proposal, it might not be the most efficient solution. On the other hand, a possible change in the Constitution, giving some autonomy to the Executive Power concerning the conclusion of international agreements aiming at the association of Brazil to international organizations, would demand bigger negotiation efforts with the Legislative Power. Although it is more difficult to implement, this alternative, once enforced, would probably produce more satisfactory results.

Further research is necessary in order to define which of these two alternatives should be implemented. A possible research topic could be to find out the reasons why international agreements take so long to be approved by the Congress. In case it is proven that the delay is due to the large amount of work done by the Congress, or whether it is due to difficulties related with the large amount of provisional measures sent by the President for Congress approval, or any other reason, the first alternative should be pursued as it could be efficient. However, if the conclusion is that, in fact, the delay regarding the approval is due to the Congress' little interest on the matter, then the second alternative could be more satisfactory.

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