PREVALENCE OF INTERNATIONAL TREATIES IN THE BRAZILIAN TAX LAW

JOSÉ CARLOS FRANCISCO*

Professor of Undergraduate and Graduate at Mackenzie University/SP, Director of the University Center for the Study of the Federal Judges Association of São Paulo and Mato Grosso do Sul - AJUFESP, Director of the Brazilian Institute for Constitutional Studies - IBEC, Master and PhD in Constitutional Law at the University of São Paulo - USP, Post-Doctor from the Université de Paris 1 (Panthéon-Sorbonne), and Federal Judge in the 3rd District.

I. OBJECTIVE

The objective of this study is to demonstrate that the rules of international tax treaties take precedence over the prior and supervening Brazilian domestic law (of any taxing state entity). To demonstrate this statement, we seek to prove that the strengthening of international treaties in the normative system fonts is a reflection of the contemporary socioeconomic context and also the regulatory context of various foreign countries in which there are constitutional assertions marking the preponderance of these international documents (or the international courts interpretations) in relation to the domestic law. We demonstrate that the Brazilian legal system is aligned to the legal formal and material strengthening tendency of treaties, towards the trend given by the 1988 Constitution and especially the 45/2004 Constitutional Amendment.

* José Carlos Francisco,

Following, we introduce three predominant basic types of international treaties in relation to Brazilian domestic law (except when the national legal system presents a more favorable clause to the taxpayer). Although the different legal and normative foundation arguments, the domestic legislation (before or after international acts on tax matters) must comply with the treaty and constitutional hierarchy force or treated with infra hierarchy but supralegal force (in both cases when caring for rights, guarantees and fundamental duties of taxpayers contained in the light of Article 5, § 3, of the 1988 Constitution and guidance by the Supreme Court) and treated with infra hierarchy and ordinary or legal force because of the Article 97 of the National Tax Code and the Vienna Convention on treaties. Finally we conjectured about the reception of international treaties currently in force, before supervening Constitutions as a consequence of the expansion of the normative force of these international instruments.

II. STRENGTHENING OF INTERNATIONAL TREATIES ON SOURCES OF REGULATORY SYSTEM

With foundations based on customs and supported on free consent, good faith and *pacta sunt servanda*, treaties go through history of legal relations to arrive at the present time as an international agreement between States or international organizations governed by public international law and formalized in written document (single instrument or more related instruments). Allied to treaties is reciprocity by which States give equivalent treatment to that entered into formal agreements, but without formal instrument between them.

The historic march shows clear improvement in the socioeconomic importance of international treaties (although with periodic setbacks and deviations), which is reflected in the strengthening of the treaties in the normative system fonts to the point that currently exist international normative acts with equal force to common laws, or supra legal force and even constitutional force.

Socioeconomic context: elementary causes of treaties

Since antiquity there are records of agreements between States to meet the common interests of the negotiators and contracting entities. Instrument by which is enabled cooperation (social, strategic, etc) between Nation States and international organizations, alternative dispute resolution and dispute resolution, regulatory issues of common interest, comparative advantages in the production of economic goods, etc. and there are several reasons that led treaties to an increasing role in the international context (regional or global).[1] Peace by trade prompeted several international cooperation treaties between countries from the mid 20th century, providing the mechanisms and development of advanced supranational institutions, which has its best example as the European Union. [2]

With the advancement of knowledge, technology, and especially the media experienced since the second half of the Twentieth Century, new aspects led to the need for international cooperation on issues of common interest (eg. environmental issues and corruption), and once overcome the obstacles of the Cold War from the 1980s, multiplied constitutional and legal frameworks that incorporated these trends of international harmonization.

Although transformations are part of the socioeconomic process throughout history, today's changes are accelerated and globalized, so that the distribution of risks no longer corresponds to differences in social, economic and geographical societies that marked until the beginning of the 20th century. In this globalized environment, all societies take risks at global proportions, affecting everyone (though the risks are not equal for all), since we live the uncertainties of a different world (but not exactly worse compared to the early stages of the modern age). With globalization, the risks and threats lived in a country have the potential to reflect the immediacy and similar intensities in other countries.

1 Developed by RICARDO, David, Princípios de economia política e tributação. Trad. Paulo Henrique Ribeiro Sandroni. São Paulo: Nova Cultural, 1996, the theory of comparative advantage has important role in international trade by explaining the reasons why trade between two countries can be beneficial even if one is more productive in manufacturing all goods, as each country specializes in sectors where it is more efficient and thus have higher productivity, from which markets its products to other countries. KANT, Immanuel. À paz perpétua. Porto Alegre: L&PM, 1989, seeking to build a society of nations based on peaceful alliances, conceived the idea of international federation of free states in search of peace, formalized in a memorandum: cornerstone of international law (ius gentium - translated as law of Nations, although it represents right of states). LOCKE, John. Segundo tratado sobre o governo civil: ensaio relativo à verdadeira origem, extensão e objetivo do governo civil. Trad. Alex Marins. 5. ed. São Paulo: Martin Claret, 2004, in the Chapter XII Of the Legislative, Executive, and Federative Community (p. 106-114) also brings the Federative Power prediction who must relate to other communities or men who did not join covenants, decreeing peace or war.

2 Several constitutional orders reveal this opening to supranational legal areas, such as the Preamble and Article 24 of the Fundamental Law of Bonn, Article. 11 of the Constitution of Italy, 1948, Article 8 and Article 16 of the Constitution of Portugal 1976 and Articles 9 and Article 16 of the Constitution of Spain 1978.

This set of risks has the potential to provide a new form of capitalism, a new form of economy, a new form of society, a new form of personal life and a new form of global order.[3] In this new context, new models of governance are necessary in order to draw and execute effective public policies in an unstable environment.[4] Driven by these needs, international cooperation depends on formal treaties and reciprocity by which countries and international organizations make possible those policies, or even create multi-country institutions capable of providing the necessary solidarity to face these new challenges.

It has been a long time the union interests are driven by regional or global problems is challenging the superiority of links generated by the meaning of nation and homeland.[5]. As a consequence, there is a redesign of the classic conception of national severeignty in favor of ideas and proposals of solidarity and pluralism among countries to strengthen ties of consciousness that exceed the bonds of nationality.[6]

A new multicultural setting seems to be formed from a civilization connected by social networks in which there is a new form of social organization afforded by electronic media changing the process of knowledge and overcoming the printed information, also marked by the advertising and public relations (dimension of global and electronic interdependence), recreating the world to such an extend that electronic media can lead humanity to a collective identity with tribal basis, the global village.[7]. If there is the possibility of affirmation of a world civilization (of course, without ignoring restricted or reserved societies, especially on religious grounds) it is also the emergence of a natural source of power that do not need to be owned by a single country, but may be exercised by a group, precisely because of the pluralism of the global environment without embargoes of historical cycles of hemogenic civilizations identified by Arnold Toynbee (with emergency, flowering and decadence).[8]

3 Economic risks were "internationalized" mainly because of the financial flow of capital and transnational projects market, becoming highly volatile and unstable planning and management of macroeconomic policies by national governments. On the internationalization of uncertainty, BECK, Ulrich. La Sociedad del riesgo mundial. En busca de la seguridad perdida. Barcelona: Paidos Ibérica, 2008, discusses the risks of the 21st century and its use for political purposes, through terrorism and climate change, in a context in which fear appears as a dictator of that era, and transforms the policy language.

4 About new models of governance in post-modernity, CHEVALLIER, Jacques. L'État post-moderne. 3e éd. Paris: Librarie Générale de Droit et de Jurisprudence – L.G.D.J., 2008. Série Politique.

5 DUVERGER, Maurice, Droit Constitucionnel et institutions politiques. 2. ed. Paris: Presses Universitaires de France, 1956, p. 72.

6 In this respect, BONAVIDES, Paulo. Ciência Política. 10. ed. São Paulo: Malheiros, 2000.

7 About Global Village, McLUHAN, Herbert Marshall A galáxia de Gutenberg: a formação do homem tipográfico. Trad. Leônidas Gontijo de Carvalho e Anísio Teixeira. São Paulo: Companhia Editora Nacional, 1972. (Coleção Cultura, Sociedade, Educação – 19). While on the subject, TAMAMES, Ramón. Um nuevo ordem mundial. Madrid: Espasa Calpe, 1991, p. 259 and following, asserts the existence of a world civilization identified in four points. 1) common information is the main vehicle access (internet) or by sources of expression and international reach (CNN, Time, The Economist, etc.); 2) common language (not the Esperanto of Dr. Zamenhof, 1887), but his contemporary example, English; 3) common culture, since in most homes and shelters in the world (albeit Western, non-Islamic) there is a TV, propagating Hollywood movies, rock and blue jeans; 4) common technique, to economic globalization and scientific measured and awarded in international standard (such as Nobel) and U.S. transnational corporations, Japanese, German etc.

8 TOYNBEE, Arnold J. Estudos de história contemporânea: a civilização posta à prova e o mundo e o ocidente. São Paulo: Companhia Editora Nacional, 1976.

Peter Häberle states that we live in a sort of Cooperative Constitutional State, with complex causes transiting through sociological, economic and ideals and moral aspects (especially referred to Human Rights), providing greater openness to supra-national legal systems, so that the nation states fail turning to themselves in the classic models of sovereignty in favor of a strengthening trend and prevalence of community ties and weakening the lines of difference between the inner-national and outer-international supranational, even if this process begins with the mere coordination and ordering for peaceful coexistence.[9]

Legislative context: structuring normative foundation

During the pre-modern fase and even during the early modern stage, the treaties generally were regarded as acts of equivalent hierarchy with ordinary legislation, although good faith that moved the celebrant countries have made these international acts a legal document that should be observed by domestic law compliance by supervening domestic law of those countries. The rationality itself that moves agreements between countries requires the observance of treaties by celebrants, which requires compliance by the supervening domestic law, without prejudice to any right of termination or formal compalint of these international agreements.

But the legal importance of international treaties took great momentum since the mid 20th century, particularly those who care for human rights. Emerged several documents and organizations giving supranational patterns of coexistence and cooperation, with particular attention to the Universal Declaration of Human Rights of the United Nations (1948, strengthened in 1966 with the International Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights and by relevant optional protocols) and the American Convention on Human rights of the Organization of American States (Pact of San Jose, Costa Rica, 1969). The points of convergence in these articulated human rights treaties reveal basic and essential aspects of life in society (it is true, according to Westernized values), although formulated in texts with significant semantic gap as a way to bring together in a single organization, peoples (r nations) and with many countries with different historical realities, different stages of socioeconomic development and asymmetric potential.[10]

9 HÄBERLE, Peter. El Estado constitucional. Trad. Hector Fix-Fierro. México: Universidad Nacional Autônoma de México, 2004, p. 64 and following.

10 Although the semantic gap of expressions used in these international acts serve the purpose of giving elasticity to the normative content and allow the accommodation of diversity in a pluralistic international environment, this same openness represents a direct challenge to the legal validity of the content of normative acts, as expressions like "human dignity "and" human rights "give great scope for interpretation, weakening security in understanding the normative text and giving great discretion to the interpretive process.

By virtue of the need shown by historical facts (and not by a simple liberality), many countries have strengthened the influence of international treaties in their jurisdictions. Equivalent acts to the ordinary laws to acts with constitutional status acts, many countries have made reflect the larger space and the strengthening of international treaties in their domestic legal systems, besides the prevalence or precedence of international treaties regarding the infraconstitutional system.

Reflection advance in foreign legal systems

As either part of the constitutional order itself (forming the block of constitutionality), or as an interpretive reference to the constitutional order, or yet endowed with enhanced diploma or supralegal normative force (besides the precedence derived from good faith that led to its conclusion) international human rights treaties and international courts pertaining to protection of rights that are essential to human life and society had strengthened the internal normative system fonts, highlighting the countries comprising the European Union and South America.[11]. The fact that international treaties on human rights have expanded their power in the hierarchical system also reflected in international treaties with infra hierarchy and ordinary normative force, since all of them have their origin in the expansion of the need for cooperation between countries and international solidarity.

The Italian Constitution in force since 1948, in its Article 10 provides that the Italian legal system should fit the norms of the International Law generally recognized, while Article 11 provides that the Italian legal system consents (under the same conditions of equality with other States) to limit the sovereignty necessary to an order that ensures peace and justice among the nations, and shall promote and encourage international organizations to meet these goals.

11 MAUSS, Didier. A influência do Direito Internacional contemporâneo sobre o exercício do poder constituinte. In: BARROS, Sérgio Resende de; ZILVETI, Fernando Aurélio (Coord.). Estudos em Homenagem a Manoel Gonçalves Ferreira Filho. São Paulo: Dialética, 1999, p. 72, about the changes of the Constitutions of the members of the European Community countries, rightly notes that " the important point is not to argue the legitimacy or illegitimacy of such changes, but simply to note that it was impossible to make develop the EU as wished the twelve member countries in 1992, without modifying most of the time, their constitutions, "adding that " any country that wishes to join the European Union is obliged to accept what is called " Community acquisition ". The Charter of Fundamental Rights of the European Union formally adopted in Nice in December 2000 by the European Parliament, the European Council and the European Commission, as amended and proclaimed the second time in December 2007, has binding legal force (such treaties), and entered into force in December 2009 with the Treaty of Lisbon. Although not to be confused with the Court of the European Union (based in Luxembourg) and does not incorporate the EU but the Council of Europe, the European Court of Human Rights (created in 1954, based in Strasbourg) comprises the protection of human rights in the old continent by applying the European Convention on Human rights (Convention for the protection of Human rights and Fundamental Freedoms, in force since 1953).

The Article 24 from 1949 Fundamental Law of Bonn predicted that the German Federation may transfer, by law, sovereign rights to international institutions, adhere to a system of mutual collective security and consented to limitations on their sovereign rights in favor of a peace order durable in Europe and in the world, and also international agreements for international arbitration in general, with broad and mandatory scope, as well as Member States in relation to their skills and state missions with regard to neighboring institutions, with the approval of the Federal Government. The Article 25 of the German Basic Law also established that the general rules of public international law are part of the federal law,and the laws are superior and directly create rights and duties for the inhabitants of the federal territory.[12]

Overcome the ephemeral and tumultuous force of the 1946 Constitution, the Fifth French Republic was stated in the 1958 Constitution that initially in its Article 55, stated that treaties and international agreements approved regularly have higher laws (supralegal normative force), but constitutional reforms led to the incorporation of Article 53-2 (recognizing the jurisdiction of the International Criminal Court under the 1998 Treaty of Rome), as well as Article 53-1 and Article Article 1 to art 88-7 (strengthening alliances that led to the European Union, seeking peace through trade and protection of human rights).

In Sweden, Article 19 of Chapter 2 of its Government Basic Law Instrument of 1974 (one of the four documents that comprise the Constitution) provides that any law or other normative act can be adopted if contrary to the submission of Sweden to the European Convention for the Protection of Human Rights and Fundamental freedom. Yet Article 6, 7 and 8 of Chapter 10 of the same Government Basic Law on governamental instruments estimates the transfer of powers to European institutions, especially with regard to the protection of human rights.

The 1975 Greek Constitution (revised in 1986 and in 2001) brings in its Article 28, first the recognition of supralegal normative force in international treaties to affirm the prevalence of international acts in relation to domestic law to then admit the limitation of their sovereignty in favor of important national interests, besides the non- infringement of human rights.

12 It is true that Germany lived peculiar situation shortly after the end of World War II, since their territory was occupied by foreign forces, then saw the split in West Germany and East Germany, but the dramatic experiences of human rights violations strengthened the orientation of the Fundamental Law of Bonn to do indicate the relevance of international order (currently applied to the unified Germany).

The 1976 Portuguese Constitution, in its Article 7, authorizes the acceptance of the jurisdiction of the International Criminal Court, the complementarity conditions and other terms set out in the Rome Statute for the realization of international justice that promotes respect for the rights of the human person and of peoples. Yet Article 8 of this constitutional order provides that the rules and principles of general or customary international law are part of the Portuguese law and the provisions of the treaties governing the European Union and the rules issued by its institutions, in the exercise of their respective powers, shall apply the internal order, as defined by the EU law, with respect for the fundamental principles of the democratic state of law. The Article 16 of the 1976 law states that the fundamental rights enshrined in the Constitution shall not exclude any other set of laws or rules of international law, and that the constitutional and legal provisions relating to fundamental rights shall be integrated and interpreted in accordance with the Universal Declaration of Human Rights.

The current 1978 Spanish Constitution, in its Aticle 10, 2, provides that the provisions relating to fundamental rights and freedom that the Constitution recognizes should be interpreted in accordance with the Universal Declaration of Human Rights and the international treaties and agreements duly ratified on the same material (ie, understanding enshrined in international courts regarding this Statement and treated).[13] It is true that this Article 10, 2, of the current Constitution does not give constitutional status to these international instruments while such rights and duties are not also recognized the constitutional order, but as decided by the Spanish Constitutional Court in STC 36/1991 of 14.02.1991, in STC 64/1991 of 22.03.1991, STC 372/1993 of 13.12.1993 and in STC 41/2002 of 25.02.2002, this art. 10, 2, establishes a connection between the system of rights and fundamental freedom and international conventions and treaties on the same issues and because it forces the interpretation of constitutional provisions in accordance to the understanding of international tribunals on the treaties, in practice the content of international acts becomes somewhat constitutionally declared the content of the rights and freedoms of the order of 1978. Therefore, the guidelines extracted from trial courts on international treaties represent interpretive source for the identification of content that comes to constitutional rights and freedom can not be considered independent or autonomous sources of constitutional hierarchy. Yet Article 93 of the 1978 Spanish constitutional order provides that, upon the organic law, it is possible to conclude treaties by which they assign to an organization or international institution the exercise of powers derived from the Constitution (reflecting the needs that lead to the European Union as well falls within the protection of human rights), leaving it to the General Courts or the Government, as may be the case, to ensure compliance with these treaties and resolutions issued by international or supranational bodies that are holders of entrusted powers. In turn, the Article 95 of the Spanish Constitution states that the conclusion of an international treaty containing stipulations contrary to the Constitution require prior constitutional revision, and the Government or either Chamber may request the Constitutional Court to declare whether there is or not this contradiction

13 As historical background, Article 7 of the Constitution of the Second Spanish Republic in 1931 established that the Spanish government would abide by the universal norms of international law incorporating them in its positive law.

The Chilean Constitution, approved in referendum in 1980 in its Article 5, states that sovereignty resides in the nation (not in the people or an individual sector), but the exercise of sovereignty recognizes as limiting the respect for basic rights emanating from human nature, being the duty of the organs of State to respect and promote such rights guaranteed by the Constitution and by international treaties ratified by Chile and which are in force.

The 1982 constitutional order of Honduras, in its Article 17 (with modifications of the 243/2003 Decree) provides that when an international treaty opposes a constitutional provision it must be approved by the procedure governing the reform of the Constitution, and, equally, the constitutional provision affected shall be modified by the same proceeding before the treaty is ratified by the Executive

The 1985 Guatemalan Constitution in its Article 46, Guatemala formally noted as a general principle on human rights issues that treaties and conventions accepted and ratified have precedence over domestic law. As decided by the Constitutional Court of Guatemala, Gaceta 18, part 280-90, page 99 sentencia: 10/19/90, the art.46 of the Constitution of Guatemala puts human rights above ordinary or secondary legislation level, but does not recognize the constitutional hierarchy, especially the superiority to the Constitution (Article 44, § 3, 175 § 1, 204, 277, 278, 279, 280 and 281 of the Constitution). The same Constitutional Court does not recognize these treaties as a parameter to control the constitutionality (Gaceta 43, part 131-95, page 47 sentencia: 12-03-97)

The 1987 Nicaraguan Constitution, in its Article 46, ensures the complete force of the rights enshrined in the Universal Declaration of Human Rights, in the American Declaration of the Rights and Duties of Man,in the International Covenant on Economic, Social and Cultural Rights,in the International Covenant on Civil and Political Rights of the United Nations and the Convention on Human Rights of the Organization of American States.

Colombia in Article 93 of its1991 constitutional order made prevail in the domestic order and international treaties and agreements ratified by the Congress that they recognize human rights and prohibit their limitation in states of emergency, in addition to rights and duties enshrined in the Constitution should be interpreted in accordance with such treaties and conventions, even admitting the jurisdiction of the International Criminal Court that handles the Rome Statute adopted on 17.07.1998

The 1992 constitutional system of Paraguay in its Article 137, provides that the supreme law of the Republic is the Constitution, followed by treaties, conventions and international agreements, then the provisions of other laws in lower hierarchy, while Article 142 establishes that international treaties on human rights can not be terminated except by procedures governing constitutional amendment.

The 1993 Constitution of Peru in its Article 57 establishes that treaties affecting constitutional provisions must be approved by the same procedure governing the reform of the Constitution before being ratified by the President, while the Article 205 provides that exhausted domestic remedies, whoever is considered injured in the rights assured by the Constitution may have recourse to constituted international tribunals or bodies according to treaties or agreements signed by Peru, completing the Fourth Transitory and Final Disposition stating that the rules relating to rights and liberties that the Constitution recognizes are interpreted in accordance with the Universal Declaration of Human rights and with international treaties and agreements on the same issues ratified by Peru.[14]

After the 1994 Reformation, the 1853 Argentine Constitution in its Article 75, 22, lists several international treaties that have constitutional hierarchy (though do not derogate articles in the first part of the Constitution) and taken as complementary to the rights and guarantees recognized by the constitutional order, which can only be terminated by the Executive after prior approval of two-thirds of all the members of each House. The same constitutional provision provides that other treaties and conventions on human rights require approval of two-thirds of each House to have constitutional status.

The lines of Article 23 of the 1999 Venezuelan Constitution, treaties, covenants and conventions on human rights have constitutional hierarchy, that prevail in the internal order, insofar as it contains more favorable standards to the ones established by the Constitution or by laws of the Republic, in addition to have immediate and direct application by courts and other government entities.

The Article 91 and Aricle 92 of the 2002 Constitution of the Netherlands provide the possibility of conferring legislative, administrative or judicial authority to international organizations of Public International Law, but if that competence conflicts with the Constitution, the transfer should depend on the approval of two-thirds of the Houses of the General States

In Ecuador, the Article 84 of the 2008 Constitution provides that the National Assembly and the entire body with legislative powers should suit, formal and materially the laws and other legal provisions to rights under the Constitution and international treaties and the ones that are necessary to ensure human dignity or communities, peoples and nationalities, and in no case the reform of the Constitution, laws and other normative acts should offend the rights recognized in the Constitution Whilst Article 422 of the same constitutional rule states that you can not enter into treaties or international instruments to which the Ecuadorian State assigns sovereign jurisdiction (except settlement of disputes between states and citizens in Latin America by regional arbitrators or courts for the appointment of signatories) while the Article 424 and Article 425 provides that the Constitution is supreme, superior to all other ones but international human rights treaties that recognize more favorable rights to those contained in the constitutional order takes precedence over the normative acts of the public authority, as Article 436, 1, provides that the

14 The Article 105 the constitutional order of Peru 1978 instituted the precepts contained in the treaties on human rights had constitutional status, and could be modified by the procedure that governed the reform of the Constitution.

Constitutional Court is the highest court for interpreting the Constitution and international human rights treaties.

Bolivia in Article 13, IV, of its 2009 Constitution states that international treaties and conventions ratified by the Multi National Legislative Assembly, which recognizes human rights and prohibit their limitation in state of emergency prevail in the internal order, and the rights and duties enshrined in the Constitution are interpreted in the light of international acts. The Article 410, II, of this constitutional framework claims the supremacy of the Constitution in the source system, but adds to the constitutional order international treaties and agreements on human rights and rules of Community law.

In short, inserted as Constitutional principle, as infra-constitutional act but also supralegal as normative act as infra-constitutional and ordinary act (or legal) force, also recognized as an interpretive source of constitutional order, there is noticeable strengthening of international treaties in the normative system fonts.

III. ALIGNMENT OF THE BRAZILIAN LEGAL SYSTEM TO THE TREND OF STRENGTHENING

The 1988 Brazilian Constitution reflects the trend of differentiated allocation of international treaties in the legal hierarchy. This allocation is most visible in the field of human rights under the rules of Article 5, § § 2 and 4 of the Permanent body, and Article 7 of theTransitory Constitutional Disposition Act (ADCT), both of the 1988 Constitution, but other issues (including tax) have strengthened their relevance to the guiding principles of international relations provided in Article 4 of that Permanent body, all revealing the need for prevalence of international treaties dealing on various topics, especially because international solidarity requires cooperative commitment between countries aiming actions of common interest, notably in socioeconomic matters (in which obviously fits taxation).

Although not straight and steadily, the previous Brazilian constitutional provisions brought references to international treaties and gave them prevalence and compliance in relation to the internal laws (including supervening laws) until the 1988 Constitution (especially after the Amendment no. 45/2004) ratified the expressive importance of these international acts in the source system and the legal hierarchy.

Trend for strengthening the formal-legal and material treaties

In the 1824 Empire writing, Article 102, VIII, provided that the Emperor was the Chief Executive, and exercised the power by his ministers of state, and, within his main tasks was to conclude treaties of offensive and defensive alliance, subsidy and trade, taking them after completion to the General Assembly, when the interest and security of the State permitted and if the concluded treaties in peacetime involving transfer or exchange of territory of the Empire, or possessions that the Empire had the right over, it would not be ratified without approval by the General Assembly. The late 19th century and early 20th century was recognized the primacy of international treaties in the face of subsequent domestic legislation since the absolute equivalence between ordinary law and treaties that could justify a supervening law (not preceeded by the procedure of complaint) could simply result in the non-application of the treaty, to the detriment of the good faith of the celebrants, legal security, customs and principles of international law, which represents a violation of Article 10 of the Convention on Treaties, signed up at the 6th American Conference in Havana (promulgated by 18.953/1929 Decree).[15]

The conclusion by the Chief Executive and the ratification by the Legislative Power were kept to formalize international treaties in Brazil in later constitutional provisions, but the treated material preponderance over internal supervening legislation introduced some oscillations. Related to tax treaties in force of the1937 Constitutional Charter, the Supreme Court affirmed the prevalence of these international acts in the Civil Appeal no.7.872/RS, having Min Philadelpho de Azevedo as overseer in the judgment on 11.10.1943.[16] Also on tax matters, the validity of the 1946 Constitution, the prevalence of international treaties in relation to domestic legislation was later reaffirmed by the Supreme Court in Civil Appeal 9.587/RS, having Min Lafayette de Andrada as overseer in the judgement on 21.08.1951. [17]

During the rule of the 1946 Constitution emerged the National Tax Code stating in its Article 98 that treaties and international conventions revoke or modify the internal tax laws, and will be observed by the ones that befall them. As any supervening law, international treaty duly ratified can derogate or abrogate previous infraconstitucional provision (whether complementary or common law), which is why the importance of the provision of Article 98 of the Tax Code is the prevalence of international normative act with respect to subsequent domestic laws to it [18]

15 On the subject, RODRIGUES, Manoel Coelho. A extradição no direito brasileiro e na legislação comparada. Anexo B. Rio de Janeiro: Imprensa Nacional, 1931. t. III, p. 75/78.

16 Relevant excerpts from this Decision are in PINHEIRO, Aline. STF sinaliza que pode derrubar prisão para depositário infiel. Consultor Jurídico, 26 Nov. 2006, <http://www.conjur.com.br/2006-nov-23/prison_for unfaithful depositary_ toppled?page=11>, accessed 26 Mar. 2014.

17 URSAIA, Maria Lucia Lencastre. Vigência e eficácia da norma jurídica convencional na ordem jurídica brasileira. Revista CEJ, Brasília, n. 20, Jan./Mar. 2003, p. 99-104.

18 In our view, it is not properly handled by the repeal of incidental or special law, nor the supplementary treaty repeals previous legislation, because what happens is the suspension of the legal effect of national normative act given the diversity of regulatory sources (internal and other international) and also because of duality or plurality of parts that produce international act. However, we employ the expressions derogation and revocation to be more common on the subject and did not cause significant effects to the object of this study.

The 1967 Charter (amended by 01.1969 Amendment) in Article 7, placed that international conflicts should be resolved by direct negotiations, arbitration and other peaceful means, with the cooperation of international organizations that Brazil is part of, being forbidden the war of conquest. Although the Union concluded treaties and agreements with foreign States or participated in international organizations (Article 8), under this Charter, the normative force of international treaties was infraconstitutional (including those relating to human rights), or because the celebration was given by common pathways (Legislative Decree and Presidential Decree), either because the Article 119, III, " a" and " b " entrusted jurisdiction to the Supreme Court to judge, on extraordinary appeal (such as the common law), cases decided in a sole or last instance by other courts (when the contested decision contradicted this device letter or deny validity of a treaty or federal law), and to declare the unconstitutionality of a treaty or federal law. But it was based on Article 98 of the Tax Code that the Supreme Court issued Pronouncement 575 on 01.03.1977, since the interpretation in face of the 1967constitutional order (01/1969 Amendment), recognizing the prevalence of treaties to the understanding of later tax laws

Yet, on the judgment of Extraordinary Appeal 80.004/SE, having Min Cunha Peixoto, as overseer, Full, DJ, 29.12.1977, the Supreme Court changed its view to assert that international treaties have infra normative force, and are subject to derogation and abrogation by domestic law, anchored in the reading of the 1967 Charter of 1967 (01/1969 Amendment) as to the absence of constitutional law that prevents such repeal. Although this trial did not take care of tax matters, Min Cunha Peixoto distinguished normative treaties (outline rules on points of general interest, engaging the future by admitting abstract principle) and contractual treaties (agreements on any subject, creating subjective rights), concluding that Article 98 of the Tax Code handles contractual treaties that must be respected by the parties, and constitutes the exception to the general rule (stated in 80.004/SE RE), the application of this Article 98 is restricted to tax matters.[19] Importantly, other judgments of the Supreme Court employed the Article 98 of the National Tax Code regardless of whether the treaty is legal or contractual. [20]

19 To query the full text of this judgment, <http://redir.stf.jus.br/mwg-internal/de5fs23hu73ds/progress?id=UE6MIzSmro>, accessed on 26 Mar. 2014.

20 For all RE 90.824/SP, Full, Rep. Min Moreira Alves, trial 25 June 1980, DJ 19 Sep. 1980,<http://www.stf.jus.br/portal/jurisprudencia/listarJurisprudencia.asp?s1=%2890824%2ENUME%2E+OU+90824%2EACMS%2E%29&base=baseAcordaos&url=http://tinyurl.com/c5aufvm>, accessed on 26 Mar. 2014. the Treaty of Montevideo addressed in this trial can also be considered as handled contract, although the arguments used in the trial has been claimed towards the prevalence of treaties in the face of later domestic legislation.

Decisive Step: 1988 Constitution And Amendment 45/2004

The 1988 Constitution took important legislative steps towards the strengthening of international treaties, because besides the traditional provisions on the competence of the President of the Republic for celebration (Article 84, VIII) and the National Congress for approval of such international acts (Article. 49, I), and legal control by the Supreme Court (Article. 102, III, "b") and the Superior Court (Article 105, III, "a"), this constitutional document made important references to the importance assumed by international normative acts.[21]

It is true that the orientation expressed in Extraordinary Appeal 80.004/SE reflected in other judgments of the Supreme Court now under the aegis of the 1988 Constitution, so that the parity between treated and internal normative acts (ie, lack of provision in higher hierarchy of system fonts) generated solution by the basic criteria of composition of apparent antinomies (later law prevails in the face of previous law and special law prevails in the face of subsequent general law), even on issues related to human rights.[22] On non tax issues, the Supreme Court had settled understanding towards parity between normative treaties and ordinary laws, so that these international acts would not even traverse about pertinent acts on the supplementary law topics.[23]

21 Before Amendment 45/2004, part of the constitutional doctrine already stated status of international human rights treaties in reliance on paragraph 2 of Article 5 of the Constitution. In this respect, CANÇADO TRINDADE, Antonio Augusto. Instrumentos internacionais de proteção dos direitos humanos. São Paulo: Centro de Estudos da Procuradoria Geral do Estado de São Paulo, Dec. 1996. n.º 14, p. 15 and following, including listing several countries that affirmed the constitutional normative force of human rights treaties. Also affirming the constitutional hierarchy of international human rights treaties in the Brazilian Amendment right before 45/2005 PAGLIARINI, Alexandre. Constituição e Direito Internacional, cedências possíveis. Rio de Janeiro: Forense, 2003 and PIOVESAN, Flavia. Direitos Humanos e o Direito Constitucional Internacional. 7. ed. São Paulo: Saraiva, 2006, p. 73. While on the subject, PIOVESAN, Flavia. Reforma do judiciário e direitos humanos. In: TAVARES, André Ramos; LENZA, Pedro; ALARCON, Pietro de Jesus Lora (Org.). Reforma do judiciário analisada e comentada. São Paulo: Método, 2005, p. 72, states that treaties are incorporated by the strictest rite of amendments would only strengthen (the formal aspect) of its equipment immediately after constitutional status is afforded under Article 5, § 2, of the Constitution.

22 The Supreme Court stated that the Pact of San Jose, Costa Rica added up to national law to force infra standard (eg., The HC 77.631/SC, Rep. Min Marcus Aurelius), and being a later general rule, would not prevent the civil imprisonment allowed by previous special legislation and not even later,which is properly anchored in Article. 5th, LXVII of the Constitution. The American Convention on Human Rights (Pact of San Jose, Costa Rica) was held in 1969 but was passed by Legislative Decree 27 only in 1992 and was published and promulgated by Decree 678/1999. In our view, these provisions of the Pact of San Jose are specific and not general precepts, so that would have prevented the legal effectiveness of previous legislation (given the mainstream understanding towards this treaty have normative force equivalent to common law), to the force of the new Civil Code in 2003, which expressly handled the civil prison of an unfaithful trustee.

23 For all ADI MC 1480/DF, Full, Rel Justice Celso de Mello, judged on 04 Sept. 1997, 18 May 2001 DJ, it gives off the monistic and dualistic theories to say that it is the Constitution that must affirm the strength hierarchy of normative acts.

It was after the Constitutional Amendment 45/2004 that the constitutional orientation was pacified by the strengthening of international treaties (register, Constituency legitimate choice, regardless of the monistic and dualistic theories). Arguments drawn from texts originally provided by the 1988 Constituent Assembly had new impetus, including the Preamble of the Constitution, without no legal force but guiding the interpreter advocates the involvement of society and the Brazilian State (in domestic and international order) with peaceful solution of controversies. It also had argumentative reinforcement in the legislative field with Article 4 of the Permanent Body when stating about governing principles in international relations (global international and regional cooperation) and the pursuit of economic integration, political, social and cultural development of the peoples of Latin America, viewing the formation of a Latin American community of nations (international regional cooperation).

The new grounds in favor of strengthening of international treaties in the normative system fonts came with the introduction of paragraphs 3 and 4 of the Article 5, of the Permanent Body, since these paragraphs inserted by the 45/2004 Amendment concluded long discussion about the constitutional status of treaties on human rights (existing since the promulgation of the Constitution on grounds of paragraph 2 of Article 5 of the Permanent Body and art. 7, ADCT).[24]

Therefore, after 45/2004 Amendment is clear the Brazilian legal guidance towards alignment with the legal strengthening of international treaties on human rights and protection of global and regional systems. Strengthening this alignment (not just restricted to issues relating to human rights), the Vienna Convention on Treaties (in force since January 1980) was approved by the National Congress on 17.07.2009 (Legislative Decree 496/2009, with restrictions of Article 25 and 66)., whose instrument of ratification was deposited by Brazil at the United Nations General Secretariat on 25.09.2009, and published and promulgated by the President at the end of 2009 (7.030/2009 Decree, DOU, 15.12.2009) [25]

24 The Amendment 45/2004 also predicted in the Article 109, § 5, of the Constitution, the incident of displacement of competence of the state courts to the federal courts by which, in case of serious violations of human rights, as it is that of the jurisdiction of the federal judiciary labors involving the fulfillment of obligations international human rights treaties to which Brazil is a party.

25 The increasing importance of such international acts motivated the International Law Commission of the United Nations to prepare the Vienna Convention on Treaties, of 23 May 1969, whereby it was codified what was customary on treaties establishing international organizations and treaties adopted within an international organization, so that now are positivized topics such conclusion and entry into force (including rules for adoption and formulation of reservations), compliance, enforcement, interpretation, amendment, invalidity, termination and suspension of treaties. Even admitting the importance of international customs as competing source of treaty law, the encoding performed by the Vienna Convention strengthens these international acts in the pursuit of peace and security, social stability benefits, creates greater transparency of decision making and facilitates development of friendly relations and the achievement of cooperation among nations.

However, respectable voices in the Supreme Court gave indications in different directions, as the eminent Min Moreira Alves at the trial of ADI 1.600/DF, rejecting or declaring unconstitutionality of the Article 98 of National Tax Code (shortly before 45/2004 Amendment).26. With due reverence, understandings accordingly seem a paradox in terms that the inclusion of international treaties in the constitutional hierarchy level reverberates throughout the legal system, not only by the occasional need for a specific treaty (with constitutional force) to delimit the regulatory framework and interpretation and application of legal system interpreted according to the Constitution, but also because this process insertion abstractly reveals the importance attached by the Constituent to the international system based on bilateral and multilateral treaties (regardless of the content of the treaties). Therefore, to provide that international treaties may have constitutional force, Article 5, § 3 of the Constitution reinforces both treaties on human rights and international treaties on other topics (including tax) because all of them have in common the same reasons and purposes of cooperation and international solidarity, even though each of these treaties may occupy diverse hierarchical level in the system of sources

IV. TREATIES MODALITIES AND TAX ISSUES

After the legal restructuring promoted by the 45/2004 Constitutional Amendment, the Brazilian legal system has at least three types of international treaties sorted by criteria in the hierarchy of normative system fonts:

a) treaties with hierarchy and constitutional force: due to the provisions of Article 5, § 3 of the Constitution, international treaties and conventions on human rights that are approved in each House of the National Congress, in two shifts, three-fifths of the votes of its members shall be equivalent to constitutional amendments;

b) treaties with infra and supra-legal power hierarchy: treaties on human rights inserted in the Brazilian domestic law without the observance of the rite provided in Article 5, § 3 of the Constitution (and therefore not approved by the strict procedure imposed on amendments) are in an intermediate position between constitutional and infra-constitutional order;

c) treaties with infra-constitutional hierarchy and ordinary (or legal) force: other international treaties approved by the Brazilian legal system take hierarchy and ordinary legal or normative force, but should take precedence in relation to Brazilian regulatory instruments on grounds of good faith that motivates their celebrations, under the Vienna Convention on Treaties or due to Brazilian normative predictions (such as Article 97 of the Tax Code).

26 Eminent Vote of Min Moreira Alves, launched in ADI 1.600/DF, Full, Rep. Min Sydney Sanches, judged on 26 Nov. 2001, 20 June 2003 DJ, <http://redir.stf.jus.br/mwg- internal/de5fs23hu73ds/progress? HoATlrQpXP id =>, accessed 26 Mar. 2014.

Surely there are other criteria for classification of international treaties, but in this study we take care of the three modes indicated above (over which they are certain) to contextualize them with tax issues

It is relevant to say that all forms of international treaties referred above represent normative acts issued by the Federative Republic of Brazil (acting through the Federal Government, acting on behalf of the Republic), for which its provisions shall apply to the Union, the Member States, the Federal District and the municipalities. [27]

Although this study aimed to point out the prevalence of international treaties (in any of its forms) in relation to domestic law, it is important to remember that this prevalence depends on whether the treaty brings a more favorable clause to the taxpayer, since as a rule the international acts forecast for the preference of the most protective clause to citizens (regardless of this clause included in treaty or domestic law). Therefore, the prevalence of the international treaty is "potential" because as a general rule in these matters, should always be applied to a more favorable disposition to the citizen-taxpayer

It urges to remember that the operator of the Brazilian law should apply the content of international treaties according to the interpretation usually given by competent International Courts, and not according to their own interpretation, because the reference should be the guidance given by harmonizing Courts to facilitate cooperation and solidarity proposed for the conclusion of international treaties. [28]

27 The Supreme Court in the judgment in RE 229.096/RS, Full, Rel to Case Min. Carmen Lucia, judgment on 16 Aug. 2007, 11 Apr. 2008 DJ, decided that the conclusion of international treaties by the Republic is not subject to the prohibition of granting exemption in state, district and local taxes imposed on the Federal Government for the Article 151, III, of the 1988 Constitution.

28 The operator of the right of each country is not "free" to interpret the content of normative precepts employed in treaties, observing the interpretation given by the competent international courts, as well as the operator observes the law as interpreted by the constitutional court of his country about its constitution. About conventionality control laws for everyone, RAMOS, André de Carvalho. Responsabilidade internacional do Estado por violação de direitos humanos. Revista CEJ - Centro de Estudos Judiciários, Brasília, n. 29, Apr./June 2005, p. 56 and following.

Treaty with constitutional status and hierarchy: Rights, guarantees and fundamental duties of the taxpayer

The Brazilian constitutional system rejected international treaties with supra-constitutional normative force (upper and limiting the Original Constituent Power) but the *treaty-making power* exercised by public authorities of the Brazilian state allows the production of treaties equivalent to the constitutional amendments complied the formalities of Article 5, § 3 of the current.[29] These international acts reverberate in the national legal system as an exercise of Constituent Power Reformer, provided they are complied with cumulatively content requirement (human rights issues) and requirement form (Hard Case), in addition to complying with circumstantial and implicit limits (form and content) taxes to formal constitutional reform.[30]

On the matter of requirement of form, the rigid process required of international treaties is similar to tax at ordinary constitutional amendments of Article 60 of the Constitution. There are some peculiarities concerning these treaties that differentiate their rite to the ones employed for the amendments, because they will initially be signed by the President (private initiative), following to the National Congress for approval by legislative decree (two rounds of voting in each House, by requiring at least a majority of three-fifths in each of them) and, ultimately, promulgation and advertising by decree of the President..[31]

29 In this respect, the E.STF, the MI-772 AgR, Rel Justice Celso de Mello, judgment on 24 Oct. 2007, Plenum, DJE, 20 Mar. 2009.

30 On international treaties with constitutional status and its relationship with the constituent power FRANCISCO, José Carlos; MESSA, Ana Flávia. Tratados internacionais sobre direitos humanos e poder constituinte. In: PAGLIARINI, Alexandre Coutinho; DIMOULIS, Dimitri (Org.). Direito Constitucional Internacional dos direitos humanos. Belo Horizonte: Fórum, 2012. v. 1, p. 241-275.

31 This rite was used for the adoption of the International Convention on the Rights of People with Disabilities and its Optional Protocol, signed in New York on 30 Mar. 2007. Initially signed by the President, they were approved by Legislative Decree 186, Gazette of 10 July 2008, followed by Presidential Decree 6949, Official Gazette of 26 Aug. 2009, after which the Brazilian Government deposited its instrument of ratification of such acts with the Secretary-General of the United Nations on 1 Aug. 2008, then these international acts came into force for Brazil, the external legal form in 31 Aug. 2008.

As for the contents, the concept of human rights is not univocal, but to what matters to this study, we employed the expression as synonymous with fundamental rights shaping the sujective rights to the setting of human nature and life in society also applicable to relations between human beings (individually or in groups) and State (vertical application) or between individual humans in their interpersonal relationships or group (horizontal application), being secured by the individual's own actions when able, and if unable, it is granted by successive actions of his family, society National State and additionally the international (global and regional) order.32 Cleared the conceptual discussion, there are issues that are categorically placed on the meaning of fundamental human rights, especially prerogatives inherent to freedom, equality, safety, life and property, historical themes contained in international documents declaratory or constitutive of these rights (eg, Universal Declaration of Human rights, the American Convention on Human rights, the International Covenant on Civil and Political rights and its Optional Protocol, and the International Covenant on Economic, Social and Cultural rights)

Many of the prerogatives clearly inserted in the list of fundamental human rights are demonstrated in several areas of law, setting also subjective rights essential to human life in society.Taking the example contained in international historical documents with direct reflection on the Brazilian constitutional order, if equality and security are fundamental human - rights when it comes to understanding them, for example, in the context ofArticle. 5 of the Constitution, likewise such prerogatives are also indispensable when it comes to equivalent predictions in areas of Administrative Law, Criminal Law and Tax Law and other areas of legal expertise.The literal prediction of the Article. 5, § 2 of the Constitution emphasizes that the rights and guarantees expressed in this provision does not exclude others in the same constitutional order, nor under the scheme and the principles adopted by it, or the international treaties to which the Federative Republic of Brazil is a party.

32 We recognize the conceptual diversity involving fundamental rights, human rights, humanitarian law, human rights, civil liberties, rights of personality etc.., but we delimit our study in order to employ the concept along the lines outlined above, without ignoring the prevalence of use of the expression "human rights" in international law and "fundamental rights" in the National Law (eg., Brazil, with Title II of the 1988 Constitution). About conceptual diversity, by all COMPARATO, Fábio Konder. A afirmação histórica dos direitos humanos. 4. ed. São Paulo: Saraiva, 2005, and COMPARATO, Fábio Konder. Direito Público: estudos e pareceres. São Paulo: Saraiva, 1996, p. 44 (in which the author places human rights as superior to the original constituent power limits).

It is apparent the correspondence between human and fundamental rights contained in Title II of the Constitution (especially in Article 5) with the tax constitutional system forecasts (notably Article150) which we illustrate by way of example:guarantee to freedom, equality and security expresses the requirement of strict legality or absolute reserve law (Article. 5, XXXIX, taking care of criminal types, and Article 150, I, on the main elements of the tax liability), the right to equality (Article 5, on items such as I, XLI and XLII with diverse content, and Article 150, II, on tax equality), legal security (Article 5, XXXVI ensuring the general rule of non-retroactivity and Article 150, III, "a", related to retroactivity tax) and property (Article. 5 with various protections on items such as XXII, XXIV and XXV, and Article 150, IV, regarding the prohibition of the use of tax of confiscatory effect, beyond the protection of free enterprise and trade), freedom of movement (Article 5, XV on locomotion in general and Article 150,V, taking care of the limitation of persons or goods, by means of taxation), and ensuring the privacy and intimacy (Article 5, X and XI, taking care of privacy, intimacy and home, and the necessary interpretations to also ensure legitimate fiscal performance to house the intimacy and privacy of taxpayers with regard to the banking and fiscal secrecy and inviolability of the premises).[33] There are even fundamental taxpayer rights without direct correspondence with general predictions, as occurs with the prior taxation (clear derivation of legal certainty and legitimate expectations, in view of predictability).[34]

The existence of fundamental taxpayer rights was recognized by the Supreme Court decades ago, when it decided the unconstitutionality of Constitutional Amendment 03/1993 for violation of the entrenchment clause of Article 60, § 4, IV of the 1988 Constitution, since that amendment could not depart the prior taxation (Article 150, III, "b", of the order of 1988) to impose Provisional Tax on Financial Transactions (IPMF) the same year of its creation.[35] And if there are fundamental taxpayer rights, there are also equally indispensable imposing duties to meet obligations necessary for the realization of human nature and life in society.[36]

33 In this study we present illustrative list of connections between general fundamental human rights with fundamental human rights of taxpayers, because our thematic focus led to the analysis of equivalence, without focusing on all correspond cases (hearty theme for other studies in the academic community).

34 On the subject, FRANCISCO, José Carlos. Estado Pós-Moderno, confiança legítima e anterioridade tributária. Revista Brasileira de Estudos Constitucionais, v. 1, p. 245-267, 2011.

35 ADI 939-7/DF, Full, Rep. Min Sydney Sanches, judgment on 15 Dec. 1993, 18 Mar. 1994 DJ, <http://redir.stf.jus.br/mwg-internal/de5fs23hu73ds/progress?id = n +5 FdTpEDZ>, accessed on 26 Mar. 2014.

36 On fundamental taxpayer rights, FRANCISCO, José Carlos. Direitos e garantias fundamentais do contribuinte. In: TAVARES, André Ramos (Org.). 1988-2008: 20 anos da Constituição Cidadã. São Paulo: Imprensa Oficial do Estado de São Paulo, 2008, v. 1, p. 120-125, MACHADO, Hugo de Brito. Direitos fundamentais do contribuinte e a efetividade da jurisdição. São Paulo: Atlas, 2009 and MARTINS, Ives Gandra (Org.). Direitos fundamentais do contribuinte. São Paulo: Revista dos Tribunais, 2000. About the fundamental duties of the taxpayer, by all NABAIS, José Casalta. O dever fundamental de pagar impostos. Coimbra: Almedina, 2009.

Thus, there is certainly the possibility of international treaties (bilateral or multilateral) to care for human rights in the tax component associated with the work and the freedom of trade as a productive source of goods and services that meet the needs of contemporary societies and are also fulfilling the human dignity, bringing provisions which go beyond the provisions already secured by Brazilian regulatory instruments.[37] In these circumstances such treaties can potentially be launched at the constitutional level one time fulfilled the formalities provided for in Article 5, § 3, of the Constitution.

It is true that the Brazilian concrete experience currently has only one international treaty with constitutional.[38] But the notable expansion of international cooperation in trade leads to the implementation of tax treaties with constitutional force, since the legal structures of various countries (including Brazil) allow the recognition of this kind of treaties in the regulatory system fonts.

It is important to remember that, on human rights, there is always the prevalence of more favorable or protective normative citizen clause (ie, the taxpayer). Therefore, human rights treaties (including tax matters) must be interpreted in light of the maximum effectiveness and preference for the application of the more favorable clause to the protection of the human being, which is why these international acts have the potential to impact and dominates the constitutional and infra-constitutional legal system if forecast more protective prerogative that is essential to human life or society.[39]

37 Institutions such as the Organization for Economic Cooperation and Development (OECD) and the World Trade Organization (WTO) have structure to foster international agreements of this kind.

38 These lines, the International Convention on the Rights of People with Disabilities and its Optional Protocol, signed in New York on 30 Mar. 2007, Legislative Decree 186, Gazette of 10 July 2008 and Presidential Decree 6949, Official Gazette of 26 Aug. 2009, in force for Brazil, the external legal form in 31 Aug. 2008.

39 In E.STF in HC 91 361, Rel Justice Celso de Mello, judged on 23 Sep. 2008, Second Class, DJE of 06 Feb. 2009, analysing exactly the question of Article. 5, § 3, of the Constitution, remained firmed that " judicial officers and courts, in exercising their interpretative activity, especially in the context of international human rights treaties, must observe a basic hermeneutical principle (such as that proclaimed in Article 29 of American Convention on Human rights), consistent in assigning primacy to the rule that proves more favorable to the human person, in order to spare him the most extensive legal protection. The judiciary,in this hermeneutical process that honors the criterion of the most favorable rule (which can either be that under international treaty like we think positively valued in the domestic law of the State), must extract the maximum effectiveness of international declarations and proclamations of constitutional rights as a way to facilitate access of individuals and, especially the most vulnerable, the institutionalized systems of protection of fundamental rights of the human person, under penalty of freedom, social groups, tolerance and respect for human otherness become empty words. Application to the case of Article 7, no. 7, c/ Article 29, both the American Convention on Human Rights (Pact of San José, Costa Rica): a typical case of primacy of more favorable rule to the effective protection of the human being.".

Treaty with infra-constitutional and supra-legal force. Yet, rights, guarantees and taxpayers fundamental rights

The demonstration of the existence of human-rights in fundamental tax arena is also important for another form of international treaty in this Brazilian contemporary reality, namely, treaties before and after 45/2004 Amendment human rights that were not or are not approved own by a qualified majority of constitutional amendments.

IV. TREATIES PRIOR TO 45/2004 CONSTITUTIONAL AMENDEMENT

Regarding prior to Amendment 45/2004, we believe that these treaties on human rights normative acts should have been greeted with constitutional force for the material importance of the topic and the maximum effectiveness in protecting human rights, as well as logical and pragmatic criterion tor rationalize and carry out the constitutional will, avoiding exhaustive (or unlikely) work of Congress to approve now by three-fifths majority and in two rounds of voting, which was already approved (although by a simple majority), replicating existing legal rules in favor of the primacy of form to the detriment of strengthening the content of human rights.[40] The Article 75, 22 of the 1853 Argentinian Constitution, with the reform of 1994 made it clear that approval to list several international treaties previously concluded, which gave constitutional status, while also predicted the mode of termination of these treaties and even the process for preparing of new international instruments on human rights.[41]

40 Our understanding does not create intermediate category of treaties (infraconstitutional but supralegal), because the reception houses as constitutional commandments the international acts on human rights prior to Amendment 45/2004. On this topic, FRANCISCO, José Carlos. Bloco de constitucionalidade e recepção dos tratados internacionais. In: Tavares, André Ramos; Lenza, Pedro; Alarcón, Pietro de Jesús Lora (Coord.). Reforma do Judiciário: analisada e comentada: Emenda constitucional 45/2004. São Paulo: Método, 2005, p. 99-105. The systematic interpretation of Constitutional Amendment 45 also reinforces this reception, because in a similar situation, providing for the binding precedents, Article 8 of that Amendment was careful to specify that " the current dockets of the Supreme Court will produce a binding effect only after confirmation by two-thirds of its members and published in the official gazette", a rule that was not extended to international treaties prior to Constitutional Amendment 45 and thus allows the application of the general criterion of reception.

41 The Argentine Constitution provides as follows: "Article 75 - Corresponds al Congreso: [...] 22. APPROVE the CONCLUDED treated desechar con las Naciones: other y con las organizaciones internacionales y los concordatos con la Santa Sede. Los concordatos treated y tienen las leyes the top jerarquía. La Declaración American los Derechos del Hombre y Deberes; it Declaración Universal Derechos Humanos; la Convención on American Derechos Humanos; el Derechos International Covenant on Economic, Sociales y Culturales; el International Covenant on Political y Derechos Civiles y su Optional Protocol; la Convención on the Prevention sanción y la del Crime of Genocide; International Convención la la Eliminación about them all Forms of Racial Discriminación; la la Eliminación Convención about them all Forms of Discriminación contra la Mujer; Convención la contra la Tortura y otros Abuse Feathers Crueles, the Inhumanos Degrading la Convención about los Derechos del Niño; las condiciones en su force, tienen constitutional jerarquía in derogan ALGUNO artículo de la primera part of this Constitución y deben de los derechos entenderse complementarios guarantees by ella y reconocidos. Sólo podran be reported, en su case for el Ejecutivo National Power, aprobación of them foresaw the terceras parts of it totalidad de los miembros of each Chamber. Treated Los derechos humanos y convenciones about: other, luego be aprobados por el Congreso del requerirán vote them terceras parts of it totalidad miembros each of them to enjoy la Cámara jerarquía constitutional.".

However, the path taken by the doctrine and jurisprudence was not treated with the receipt of constitutional status.[42] Still many aspects enabled the conclusion that the legal position of those treaties prior to Amendment 45/2004 should be differentiated in the hierarchical system (even if not approved amendments to the tax procedure), such as the expanded use of mechanisms aimed at protection of human rights (eg., Court of San Jose, Costa Rica), the political effect of the termination of the relevant international treaties on human rights (brake overflowing the environment of international political relations to take legal contours, narrowing or eliminating choices of the Rulers) and also new socioeconomic contexts.

Thus, arose the Brazilian international treaty system with infraconstitutional hierarchy but with supralegal strength. In discussing the prohibition of civil prison of unfaithful trustee in the light of San Jose, Costa Rica Covenant, the Supreme Court ruled that since the accession of Brazil, without any reservation, the International Covenant on Civil and Political Rights (Article 11) and the American Convention on Human rights (7 San Jose, Costa Rica Covenat, Article 7), both in 1992, there is no legal basis for civil detention of an unfaithful trustee, since "*the special character of these international instruments on human rights sets their specific place in the legal system, being under the Constitution, but above the domestic law* "in such a way as to render inapplicable the Article 1287 of the 1916 Civil Code and 911/1969 Decree-Law, as well as Article. 652 of the New Civil Code (10.406/2002 Act).[43]

Given the diversity of international treaties on tax matters endorsed by Brazil, those made before 45/2004 Amendment and containing provision corresponding to essential prerogatives to human life and society, have infra-constitutional status but supralegal normative status. Given these clauses inserted in treaties, it is not possible to apply the constitutional legislation to the contrary, either as regular supplementary law, prior or subsequent to the promulgation and publication of international law act.

42 SARLET, Ingo Wolfgang. Considerações a respeito das relações entre a Constituição Federal de 1988 e os tratados internacionais de direitos humanos. Espaço Jurídico, Joaçaba, v. 12, n. 2, July/Dec. 2011 away receiving the treaties prior to Amendment 45/2005 states that, in the light of the technique of consistent interpretation, § 3 of Article 5 of the Constitution is constitutional (especially combined with § § 1 and 2 of the same article) when understood to ensure constitutional status (at least in the material sense) to treaties on human rights already incorporated before this Amendment and formal hierarchy and equipment treaties eventually incorporated by the rite established in § 3 of Article 5. For the periods prior to Amendment 45/2005 treaties to be formally considered constitutional, the approval by the rite provided for in Article 5, § 3 of the Constitution is required.

43 On the subject, HC 87,585, Rep. Min Marcus Aurelius trial 03 Dec. 2008, Plenum, DJE of 26 June 2009, and RE 466 343, Rep. Min Cezar Peluso, vote Justice Gilmar Mendes trial in 3 Dec. 2008, Plenum, DJE of 05 June 2009. While on the subject, the Supreme Court published 25 Binding Precedent, which is illegal according to the civil prison of unfaithful trustee, whatever the mode of deposit. Analyzing the understanding of the Supreme Court in the case of sealing the civil prison, SARLET, Ingo Wolfgang. Considerações a respeito das relações entre a Constituição Federal de 1988 e os tratados internacionais de direitos humanos. Espaço Jurídico, Joaçaba, v. 12, n. 2, July/Dec. 2011, p 344, states that, to the best judgment, the Supreme Court printed top hierarchy of the Federal Constitution to international treaties, it is banned, completely, what the Constitution explicitly allows, ie, what the Constitution allows the infraconstitutional legislature was forbidden to make no degree of freedom of action.

Later Treaties to 45/2004 Constitutional Amendment

After the enactment of 45/2004 Constitutional Amendment, international treaties on tax matters that display content of human rights must be approved by the rite imposed by Article 5, § 3, of the Constitution, precisely because of the importance of protective equipment as to what is essential, so that the adoption of this rite is a declared order. However, the adoption of the obligatory rite of Article 5, § 3 of the Constitution is not clear at this stage of development of the Brazilian legal knowledge, only because there are complex issues such as the diversity of the content of international tax treaties (eg., Not all clauses of the treaty may have human rights own content, showing up with typical ordinary content).

Although we do not exalt formal arguments, it is also true that we can not ignore them, so that failure to observe the rites laid down in Article 5, § 3, of the Constitution prevents constitutional status, but the importance of human rights does not put these treaties approved by the ordinary rite in the same normative level of ordinary legislation. Thus, the political freedom to debate in the Congress when choosen this mode of discussion on voting of human rights treaties can not neglect the protection of human rights.

Therefore, if the inclination prevail in the sense that the Congress has the discretion to choose the rite of adoption of these treaties and thus human rights treaties on tax issues are approved by the ordinary rite, we believe that there will have infra-constitutional but supralegal normative clauses force that have materially contents of human rights, like the international treaties on human rights prior to the 45/2004 Constitutional Amendment

Treaty with infra hierarchy and ordinary or legal force: reception and interpretation of Article. 97 of the National Tax Code and the Vienna Convention

International treaties with infra hierarchy and ordinary legal or normative force have simplified rite according to the 1988 constitutional order, starting with the signing by the President (private initiative Article. 84, VIII), followed by ratification by the Congress by a simple majority (art. 47) and formalized in legislative decree (art. 49, I), exchange of instruments of ratification, and, ultimately, promulgation, publication and enforceability by presidential decree. [44]

Before the enactment of 45/2004 Amendment, the Brazilian legal guidance was parted in the prevalence of international treaties with ordinary (or legal) content regarding supervening legislation. As mentioned above, the non tax issues and under the reflection of the decision by the Supreme Court in RE 80.004/SE, the lack of provision in the top hierarchy of the source system led to the solution of antinomies between supervening international treaties and national legislation on the basic criteria subsequent law that prevails in the face of previous law and special law prevails in the face of subsequent general law (even for issues related to human rights). The regulatory parity between treated and ordinary laws prevented even these international acts could be on the supplementary laws pertinent topics. [45]

However, in fiscal matters we believe that the legal status of international treaties has always been different under the Legislator option to give preference to international commands when confronted by supervening domestic legislation of the Union, Member States, the Federal District and the municipalities. The Article 97 of the Tax Code always seemed constitutional, since its origin in the face of the 1946 Constitution, through its force throughout the 1967 Charter (and 01/1969 Amendment) until receipt by the 1988 Constitution. Valid under the formal prism in 1966 because ordinary law of the Federal Government took care of general rules relating to all tax paying state entities (subject subsequently entrusted to the complementary law since the Charter of 1967 and now under the terms of Article 24, I, and § 1 of the 1988 Constitution), the choice of art. 97 of the Tax Code by giving precedence to international treaties over the subsequent constitutional legislation seems perfectly placed within the (debatable) discretion of the Brazilian legislator in 1966, and throughout its lifetime to go to meet the original wording contained in the 1988 Constitution strengthened after 45/2004 Amendment.[46] We reaffirm that the precedent established by

44 The Supreme Court considers the presidential decree indispensable act for applicability of international regulatory act internally as articulated in ADI 1.480/DF, ReI. Justice Celso de Melo. DJ, 18 May 2001.

45 In the Supreme Court, HC 77.631/SC, Rap Min Marcus Aurelius, ADI MC 1480/DF, Full, Rap Celso de Mello, Federal Court trial 09 Apr. 1997, 18.05.2001 DJ, and vote of Min Moreira Alves, about Article 97 of the National Tax Code, released in ADI 1.600/DF, Full, Rap Min Sydney Sanches, trial 26 Nov. 2001, 20 June 2003 DJ. In ADI 1.480/DF, Rap Celso de Melo, DJ 18 May 2001, the Supreme Court also established that international treaties signed by Brazil (or to which Brazil might join) can not deal with matters subject to supplementary law, in which case the very Constitution makes the legislative treatment of certain subject to the exclusive legislative field of supplementary law which can not be replaced by any other normative infra species, including international acts already incorporated in the domestic positive law.

46 In our opinion, there is no proper discretion of the legislator in precedence established by Article 97 of the National Tax Code, even in the light of the 1946 order, since good faith, security, need for cooperation and international solidarity was already present at that time imposing the need to respect international treaties by supervening legislation. However, even for those who can accept the existence of discretion in these cases is the fact that Article 97 of the National Tax Code positivates the choice of the legislature.

Article. 97 of the National Tax Code applies to ordinary laws and laws that establish additional taxes (eg, the exercise of residual powers) or have on general rules for all the above reasons, regardless of the treaty has normative or contractual content..[47]

In the contemporary environment, with greater reason must be affirmed the application of Article 97 of the Tax Code. If not enough the Preamble of the 1988 Constitution and principles originating from the same constitutional document tending principles and structuring rules (Article 4 sole paragraph) and fundamental rights and guarantees (Article 5, § 2) of the Permanent Body (and even forecasts in the transitional field, such as Artilce 7), the necessary prevalence of international treaties in relation to domestic law became even more imperative given the changes in the socioeconomic context lived in the early 21st century and changes to the regulatory framework made by the 45th Amendment/2004 and the Vienna Convention on treaties, played on interpretative arguments (with new guidelines of the Supreme Federal Court including binding) with reflections on Article. 97 of the Tax Code

The frequent and accelerated changes in the globalized environment of the risk society and the need for governance models enough to design and implement public policies, as well as several other factors historically presented (good faith, security etc..), led to the leverage of the importance of formal treaties and reciprocity capable of providing essential solidarity to meet these new challenges. In this globalized environment and risk, international cooperation and solidarity are not restricted to issues related to human rights (including those tax issues) and therefore ordinary international treaties that care for ordinary themes have gained greater importance as indispensable tools in today's globalized environment in diverse subjects (including ordinary tax matters).

If it is accepted that international cooperation gained new legal parameters for human rights through legislative strengthening of international treaties, the same good faith, trust, and regulatory parameters that govern these international acts to reproduce other treaties equally done by the same countries. If the "word" given by a country in a signed document on human rights is "reliable" and must be fulfilled (now with enhanced Article 5, § 3 of the Constitution), increasing the prospect of cooperation and positivized solidarity in constitutional and legal provisions require that the "word" given by that country in other international documents (on other topics) should also be "trusted", beyond the traditional arguments of the good faith, security etc.

47 The distinction between contractual treaties and normative contracts is losing importance in the doctrine. For all REZEK, Francisco. Direito Internacional Público. São Paulo: Saraiva, 2002, p. 28-29.

Although unlikely to occur the repeal of Article 97 of the National Tax Code, the prevalence of international acts in the face of internal supervening legislation would still be under Article 26 and Article 27 of the Vienna Convention on Treaties of 23/05/1969 (approved in Brazil by Legislative Decree 496/2009 deposited with the General Secretariat of the United Nations on 25.09.2009 and promulgated by Decree 7.030/2009). Pursuant to Article 26 and Article 27 of this Convention, any treaty in force is binding upon the parties and must be performed by them in good faith, and a party should not invoke the provisions of its internal law as justification for its failure to perform a treaty (except in cases of clear disregard to the precept of its internal law of fundamental importance). The recent adoption of the Convention by Brazil is one more argument to strengthen the tendency of the precedence of international treaties regarding supervening ordinary legislation.

Therefore, the prevalence of the international treaty with ordinary (or legal) strength in the face of supervening national legislation at ordinary tax issues is given based on Article 97 of the Tax Code with support toArticle 26 and Article 27 of the Vienna Convention, interpreted in the contemporary socio-economic context (in particular the dynamics of the society of risk) and the new regulatory environment created by the 1988 Constitution with the amendments of 45/2004 Amendment. The practical effect of this prevalence is similar to the one determined by infra-constitutional treaty with supra-legal force, although the legal fundaments are distinct, as stated above.

The Poblem of diversity of contents

Before and after the enactment of Constitutional Amendment 45/2004, treaties, conventions and international acts on tax matters may display issues with different natures, sometimes related to human-fundamental rights of taxpayers, sometimes ordinary tax issues, although in all cases these International acts have prevalence over the internal constitutional legislation. It is also common to have some tax provisions in international treaties whose central themes given contain various issues (eg, cultural cooperation or postal servisse).

In the case of prior or subsequent treaty to the 45/2004 Amendment adopted without the rigidity required by Artticle 5, § 3, of the Constitution, it is up to the interpreter to analyze if the contents of a particular provision of a treaty displays essential prerogative to the realization of human nature and life in society not contemplated by current Brazilian constitutional system and that brings more favorable.[48] Setting-fundamental human rights of the taxpayer, the legal justification for the prevalence in relation to domestic legislation will be modeled on infra hierarchy but the supra-legal force under international normative acts. If the precept of international treaty issues cares for ordinary cases, the prevalence of legal reasoning will be in the terms of Article 97 of the National Tax Code and the provisions of the Vienna Convention on Treaties.

In the case of tax treaties eventually approved in the manner of Article 5, § 3, of the Constitution, the adoption of this rite will drive any treaty to constitutional hierarchy, regardless of the content of each of the precepts of this international act. This conclusion is buttressed in formal arguments (for which we keep reserves) but certainly is the dominant view under Brazilian law, so that any provision contained in the constitutional order (either the PermanentBody or Transitional Body) can only be derogated or abrogated once the amendment process is done by strict rite.

48 We remember that this analysis will have practical utility if the Brazilian legal system brings less favorable protection to taxpayers, although the abstract or academic point of view of such analysis always has value.

V. INTERNATIONAL TAX TREATIES AND SUPERVENING CONSTITUTIONS

The globalized context, it is reasonable to assume that new constitutional orders (all new constitution or amendments) will bring normative precepts accommodating previous international acts, which poses several questions about maintaining the legal force of international treaties edited in light of the constitutional order being abrogated or derogated.[49]

The normative force of international human rights treaties in force when the issue of a new Brazilian constitutional system depends, first, by any provision of the Original Constituent. Because the conventional understanding, we consider the constitutional provision of the new system on these treaties, given that the Original Constituent is the initial source power in the system, as the committee is unlimited and unconditional as to form. Given the importance of human rights (including tax matters), it is recommended that the Original Constituent makes express reference to treaties previously edited, preferably indicating the international acts that understands should be emphasized (as set out in Article 75, 22 of the Argentine Constitution).[50]

In the case of silence of the original Constituent regarding international normative acts previously produced, it seems evident that the infra-constitutional treaties with supralegal force will be received, as well as other infra-constitutional treaties with legal or ordinary force which has happened in the constitutional Brazilian history. With regard to international human rights treaties with constitutional hierarchy and power, also seems to be welcomed, but the hierarchy and normative force by which the reception occurs will depend on how the new constitutional order will take care of the matter.

In the case of international human rights treaties with constitutional force, with general provision in the new constitutional order in the same way of the current Article 5, § 3, of the 1988 Constitution, we believe that these treaties should be received with constitutional status, since the subject is materially constitutional and the form used for approval was also constitutional. Lacking equivalent constitutional provision to Article 5, § 3, of the Constitution, but having a similar one to that given in § 2 of the same article precept. 5, we also believe in reception with hierarchy and constitutional force, and if there is no equivalent to the current precepts in § § 2 and 3 of Article 5, at least these treaties should be approved to infra-constitutional hierarchy but with supralegal force.

49 According to RAMOS, André de Carvalho. O Supremo Tribunal Federal e o Direito Internacional dos direitos humanos. In: SARMENTO, Daniel; SARLET, Ingo Wolfgang (Coord.). Direitos fundamentais no Supremo Tribunal Federal: balanço e crítica. Rio de Janeiro: Lumen Juris, 2011, p. 9, the biggest issue in the Brazilian doctrine concerning the International Human Rights Law in recent years has been the normative status of international human rights treaties incorporated.

50 Some constitutional provisions have taken care to state about previous international treaties, such as the Chilean Constitution, approved in referendum in 1980 which brought in its 15th clause of its transitional provisions prediction that the treaties approved by Congress prior to the enforcemnet of this Constitution and that takes care of matters for which the constitutional order requires approval by an absolute majority or four-sevenths of deputies and senators will be deemed to have complied with these requirements, making explicit the receipt of international acts in the manner that the constitutional order began to demand.

For the same reasons, with similar predictions to current §§ 2 and 3 of Article 5 of the 1988 Constitution, with respect to human rights treaties with infra-constitutional hierarchy but with supralegal force, the minimum is keeping that same allocation in the system fonts, but hopefully doctrine and prevailing case law make use of this opportunity to finally admit that typically constitutional matters and international alignment in favor of human rights also deserve the constitutional recognition status for those treaties.

VI. CONCLUSION

Based on the foregoing, we believe that all forms of international tax treaties take precedence over the prior and supervening Brazilian domestic legislation enacted by any state taxing entity, although the legal grounds that justify this conclusion are different in part. As the ordinary foundation that justifies the prevalence of all treaties there are aspects such as the strengthening of these international acts in the regulatory system sources from different countries, that reflects the contemporary socioeconomic context of risk that increases the need for cooperation and international solidarity, a tendency which Brazil lined up

Although Brazilian law has judged for significant periods in history in favor of the prevalence of international treaties regarding supervening domestic law, there were decisive normative steps in this direction given by the 1988 Constitution and especially the Constitutional Amendment 45/2004, with repercussions for all terms and topics addressed in international treaties signed by Brazil.

In tax matters, the precedence of the interpretation given by the text of international treaties courts is justified by several arguments. In the case of treaties with constitutional status hierarchy and caring for human-fundamental rights of taxpayers, the inclusion of these acts at the apex of the hierarchical system affects the interpretation and conformation of the entire infra order, similar to the situation that occurs with treaties with infra hierarchy but with supralegal strength. In the case of treaties with infra hierarchy and ordinary or legal force, its prevalence is contained in the Article. 97 of the National Tax Code and the Vienna Convention on Treaties, whose interpretations must be made in light of contemporary socio-economic context (in particular the dynamics of the society of) and the new regulatory environment created by the 1988 Constitution with the amendments of the 45/2004 Amendment.

Therefore, for many reasons and provided that the national legal system does not present more favorable to the taxpayer clause grounds, international treaties on tax matters prevail in the face of supervening domestic legislation of the Union, Member States, Federal District and municipalities, leaving the operator of Brazilian law be guided by the interpretation given by compententes of international courts to facilitate the harmonious cooperation and solidarity proposal for the conclusion of international acts.

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