

NEGOTIATIONS BETWEEN GOVERNMENTS FOR THE EXPORT OF DEFENSE PRODUCTS: THE MAIN OBSTACLES AND AN OPPORTUNITY FOR THE BRAZILIAN DEFENSE DIPLOMACY

NEGOCIAÇÕES ENTRE GOVERNOS NA EXPORTAÇÃO DE PRODUTOS DE DEFESA: PRINCIPAIS OBSTÁCULOS E UMA OPORTUNIDADE PARA A DIPLOMACIA DE DEFESA¹

NEGOCIACIONES ENTRE GOBIERNOS PARA LA EXPORTACIÓN DE PRODUCTOS DE DEFENSA: LOS PRINCIPALES OBSTÁCULOS Y UNA OPORTUNIDAD PARA UNA DIPLOMACIA DE DEFENSA BRASILEÑA²

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ABSTRACT

The objective of the research was to find opportunities to improve the system for conducting agreements on exports of Brazilian defense products through the government-to-government modality. Defense Diplomacy involves the use of the defense structure in times of peace, as a tool of foreign and security policy, having as one of its practical fields the conquest of markets for the Defense Industry. The work finds its scientific framework in the English school of the international relations, for which Diplomacy is one of the institutions of its international society. Methodologically, a case study of two negotiations conducted in the Ministry of Defense in 2015 was carried out. The main obstacles encountered in these negotiations were analyzed, based on the national legal framework, the lack of agile structures and guarantees, from which opportunities for improvement are discussed. In addition to a brief theoretical framework,

RESUMEN

El objetivo de la investigación fue encontrar oportunidades de mejora para la des-vinculación sistemática de acuerdos de exportación de productos de defensa brasileños en la modalidad de gobierno a gobierno. La diplomacia de Defensa implica el uso de la estructura de defensa en tiempos de paz, como una herramienta de seguridad y política exterior, teniendo como uno de sus campos prácticos, la conquista de mercados para la Industria de Defensa. El trabajo encuentra su marco científico en la escuela inglesa de relaciones internacionales, para lo cual la Diplomacia es una de las instituciones de su sociedad internacional. Metodológicamente, se eligió un estudio de caso de dos negociaciones realizadas en el Ministerio de Defensa en el año 2015. Fueron analizados los principales obstáculos encontrados en estas negociaciones, considerando el marco legal nacional y la falta de estructuras y garantías

RESUMO

O objeto da pesquisa foi encontrar oportunidades de melhoria para a sistemática decondição de acordos de exportação de produtos de defesa brasileiros na modalidade governo-a-governo. A Diplomacia de Defesa envolve o uso da estrutura de defesa em tempos de paz, como uma ferramenta de política externa e de segurança, tendo, como um de seus campos práticos a conquista de mercados para a Indústria de Defesa. O trabalho encontra seu arcabouço científico na escola inglesa das relações internacionais, para a qual a Diplomacia é uma das instituições de sua sociedade internacional. Metodologicamente, optou-se por um estudo de caso de duas negociações conduzidas no Ministério da Defesa no ano de 2015. Foram analisados os principais obstáculos encontrados naquelas negociações, considerando o arcabouço jurídico nacional e a carência de estruturas e garantias ágeis, discutindo-se oportuni-

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a brief overview of the structures of the four main defense exporting countries was also carried out vis a vis the conduction of contract negotiations in the sector. Finally, it is concluded that there is a need to create a structure capable of coordinating the various state actors, which provide the necessary support and guarantees for government-to-government negotiation and contribute to the strengthening of the Brazilian DIB.

Keywords: Defense Industrial Base. Export defense products. Government-to-government negotiations

ágiles, discutiendo las oportunidades de mejora del modelo nacional de comercio internacional de productos de de-fensa. Como una forma de contextualizar, además de un breve marco teórico, también se llevó a cabo un panorama de las estructuras de los cuatro principales países exportadores de materia-les de defensa para la conducción de negociaciones contractuales en el sector. Finalmente, se concluye con la necesidad de creación de una estructura que sea capaz de coordinar los diver-sos actores estatales o no, que brinden el apoyo y las garantías necesarias a las negociaciones del gobierno y contribuya al fortalecimiento de la BID brasileña (base de defensa industrial).

Palabras clave: Base de Defensa Industrial. Exportación de productos de defen-sa. Negociaciones del tipo gobierno a gobierno

dades de melhoria para o modelo nacional de comércio internacional de produtos de defesa. A guisa de contextualização, além de um breve enquadramento teórico, foi ainda realizado um panorama das estruturas dos quatro principais países exportadores de materiais de defesa para a condução de negociações de contratos no setor. Por fim, conclui-se pela necessidade da criação de uma estrutura capaz de coordenar os diversos atores estatais ou não, que deem o respaldo e as garantias necessárias às negociações governo a governo e contribua para o fortalecimento da BID brasileira.

Palavras-chave: Base Industrial de Defesa. Exportação de Produtos de Defesa. Negociações governo-a-governo.

1. INTRODUCTION

Defense Diplomacy is a concept that has been most recently incorporated into Brazilian academic discussions, although it is formed of elements that find a more ancient shelter, in the very genesis of diplomacy as a social practice in the context of international society.

Seeking to outline a theoretical and methodological framework for the present article, it begins by realizing that the international literature of the last 15 years has given increasing importance to Defense Diplomacy, highlighting especially the scope of cooperation (BARKAWI, 2011, COTTEY, FORSTER, 2004, MUTHANA, 2006, PLESSIS, 2008 and REVERON, 2010). It is considered important Silva's thought (2015) that affirms that defense diplomacy goes beyond cooperation, characterizing itself as a continuous activity that is institutionalized through beliefs and norms in a set of comprehensive social practices in the scope of defense, and can even be understood as an institution of the international society (SILVA, 2015, page 198). This concept links us directly to the English School of International Relations, which is precisely the theoretical lens through which the present work was constructed.

Placing itself as a middle way, the English School is born as a synthesis, recognizing the important role of other actors, besides the States, in what Bull (2002) called international society. For Bull (2002, page 19), one can speak in an international society by the recognition of "certain common values and interests ... linked ... by a common set of rules" and participation in "common institutions". In this sense,

defense diplomacy is therefore a part of the which the author calls "diplomatic machinery" (BULL, 2002, page 19), an institution that is recognized as being important and active in its international society⁵.

In dealing with government-to-government negotiations, we turn once again to

Bull's theoretical aid which warns that its international society presupposes a system, but that there may be a system without a society, accepting, theoretically, this kind of negotiation, which once again legitimizes the role of defense diplomacy. In his words:

"two or more states can maintain contact with each other, interacting in such a way that each of them represents a necessary factor in the calculation of the other, without the two can be aware of common interests and values, but realizing that they are both subject to a common set of rules, or cooperating for the functioning of common institutions "(BULL, 2002, page 19).

⁵ It must be noted that in Brazil military and defense diplomacy are sometimes used interchangeably. However, it is considered pertinent the proviso made by Silva (2015), which differentiates the two ones we have. Military Diplomacy would be linked to diplomatic action taken by the military itself, while Defense Diplomacy can be carried out even by civilians, within the Ministry of Defense (MD). It can be said, therefore, that the term Diplomacy of Defense is more comprehensive, which encompasses the former without excluding the legitimacy of the latter, aligning in the same frame, the actions of attachés to MD (Ministry of Defense) employees in the sale of national defense products.

⁶ Law No. 12,598, of March 21, 2012 (BRASIL, 2012), defines Defense Product (PRODE) as "any good, service, work or information, including weapons, ammunition, means of transportation and communications, uniforms and materials for individual and collective use used in defense finalist activities, with the exception of those for administrative use. "

More pragmatically, Cottey and Forster (2004, page 5-7) acknowledge the comprehensive portfolio of defense diplomacy activities, but emphasize participation in bilateral defense agreements and the support in the provision of military use and other materials.

The international defense products market is estimated at about U.S. \$ 1,747 billion, representing about 2.4% of the world's gross domestic product. The volume of conventional weapons transfers grew by 14% in the period covered by the years 2009 to 2013, when compared to the previous quinquennium. The five largest suppliers in this latest period are the United States, Russia, Germany, China and France, which together are responsible for 74% of the sector's exports (STOCKHOLM INTERNATIONAL PEACE RESEARCH INSTITUTE, 2014, page 8).

These countries have as a characteristic the direct involvement of the government in the external affairs of defense products, through state export agencies or companies, *trading companies*, or other governance structures, with the objective of promoting the commercialization of these goods, with the power to operationalize technological, industrial and commercial compensation contracts, and sometimes financing. This way, these States give the purchase and sale of these assets greater legal certainty.

In Brazil, exports of defense products (PRODE) occur mostly through direct negotiations between Brazilian companies and their respective customers, whether it is the governments or private institutions. The involvement of the Brazilian government has limited scope, restricting itself to analyzing, issuing opinions and accepting applications for the export of some of these goods, mainly of those of warlike use and of those who have the power of destruction or another risk property that indicates the need for the use to be restricted to legally qualified individuals and legal entities, or which may, to some extent, compromise stability and cooperation at the regional scope.

Nowadays, these negotiations are in practice accompanied by sectors of the Ministry of Defense. However, some international negotiations in the defense sector, nowadays are demanding a greater engagement of the State, which has put the Brazilian model in difficulty, sometimes preventing the negotiations to succeed. It is this finding that brings up the problem that the present article aims to discuss: what obstacles in the negotiation of PRODE (exports of defense products) government to government, has the Brazilian system faced?

To this end, this article will use a case study on two different processes that were processed in the MD (Ministry of Defense) in 2015. Data were collected from the International Relation Section (SRI), of the International Affairs Sub-Office (SCAI) of the Chief of Strategic Affairs (CAE) of the EMCFA (Joint Command

of the Armed Forces) of the Ministry of Defense in June 2015. However, it is important to note that the theme runs through a sensitive area, of strategic interest, involving other countries.

A theme where several sources are covered by confidentiality criteria and are not currently available to be referenced in a detailed way. For this reason, the focus of this work is on Brazilian systematics and not on the object or merits of possible contracts. By the way of ambiance, it will initially be carried out a brief overview of the structures for this type of negotiation of the world's leading defense supplier countries which have been cited previously. Next, the case study itself, taking into account the current structure of the MD (Ministry of Defense) and some aspects of the national legal system, both without restriction of confidentiality. It is emphasized that such aspects in themselves will not be questioned or discussed in a detailed way in this work, because they go beyond the proposed object, which is limited to the identification of possible obstacles in government-to-government negotiation of defense products. Its reflexes for this object, however, may inspire new and particular studies.

2. EXPORT OF DEFENSE PRODUCTS ON THE WORLD STAGE

By analyzing the American industrial defense base, Dunne (1995, page 401) states that the companies of the sector are not simply producers and exporters of products. According to him, its influence and effect goes far beyond the supply of equipment or armaments in itself⁶. In fact, the conquest of markets for the war industry is identified by Cottey and Forster (2004, page 69) as one of the tasks of diplomacy in the

⁶ Dunne (1995) delves deeper into the internal American BID (industrial defense base) issue, analyzing the reflexes of the formation of the so-called American Industrial-Military Complex (CIM), which was used as an object of reflection with the warning of President Eisenhower in the 1960s, not being the object of this text, as well as the reflections and internal relations of the companies of the Brazilian BID (industrial defense base). More broadly, we intend to call for an important extension of the consequences of the sale of arms, even in the articulation of cooperation and the extension of the concept of security, in which Cottey and Forster (2004) will describe the new roles of defense diplomacy, among them the collaboration for the expansion of markets for the BID (industrial defense base).

⁶ But most countries do not have data on these barriers, such as tariffs, quotas and more. On the other hand, not only are tariffs and quotas very different from country to country, but countries nowadays impose much softer trade restrictions that are difficult to identify and measure.

⁷ Monopsony is a way of market with only one buyer, called a monopsonist, and numerous sellers. It is a type of imperfect competition, inverse to the case of the monopoly, where there is only one seller and several buyers. A monopsonist has market power, due to the fact that he can influence the prices of a given good, varying only the quantity purchased. Your earnings depend on the elasticity of supply. This condition can also be found in markets with more than one buyer. In this case, there is an oligopsony market (MANKIOW apud MOTA, 2009).

field of defense.

After the end of the Cold War, both Dunne (1995) and Cottey and Forster (2004) complement each other in reading the reflexes of the maintenance of the export of defense products in the world market through the extension of the concept of security. The first, in maintaining the demand for the whole network of the BID (industrial defense base) of the bigger countries, which he described as something very complex. The second, through focusing on the perception of military cooperation or defense in times of peace, including through arms sales, but also empowerment, training and exchanges, that were finally used as foreign and security policy tools, counteracting the military alliances historically based on the use of force, or threat, to deterrence, intervention, defense or compulsion.

In the words of Cottey and Forster (2004, page 6-7), it would be a way of counterbalancing threats, maintaining spheres of influence, supporting friendly governments in the internal control of the state and conquer markets for the war industry.

Hartley Sandler (1995, pages 145-146) point out that the defense market does not resemble the perfectly competitive economic model. It is often characterized by the existence of a single buyer, by the existence of one or only a few large suppliers, by the existence of companies not totally oriented by the maximization of profit, by the uncertainty, by imperfect information and by governmental barriers to the circulation of products.

According to Mota (2009), in the economic field, the defense products market presents several imperfections regarding the structure of competition. There are several barriers to entry and increasing returns of scale, for example. In addition, the defense market behaves as much as a monopsony⁷ or oligopsony, since this depends almost exclusively on government purchases or exports to other governments, but also has characteristics of monopoly or oligopoly, considering the small number of bidders. This results in a lot of negotiation in the commercial transactions, intermittency and seasonality in the demand, costs and risks, which can often be too heavy for the private sector to afford alone. Finally, according to the author (MOTA, 2009, pages 3-4) the defense market is far from behaving according to the rules of the free market, demanding the action of the State to balance the imbalances.

The direct involvement of the government in the external affairs of defense products is evident when analyzing the world's largest suppliers of

conventional weapons.

Next, it will be presented in a summarized way, as four of the five largest conventional arms exporters who manage this sector (BRAZILIAN INDUSTRIAL DEVELOPMENT AGENCY, in press, page 11-47). In the United States (USA), it initially conducts the *Foreign Military Sales* (FMS) which is a government-run PRODE (exports of defense products) sales program, more specifically the Department of Defense (DoD) and supervised by the Department of State (DoS), which performs the political control (BRAZILIAN INDUSTRIAL DEVELOPMENT AGENCY, in press, page 11). It also carries out the operational control, with the intervention of several other departments, especially the Treasury and above all the Congress, which must be notified in advance of each operation. It is important to note that this program is at the same time helpful to functions of foreign policy, defense policy and industrial policy.

The buyer of US military equipment has four main channels of action: purchase via FMS, with passage directly by the US government, through embassies or DoS (Department of State); purchase via FMS (Foreign Military Sales), with integrated participation in the process (Israel case); direct purchase of the defense industry, with FMS (Foreign Military Sales) support for negotiation, in particular when there is compensation or co-production by the purchasing country; and direct commercial procurement, a mode in which the US government is limited to the control of exports (BRAZILIAN INDUSTRIAL DEVELOPMENT AGENCY, in press, page 13).

It is important to note that the latter modality accounts for about half of total United States weapons exports.

It is reinforced once again that, from the American point of view, the DoD (Department of Defense) finances and encourages the participation of companies of American defense in countries of their interest, among other reasons, to prevent or combat regional destabilization, from the perspective of a more extended concept of security. In this sense, there are available not only sales programs, but also financing for the acquisition of this material.

In Russia, the *Rosoboron export State Corporation* is a state-owned company, constituted by an open stock company, whose majority capital belongs to the government. It operates as the only institution authorized to intermediate exports and imports of military equipments in that country. It accounts for about 80% of Russian defense products exports (BRAZILIAN INDUSTRIAL DEVELOPMENT AGENCY, in press, page 62). The remaining 20% are marketed directly by the companies themselves. However, all imports go through the Russian trading, in spite of the low volume of external arms acquisitions by Russia (MITCHELL, 2009, page 12). The special attention that

⁸ The methodological option was not to analyze China, that in addition to the reliability and transparency of available sources, especially for this area, has its exclusively state structure, making it impossible to compare and collect subsidies for the discussion of the Brazilian case.

the theme receives in that country occurs mainly in relation to the sale of arms by the Russian government that have been, since the end of the Cold War, quite low in relation to the size of the war industry that was developed in the Soviet period (STOCKHOLM INTERNATIONAL PEACE RESEARCH INSTITUTE, 2007, page 392). It must be noted, however, that the Russian government has implemented significant military modernization programs.

Germany does not have an official agency for the promotion of weapons exports

and military attachés do not disclose military products abroad. However, some government controls have been relaxed. As a way to show an example, the veto power in weapons sales produced in partnership with other countries was abolished; the concept of "areas of tension" has been removed from policies related to arms export restrictions (KRAUSE, 2006, page 146). Such flexibilizations give the country better export conditions, which contributes to an increase in the viability of its war industry.

In France, the *Direction Générale de l'Armement - General Direction of Weapons* (DGA) is a government agency responsible for program management, by the development, acquisition of weapons systems for the French Armed Forces and by the foreign sale of the products of the defense industry of the country. Among the seven directorates that make up the DGA (General Direction of Weapons), it is up to *Direction du Développement International - Direction of International Development* (DI) to define and execute the export policy, as well as the management of export control of defense materials (BRAZILIAN INDUSTRIAL DEVELOPMENT AGENCY, in press, page 33).

In 2007, the French government took some measures, with the aim of increasing the participation of the defense products of its industry in the world market synthesized in the Ministry of Defense's Impulse to Exports Strategy (*Stratégie de Relance des Exportations du Ministère de la Défense*). The strategy focused on two dimensions: the simplification and greater fluidity of control measures; and the dynamization of export support mechanisms. The first dimension encompasses five axes: reducing delays in the processing of export orders, streamlining and facilitating industrial processes, reformulate the list of classification of defense products, strengthen dialogue with industry, in particular Small and Medium Enterprises and facilitate exchanges with our European partners and allies. As for the second dimension, three axes were considered central: to develop a National Strategic Plan for Support to Exports; modernize and give new impetus to the coordination of this support; and reorganize the sale and disposal of used equipment (BRAZILIAN INDUSTRIAL DEVELOPMENT AGENCY, in press, page 27; HUNTER-ROUSSELLE, 2010).

However, while looking at the restructuring of PRODE (exports of defense products) French export system, Beraud-Sudreau (2014) draws attention to the complexity of industry relations. In accordance with this relationship, in despite of presenting questions related to defense policy often as state policies, impervious to changes in government, this was not what was observed in the French case. More than that, according to the author, even more decisive than the changes from left to right, at the top of French politics, were the relationships between the various actors and organizational structures that dealt with the negotiation processes of the defense sector. In order for some gain to be realized, it took time and effort to adjust these actors in their new roles (BERAUD-SUDREAU, 2014).

Moraes (2014, page 70), in his study on state intermediation in military equipment exports, concludes that there are three types of government participation in these businesses, which the author calls packages. According to him, the basic package covers: security solution, contractual guarantees by the government, financing and training for the use of the equipment provided; and offer after-sales services. The intermediate package allows: the production under license in the purchasing country; technology transfer; and the purchase of customer products (agricultural, mineral, industrial etc.), for which it would be necessary to mobilize a greater number of actors, both public and private. Finally, the advanced package would be placed to a large extent, beyond the institutional capacities of an agency, covering structural issues in the relations of the selling country with foreign countries, such as establishing strategic relationships between buyer and seller, the seller's commitment by the external defense of the buyer and the commitment of mutual support in multilateral institutions.

In assessing the initiatives of the United States, Russia, Germany, and France, it is possible to identify elements of the state intermediation packages in the exports of military equipment, cited by Moraes (2014, page 70). It is also verified that there are, in each country, actions in the three grades, and it is difficult to determine the precise position within the levels presented by the author. Even so, the classification presented by Moraes (2014) is important by indicating a range of possibilities and state involvement in the negotiation of defense products. It is important to note that even in countries where there is clearly defined a central articulating agency, its presence is not the ideal solution for all problems. Acting alone, it would have little effectiveness, residing its meaning above all, in the capacity to mobilize other actors. This can occur for example, through the provision of attractive incentives, in which other state or non-state bodies, would be offering elements that contribute to

the success of the defense policy as a whole.

It is important to emphasize that the mechanisms described so far fall within the context of defense diplomacy, in several of its nuances and in its plurality of actors. From the contribution of the military attachés to the state or private industry, through the coordination of the Ministry of Defense or the body designated for this purpose. It is also noticed that the analyzed processes extrapolate the classic cooperation, it can be in the complexity, or in the differences that need to be worked out in a commercial negotiation of the kind.

3. BRAZILIAN SCENARIO OF EXPORTS OF DEFENSE PRODUCTS: A CASE STUDY

The Brazilian defense industry had a great highlight in the 1980s, then dropped sharply in the 1990s and in the first 10 years of the twenty-first century, benefited from the increase in military spending in several countries and national exports resumed a growth trend (ANDRADE et al., 2016; MORAES, 2012)⁹. It was important for Brazil to have occupied between 2009 and 2013 the 23rd worldwide position in transfers of conventional weapons abroad, it had a deficit in the trade balance in trade of these products in about US \$ 1,272 million in the same period (STOCKHOLM INTERNATIONAL PEACE RESEARCH INSTITUTE, s.d.). Brazilian companies sold approximately US \$ 301 million in this sector in the period, which corresponds to about 0.214% of the total volume traded in the world (STOCKHOLM INTERNATIONAL PEACE RESEARCH INSTITUTE, s.d.). Based on data from SIPRI (Stockholm International Peace Research Institute), Andrade et al. (2016, page 27) state that between 2000 and 2013, a strong concentration of external sales in the air sector can be observed through Embraer, accounting between 2000 and 2013 for 81.3% of sales of Brazilian military products. Between 2000 and 2010, other companies which are worth mentioning in the sale of military products were Mectron, with missiles and Avibras, with the artillery system of rockets Astros II and radars. The other exports were to a large extent, second-hand products (MORAES, 2012, pages 45-47). As it can be seen, the Brazilian government's role in the export of defense products is rather timid.

Regardless of the volume, a dynamics of control of these sales is necessary in the face of the international commitments assumed by Brazil, besides being fundamental for the definition of public policies for the sector. Large amount of defense

products is not even controlled at any level⁹. In a wider context, Lamb and Kallab (1992) point out other constraints for the confidence in defense spending data, especially in developing countries. According to them, in some countries, especially in Latin America, budget data are available, but in a complex way, requiring careful processing. Others do not have a separate account under the Ministry of Defense. More broadly, the authors also affirm that the collection and dissemination of information has a direct relationship with economic development. In addition, typically there is a cloak of secrecy in various defense expenditures LAMB; KALLAB, 1992, page 2). In this context, there are important obstacles to a precise mapping of the sector.

Governments in general and some international bodies, such as the United Nations, are the main recipients of defense products. These entities determine the acquisition of these goods in accordance with military needs linked to their strategic objectives, thus defining the size of the markets.

The main importers of Brazilian defense products from 2000 to 2010 were the countries of South America (ANDRADE et al., 2016, page 27). Any market with potential to receive Brazilian products, however, requires the direct participation of the exporting government to conclude the contracts. This occurs, in particular, among other reasons, by the need for international control to ensure greater legal certainty in the negotiations, as required by the

¹⁰ In Brazil, PRODE (exports of defense products) control happens through a system with four inputs. The first one is the products controlled by the Army, provided for in the Regulation for Controlled Products Inspection (R-105), as its export authorized and controlled exclusively by the Brazilian Army (EB). The second one is regarding the military employment materials (MEM) provided for in the National Policy of the Exportation of Military Employment Material (PNEMEM), with first edition in 1974 and update in 1990. In this case, the exporters make an application for preliminary negotiation authorization to the Ministry of Foreign Affairs (MRE), which, in short, evaluates the existence of international embargoes, the situation of the international relations of the buyer country with Brazil and if the product is a sensitive product, the Ministry of Defense (MD) will be notified. Following the approval of the preliminary negotiations, the exporter must join with a request for export itself, also in the MRE (Ministry of Foreign Affairs). If the negotiation goes ahead, the MRE (Ministry of Foreign Affairs) consults the MD (Ministry of Defense) in which, if it authorizes, it controls the export of the MEM (military employment materials). The third possibility is the export of sensitive goods and directly linked services, regulated by Law number 9,112, October 10, 1995, in which the exporter must join with a request for export in the Ministry of Science Technology and Innovation (MCTI), which consults the MRE (Ministry of Foreign Affairs) and the MD (Ministry of Defense), in addition to other necessary bodies. After consultation, in the absence of impediments, the MCTI (Ministry of Science Technology and Innovation) authorizes and controls the export of the good. Finally, the last form is when the defense product in question has no military use, no destructive power or other risk property which indicates the need for its use to be restricted to legal and natural persons and legal entities, and that can not cause to some extent, commitment to regional stability and cooperation. In that case, they would not require export compliance or consent, by the Ministry of Defense or the Armed Forces.

⁹ For the BID (industrial defense base) current perspectives from a detailed historical overview, it is necessary to refer to Andrade et al. (2016).

domestic legislation of each country or because it is usual practice in the trade of defense products. These are the so-called contracts between governments, also known as: government-to-government, *government-to-government*, Gov to Gov, Gov x Gov, or even G2G.

In Brazil, the international act, such as trade agreements between governments and framework agreements regarding cooperation in defense matters, require the cooperation of the Executive and Legislative Branches for their conclusion. According to the current Federal Constitution (BRAZIL, 1988, article 84, § VIII), celebrating international acts is the exclusive competence of the President of the Republic, although they are subject to the referendum of the National Congress, which, in addition, to settle definitively regarding treaties, agreements and international acts that entail burdensome burdens or commitments to national patrimony (BRASIL, 1988, article 49, §I). The President of the Republic may delegate his authority to sign an international act, granting a Charter of Full Powers to ministers or any other authorities.

The time of creation, processing and approval of an international agreement of this nature has been, in general, from approximately six to eight years. It is thus verified that the long term of negotiation tends to create serious embarrassments to the conclusion of trade agreements.

From this point, it is the first case study that was the attempt of the Ministry of Defense of a country to enter into a government-to-government agreement with the Brazilian State, in accordance with the laws of the buyer country for the acquisition of foreign war material, hereinafter referred to as Case A. The government in demand demanded that a legal representative of Brazil assume, as contracting party, the role of guarantor of the quality of the product and of the faithful fulfillment of the obligations assumed by the supplier, that it was a private Brazilian company. An important information is highlight that there was already an agreement¹¹ regarding defense cooperation signed between Brazil, approved by the National Congress, only pending promulgation by the Presidency of the Republic.

As possible solutions to the case, seven possibilities were listed:

- a. conclusion of a supplementary agreement to the framework agreement and the signing of a contract between the purchasing country and the private company;
- b. conclusion of an additional agreement to the framework agreement and the signature of a contract between the buyer country and the private company, with the Brazilian government as intervenient of this contract;

- c. conclusion of a supplementary agreement to the framework agreement and the signature of a contract between the purchasing country, the Brazilian government and the private company;
- d. conclusion of an additional specific agreement to the framework agreement, in the model of an *Implementation Agreement*¹⁰, and the signing of a contract between the buyer country and the private company, with the Brazilian government as intervening party;
- e. conclusion of a supplementary agreement to the framework agreement, in the model of an *Implementation Agreement*, and the signature of a contract between the buyer country, the Brazilian government and the private company;
- f. take into consideration only the framework agreement, ruling out the need to conclude an additional agreement, and the signature of a contract between the buyer country, the Brazilian government and the private company; and
- g. signature of a contract between the buyer country, the Brazilian government and the private company, disregarding the existence or non-existence of a prior agreement.

Supported by the opinion of the Legal Counsel of the Ministry of Defense (CONJUR/MD)¹¹, the Brazilian counterpart in the negotiations identified that the best route to be given to the case would be that Minister of State for Defense to conclude memoranda of understanding, inter-ministerial and / or inter-institutional agreements and protocols, international acts, technical arrangements, regulatory mechanisms or exchange programs, in order to specify obligations already assumed through an earlier framework agreement, legitimately approved by the National Congress and ratified in definitive by the President of the Republic.

Such an instrument should have its conclusion previously coordinated with the Ministry of Foreign Affairs (MRE) and could not generate burdensome

¹² In *Foreign Trade*, a framework agreement or a basic agreement sets out the broad lines for negotiations in a broader sector. The terms of a particular negotiation are particularized with opportunity for adjustments or complementary agreements.

The Brazilian government would not be a party to the agreement and would act in the form of assistance in obtaining the necessary consents, pledging to ensure that the Brazilian private company fulfilled its obligations.

¹³ The Brazilian government would not be a party to the agreement and would act in the form of assistance in obtaining the necessary consents, committing itself to ensuring that the Brazilian private company fulfilled its obligations.

burdens or commitments on the national patrimony, or generate obligations for the State in the sphere of international law. That is, the resulting costs, if there was any, they should be included in the budget of the Ministry of Defense, as well as the contracts could not contain commitments regarding matters of great political, economic, environmental, scientific and technological development for Brazilian society; could not contain a tax provision, financial charges or serious commitments to national patrimony that had not previously been authorized by law; they could not entail changing legislation or creating rights and obligations for the State; and could not modify or revise commitments, rights, obligations and functions recorded in international acts approved by the National Congress.

These types of agreements are called executive acts, and are based on the US experience of the *executive agreements*¹². Despite the considerations made by CONJUR / MD (Legal Counsel of the Ministry of Defense), there was also the possibility that such international protocols could have their validity considered void if judicially questioned. In the end, there is a risk that only international protocols can be dealt with in an interinstitutional way as an understanding of private nature, that is, in the popular language, gentlemen's agreement.

Unfortunately, the sale of the Brazilian defense products in question was not concluded, in view of the delay on the Brazilian side in assuming the required costs, which was partly due to the uncertainty of the novelty of the issue.

It is also important to highlight that the opinion has paved the way for adopting several of the solutions initially visualized, however, not contemplating a series of functionalities of said packages presented by Moraes (2014, page 70), mentioned above.

The second case to be studied in this paper, which we will call case B, are the negotiations, not yet completed, of acquisition of Brazilian defense products by another country. The buyer country presented the need for immediate receipt of some of the goods that were of interest, but which were not available in the meantime *off-the-shelf*¹³. In this context, the impossibility of immediate delivery of assets would

make the whole business impractical and the impasse motivated the creation of three action lines:

1. *leasing* of goods of immediate delivery by the Brazilian Armed Forces to the Buying Government;
2. direct sale of goods of immediate delivery by the Armed Forces of Brazil to the Buying Government; and
3. sale of the goods of immediate delivery by the Brazilian Armed Forces to the Brazilian company, which would resell these modernized products to the Buying Government.

Considering that the first two possibilities would lead to the need for authorization by the National Congress, which would require great time. Finally, we opted for the last solution. However, such an exit would also imply the alienation of defense products in use by the Armed Forces. This would occur without the guarantee of replacement of the asset in the short or medium term, since the value of the sale would be turned into treasury resources, not linked to the recomposition of military defense capability.

From the experiences of cases like those described above and aware of the necessity of enlargement of state participation in defense product exports, the Brazilian government established a Working Group (GT) within the Ministry of Defense (MD) and the Ministry of Development, Industry and Foreign Trade (MDIC), by means of the Interministerial Ordinance, number 1.426 / MD / MDIC, of May 7, 2013 (BRAZIL, 2013), with the purpose of conducting studies and identifying or proposing measures of development for the expansion of the capacity of the Industrial Defense Base, with the creation of a Defense Trading. According to the ordinance, the *trading* will need to promote, with institutional support, the commercialization (export and import) of defense products, with the power to operationalize technological, industrial and commercial compensation contracts.

The Working Group *Trading* has identified that some Brazilian defense products companies such as Embraer and Emgepron actually operate as *Trading Companies*. They sell products manufactured by other companies under other CNPJ (National Registration of Legal Entities) numbers. However, it must be noted that its main activities are not the execution of this type of intermediation. There is no known case of any type company in the country, nor is there any state company strictly dedicated to the role. In fact, there are no companies of the kind operating with products other than those of defense and linked to their own productive vocations¹⁴.

¹⁴ Article 5, §VII, of Ordinance No. 1000 / MD (Ministry of Defense) of April 30, 2015 (BRAZIL, 2015): "Specific information regarding the processes of export of defense products, which will remain with restricted access, taking into account the negotiations or the international relations of the country and its industrial secrets under the terms of items II and VI of article 23 of Law number 12.527 of 2011, regulated by Decree, number 7.724, of 2012, even when they are disqualified".

¹⁵ These are international agreements regarding matters that fall within the exclusive competence of the Executive Branch and those concluded by agents, who have competence for this, on matters of local interest or of restricted importance, not requiring ratification by the National Congress.

¹⁶ Term in English that designates the so called shelf products. That is, products

O Working Group *Trading* of Defense, after its study, has shown in its preliminary conclusions that Brazil has institutions which already carry out the necessary activities for an export system. However, this does not act properly articulated, which leads to the need to create an element of coordination that involves, mainly, the state actors. Such coordinator should receive as basic assignments:

- a. to act globally;
- b. export or intermediate defense solutions;
- c. to promote exports of defense products and systems and defense companies' duals;
- d. to provide or broker the post-sale guarantees (Technical Assistance);
- e. to promote negotiations with technological, industrial and commercial compensation;
- f. to operate a bank of credits of technological, industrial and commercial compensation;
- g. to operate a centralized account for the purpose of payments and indemnities arising from the institutional transactions and the indemnified transfers of PRODE (exports of defense products) and defense systems (SD) of the Armed Forces;
- h. intermediary operations with government financing entities;
- i. to disseminate and contribute to the strengthening of the BID, especially small and medium-sized National Defense Strategies;
- j. to act as an instrument of the State Policy, in accordance with the National Defense Strategy (END) and the various policies currently under development, such as the National Defense Industry Policy (PNID), the Product Export Policy of Defense (PNEPRODE) and the National Policy of Commercial, Industrial and Technological Compensation (PNAC);
- k. to prioritize the export of defense products of high national content, developed and /

or produced in the country;

- l. to count on the support of the Military Organizations of the Armed Forces, such as demonstrations, training, transfer of capacities, cataloging, certifications and technical and operational evaluations; and
- m. m. to be given a minimum degree of institutionality to guarantee the Gov-to-Gov relationship.

According to the Working Group, the solution presented could also go through the designation of an existing body, such as the Department of Defense Products (SEPROD)¹⁸ of the Ministry of Defense to carry out such duties, expanding its scope and autonomy. It is therefore pointed out that there is a need for a central body that will be in charge of negotiations between governments¹⁹, for the export of Brazilian defense products.

An important principle established in the sectoral policies under development and the solution presented by the Working Group *Trading* of Defense is the agreed understanding of the need for full collaboration and participation by the Embassies and, in particular, of the Military Attachés to carry out the promotion of the BID, as agents of commercial promotion and the main person in the Gov-to-Gov negotiations. It is important that, although this may seem quite logical, there is, so far there is no rule or guideline governing the subject. This principle, however, is already included in the current draft of the National Policy on the Export of Defense Products (PNEPRODE), which will replace the National Policy on the Exportation of Military Employment Material (PNEMEM).

4. FINAL CONSIDERATIONS

To know the functioning of the current structure for export of defense products, as well as a possible institutional arrangement that could circumvent existing difficulties in current practices, is area totally affects the performance of professionals and academics who study and act in the fields of National Defense and International Relations, among other areas related to Defense Diplomacy.

that are already available on the shelf of the companies and they do not require any adaptation or customization for the customer.

¹⁷ *Tradings* are commercial exporting companies, that is, they are companies that have the corporate purpose of commercialization, being able to buy products manufactured by third parties to resell in the domestic market or destined them for export, as well as to import goods and carry out their commercialization in the domestic market. That is, they carry out activities typical of a commercial enterprise.

¹⁸ In the past, however, there was a large state export trading company with two characteristics potentially interesting to the current Brazilian BID (industrial defense base): was able to do gov-to-gov operations and had a broad network of marketing channels on a global scale: Interbras, the commercial support of Petrosbras.

¹⁹ Draft of the Technical Report of the Inter-ministerial Working Group for the Promotion of Defense Product Exports (Defense Trading) – Inter-ministerial Ordinance No. 1,426 / 13 - MD (Ministry of Defense) / MDIC (Ministry of Development, Industry and Foreign Trade). Such information is under construction, and there is no definition of the path they are following.

In this sense, it is believed that the present work has achieved its purpose: to identify by a case study of obstacles in the negotiation of PRODE (exports of defense products) government to government with the current Brazilian system. It was realized the long time needed to refer contracts that require the manifestation of the congress; the difficulties, even legal, to assume guarantees before the contracts, specially when involving private companies; lack of flexibility to adapt to buyer's standards; and lack of security in the systematic investment in the equipment of the armed forces, hindering the involvement of material in service in the Armed Forces in sales of second-hand military equipment, which is very common in the international defense market.

The present work also fulfills the role of drawing the attention of the society and the leaders of the country, who has the role of making political decisions. The stimulus to the debate and the diffusion of the presented knowledge are fundamental, bringing to light a theme with a wide network of consequences and reflexes. Thus, we seek to contribute, to a certain extent, for a discussion that leads to the construction of an institutional arrangement to increase the conduct of government-to-government agreements by empowering the national BID, with its developments in the field of Brazilian Defense Diplomacy.

The international governance models used by leading international trade of defense products are an important reference point for initiatives to expand and maintain national exports, especially those that use the foreign market as a mechanism of leverage of a broader productive and technological base than domestic demand is capable of sustaining.

Defense policy and foreign policy are simultaneous and complementary instruments of the international relations of a State. Together, these policies provide the possibility of combining military and non-military means in strengthening an international system with diverse actors, institutions that are reaffirmed by mutual recognition, as described by the English school of international relations.

It was also observed that defense acquisitions are not only the outcome of purely technical decisions, aiming at filling military capabilities. They are fruits of many elements, in a more complex relationship between States, going beyond the simple concept of cooperation.

Similarly, the export of a particular defense product may mean more than a commercial operation because it can be used as a measure of commitment to regional stability and cooperation, which may require more complex levels of engagement and coordination of the various processes and actors.

Despite a recurrent discourse seeking technological autonomy in the Brazilian defense sector, there are difficulties in maintaining stability

and predictability of resources earmarked for domestic military procurement. This fact values the survival strategy of the Brazilian defense industry through sales to the foreign market, such as major players in the industry such as Russia, Germany and France.

Considering the difficulties encountered by the Brazilian BID companies to successfully carry out their government-to-government exports, it is considered fundamental to create an institutional arrangement that could be responsible for the officialisation of exports of national defense products, as in countries previously described. This way, Brazil would abandon the practice of looking for specific solutions, emerged on a case-by-case basis, which have not even proved to be effective. This institutional arrangement would be competent to carry out guarantees and enter into contracts between governments, in addition to contributing to the promotion of exports and the promotion of the productive capacity of the Brazilian BID as a whole.

A possible solution of this arrangement, applicable within the national legal system, is to systematize the historical of the sporadic initiatives applied in previous cases. In addition, setting up a future framework would create better conditions for the reissuing of previous contracts.

Needless to emphasize the contribution to the country's trade balance, since defense products, in general, they are products with high added value. In Brazil, the export of defense products is still far from being a relevant part of our export agenda.

Acting in this direction, the Brazilian government would be taking another step towards achieving one of the objectives for its defense policy: to develop the national defense industry, aimed at obtaining autonomy in indispensable technologies.

BIBLIOGRAPHIC REFERENCES

BRAZILIAN INDUSTRIAL DEVELOPMENT AGENCY
The theme: Estudo comparativo (Benchmark) sobre modelos de tradings de defesa internacionais vinculadas aos seus respectivos governos. Brasília. (Brazilian Industrial Development Agency) in press.

ANDRADE, I. O. et al. The lecture: O fortalecimento da indústria de defesa do Brasil. Rio de Janeiro: Ipea (Institute of Applied Economic Research), 2016.

BARKAWI, T. Defense diplomacy in north-south relations. *International Journal*, Thousand Oaks, volume: 66, number: 3, page: 597-612, summer 2011. Available on the website: <<http://bit.ly/2oy0UpV>>. Accessed on: January 2, 2013.

BERAUD-SUDREAU, L. Un changement politisé dans la politique de défense: le cas des ventes d'armes. **Gouvernement et action publique**, Paris, volume : 3, number :3, pages : 79-103, July September 2014. DOI (Detachments of Internal Operation): 10.3917/gap.143.0079. Available on the website: <<http://bit.ly/2CILzYG>>. Accessed on: February 10, 2015.

BRASIL. Presidency of the Republic. Constitution (1988). **The book: Constituição da República Federativa do Brasil**. Brasília, DF: Congresso Nacional, 1988. Disponível no site: <<http://bit.ly/1bIJ9XW>>. Accessed on: June 5, 2015.

_____. Civil House. Law number 12,598, of March 21, 2012. It establishes special rules for procurement, contracting and product development and defense systems;

treats regarding rules of incentive to the strategic area of defense; amends Law number: 12249 of June 11, 2010; and gives other pensions. **Official Journal of the Union**, Brasília, March 22, 2012. Available on the website: <<http://bit.ly/2F75W6P>>. Accessed on: February 26, 2018.

_____. Defense Ministry. Interministerial Ordinance nº 1.426, of May 7, 2013. **Official Journal of the Union**, Brasília, DF (Federal District), May 8, 2013.

_____. Defense Ministry. Ordinance No. 1,000, of April 30, 2015. **Official Journal of the Union**, Brasília, DF (Federal District), May 4, 2015.

BULL, H. The book: A sociedade anárquica: um estudo da ordem da política mundial. São Paulo: Imprensa Oficial do Estado de São Paulo; Brasília: Editora Universidade de Brasília, 2002.

COTTEY, A.; FORSTER, A. The book: Reshaping defense diplomacy: new roles for military cooperation and assistance. Oxford: Oxford University Press, 2004.

DUNNE, J. P. The defense industrial base. In: HARTLEY, K.; SANDLER, T. (Ed.). Handbook of defense economics. Amsterdam: Elsevier, 1995. Pages: 399-430.

HARTLEY, K.; SANDLER, T. The book: The economics of defense. Cambridge: Cambridge University Press, 1995.

HUNTER-ROUSSELLE, A. The book: Relance des exportations de défense: le ministre dresse un premier bilan. Paris: La Ministre des Armées, 2010. Available on the website: <<http://bit.ly/2BRLyVo>>. Accessed on: August 20, 2017.

KRAUSE, K. Arms and the State: patterns of military production and trade. New York: Cambridge University Press, 2006.

LAMB, G.; KALLAB, V. (Ed.). The book: Military expenditure and economic development: a symposium on research issue. Washington: The World Bank, 1992.

MITCHELL, C. S. The book: Phoenix from the ashes? Russia's defense industrial complex and its arms exports. Canberra: Anu e Press, 2009.

MORAES, R. F. The book: A inserção externa da indústria brasileira de defesa: 1975-2010. Brasília: Ipea, 2012. Brasília: Ipea, 2012.

_____. The book: Indústrias de defesa e intermediação estatal nas exportações de equipamentos militares: as experiências de Rússia e França. Brasília: Ipea, 2014.

MOTA, R. M. Master's thesis: Engenho e arte de guerra: a inovação nas vertentes do setor de defesa. 2009. 146 f. Dissertation (Master in Administration) - Faculty of Economics, Administration, Accounting and Information Science, University of Brasília, Brasília, 2009.

MUTHANNA, C. K. A. The book: Enabling military-to-military cooperation as a foreign policy tool: options for India. New Delhi: Knowledge World International; United Service Institution of India, 2006.

PLESSIS, A. Defense diplomacy: conceptual and practical dimensions with specific reference to South Africa. The book: Strategic Review for Southern Africa, Pretória, volume: 30, number: 2, pages: 87-119, November, 2008. Available on the website: <<http://bit.ly/2F7lF5W>>. Accessed on: January 2, 2015.

REVERON, D.S. The book: Exporting security. Washington: Georgetown University Press, 2010.

SILVA, A.R. A. **The book: A diplomacia de defesa na política internacional. Revista da Escola de Guerra Naval**, Rio de Janeiro, volume: 21, number: 2. Pages: 179-202, July - December 2015.

NEGOTIATIONS BETWEEN GOVERNMENTS FOR THE EXPORT OF DEFENSE PRODUCTS: THE MAIN OBSTACLES AND AN OPPORTUNITY FOR THE BRAZILIAN DEFENSE DIPLOMACY

STOCKHOLM INTERNATIONAL PEACE RESEARCH INSTITUTE. Sipri yearbook 2007: armaments, disarmament and international security – Summary. Stockholm: Sipri, 2007. Available on the website: <<http://bit.ly/2t0vCNM>>. Accessed on: February 26, 2018.

_____. The book: Sipri yearbook 2014: armaments, disarmament and international security– Summary Stockholm: Sipri, 2014. Available on the website: <<http://bit.ly/2Fz1AmP>>. Accessed on: March 29, 2015.

_____. The book: Sipria rms transfers data base [banco de dados]. Stockholm: Sipri, s.d. Available on the website <<http://bit.ly/2dckqTy>>. Accessed on: February 26, 2018.