7-1-1989

Brazil

BRAZIL

The following is a summary of recent legislative, judicial and administrative changes in Brazil.

I. Legislative and Administrative Rulings

Proposed Legislation on Provisional Measures

Several Senators and Representatives have submitted to Congress the proposed Resolution No. 1, 1989-CN, to regulate the procedure for the examination and voting on provisional measures. The resolution has been adopted by the President of the Republic, based on Article 62 and Article 84, item XXVI of the Federal Constitution.

The proposed resolution treats provisional measures as legislative bills, even though according to the Constitution, such measures have the force of law from the date of their adoption by the Congress. Therefore, at least from the point of view of the members of Congress who have endorsed the proposed resolution, this highly controversial question has already been resolved: provisional measures are bills, with the force of law as of the date of their adoption by the President, so long as they are approved by the President. If totally or partially rejected, modified, or substituted, Congress must regulate any legal relationship which may have arisen during the period of validity of the measures.

The following are noteworthy aspects of the proposed resolution:

a) without review by Congress, the President of Congress may pass provisional measures which are manifestly unconstitutional, or which have been reissued with the same content as previous measures already rejected or not considered within the required period of thirty days;

b) each provisional measure will be examined by a joint congressional committee before being submitted to the plenary session with the committee's recommendation;

c) amendments to delete, substitute, modify or add to the provisional measures will be admissible;

d) according to the recommendation of the joint committee, provisional measures and amendments will be examined by the plenary session as a bill, as a legislative decree, or both;

e) the bill totally or partially approving the measure, including amendments or substitutions, will be forwarded for approval by the President; and

f) the legislative decree that governs any relationship which may have arisen during the period when the provisional measure remained in force will be signed by the President of Congress, in the event of total or partial rejection, addition, or substitution.

Therefore, according to the proposed resolution, Congress has much discretion on the provisional measures; it may approve or reject them, in part or in full, or it may approve substitutions and amendments making deletions or additions. Except in the case of full approval, it is the duty of Congress to establish how to resolve conflicts that may have arisen during the period when the provisional measure had the force of law.

The resolution proposes that provisional measures be voted on by Congress by means of a roll call. The expectation is that the provisional measures will be discussed and voted on with the minimum quorum required by Article 47 of the Constitution: an absolute majority for the installation of the session, and a simple majority for the voting.

Branches of Foreign Financial Institutions

Branches of foreign financial institutions already operating in Brazil may now function as multiservice financial institutions. The authorization for the reorganization of these institutions was granted by the executive branch through Decree No. 97593 of March 28, 1989.

Until very recently, Brazilian financial institutions had to operate their investment and commercial banks through separate legal entities. Each of these companies would operate in different areas, such as foreign exchange, housing, financing, or portfolio management. In Resolution 1524 of September 21, 1988, the Central Bank of Brazil allowed these separate legal entities to be merged and to function as a multiservice bank, operating in any area it chooses. This option, however, was not available to branches of foreign financial institutions until the enactment of

Decree No. 97593 (DOU-I, March 29, 1989).

Financial Assistance by the Central Bank

Since its creation as the federal monetary and exchange authority in 1964, the Central Bank of Brazil has several times assisted financial institutions with their liquidity problems. Often, this last minute help has been criticized by the general public, who as taxpayers eventually pay for the bailout through taxes, and by certain sectors of the financial markets. Critics complain about low interest rates and the strong lobbying from state governors who obtain funds for their sometimes bankrupt state financial institutions.

In order to sidestep this criticism, the Central Bank released Resolution No. 1598, dated March 29, 1989, which sets forth in detail all credit lines for financial institutions, as well as the financial terms and conditions of such credits. Resolution No. 1598 identifies the type of financial institutions to which each credit line is available, and the requirements to be met for the availability of credit (DOU-I, March 30, 1989).

Monetary Reform

Following the January 15th monetary reform that created another currency (the new *cruzado*), a commission was set up by the federal administration to oversee the implementation of the various measures taken to control inflation. This commission was given powers to issue technical notes, which are very basic regulations and explanations that resolve the daily problems created when the new currency and a price freeze were decreed. Over the last few weeks, several technical notes were issued by the commission. The most important notes are summarized as follows:

a) Technical Note No. 2, dated January 19, 1989, confirmed that in order to avoid price reduction transactions involving a large number of units of a certain product, it is possible to express the unit price using more than two fractional digits. The final price for the total number of units, however, must be expressed with only two fractional digits. This note became necessary because the monetary reform eliminated three digits from the former currency (DOU-I, January 20, 1989).

b) Technical Note No. 4 provides that installment payments

that have been frozen may be freely negotiated by sellers and buyers, thereby eliminating financial costs and inflationary expectations. Technical Note No. 4 also provides that no extra financial costs may be added to frozen prices (DOU-I, January 25, 1989).

c) Technical Note No. 5, dated January 25, 1989, clarifies that prices under governmental control are subject to deflation in accordance with the deflation schedule released by the Ministry of Finance (DOU-I, January 26, 1989).

d) Technical Note No. 6, dated January 25, 1989, clarifies that the new thirty-three percent vacation bonus to be paid with vacation pay is not to be included in the calculation of the average monthly salary for purposes of the salary readjustment determined by the monetary reform (DOU-I, January 26, 1989).

e) Technical Note No. 7, dated February 1, 1989, determined that all credit card charges incurred before January 15, 1989 (the date of the monetary reform) are to undergo deflation in accordance with the deflation schedule announced by the Ministry of Finance (DOU-I, February 2, 1989).

Special Financial Statements

On February 2, 1989, the Securities Commission released its Resolution No. 17, which ordered publicly-held companies to prepare extraordinary financial statements to reflect the changes in the currency determined by the monetary reform of January 15, 1989. Resolution No. 72 also sets forth the accounting rules to be observed in preparation of such statements (DOU-I, February 14, 1989).

Discontinuance of the National Monetary Council

The National Monetary Council was created twenty-five years ago by the Banking Law (Law No. 4595 of December 31, 1964) for the purpose of formulating monetary and credit policies. Throughout the years, especially during 1965 to 1975, several other powers were transferred to the National Monetary Council, including the power to authorize the printing of currency.

The new Brazilian Constitution stated that legal provisions that give government agencies powers now granted to Congress will be revoked within six months of the promulgation of the new Constitution. This means that the National Monetary Council, the Na-

tional Private Insurance Council (SUSEP), the Price Council (CIP), and the National Foreign Trade Council (CONCEX) are all expected to lose their regulatory powers.

Therefore, on March 31, 1989, the President signed Provisional Measure No. 45, extending until April 30, 1990, the validity of legal provisions that grant the National Monetary Council and the other agencies mentioned above, the powers they had before the enactment of the new Constitution (DOU-I, April 3, 1989).

Provisional Measure No. 45, however, was not voted on by Congress within thirty days of its issue, and was consequently considered void. Finally, on May 3, 1989, the executive branch issued Provisional Measure No. 53, extending for six months the validity of the laws that grant the National Monetary Council the powers they had before October of last year (DOU-I, May 5, 1989).

New Federal Court

Under the October 1988 Brazilian Constitution, a new federal court was to be created to function as an appeals court for the federal judiciary. This court, the Superior Court of Justice, is, in accordance with Article 104 of the Constitution, composed of at least thirty-three justices appointed by the President of the Republic from among Brazilians over thirty-five years of age, and subject to confirmation by the Senate.

On March 30, 1989, the head of the executive branch signed Law No. 7746, which regulates the composition and the installation of the Superior Court of Justice. On April 10, 1989, the first twenty-six members of the court approved Act No. 1, regulating the functioning of the new court, the areas of specialization of its panels, and certain procedural rules governing the cases to be heard by this court.

The jurisdiction of the new federal court includes, *inter alia*, the hearing of criminal cases against governors, justices of state and federal courts of appeals, writs of mandamus and *habeas* data against ministers of state, conflicts of jurisdiction between any courts of appeals, and writs of injunction.

The new court also has jurisdiction to hear cases involving any federal authority or regulation, as well as appeals from the decisions rendered by the federal regional courts, when such decisions are against federal law or treaties, when the decision determines

the validity of a state law, regulation or act contested in view of federal law, or when such decision gives a federal law a different interpretation from one handed down by another federal regional court (DOU-I, March 31, 1989).

Restraints on the Rendering of Legal Services

The legal profession in Brazil has seen many competitors impinge on activities that, until now, have been considered proprietary to lawyers. This encroachment, particularly by accountants and auditors, has caused attorneys to focus on the efficiency and improvement of their services. This competition, however, has generated some negative aspects, and some of it has even breached legal provisions. One of the legal provisions breached is contained in Articles 71 and 72 of Law No. 4215 of April 27, 1963. These provisions provide that only professional firms or independent lawyers duly registered with the Brazilian Bar Association can render legal services to clients. Law firms in Brazil are not even registered with the commercial or civil registries, but only with the bar.

However, many accounting firms, especially the large ones, have hired lawyers to provide legal services not only for the firms themselves, but also for their clients. These firms, however are not law firms, and are not registered with the bar.

In order to put a stop to this illegal rendering of services, the Federal Council of the Brazilian Bar Association approved Resolution 69 on March 9, 1989. This resolution expressly provides that the rendering of legal services to third parties, including judicial and extrajudicial collection of amounts due, is an activity restricted to lawyers or law firms composed only of bar members duly registered with the Brazilian Bar Association. Resolution No. 69 also provides that the Brazilian Bar Association will adopt whatever measures are necessary to forbid the registration of companies that include in their corporate purpose activities restricted to the legal profession (DOU-I, March 17, 1989).

New Environmental Agency

By means of Provisional Measure No. 34, dated January 23, 1989, the President of the Republic discontinued two of the federal agencies in charge of environmental matters, namely, the Special Secretariat of the Environment (SEMA) created in 1973, and the

Fishing Development Authority (SUDEPE), created in 1962.

In place of these agencies, Provisional Measure No. 34 created the Brazilian Institute for the Environment, an independent agency within the Ministry of the Interior. The creation of the new agency was announced amidst burgeoning local and international pressure from environmental lobbyists for protection of the Brazilian rain forest (DOU-I, January 24, 1989). This new institute will formulate and implement the Brazilian environmental policy based on the preservation, conservation and rational use of natural resources. It also will take over the employees and assets of two other agencies discontinued in early January by the Executive: the Rubber Development Authority (SUDHEVEA), an agency established earlier this century when rubber was still produced only in the Amazon region, and the Brazilian Institute of Forestry Development (IBDF). Provisional Measure No. 34 was approved by Congress on February 22, 1989 and became Law No. 7735.

New Environmental Legislation

Based on the constitutional provision that provides that all citizens are entitled to an ecologically-balanced environment and grants the federal government sweeping powers to defend the environment, the President issued on April 10, 1989 the following decrees:

a) Decree No. 97626 provides for research on the control of production, sale and use of techniques, methods and chemical substances that endanger life, the quality of life and the environment. Article 1 of Decree No. 97626 specifies that a special commission shall research and subsequently propose legislative measures within 180 days.

b) Decree No. 97628 provides that any individual or legal entity responsible for consumption of raw materials in excess of 4,000 m^3 of coal or 12,000 m^3 of wood, shall have to maintain or form their own forests for their supply. Production from the forests must be equivalent to the individual or legal entity's consumption, taking into account future expansion. Decree No. 97628 provides detailed rules governing the formation and exploitation of such forests and their monitoring by federal agencies. Decree No. 97628 is issued as a regulation of Article 15 of the Forest Code (Law No. 4771 of September 15, 1965).

c) Decree No. 97629 provides for the control of the production

and marketing of substances that endanger life, the quality of life and the environment. The decree regulates the importation, marketing and use of mercury, a metal used frequently in mining areas in the northern region of Brazil that has caused substantial damage to rivers in the Amazon Basin (DOU-I, April 12, 1989).

Moreover, on April 14, 1989, the President signed Law No. 7754, which envisages the permanent conservation of forests and other natural vegetation existing at the source of rivers. These areas are to be under federal jurisdiction, and deforestation therein is strictly prohibited. Law No. 7754 also sets forth the pecuniary penalties, varying from approximately US$140 to US $1,400, applicable to violations of the conservation areas (DOU-I, April 18, 1989).

Banking Institutions' Duty to Inform

In a case discussing corporate income tax, the Third Chamber of the First Taxpayers' Council (the Brazilian administrative tax court) held that banking institutions cannot refuse to provide tax authorities with copies of the summaries of accounts of their clients or of other persons related to such clients, or deny information or any other clarification requested by the Federal Revenue Service, even if an investigative proceeding has not been initiated against the banking institution. The administrative court also held that if requested by tax authorities, this information must be supplied to support allegations in an investigative proceeding. (Judgment of November 3, 1988, Third Chamber, First Taxpayers Council, Braz., No. 103-08,776, slip op. (per curiam), *aff'd*, DOU-I, April 3, 1989).

Conflict over Informatics Law

The Minister of Industry and Commerce issued an order to the Special Informatics Office (SEI), the powerful federal agency in charge of administering the Informatics Law, ordering that it approve the bylaws and other contracts of a company whose application had been filed for twenty-seven months. This case received widespread attention from the press, as the company in question had requested registration as a domestic company under the Informatics Law, and had awaited an SEI decision for twenty-seven months.

SEI officials appear to have considered that the company did not conform to the domestic company concept of the Informatics Law, but for some reason they had decided not to issue a decision on the application.

Under the Informatics Law, only domestic companies whose unconditional voting control is held by Brazilian residents may produce certain types of electronic products, such as personal computers. Based on the fact that seventy percent of the company shares are unconditionally held by Brazilian residents (representing 100 percent of the voting capital of the company), and since only thirty percent of the shares are held by foreigners, the Minister of Industry and Commerce ordered SEI to approve the company's registration.

In his decision, the Minister stated that a refusal to make a decision on the case was an abuse of authority on the part of SEI. This is the first time that a cabinet level official has publicly attacked SEI's strong nationalistic policies.

A few days after this order, an injunction was obtained from the Federal Court of Appeals in Brasilia, suspending the minister's order and alleging that the President of the Republic —not the Minister of Industry and Commerce—had direct authority over SEI. This injunction was obtained by the National Association of Computer Manufacturers (ABICOMP), a lobbying group strongly in favor of the SEI's nationalistic use of the Informatics Law.

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