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Autolatina v. Brazil: A Multinational Tells Brazilian Prices to Take a Hike

Lisa Landy

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AUTOLATINA v. BRAZIL: A MULTINATIONAL TELLS BRAZILIAN PRICES TO TAKE A HIKE

LISA LANDY*

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I. INTRODUCTION

Although price controls have achieved little success, they have long been a mainstay of Brazilian economic policy.¹ Recently, this

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1. See generally T. BRUNEAU & P. FAUCHER, *AUTHORITARIAN CAPITALISM - BRAZIL'S CONTEMPORARY ECONOMIC AND POLITICAL DEVELOPMENT* (1981) (a collection of essays on general economic development and industrialization of the Brazilian economy); Galloway, *Brazil in LATIN AMERICA - GEOGRAPHICAL PERSPECTIVES* 324-82 (H. Blakemore & C. Smith 2d ed. 1983) (article gives a short, very general outline of Brazil's economic development since the 1500s with tables projecting future economic growth); L. PEREIRA, *DEVELOPMENT AND CRISIS*

policy created severe problems as it forced many price-controlled companies to operate at a loss.² This Note discusses the response of Autolatina, the holding company for two of the largest car makers in Brazil (Volkswagen do Brasil, S.A. and Ford do Brasil, S.A.), to price controls. The Note further discusses price controls as creeping expropriation and whether Autolatina would have received compensation had it pressed its claims under Brazilian and/or international law.

II. ECONOMIC BACKGROUND

A. Introduction

Brazil has been highly attractive to foreign investors. Brazil's abundant natural resources, vast territory, and large population,³ together with government subsidies and protection for investors, have induced multinational corporations to invest.⁴ In 1987, Brazil overtook Canada as the world's eighth largest economy with a significant rise in gross national product⁵ and a US\$12.5 billion trade surplus.⁶ However, a US\$103 billion foreign debt and a runaway inflation rate indicated that Brazil had serious economic difficulties.⁷

B. Inflation and Price Controls

Inflation is a chronic problem in Brazil. The Government's ec-

IN BRAZIL 1930-1983 (1984).

2. See generally Bruce, *Brazil's Crackdown on Inflation Worries Multinational Companies*, J. COM. & COM., Feb. 3, 1987, at 1A; Bruce, *Brazil's Austerity Measures Protested*, J. COM. & COM., Nov. 25, 1986, at 3A; Bruce, *Brazil's Inflation Gains Threatened*, J. COM. & COM., July 10, 1986, at 1A.

3. Today, Brazil's population is over 153,000,000. WORLD ALMANAC & BOOK OF FACTS 657 (1989).

4. See J. VILLEGAS, BRAZIL AS A MODEL FOR DEVELOPING COUNTRIES (1979); see also Evans, *State, Local and Multinational Capital in Brazil: Prospects for the Stabilization of the Triple Alliance in the Eighties*, in LATIN AMERICA IN THE WORLD ECONOMY 139-68 (D. Tussie ed. 1983).

5. Brazil's GNP has risen faster than that of any other large country. *Cruzado Enthroned: Brazil's New Currency Needs More Than a Price Freeze to Support It*, ECONOMIST, Mar. 8, 1986, at 13 [hereinafter *Cruzado Enthroned*]; *Brazil's New Beat*, MACLEANS, Jan. 19, 1987, at 18.

6. *Cruzado Enthroned*, supra note 5, at 14. Brazil's trade surplus is the third largest in the world. *Id.*

7. See *Brazil's New Beat*, supra note 5, at 18-21. Brazil's debt is the highest in the developing world. *Id.*

onomic policies raised the inflation rate from 235% in 1985 to 416% in 1987. The inflation rate for 1988 was 1038%; for 1989, 1783%; and for 1990, 1795%.⁸ Brazil's perennial response to inflation has been to implement price controls, despite their proven ineffectiveness. In 1979, Brazil attempted to combat inflation by limiting producers to two price changes per year. These changes were to correspond to fluctuations in general price levels, not actual cost.⁹ This decision was a catastrophe. Companies experienced such severe losses that a number of them threatened to close down.¹⁰ The plan was abandoned only a year later for a system where companies could set their own prices within guidelines set by the Interministerial Price Commission (Comissão Interministerial de Preços) (CIP). This system was known as "Liberdade Viglada" (monitored freedom).¹¹

Price controls only conceal or repress inflationary pressure without removing its cause.¹² An excess in demand over supply fuels inflation; fixing prices at levels lower than those set by market forces stimulates demand, thereby accelerating inflation.¹³ Brazil's economic history provides many salient examples.¹⁴ Nevertheless, price controls have remained an integral part of Brazil's economic reforms. In 1986, when Brazil froze prices as part of the Cruzado I and II plans,¹⁵ the Government kept price increases significantly

8. CONJUNTURA ECONÔMICA, Nov. 1990, at 130.

9. Rosenn, *Regulation of Foreign Investment in Brazil: A Critical Analysis*, 15 LAW. AM. 307, 350 (1983).

10. *Id.* at 349-50; BUSINESS INTERNATIONAL CORPORATION, MANAGING SUCCESSFULLY IN A BRAZIL UNDER PRESSURE 91-96 (1981) [hereinafter MANAGING SUCCESSFULLY].

11. Rosenn, *supra* note 9, at 350; MANAGING SUCCESSFULLY, *supra* note 10, at 91-93.

12. K. SARSENA, PRICING POLICY AND PRICE CONTROLS IN DEVELOPING COUNTRIES 28-29 (1986); see also J.K. GALBRAITH, A THEORY OF PRICE CONTROL (1952).

13. See Rosenn, *supra* note 9, at 350; MANAGING SUCCESSFULLY, *supra* note 10, at 91-93. Price controls must correspond to actual needs and leave sufficient room for profit so that producers retain the incentive and the means to compete in the marketplace. See also M. VAN MEERHAEGLÉ, PRICE CONTROL AND PRICE POLICY (1969). Furthermore, price controls necessarily create a black market which operates on its own level of supply and demand. Therefore, the inflationary effects of price controls depend on which prices are studied - official prices or black market prices.

14. See generally Arida & Lara-Resende, *Inertial Inflation and Monetary Reform: Brazil*, in INFLATION AND INDEXATION 27 (J. Williamson ed. 1985); Thunberg, *Brazil's Interrupted Economic Miracle*, in BANKS, PETRODOLLARS, AND SOVEREIGN DEBTORS 99 (P. Hartland, H. Thunberg & C. Ebinger ed. 1986).

15. The Cruzado Plan also replaced the old "cruzeiro" with new currency, the "cruzado," officially set at 13.8 to the US dollar. *Stop Passing the Buck*, TIME, Aug. 25, 1986, at 49.

When Argentina introduced a new currency, the "austral," to combat inflation, the inflation rate went down. The drop, however, was due primarily to a sharp cut in a budget

below the reported inflation rate.¹⁶

C. *The Role of the Price Commission (CIP)*

The CIP is the principal agency for setting price ceilings and general price policy.¹⁷ In 1981, the CIP controlled the prices of 75% of Brazilian industrial products.¹⁸ All companies whose annual sales exceeded one million United States dollars had to submit price requests on lengthy questionnaires to the CIP for approval each time they sought to change their prices.¹⁹ The CIP did not follow explicit, detailed regulations in reaching its pricing decisions, and no appeal procedure from those decisions existed.²⁰ In order to respond to the rapid inflation, firms needed to change prices every month. Unfortunately, delays, paperwork, and economic uncertainty created insurmountable obstacles for companies subjected to price controls.²¹

Initially, the Plano Cruzado, an "anti-inflationary" price control law enacted in 1986, received popular support, especially from consumers.²² Consumers supported the freeze because it increased

deficit previously running at 12% of GNP. Brazil has not attempted similar budget cuts. *Cruzado Enthroned*, *supra* note 5, at 14; Roett, *Brazil: Economic Crisis and Policy Options*, in *BRAZIL'S ECONOMIC AND POLITICAL FUTURE* (J. Chacel, P. Falk & D. Fleischer ed. 1988).

16. Rosenn, *supra* note 9, at 350.

17. Rosenn, *Trends in Brazilian Regulation of Business*, 13 *LAW AM.* 169, 183-84 (1981) [hereinafter *Trends*]. Other agencies that control prices are the National Superintendency of Private Insurance (SUSEP), which provides insurance rates, and the National Petroleum Council (NPC), which sets gasoline prices.

18. *Id.* In 1980, the CIP was demoted to an administrative arm of the Special Secretariat for Prices and Supplies, which directly coordinated pricing policies under the more liberal ideas of the "Liberdade Viglada." Thus, the CIP lost a great deal of independent economic decision-making power. *MANAGING SUCCESSFULLY*, *supra* note 10, at 91. The reinstatement of more rigid price controls in 1986, however, restored to the CIP much of this lost power. See generally *BRAZIL'S ECONOMIC AND POLITICAL FUTURE* (J. Chacel, P. Falk & D. Fleischer ed. 1988).

19. *MANAGING SUCCESSFULLY*, *supra* note 10, at 92-96. Not only are the questionnaires lengthy, but they are also quite costly to prepare and submit. *Id.*

20. Rosenn, *supra* note 9, at 350. The *Autolatina* case, however, documents an instance where the CIP's rulings were not the last word.

21. *Trends*, *supra* note 17, at 183.

22. The Plano Cruzado, or Cruzado Plan, included a price freeze on goods and a wage increase which was to escalate in accord with the consumer price index. Baer & Beckerman, *The Decline and Fall of Brazil's Cruzado*, 24 *LATIN AM. RES. REV.* 35, 39 (1989). For a discussion of the popular support for the Cruzado Plan, see *Cruzado Enthroned*, *supra* note 5, at 13; Sayad, *Brazil's Economic Stabilization Plan: An Analysis*, in *BRAZIL'S ECONOMIC AND POLITICAL FUTURE* 9, 12 (J. Chacel, P. Falk & D. Fleischer ed. 1988). Some consumers even went so far as to block checkout counters of stores that defied the price freeze. *Cruzado Enthroned*, *supra* note 5, at 13.

their earnings while keeping prices low thus giving them more spending power; they accordingly gained confidence in their government.²³ The program met early economic success as well. Eventually, however, the frozen prices and higher spending power created excessive demand, which, in turn, created shortages of many products (especially meat, eggs, and automobiles) and sent the inflation rate soaring once again.²⁴ By August 1987, inflation was officially reported at 6% per month, although non-government sources reported it at over 10% per month.²⁵ By November 1987, the cumulative inflation rate was up to 338%.²⁶ Once again, the very measures chosen to lower inflation actually fueled it, and the CIP's lack of coherence and effectiveness was evident. Meanwhile, many businesses reacted to the crisis by freezing investment plans.²⁷ Some businesses considered even more drastic measures, including pulling out of Brazil completely.²⁸ It is in this context of stringent price controls and rampant inflation that the *Autolatina* case developed.

III. FORMATION OF AUTOLATINA

Volkswagen's establishment of an automobile manufacturing plant in Brazil in the mid-1950s marked the emergence of Brazil as an economic force.²⁹ Most of Brazil's economic development is attributable to the auto industry and its spinoffs as catalysts for industrial development.³⁰ Ford, Fiat, Chrysler, General Motors, and others eventually joined Volkswagen in the Brazilian market. Thus, a variety of foreign auto manufacturers were subjected to

23. The increased confidence in the Government did not derive from the substance of the measures taken, but from the fact that measures were actually initiated at all. Sayad, *supra* note 22, at 12.

24. *Stop Passing the Buck*, *supra* note 15; *Cruzado Enthroned*, *supra* note 5, at 14; *RIP, Cruzado: Why Brazil's Anti-Inflation but Pro-growth Plan Collapsed*, *ECONOMIST*, Jan. 10, 1987, at 15.

25. *New Austerity Measures Slated in Brazil*, *J. COM. & COM.*, Aug. 26, 1987, at 1A; *Brazilian Inflation Rises*, *N.Y. Times*, Dec. 1, 1987, at 23, col. 1.

26. *Id.* To be sure, the accuracy of all reported inflation rates is suspect because inflation rises so quickly that figures can vary greatly depending on the date of the analysis. For a more thorough analysis of the Plano Cruzado's effect on inflation, see Baer & Beckerman, *supra* note 22.

27. *Brazil's New Beat*, *supra* note 5, at 19-21.

28. *Id.*

29. *Id.* at 19. See also Denghy, *Tracing Brazil's Auto History*, *AUTOMOTIVE NEWS*, Nov. 26, 1984, at 62.

30. See Fleischer, *Epilogue to BRAZIL'S ECONOMIC AND POLITICAL FUTURE* 257 (J. Chacel, P. Falk & D. Fleischer ed. 1988).

the vacillations in profits and losses that resulted from the Government's economic policies.³¹

Ford do Brasil, which controlled 30% of the Brazilian auto market, lost substantial amounts of money in the first half of the 1980s.³² Volkswagen do Brasil, Brazil's largest automaker with 40% of the market, also operated at a loss during the same time period.³³ Consequently, in 1986, Ford and Volkswagen began negotiating a joint venture to lower production costs. Initially, the two companies focused on Argentina, but soon switched their sights to Brazil due to Brazil's larger domestic market and superior base for exports.³⁴

The two companies were a good match because Ford had spare capacity in engine production and Volkswagen needed engines for some of its newer models.³⁵ Autolatina's fifteen plants (ten in Brazil and five in Argentina) had a capacity of 700,000 to 900,000 cars and trucks, employed 75,000 people, and had projected annual sales in excess of US\$4 billion, with US\$3.5 billion slated for export.³⁶

Autolatina began operating with US\$1.8 billion in equity and a substantial five year investment plan.³⁷ In 1987, however, Autolatina experienced losses of over US\$400 million and was forced to fire 15,000 workers primarily because of government price con-

31. *Brazilian Automakers Prepare for New Boom*, J. COM. & COM., July 31, 1987, at 1A; *Automakers Face Conflict in Brazil*, J. COM. & COM., June 31, 1986, at 5A; Wall St. J., Aug. 28, 1987, at 12, col. 4.

32. *Latin Touches*, ECONOMIST, June 21, 1986, at 74; Ryser, *Ford and VW: A Marriage of Convenience*, Bus. Wk., Dec. 8, 1986, at 53.

33. Turner, *VW and Ford to Cut Losses with Merger in Brazil, Argentina; VW's Share 51%*, AUTOMOTIVE NEWS, Dec. 1, 1986, at 2 [hereinafter *Merger in Brazil*]. In 1986, the combined losses of Volkswagen and Ford totalled between \$120 and \$150 million. Turner, *VW-Ford Firm May Expand in Latin America*, AUTOMOTIVE NEWS, Dec. 22, 1986, at 1 [hereinafter *Expansion*].

34. *Latin Touches*, *supra* note 33, at 74.

35. Ford, in 1986, produced 30,000 cars in its Buenos Aires plant which had a capacity of 100,000 cars. With the merger, Volkswagen could produce an additional 20,000 cars at this plant. The Ford plant in São Paulo was only producing 100,000 cars despite a capacity of 300,000. Volkswagen could now begin producing at this plant. As such, the merger enabled the two firms to take advantage of a 30% spare production capacity and to minimize costs in the process. Ryser, *supra* note 32.

36. Ryser, *supra* note 32. Autolatina may expand into Mexico and Venezuela provided that the Brazilian/Argentinean effort is eventually profitable. *Expansion*, *supra* note 33, at 30.

37. *Id.*; see also Turner, *Autolatina Launches Operations, Expects Losses*, AUTOMOTIVE NEWS, July 6, 1987, at 2. Autolatina planned to invest US\$1 billion to remodel and update its facilities over a five year period. *Merger in Brazil*, *supra* note 33.

trols.³⁸ The low prices set by the Government forced Autolatina to sell below cost, wreaked havoc with the entire auto industry, and resulted in the important case of Autolatina against the Government of Brazil.³⁹

IV. THE WRIT OF SECURITY

A. *The Facts*

In early 1987, the CIP's price controls critically limited Autolatina, forcing it (as well as the other automakers in Brazil) to sell at 28% below cost.⁴⁰ Faced with the possibility of Autolatina's moving out of Brazil, Dilson Funaro, the Finance Minister, signed a Protocol with the National Association of Automakers (ANFAVEA) on April 8, 1987.⁴¹ The Protocol, among other things, stated that auto producers could pass cost increases along to the consumer in the price of vehicles every thirty days. In exchange, Autolatina would invest US\$1 billion in the Brazilian auto industry and export US\$7.2 billion worth of automobiles by the end of 1989.⁴² Six days after the signing of the Protocol, the CIP authorized Autolatina to increase its prices by 15%, and on May 10, 1987, another 26%.⁴³ After this time, however, the relationship between Autolatina and the Government grew tense.⁴⁴

By late September 1987, Autolatina was still registering tre-

38. *A Hora do Armistício*, REVISTA VEJA, Mar. 16, 1988, at 78-79 [hereinafter *Hora*]; *Autolatina Sees Deficit*, N.Y. Times, Dec. 1, 1987, at 23, col. 1.

39. In a nutshell, the price set by the CIP made new cars cheaper than old cars and caused a consumer stampede (which further fueled inflation). The set prices, however, did not cover the cost of production of the vehicles. The situation was exacerbated when suppliers refused to provide parts at the Government's frozen prices, thus forcing cuts in production and delivery of vehicles. Meanwhile, workers' unions threatened the industry by staging a two week strike in response to layoffs and firings. See Truell, *Brazil's Finance Chief Is Feeling Heat at Home Amid Talk He May Resign*, Wall St. J., Nov. 4, 1987, at 33, col. 2; *Units of Ford, Volkswagen Suspend Brazil Deliveries*, Wall St. J., Oct. 5, 1987, at 19, col. 4; *Brazil's New Beat*, *supra* note 5, at 19-21.

40. *Expansion*, *supra* note 33, at 30; *Bresser Lanca Ofensiva Contra Aumento de Preços da Autolatina*, Gazeta Mercantil, Nov. 9, 1987, at 10, col. 3 [hereinafter *Ofensiva*]; *Brazil's Debt Accord Provokes Chorus of Disapproval at Home*, LATIN AMERICAN WEEKLY REPORT, Nov. 19, 1987, at 8 [hereinafter *Debt Accord*]; *Autolatina Contra-ataca*, REVISTA SENHOR, Dec. 29, 1987, at 81 [hereinafter *Contra-ataca*].

41. *Contra-ataca*, *supra* note 40, at 81; *Resgatar o Equilíbrio para Resolver o Caso Autolatina*, Gazeta Mercantil, Nov. 10, 1987, at 4, col. 1 [hereinafter *Resgatar o Equilíbrio*]; *Debt Accord*, *supra* note 40; *Ofensiva*, *supra* note 40.

42. *Contra-ataca*, *supra* note 40, at 81.

43. *Id.*

44. *Id.*

mendous losses because of galloping inflation and low prices.⁴⁵ By this time, the relationship between the Government and Autolatina had deteriorated so much that Autolatina suspended domestic sales and seriously threatened to leave Brazil.⁴⁶ Unable to resolve the differences with Autolatina, Luís Bresser Pereira, the new Finance Minister, tore up the Protocol claiming it no longer had any juridical effect.⁴⁷

In response, Autolatina unilaterally raised its prices by 28%, 12% higher than the increase authorized by the Government.⁴⁸ The Government denounced Autolatina's action as a public display of civil disobedience and imposed punitive measures.⁴⁹ The punitive measures included curtailing Autolatina's lines of credit with Banco do Brasil and other federal banks, suspending import and export licenses, ordering the Receita Federal (Brazil's equivalent of the Internal Revenue Service) to start a deep investigation into Autolatina's business records from the previous five years, confiscating property, applying the penalty for suspending the sale of produced vehicles, and threatening to close down the factories for three to ninety days.⁵⁰ To avoid these penalties, Autolatina applied for a writ of security to the Federal Court of Appeals (Tribunal Federal de Recursos) immediately after the "disobedient" price increase.⁵¹

45. *Postscript: Brazil/Car Industry*, LATIN AMERICAN WEEKLY REPORT, Oct. 15, 1987, at 12; *Autolatina Sees Deficit*, N.Y. Times, Dec. 1, 1987, at 23, col. 1.

46. *As Razões da Autolatina*, Gazeta Mercantil, Nov. 9, 1987, at 31, col. 2; *Brazilian Subsidiaries of Ford and VW Fight with Government over Price Curbs*, Wall St. J., Nov. 9, 1987, at 24, col. 2; see also *Contra-ataca*, *supra* note 40.

On September 30, 1987, the Government allowed a 16.5% price increase, but this increase was well below the 28% requested by Autolatina. *Ofensiva*, *supra* note 40.

47. *Resgatar o Equilíbrio*, *supra* note 41.

48. *Contra-ataca*, *supra* note 40; *Autolatina Defies the Government*, LATIN AM. WEEKLY REP., Nov. 19, 1987, at 8.

49. *Ofensiva*, *supra* note 40. Bresser Pereira protested that Autolatina's price increase would further accelerate inflation. *Id.*

50. For more detailed accounts of the threatened punitive measures, see *As Razões da Autolatina*, *supra* note 46; *Ofensiva*, *supra* note 40; *Contra-ataca*, *supra* note 40; *Resgatar o Equilíbrio*, *supra* note 41; *Debt Accord*, *supra* note 40.

51. Law Number 1.522 (1951) defines the writ of security. Lei No. 1.522, 15 COLETÂNEA DE LEGISLAÇÃO [COLETÂNEA] 527 (Lex 1951). Article 1 states that "the writ of security shall be granted to protect a clear and certain right, not protected by habeas corpus, whenever anyone suffers a violation thereof, or there is a just apprehension of suffering such a violation, [through] illegality or abuse of power on the part of the authority. . . ." *Id.* In Brazil, the writ of security may be used in roughly the same manner as the writ of mandamus is used in the United States. Judgment of Mar. 6, 1968, Tribunais de Alçada Civil (court of civil appeals), Braz., 390 Revista dos Tribunais [R.T.] 223. See K. KARST & K. ROSENN, LAW AND DEVELOPMENT IN LATIN AMERICA, 106-07, 711-12 (1975).

B. Disposition of the Case

Autolatina sought the writ of security because of the severity of the actions threatened against it.⁵² Autolatina claimed that the Government breached the Protocol by not allowing Autolatina to raise its prices enough to cover costs.⁵³ The Finance Minister countered that the price controls were necessary to curtail inflation, that the Government had granted Autolatina sufficient price increases, and that other smaller factories accepted the CIP's decisions without complaint.⁵⁴ The Brazilian Federal Court of Appeals granted Autolatina a "*liminar*," similar to a preliminary injunction, allowing the company to raise its prices until the court reached a determination on the writ of security.⁵⁵ The President of the Federal Supreme Court subsequently upheld the *liminar*.⁵⁶ Thus, until the Brazilian courts decided the writ of security, the *liminar* granted Autolatina the right to raise prices, pursuant to the Protocol, without the threat of prosecution by the Finance Ministry.⁵⁷ Notwithstanding the *liminar*, Bresser Pereira continued the reprisals against Autolatina.⁵⁸

Despite early judicial intervention in the dispute, the situation was ultimately resolved out of court. Autolatina and the Brazilian Government finally reached a new agreement, very similar to the Protocol signed in April of 1987.⁵⁹ This new agreement, signed by yet another new Finance Minister, Mailson Ferreira da Nóbrega,⁶⁰

52. *Resgatar o Equilibrio*, *supra* note 41; *As Razões da Autolatina*, *supra* note 46; *TFR Concede Liminar a Autolatina*, *Gazeta Mercantil*, Nov. 10, 1987, at 27, col. 2.

53. Judgment of Nov. 19, 1987, Supremo Tribunal Federal (highest court of appeal), *Braz.*, — *Revista Trimestral de Jurisprudência [R.T.J.]* — [hereinafter *Liminar*]; *Autolatina Defies the Government*, *supra* note 48.

54. *Liminar*, *supra* note 53.

55. *Id.*

56. *Id.*; see also *Autolatina Appears Close to Pact with Brazil*, *Wall St. J.*, Nov. 20, 1987, at 25, col. 6.

57. *Liminar*, *supra* note 53; *Autolatina Appears Close to Pact with Brazil*, *supra* note 56.

58. *Contra-ataca*, *supra* note 40.

59. *Hora*, *supra* note 38. Although the temporary decision was favorable to Autolatina, a favorable final decision would have been more difficult to achieve because a writ of security demands that the plaintiff have a "clear and certain right." CONSTITUIÇÃO FEDERAL [C.F.] art. 153, § 21 (1969) (Brazil). Whether Autolatina actually had a "clear and certain right" to raise its prices in order to cover costs is debatable.

60. Bresser Pereira was forced to resign before the new agreement with Autolatina was signed. His dismissal, however, was not solely the result of the problems with Autolatina. Mr. Pereira also had policy conflicts with the Central Bank. Still, his dismissal was ultimately due to his disagreement with President Sarney over a new tax package. *TFR Con-*

allowed each sector much greater latitude to adjust its own prices.⁶¹ Autolatina was still required to submit pricing plans to the CIP, but now Autolatina could, within the limits set forth in the agreement, set its own prices without waiting for the CIP to grant permission.⁶² In return for this agreement, Autolatina agreed to drop its lawsuit and promised to invest over US\$300 million in Brazil in 1988.⁶³ In addition, the Finance Minister ratified Autolatina's previously enacted price increases.⁶⁴ The agreement would reduce the CIP's role, meanwhile, to that of a watchdog; the CIP would simply monitor the reasonableness of subsequent price increases.⁶⁵

C. Future Impact

The agreement between Autolatina and the Government underscored the Sarney Government's weakness. A judicial decision in this case would have caused the Brazilian Government considerable turmoil, regardless of the outcome.⁶⁶ A decision for the Government would have given foreign investors the impression that the Brazilian courts are unlikely to enforce Brazilian Government contracts where the Government is an unwilling party. On the other hand, a decision in favor of Autolatina would have directly negated the potency of an already weak government.

As it turned out, however, the Autolatina case demonstrated that an important multinational can defy harsh government regulations and force the Government to come to a satisfactory compromise. The Autolatina dispute also demonstrated some of the consequences of inconsistent economic policies that attempt to reg-

cede Liminar a Autolatina, supra note 52.

61. Portaria No. 132, 52 COLETÂNEA 348 (Lex 1988) [hereinafter Portaria]; see also *Brazilian Court Sanctions Ford, VW Price Increase*, Wall St. J., Nov. 11, 1987, at 23, col. 3; *Hora, supra note 38*. Portaria (Ordinance) Number 132 represents the legislative codification of the new agreement reached between Autolatina and the Brazilian federal administration. See *Legal Letter*, Mar. 1988, at 10-11, in PINHEIRO NETO - ADVOGADOS, *DOING BUSINESS IN BRAZIL* (1990).

62. Portaria, *supra note 61*.

63. *Autolatina Batalha Judicial Continua*, *Gazeta Mercantil*, Nov. 10, 1987, at 1, col. 8; *Hora, supra note 38*, at 78.

64. Portaria, *supra note 61*; *Hora, supra note 38*, at 78. The ratification was a moot issue because inflation had made those price adjustments obsolete. The important part of the agreement was that Autolatina was free to increase its prices according to its costs. *Id.*

65. Portaria, *supra note 61*.

66. See *Hora, supra note 38*.

ulate inflation with price controls.⁶⁷ No other manufacturer challenged the authority of President Sarney and his government as directly as Autolatina, but all manufacturers were aware that the new agreement strained the credibility of a government already under considerable attack.⁶⁸

V. PRICE CONTROLS AS EXPROPRIATION

A. *Brazilian Law and Creeping Expropriation*

Just where state regulation of property rights becomes a taking by eminent domain standards (i.e., expropriation) is a difficult question.⁶⁹ As one commentator has observed, "[i]n an era of rapid inflation, stringent price controls often result in a de facto taking of property, a contention which Brazilian courts have thus far refused to recognize."⁷⁰ The present Brazilian Constitution guarantees property rights - except for expropriation for public necessity, in which case the expropriated party receives prior and just compensation.⁷¹ This guarantee is comparable to any other country's

67. See *Brazil's Violent Economic Policy Shifts Are Causing Havoc Among Auto Makers*, Wall St. J., Aug. 28, 1987, at 12, col. 2; *Ofensiva*, *supra* note 40.

68. *Autolatina Defies the Government*, *supra* note 48. Part of the Sarney Government's problem stemmed from the fact that Sarney was not popularly elected president. In 1985, Tancredo Neves was chosen president for a six year term by the electoral college. *New Wine for an Old Jug*, *ECONOMIST*, May 2, 1987, at 36-37. He died before taking office and José Sarney, the vice-president, became president in Neves' stead. *Id.* Additionally, fighting within Sarney's own party and Sarney's lack of success in lowering inflation made his position unusually precarious. *The Little Man Stands Taller*, *ECONOMIST*, Mar. 8, 1986, at 39-40. The Autolatina case only increased the strength of Sarney's opposition.

69. See Rosenn, *Treatment of the Foreign Investor: The Brazilian Style*, in *THE FUTURE OF BRAZIL* 245, 262 (W. Overholt ed. 1978) [hereinafter *Brazilian Style*]. See also Weston, *Constructive Takings Under International Law: A Modest Foray Into the Problems of "Creeping Expropriation,"* 16 VA. J. INT'L L. 103 (1975). The American Law Institute's Restatement of the Foreign Relations Law for the United States recognizes that governmental expropriation results from direct official takings as well as other government actions that have the effect of a taking. *RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* § 712 comment g (Tent. Draft No. 6, 1985). The mechanisms through which such expropriations may be accomplished include taxes, regulations, and other actions that prevent, or unreasonably interfere with, or unduly delay the effective enjoyment of the property by an alien. *Id.*

70. *Trends*, *supra* note 17, at 183.

71. The Brazilian Constitution states,

[t]he right of property is guaranteed, except in cases of expropriation for public necessity or utility or social interest, in which event prior and just compensation must be paid in cash, subject to the provisions of article 161 permitting the expropriated party to accept payment in government bonds with an exact monetary correction clause. In case of imminent public danger, the competent authorities may use private property, assuring compensation to the owner at a later date.

constitutional guarantee, including that of the United States. The Brazilian laws that govern actual expropriation, however, are not faithful to the ideals expressed in the Brazilian Constitution.⁷²

In Brazil, an official expropriation is triggered by a Presidential decree of public necessity or social interest designating a particular piece of property.⁷³ Once the President declares a public necessity, it is very difficult to argue against the taking of the property.⁷⁴ Moreover, the function of the court system, in a contest, is solely to determine the proper compensation.⁷⁵ Under the Brazilian Constitution, compensation is required for a direct taking.⁷⁶ Although the Autolatina case never reached the merits, Autolatina might have argued that the Protocol signed by Autolatina and the Finance Minister, Bresser Pereira, created a protected right to raise prices. Thus, the breach of the Protocol was a direct taking of a property right, and Autolatina was consequently entitled to just compensation under the Brazilian Constitution. Even

C.F. art. 153, § 22 (1967, amended 1969) (Brazil).

Property is broadly defined in Brazil to comprise an interest that has a legally recognized value. See P. DE MIRANDA, *COMENTÁRIOS A CONSTITUIÇÃO DE 1967* at 364-66 (1968).

The Brazilian Constitution of 1824 also provides that a party's property may only be expropriated for public necessity and that the party must receive prior compensation. C.F. art. 179, § 22 (1824) (Brazil); see also C.F. art. 122, § 14 (1937) (Brazil) (extending private property protections to resident aliens).

72. Decree-Law Number 3.365 (1941) defines actual expropriation. Decreto-Lei No. 3.365, 5 COLETÂNEA 326 (Lex 1941). See also *Brazilian Style*, supra note 69, at 248; see generally A. LOWENFELD, *EXPROPRIATION IN THE AMERICAS* (1971).

73. C.F. art. 153, § 22 (1967, amended 1969) (Brazil). Social interest takings began in 1946 as part of a project for agrarian land reform and urban renewal. The properties were taken and then redistributed to private parties. C.F. art. 146, § 16 (1946) (Brazil).

74. An executive decree for an expropriation for public necessity is not valid if there is neither a settlement nor a commencement of a condemnation suit within five years. A settlement or suit for a social interest taking must be started within two years. Decreto-Lei 3.365, art. 14, 5 COLETÂNEA 328 (Lex 1941); Lei No. 4.132, art. 3, 26 COLETÂNEA 309 (Lex 1962).

75. *Brazilian Style*, supra note 69, at 249.

76. The Brazilian courts typically have three appraisers of the value of the expropriated property, one hired by each of the parties and one assigned by the judge. Most often, the judge follows his own appraiser. Decree-Law Number 3.365 lists the following factors to be considered in determining the value of the property: 1) tax assessment value; 2) acquisition cost; 3) income derived from the property; 4) location; 5) state of repair; 6) valuation for insurance purposes; 7) market value of comparable property during the past five years; and 8) enhancement or depreciation of the expropriated party's remaining property. Decreto-Lei No. 3.365, art. 27, 5 COLETÂNEA 330 (Lex 1941).

Compensation, once determined, must be paid in cash, unless the expropriation is part of agrarian reform, in which case the Constitution permits payment in bonds which are adjustable for inflation. C.F. art. 157 § 1 (1969) (Brazil), as amended by Ato Institucional No. 9, 33 COLETÂNEA 473 (Lex 1969).

without the Protocol, governmental policies forcing Autolatina to operate at a huge loss arguably constituted creeping expropriation, entitling Autolatina to compensation.

Price controls that lag behind inflation may force firms to operate at a loss, especially considering the law prohibiting a firm from holding onto its production. Although there is no concrete evidence that the CIP intentionally uses its power to force companies to operate at a loss,⁷⁷ the delays, paperwork, and uncertainty involved are devastating to firms subject to controlled prices. In any event, the Supreme Federal Tribunal, in *Sociedade de Laticínios Domino Ltda. v. União Federal*, stated that price controls without subsidization are *not* an unconstitutional taking of property, even if they force a firm to operate at a loss.⁷⁸

Due to the ever increasing amount of foreign investment in Brazil, the *Sociedade* decision may be unsound policy. Autolatina lost over US\$400 million in 1987.⁷⁹ Obviously, a firm cannot continue indefinitely with such losses and will eventually leave Brazil if the situation is not corrected. Furthermore, Brazil desperately needs the capital investment that the large multinationals, especially Autolatina, provide.⁸⁰ Eventually, Autolatina and the Government came to an agreement that was satisfactory to both sides. However, due to the instability surrounding the Sarney Administration, the agreement's durability is questionable. In sum, given Brazil's great economic needs and government instability, the Brazilian courts ought to grow more cognizant of the policy arguments which favor protecting economic property rights.

B. An International Claim⁸¹

The United Nations has recognized that property owners must

77. *Trends*, *supra* note 17, at 183.

78. Judgment of May 31, 1965, Supremo Tribunal Federal (highest court of appeals), Braz., 33 R.T.J. 720. To be sure, Brazilian courts have seldom granted compensation for indirect takings. Indeed, the Brazilian courts have tolerated disguised expropriation in various forms. See *Brazilian Style*, *supra* note 69, at 252-53. Still, there is at least one case where compensation was ordered for an indirect taking. In *Agro Florestal Giorgi Ltda. v. Fazenda do Estado*, the court required compensation for a state prohibition against cutting timber on private property. Judgment of August 4, 1971, Tribunais de Alçada Civil (court of civil appeals), Braz., 431 R.T. 141.

79. See *supra* note 38 and accompanying text.

80. See generally BRAZIL'S ECONOMIC AND POLITICAL FUTURE, *supra* note 18.

81. In addition to having a claim under Brazilian and international law, a company like Autolatina might have found protection with the Overseas Private Investment Corporation

receive compensation in cases involving expropriation for public utility, security, or national interest.⁸² Without an agreement to the contrary, local remedies must be exhausted before a claim can be brought in the international arena.⁸³ An international claim may be based merely on a "denial of justice,"⁸⁴ but the complaining party must show more than his own dissatisfaction in order to be heard.⁸⁵ A denial of justice may be defined as a lack of the proper court in which to hear the case, lack of access to that court, a refusal to decide the case, or an unjustifiable delay in deciding the controversy.⁸⁶ The Brazilian court system did not deny access or refuse to decide the Autolatina case. Still, had the Brazilian courts reached a decision against Autolatina on the merits, thus forcing Autolatina to suffer continued dramatic losses into the future, Autolatina might have argued that the Brazilian court system, in effect, never really heard Autolatina's complaint. Thus, Autolatina would argue that justice had been denied.

(OPIC). OPIC is a privately-run, United States Government agency that offers insurance for overseas investors. OPIC insures against expropriation and defines that term broadly. According to the statute governing OPIC, expropriation is "any abrogation, repudiation, or impairment by a foreign government of its own contract with an investor when such abrogation, repudiation, or impairment is not caused by the investor's own fault or misconduct and materially adversely affects the continued operation of the project." 22 U.S.C. § 2191(b) (1982). In order to recover from OPIC, therefore, Autolatina would have to demonstrate that Bresser Pereira's abrogation of the Protocol was not Autolatina's own fault. Unfortunately, Autolatina was not insured with OPIC and could not pursue such a claim. See generally Shanks, *Insuring Investment and Loans Against Currency Inconvertibility, Expropriation, and Political Violence*, 9 HASTINGS INT'L & COMP. L. REV. 417 (1986).

82. *Resolution on Permanent Sovereignty Over National Resources*, 9 U.N. GAOR Supp. 17 at 107, U.N. Doc. A/RES/1803 (1962), reprinted in 2 I.L.M. 223 (1963). A similar statement is found in the *Charter of Economic Rights and Duties of States*, 15 U.N. GAOR Supp. (No. 31) at 300, U.N. Doc. A/RES/3281 (1974), reprinted in 14 I.L.M. 251 (1975). However, there is an important difference between the Resolution and the Charter. The Resolution states that, in a case of expropriation, the owner *shall* be paid appropriate compensation under the standards of the expropriating state *and* international law. In contrast, the Charter provides that appropriate compensation *should* be paid and that any controversies will be settled under the *domestic* laws of that state.

Like the United Nations, the American Law Institute's Restatement of Foreign Relations Law of the United States recognizes that states are responsible for takings without just compensation. This responsibility covers the direct taking of property, repudiation or breach of contract, and arbitrary or discriminatory acts that impair property or other economic interests of a foreign national. RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 712 (Tent. Draft No. 6, 1985).

83. See generally F.V. GARCIA-AMADOR, 2 THE CHANGING LAW OF INTERNATIONAL CLAIMS § 19 (1984).

84. F.V. GARCIA-AMADOR, 1 THE CHANGING LAW OF INTERNATIONAL CLAIMS § 6 (1984); Weston, *supra* note 69, at 117, 171.

85. GARCIA-AMADOR, *supra* note 82; Weston, *supra* note 69, at 117, 171.

86. See GARCIA-AMADOR, *supra* note 84.

Once an international claim is established, the next question is whether international law requires compensation. The Restatement of the Foreign Relations Law of the United States provides that a state is responsible under international law for an economic injury resulting from the following state actions:

(2) a repudiation or breach by the state of a contract with a national of another state . . .

(b) where the foreign national is not given an adequate forum to determine his claim of breach or is not compensated for any breach determined to have occurred;

(3) other arbitrary or discriminatory acts or omissions by the state that impair property or other economic interests of a national of another state.⁸⁷

Bresser Pereira's breach of the Protocol with Autolatina seemingly falls within the scope of the Restatement, but the Restatement comments explain that not every breach constitutes a violation of international law.⁸⁸ Under international law, a state is only responsible for such a breach when it is discriminatory or done for governmental rather than commercial reasons.⁸⁹ In Autolatina's case, Bresser Pereira prohibited the Protocol's price increases in an attempt to control inflation. Arguably, this reasoning is governmental as opposed to commercial and would therefore entitle Autolatina to compensation under the Restatement's standard.

Meanwhile, the Iran-United States Claims Tribunal confronted the gray area where no formal taking is announced yet an alien's property is effectively seized.⁹⁰ The Tribunal held that compensation is required where the Government interferes with an alien's use and control of, or derivation of economic benefits from, property.⁹¹ The Tribunal used a standard of "reasonableness" on the degree of interference to be tolerated.⁹² As such, the Tribunal focused on the economic reality of the situation, and recognized

87. RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 712 (Tent. Draft No. 6, 1985).

88. *Id.* comment h.

89. *Id.*

90. See Brower, *Current Developments in the Law of Expropriation and Compensation: A Preliminary Survey of Awards of the Iran-United States Claims Tribunal*, 21 INT'L LAW 643 (1987).

91. *Golpira v. Iran*, 2 IRAN-U.S. C.T.R. 171, 177 (1983); *Int'l Technical Prods. Corp. v. Iran*, 9 IRAN-U.S. C.T.R. 206 (1985). See Brower, *supra* note 90.

92. *Golpira*, 2 IRAN-U.S. C.T.R. at 177; *Int'l Technical Prods. Corp.*, 9 IRAN-U.S. C.T.R. 206.

that expropriation may occur without a *direct* taking of tangible property.⁹³ In an international setting, Autolatina could apply the Tribunal decisions to recover the huge losses it suffered due to the Brazilian price control policies. The Brazilian policy forced Autolatina to operate at such a deficit as to constitute an unreasonable interference with Autolatina's derivation of income and economic benefits from its property. Thus, pursuant to Iran-U.S. Claims Tribunal precedent, Autolatina is entitled to just compensation.

VI. CONCLUSION

In the final analysis, the new agreement was the only viable solution to the conflict. A decision on the merits for Autolatina would have severely undermined the power of the already unstable Brazilian administration. A decision for the Finance Minister would have discouraged foreign investment in Brazil, which is crucial to the Brazilian economy. The new agreement between Autolatina and Brazil essentially resurrected the old Protocol. Thus, peace was restored between Autolatina and Brazil. With the volatility of the Government, however, the duration of this armistice is uncertain.

Nonetheless, there is potential for a mutually beneficial relationship between Autolatina and Brazil. Autolatina can invest heavily in Brazil and, in turn, make suitable profits. Price controls, however, created seemingly insurmountable problems. The Autolatina case demonstrated that multinationals do have recourse when faced with an uncooperative foreign government. Autolatina defied the edicts of the Finance Minister and won a temporary decision in its favor. Faced with the possibility of a final decision also in favor of Autolatina, the Brazilian Government agreed to discontinue price controls. In the future, if problems arise, Autolatina might successfully pursue an international and/or domestic claim of expropriation against Brazil and recover losses caused by governmental policies. The Brazilian Government, therefore, faces perennial vulnerability until it cultivates stable, coherent, and workable economic policies.

93. *Golpira*, 2 IRAN-U.S. C.T.R. 171; *Int'l Technical Prods. Corp.*, 9 IRAN-U.S. C.T.R. 206; *Brower*, *supra* note 90, at 644 n.108.