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The Brazilian Citizen Constitution, the Environment and Taxation

ANDREA STEUER ZAGO AND LIONEL PIMENTEL NOBRE*

I. INTRODUCTION

Brazil's fight for a democratic state ruled by law began in 1964, when the military regime assumed control of the government.1 This dictatorial regime intensified its non-democratic leadership after the issuance of Institutional Act No. 5 (AI5),2 the most authoritarian instrument in Brazilian political history. Nearly twenty years later, the Brazilian people attended political assemblies and demanded direct presidential elections and a new constitutional order.3 They encountered, however, many obstacles.

The Brazilians' need for change, the global trend of dissolving long term dictatorships, and the Cold War, ended Brazil's military regime. Brazil needed leadership that reflected its peoples' democratic aspirations.

On January 15, 1985, the people of Brazil elected Tancredo Neves as the President of Brazil.4 He created the New Republic to counteract the oppressive legislation and to restructure the representative and federal system. He intended the New Republic to eliminate the remnants of Brazil's authoritarian history with a new

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2. See BRAZIL 1954-1964 END OF CIVILIAN CYCLE 183-84 (Jordan M. Young ed., 1972) (discussing the provisions of the Institutional Act); see also Institutional Act No. 5.
3. See NYROP, supra note 1.
constitution and to modernize the country through administrative and social changes.

Brazilians supported Tancredo Neves and his reformation and modernization programs. With the New Republic, the Brazilians hoped for democracy and a new constitution, but Neves died before taking over the presidency.\(^5\) Vice President José Sarney, however, stepped in and began to implement the changes promised by Tancredo Neves.\(^6\)

In 1985, President Sarney established the fifty member Constitutional Studies Committee (Committee).\(^7\) The Committee spent an entire year working on projects to assist the National Constitutional Convention design a new constitution. President José Sarney, however, decided not to send the Committee’s project to the National Constitution Convention. As a result, the work of fifty jurists, entrepreneurs, politicians, workers and religious representatives was abandoned and forgotten.\(^8\)

II. BRAZIL’S 1988 CONSTITUTION

On October 5, 1988, the National Congress promulgated the 1988 Constitution (Constitution) of the Federal Republic of Brazil.\(^9\) The new Brazilian Constitution is progressive and liberal, containing 245 constitutional articles and 70 transitory provisions. It is one of the longest constitutions in the world.\(^10\)

A. Structure of the Constitution

The Constitution contains a modern and innovative text, and its structure differs from prior Brazilian constitutions. It has nine titles: (i) fundamental principles; (ii) fundamental rights and guarantees, involving individual and collective rights, workers’ rights, nationality, political rights and political parties; (iii) organization

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5. See id.
7. Decree No. 91.450, July 18, 1985 (Braz.).
8. The National Constitutional Convention and the National Congress had an open door policy. Unions, citizens, and national and foreign entities were able to attend the debates and make statements. The effort to make the work of the National Constitutional Convention public, contributed to the procedural delay for nineteen months.
of the State, structuring the federation and its components; (iv) organization of the powers; (v) defense of the State and of the Democratic Institutions, containing mechanisms to the state of defense and to the state of siege; (vi) taxation and the budget; (vii) economic and the financial order; (viii) social order; and (ix) General Dispositions.11

The Constitution begins by invoking the protection of God.12 It then delineates the fundamental principles.13 The Constitution also establishes the unity of the federation,14 and identifies three different branches of the Federal Government: the legislative, the executive, and the judiciary.15

For the first time in a Brazilian constitution, fundamental objectives are set forth: (i) to build a free, just and solitary society; (ii) to ensure national development; (iii) to eradicate poverty and disfranchisement and reduce social and regional inequalities; and (iv) to promote the well-being of all, without prejudice or discrimination based on nationality, race, sex, color, age or any other basis.16

In addition, the Constitution reinstates the democratic principles that the Institutional Act erased.17 For example, in Title II, the fundamental rights and guarantees title, the Constitution breaks new ground with the collective *mandamus* and the writ of *habeas data*.18 These new rights ensure the reliability of information about citizens obtained from government data banks, or other public entities.19

11. The powers consist of the Legislative, the Executive, and the Judiciary, maintaining the presidential system, fixing the essential functions of the administration of Justice, the Prosecuting Office, the office of the General Solicitor and the Public Defender and the Office of Attorneys at Law.
13. This reflects the influence of the Portuguese Constitution of 1976. See id. pmbl.
15. See id. art. 1.
16. See id. art. 2.
17. See id. art. 3.
18. See NYROP, supra note 1.
19. See C.F. art. 5(LXIX). "*Habeas data* is a procedural action created by the 1988 Constitution, allowing anyone to discover the information the government has about him in its data banks and to rectify that information if it is incorrect." Keith S. Rosenn, *Federal Republic of Brazil-Booklet 2, in Constitutions of the Countries of the World* 10 n.5 (Gisbert H. Flanz ed., 1996).
20. See C.F. art. 5(LXXII).
B. Comparison to Previous Brazilian Constitutions

No previous Brazilian constitution assured as many rights and guarantees as the Constitution. The Constitution achieves this by liberally expanding various rights contained in the 1969 Constitution.21

The Constitution affirms the same right of reply22 contained in the Press Law of 1967.23 Similarly, it affirms the same protection to authors’ rights24 and declares inviolable privacy, honor and personal image while assuring the right for indemnity.25 The small agricultural property where the family works became restraint of guarantee.26 It also assured the consumer defense by the State;27 the legitimization of associations and their rights to representation in court;28 and granted the right to receive information from public organizations.29

Furthermore, under the Constitution, any violation of fundamental rights and liberties are punishable de lege ferenda.30 Proscribed crimes include racism,31 torture, drug trafficking, terrorism, hideous crimes,32 and actions by military and non-military armed groups against democracy and constitutional order.33 As a repudiation of the abuses committed during the military regime, the Constitution also grants prisoners’ rights34 and private accusation rights for criminals.35 The Constitution also guaranteed the right for collective mandamus presented by political parties or unions in defense of its members.36 Finally, the 1969 Constitution included a right to a court injunction to protect the exercise of

21. See id. art. 5(V).
22. See id. The right of reply is similar to the right to appeal.
23. Law No. 5.250, Feb. 9, 1967 (Braz.).
24. See C.F. art. 5(XXVIII).
25. See id. art. 5(X).
26. See id. art. 5(XXV).
27. See id. art. 5(XXX).
28. See id. art. 5(XX).
29. See id. art. 5(XXX).
30. See id. art. 5(XL).
31. See id.
32. See id.
33. See id. art. 5(XLV).
34. See id. art. 5(XL), (LX), (XLV), (LV).
35. See id. art. 5(LX).
36. See id. arts. 5, 8(LXX).
constitutonl rights and freedoms.37

Comparatively, the Constitution regulates social rights more effectively than the 1969 Constitution. The Constitution provides rights of association, common to many democratic constitutions. For example, citizens have the right to unionize38 and to strike.39 Additionally, it grants citizens the freedom to organize political parties, thus revoking the previous two-party restrictions found in the 1969 Constitution.40

The Constitution also contains comprehensive articles regarding social rights.41 Article 7 is composed of thirty-four subsections, and elevates rights previously only granted by ordinary law to the constitutional level. Some of these rights merely repeat those found in the 1969 Constitution. For example, the goal behind the national uniform minimum wage is to fulfill the basic needs of the worker and his family.42

The social rights article also includes other innovations, such as union independence,43 paternity leave,44 a thirty-one day extension to maternity leave,45 increase of overtime pay,46 and a thirty-three percent increase of vacation remuneration.47 Notably, these rights and the extension of other existing rights have nevertheless resulted in a sixty percent increase in company costs.48

With respect to the federal regime, the states receive legislative and financial powers and the Constitution strengthened municipal systems of the states and towns.49

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37. See id.
38. See id. art. 8.
39. See id. art. 9.
40. See id. art. 17.
41. See id. arts. 6-11.
42. See id. art. 7(IV) (allowing for periodic wage readjustment to protect buying power).
43. See id. art. 8(I).
44. See id. art. 7(XIX).
45. See id. art. 7(XVIII).
46. See id. art. 7(XVI).
47. See id. art. 7(XVII).
C. Structure of the Brazilian Government Under the Constitution

The governmental structure of the Constitution presented one of the most controversial issues. The debate split between adopting a parliamentary system or a presidential system. Once the Convention selected the presidential system, the discussion focused on the powers and limitations of the Executive Branch.

1. Executive Branch: the President and the Ministers of State

The Constitution provides a two stage process for the presidential elections.\(^{50}\) During the first stage, presidential candidates must receive an absolute majority of the electorate’s votes.\(^{51}\) If no candidate obtains an absolute majority during the first stage, then the top two candidates participate in a second stage run-off election.\(^{52}\) The candidate having the majority of the votes during this stage wins.\(^{53}\)

The President of the Republic appoints the Ministers of State,\(^{54}\) who assist the President in the exercise of the executive power.\(^{55}\) Citizens eighteen years old or older are eligible to elect the President and the Vice-President by obligatory, direct and secret vote.\(^{56}\) The President and the Vice-President’s term lasts four years.\(^{57}\) Notably, they do not have any legislative powers.\(^{58}\)

The Constitution also enables the General Solicitor Office (Advocacia da União), to represent the State in and out of court, and renders juridical consulting services with the Prosecuting Office (Ministério Público).\(^{59}\) Elected by the members of the General Solicitor Office for a two year term, the General Solicitor (Procurador Geralda Union) is the chief-officer.\(^{60}\)

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50. See C.F. arts. 76-77.
51. See id. art. 77, § 2.
52. See id. art. 77, § 3.
53. See id.
54. See C.F. art. 84(I).
55. See id. art. 76.
56. See id. art. 14, § 1.
57. See id. art. 82.
58. See id. art. 84.
60. See C.F. art. 92.
2. Legislative Branch: the National Congress

In Title IV, the Constitution strengthens the National Congress. The Legislative Branch is composed of the National Congress (Congresso Nacional), which includes the Federal Senate (Senado Federal) and the Chamber of Deputies (Câmara dos Deputados). Complementary Law determines the number of deputies, based on the relative population proportion for each region in Brazil. Each territory elects four deputies for a four year term. Each state and federal district elects three senators by majority vote for an eight year term.

The Constitution also regulates the members' conduct in the National Congress. It proscribes obstructions and enumerates punishments for members (i) who break constitutional rules, (ii) who behave incompatibly with parliamentary decorum, or (iii) who suffer criminal condemnation in a court of law.

The legislative process encompasses the preparation of constitutional amendments, complementary laws, statutory laws, delegate laws, provisional remedies, decrees and resolutions.

Popular initiative may be exercised by presentation to the Chamber of Deputies of a draft of a law subscribed to by at least one percent of the national electorate, distributed throughout at least five States, with no less than three-tenths of one percent of the voters of each of these States.

Supplementing the legislative decree, the Constitution enables the President to issue provisional remedies in cases of relevance and urgency. If the provisional remedies are not made into law within thirty days of their publication, they are deemed annulled.

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61. *See Filho, supra* note 59, at 19.
62. *See C.F. art. 44.*
63. *See id. art. 45.*
64. *See id. art. 44.*
65. *See id. art. 46, § 1.*
66. *See id. arts. 54-55.*
67. *See id. art. 59.*
68. *Id. art. 61, § 2.*
69. *See id. art. 62.*
70. *See id.*
3. Judiciary Branch

The Judiciary Branch is administratively and financially autonomous.\(^{71}\) It is composed of: (i) the Supreme Federal Court; (ii) the Superior Court of Justice; (iii) the Regional Federal Courts and federal judges; (iv) the Labor Courts and labor judges; (v) the Electoral Courts and electoral judges; (vi) the Military Courts and military judges; and (vii) the State and Federal District Courts and its respective judges.\(^{72}\) Furthermore, the Public Ministry, the Public Defender and the Office of Attorneys at Law each serves an essential role in the administration of justice.\(^{73}\)

The Supreme Federal Tribunal is responsible for upholding the Constitution.\(^{74}\) The Constitution has nevertheless transferred many of its responsibilities under the 1946 Constitution, such as the judgments of special appeals, to the Superior Court of Justice by the Constitution.\(^{75}\)

The judges' rights that were established in previous constitutions were maintained. These included the right to a lifetime office and the immovability and non-reducibility of earnings.\(^{76}\) Payments due by the federal, state or municipal treasury by virtue of judiciary decisions must be included in the budget, presented until July 1, and paid by the end of the following yearly term.\(^{77}\)

The Constitution enlarges the power of the Prosecuting Office but does not clearly establish its limitations.\(^{78}\) Therefore, doubts remain in regards to the limits of the authority of "the juridical order, the democratic regime and the indispensable social and individual interests."\(^{79}\) The lack of real limits to the authority of the Prosecuting Office poses risks to the security of its institutional functions and may facilitate abuse and deviation from its objectives.

The tax system suffered great changes after the Constitution, especially in the distribution of tax income, and the power to as-

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71. See id. art. 99.
72. See id. art. 92.
73. See id. arts. 127, 133-34.
74. See id. art. 102.
75. See id. art. 105(III).
76. See id. art. 95.
77. See id. art. 100.
78. Id. arts. 127-30.
79. Id. art. 127.
These changes, however, did not solve the government's cash problem, which is at a permanent deficit. They instead increased the deficit by transferring part of the Union tax collection to the states and cities without a corresponding transfer of obligations from states and cities to the Union.  

D. The Constitution as the Constitution of the Citizens

The Constitution is the Constitution of the Citizens not only because the people participated in its organization, but because it is also directed towards citizenship participation, and the fight against authoritarian situations, such as the military regime. The Constitution clearly reflects a determination to foster democracy.

In the Act of the Transitory Constitutional Dispositions, two stipulations caused great controversy and much debate. The first stipulation mandated that on September 7, 1993, there would be a plebiscite to define the form—republic or constitutional monarchy—and system—parliamentary or presidential—of the government. A constitutional amendment set the plebiscite for April 21, 1993, and the majority chose Presidential Republic. The second stipulation required constitutional revisions to occur every five years after the promulgation of the Constitution. The Constitutional Revision made only six changes to the constitutional amendments; however, other revisions are necessary to stabilize the economy. Therefore, the present government is fighting for more constitutional changes in the tax and social security systems to reach economic stability without adversely affecting the poor segment of the population.

81. See id. at 60.
82. See Filho, supra note 59, at 14.
83. The original constitutional text underwent fifteen constitutional amendments and six further amendments to these constitutional amendments.
84. Act of the Transitory Constitutional Dispositions (Braz.).
85. See id. art. 2.
86. See id. amend. 2 (Aug. 25, 1992).
88. See Act of the Transitory Constitutional Dispositions art. 3 (Braz.).
89. See Coya, supra note 87.
The above provides an overview of the Brazilian Citizen’s Constitution. The following is an intensive study about the issues concerning foreign investors in Brazil from a constitutional perspective.

III. CONSTITUTIONAL ISSUES CONCERNING FOREIGN INVESTORS IN BRAZIL

The economic and financial order title was heavily debated. As a result, the Constitution became confusing and inconsistent. Although it encourages private enterprise and free competition, it also establishes foreign investment restrictions and permits state influence of the economy.

A. The Environment

Following the example of other constitutions, such as the Spanish Constitution of 1978, the Constitution contains special statements regarding the environment. Integrated throughout the entire text of the constitution, there are various statements concerning environmental law.

Article 5, the individual and collective rights and duties title of the Constitution, states that:

Any citizen has standing to institute a popular action seeking to annul an act injurious to the public patrimony or to the patrimony of an entity in which the State participates, to administrative morality, to the environment and to historical and cultural monuments; except in a case of proven bad faith, the plaintiff is exempt from court costs.

In Title II, regarding the organization of the state, both Articles 23 and 24 reference the environment. Article 23 states that the Federal Government, the States, the Federal District and the Counties, shall have joint power to “protect the environment and combat pollution in any of its forms” and “preserve the forests,

91. See Filho, supra note 59, at 20.
92. See id.
93. See generally C.F. arts. 170-81.
94. CONSTITUCIÓN [Constitution of 1978] [C.E.] (Spain).
95. See C.F. art. 225. In fact, there is an article about the environment in the social order title.
96. Id. art. 5(LXXIII).
97. Id. art. 23(VI).
the fauna and the flora." 98 Article 24 states that the Federal Government, the States and the Federal District shall have the power to legislate concurrently on "forests, hunting, fishing, fauna, preservation of nature, defense of the soil and natural resources, protection of the environment and pollution control" 99 as well as "liability for damages to the environment, consumers, property and rights of artistic, aesthetic, historic, touristic, and scenic patrimony." 100

Article 129, dedicated to the Prosecuting Office, requires the institutional functions of the Public Ministry "to institute civil inquiries and public civil actions to protect the public and social patrimony, the environment and other diffuse and collective interests." 101

Article 170, addressing the economic and financial order, provides that the economic order is founded on the valor of human labor and free enterprise. Economic order to ensure everyone a dignified existence, according to the dictates of social justice, limited by the principle of "defense of the environment." 102

Furthermore, Title VII, Article 174, provides that "the State shall favor the organization of cooperatives for prospecting and mining activity (atividade garimpeira), taking into account protection of the environment, and the socio-economic promotion of the prospectors and miners." 103 Article 200, specifically dedicated to health, provides that the unified health system shall "collaborate in environmental protection including that of the work place." 104

Finally, Article 216 provides that Brazilian cultural property includes material and immaterial goods, taken either individually or as a whole that refer to the identity, action, and memory of the various groups that have formed the Brazilian society. These protected areas include "urban complexes and sites with historical, landscape, artistic, archeological, paleontological, ecological and scientific value." 105

The various constitutional texts thus frequently address envi-

98. Id. art. 23(VII).
99. Id. art. 24(VI).
100. Id. art. 24(VIII).
101. Id. art. 129(III).
102. Id. art. 170(VI).
103. Id. art. 174, § 3.
104. Id. art. 200(VIII).
105. Id. art. 216(V).
ronmental issues before actually providing the exclusive constitutional environmental protections of Article 225. Article 225, however, contains confusing and inconsistent text. The best approach is to view the Constitution as a juridical work that one must read carefully in order to glean meaning from its ambiguous text. Article 225 states:

Everyone has the right to an ecologically balanced environment, a property intended for one common use by the people and is essential for a healthy life. The Government and the community have a duty to defend and to preserve the environment for present and future generations.\[106\]

The environment concerns all relations between the natural world and living creatures. The important part of the article recognizes the environment as an autonomous juridical entity, entitled to certain rights. While those rights are unidentifiable, they are, nevertheless, enforceable rights granted by the lawful wish of the constitutional power.

Another important innovation of Article 225 is the characterization of the environment as a “property intended for one common use by the people.”\[107\] This classic Brazilian legal expression came from Article 66 of the 1916 Civil Code, which defined the meaning of goods to encompass the sea, the rivers, roads, streets and boulevards.\[108\]

Moreover, it is important to define the meaning of “public dominion” in Brazilian law. The definition provides that the State has jurisdiction over everybody and everything in its territory. This power governs both private and public property and public interest fuels the theory of public dominion.\[109\] Based on governmental sovereignty, Brazil’s intervention powers and limits, such as expropriation of private property, are also established.\[110\]

The expression “property intended for one common use by the people” denotes a type of public property. It was not however, the intention of the constitutional power to open the environment to all public uses. Environmental concerns need governmental protection for their preservation, especially where private property

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106. Id. art. 225 (emphasis added).
107. Id.
108. See CÓDIGO CIVIL [C.C.] art. 66 (1916) (Braz.).
109. See id.
110. See C.F. art. 225.
is concerned. The framers intended that the Constitution would differentiate juridical goods from property rights, placing greater weight on the former. For example, a person can own a forest, but the use of this land is still subject to the environmental protection rules. These rules trump the property right of the owner.

Section 1 of Article 225 identifies encumbrances on the public power. Sections 2, 3 and 6 refer to activities that potentially or effectively harm the environment. Section 4 states that "[t]he Brazilian Amazon Forest, the Atlantic Woods, the Serra do Mar, the Pantanal of Mato Grosso, and the Coastal Zone are the national patrimony, and they shall be utilized, in the form of the law, under conditions assuring preservation of the environment, including use of natural resources." This statement is more symbolic than effective, and while it serves to illustrate by example, it is not numerus clausus. The constitutional power protected some areas with special ecological value by specifically referring to those areas in the constitutional text.

The National Patrimony is not an expansionary concept but seems equated with the public dominion. Along with its property rights over public goods, the state also has a generic right over private goods, which allows the state to interfere with a person's property right through administrative measures and the imposition of limits.

Section 1 contains the police powers with respect to environmental protection. It states that the responsibilities of the government are to protect the essential ecological processes, as well as to preserve the diversity and integrity of the country's genetic patrimony. Moreover, traditional administrative institutions are also charged with the environment's protection. Section 4 merely gives the Legislature the power to regulate the mentioned areas.

Section 5 states that "[v]acant lands or those reverted to the States through discriminatory actions, which are necessary to protect natural ecosystems, are inalienable." Unreclaimed public lands represent lands of public dominion, and may not be used by the public power or by any other administrative agency. An ad-
ministerial proceeding is necessary to determine whether a piece of land is unreclaimed. Once a piece of property is declared unreclaimed public land, it is inalienable. Unreclaimed public land is property of the Union, States or Cities except when used as (i) border defense, (ii) a base for military forts, (iii) a federal road, or (iv) when the land is targeted for environmental protection.

Article 225 also addresses activities considered harmful to the environment, such as mining and the use of nuclear power. In addition, it addresses repairing environmental damages.

Although very important, environmental protection is merely one of the Constitution's many prominent goals. National development competes as an issue of equal importance. Some economic activities are consequently pursued regardless of their potentially devastating environmental effect. Often, the damage from these activities is unavoidable. Therefore, the Constitution, as a result of these competing interests, requires environmental repair of damaging economic activities.

Mining is one such economically advantageous yet environmentally adverse activity. Mining is specifically mentioned in section 2, which states that "those who exploit mineral resources are obligated to restore any environmental degradation, in accordance with technical solutions required by the proper governmental agencies, in the form of the law."

Furthermore, the Legislature regulates the repair of environmental damages caused by mining activities. Brazilian mining legislation is old, dating from 1940 to 1960, and fails to reflect the current environmental concerns. Brazilian mining legislation can protect the environment either before granting mining rights

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117. See id. art. 26(IV). For the first three listed above, the unreclaimed public lands are Union property. See id.
118. See id. art. 20(II).
119. See id. art. 225, §§ 2-3, 6.
120. See id. art. 225, § 3.
121. See id. art. 3(II).
123. C.F. art. 225, § 2.
124. See id.
or during the mining activities.\textsuperscript{126} If neither step is taken, however, the Constitution still requires action.\textsuperscript{127} Specifically, section 3 requires that "conduct and activities considered harmful to the environment shall subject the infractions, be they individuals or legal entities, to penal and administrative sanctions, in addition to the obligation to repair the damages caused."\textsuperscript{128}

The adoption of section 3 had two major impacts on the ability of the government to hold accountable those who caused environmental damages. Initially, it subjected legal entities to criminal charges, whereas prior to its adoption, only individual persons could be held criminally responsible.\textsuperscript{129} Section 3 also provides for personal accountability for environmental damages.\textsuperscript{130} Under this section, those who caused damages to the environment are deemed responsible for repairing the damages caused, regardless of whether the damages were caused by unlawful activities or activities authorized by a competent governmental agency.\textsuperscript{131}

Another economically viable activity with potentially devastating environmental repercussions is the operation of nuclear power plants. Section 6 addresses nuclear power plants and states that "power plants with nuclear reactors shall be located as defined in federal law; if not, they may not be installed."\textsuperscript{132}

This section further requires that any plant operating with a nuclear reactor must have a federally authorized location and obtain proper operating permits.\textsuperscript{133} States and cities, however, conspicuously lack authority to set rules regarding nuclear matters. The only way to establish the location and the right to operate is by means of federal law.\textsuperscript{134} Furthermore, the Constitution holds nuclear operators strictly liable for damages.\textsuperscript{135}

\textsuperscript{126} See C.F. art. 225, § 1(IV), (V).
\textsuperscript{127} See id. art. 225, § 3.
\textsuperscript{128} See id. (emphasis added).
\textsuperscript{129} See Ferreira, supra note 122, at 165.
\textsuperscript{130} See id.
\textsuperscript{131} See id.
\textsuperscript{132} C.F. art. 225, § 6.
\textsuperscript{133} See id. art 225, § 1(V), (VI).
\textsuperscript{134} See id.
\textsuperscript{135} See id. art. 225, § 3.
IV. FOREIGN INVESTOR TAX CONSIDERATIONS

A. The Tributary System

1. Brazil's Tax History

Because Brazil is a Portuguese colony, the government has followed the Portuguese taxing practice. The reign of authoritarian and dictatorial governments developed a culture of never-ending increased public spending financed by the concomitant increases in the overall tax burden.

With the enactment of the Constitutional Amendment 18/65, the nationwide Brazilian tax system began to gain uniformity. Prior to its enactment, the system suffered from a lack of sufficient norms and principles to harmonize the existing trends, tendencies, aspirations and necessities of each taxing entity and its taxpayers.

Constant conflicts were generated between taxing entities because the government used different and inappropriate forms of taxation to meet the costs and expenses they incurred. As the government attempted to cover deficits with public accounts, it committed abuses and illegalities, thus generating constant internal misunderstandings as well as with taxpayers.

The government's solutions and remedies were often unjust and arbitrary. Taxpayers had few defenses to combat conflicting taxes because of the government's immunity. To protect their rights, taxpayers relied on fierce legal disputes. Those who could not afford substantial litigation fees usually paid the unjust tax.

Since few taxpayers went to court for tax matters, the government continued their unfair taxing scheme. The delay in court proceedings, however, often made the collection of outstanding taxes impossible for tax authorities. Consequently, there was overall dissatisfaction among taxpayers and the government.

A constitutional tax system, therefore, did not exist because the Constitution lacked the authority to develop efficient tax collection mechanisms. Consequently, when confronted with collec-
tion problems, taxpayers and tax officials developed alternative means to settle their differences.

The tax system adopted by the Brazilian Constitution of 1946 contained a few general constitutional principles. These principles barely supported an overall tax system. Furthermore, the dictatorial regimes found that such a sparse system made it easier to coerce taxpayers into paying their taxes. Thus, throughout the dictatorial regimes, the tax system remained minimal, complicated, and without constitutional support.

2. First Reforms Implemented – Importance of the National Tax Code

In the mid-1960s, Brazilians acknowledged the need for a complete tax reform with a perception of a Federative Principle.\textsuperscript{141} A uniquely Brazilian concept, the taxing Federative Principle granted municipalities independent taxation powers from that of the States and the Federation. Based on this understanding, Amendment 18/65 to the Brazilian Constitution of 1946 was enacted.\textsuperscript{142} This amendment began Brazil's first true tax reform.

Amendment 18/65 led to the National Tax Code. The complete disarray of the then-existing tax collection mechanisms caused administrative fees and taxes to be charged in the aggregate or in lieu of one another.\textsuperscript{143} Taxpayers confused taxes with tariffs.\textsuperscript{144} Lawmakers, jurists, and taxpayers desperately needed a body of tax principles and general norms. They chose the National Tax Code (CTN) as the instrument to accomplish such reforms.

The CTN proved to be the most important legislative text antecedent to the Constitution.\textsuperscript{145} Federal Law 5.172 of October 25, 1966, integrated the CTN into the Brazil's legal system.\textsuperscript{146}

\textsuperscript{141} See Novelli, supra note 80, at 58.
\textsuperscript{142} See C.F. amended by Nr. 18/65 (1946).
\textsuperscript{143} See Novelli, supra note 80, at 57.
\textsuperscript{144} See id.
\textsuperscript{145} See id.
\textsuperscript{146} Brazil's Federal Constitution of 1967 received the CTN, which was initially considered as an ordinary law, as a complementary law. In the past, debates considered whether the CTN (issued as an ordinary law) could be accepted by the 1967 Constitution and later by the Constitution as a Federal Law. As written by Professor Ives Gandra da Silva Martins:

\textit{Today the overwhelming majority of tax law writers maintain that the National Tax Code is a law with the efficacy of complementary legislation . . . Now, the National Tax Code, which was conceived as an ordinary law for lack of pertinent transmitting instrument, took on the efficacy of a Complementary Law by virtue...
Complementary (or supplementary) laws play a significant role in the Brazilian tax system, serving as intermediate law. The first paragraph of Article 18 of Brazil's former 1969 Constitution stated that a "supplementary law shall establish general rules of tax law," shall govern conflicts of authority on this subject between the Federal Government, the Federal District and the Municipalities and shall regulate constitutional limitations on the power to tax.

As Professor Ives Gandra da Silva Martins, from Mackenzie University in São Paulo, correctly states:

[T]his rule defines the scope of activity of the Complementary Law very well, that is, with a three-fold function, always in terms of: establishment of general rules; provisions concerning conflicts of authority among the Federal Government, States, Municipalities, and the Federal District where they arise in general rules; and regulation of constitutional limitation on the power to tax.

of the assumed acceptance whereby the amendments to its text became feasible simply by a special legislative process (Federal Constitution, art. 50). Hence, in spite of less than adequate editing (although their intentions is not less clear because of it), Articles 1 and 2 of the National Tax Code demonstrate that it was the intention of those who constructed the framework of the Brazilian Tax System to give the complementary law the function of establishing general rules of tax law.


147. See Novelli, supra note 80, at 62. The Constitution also reserved special treatment for the Complementary Law in its Article 146. According to Article 146, a complementary law shall:

I. Deal with conflicts of taxing power among the Federal Government, the States, the Federal District and the Counties;

II. Regulate the constitutional limitations on the taxing power;

III. Establish general rules for tax legislation, particularly as to:

(a) the definition of taxes and their types, as well as, with respect to taxes specified in this Constitution, the definition of the respective taxable events, basis for calculation and taxpayers;

(b) tax liability, assessment, credit, limitations; and

(c) adequate tax treatment for the cooperative acts performed by cooperative entities.

C.F. art. 46; see also Novelli, supra note 80, at 62.


149. Professor Ives Gandra da Silva Martins continues by stating:

It is systematic law since it offers to Brazil's taxation system the possibility of a mechanism capable of transmitting the guidelines (general rules) from the Constitution (i.e., its structure), as well as allowing, at second level of priority, settlement of conflicts that might possibly occur between bodies of the Federation and also, at a third level, [regulation of] the Constitutional limits on the power to tax (a rule duly explained in the text of the Constitution).
Developed in line with Brazil's economic growth, the tax system in the CTN aspired to further strengthen the Federation under a centralized conception. The Federation would also be autonomous, but not enough to destabilize the tax equilibrium from an equal burden on all taxpayers.

The system adopted by the CTN resulted from the shortcomings of the former tax systems and intimately linked the idea of taxation as an unpleasant social rule. Such a rule needed to be rigid in order to allow the taxing entities to establish taxation policies without sacrificing the harmony in the constitutional system.

The CTN permitted a more complete view of Brazil's general tax rules. It established important and necessary, yet previously unknown legislative principles such as legality, applicable venue and duration, correct interpretation of tax rules, identification of the taxing and taxed entities, definition of the taxable event, tax responsibilities, tax collection practices, exemptions, privileges, tax credits, and incentives.

The rule of legality—in accordance with which a tribute may only be levied or have its rate increased by a law voted by Congress.

The rule of equality—in accordance with which taxpayers who are in an equivalent situation must be treated on the same tax footing.

The rules of non-retroactivity—in accordance with which tributes cannot be levied regarding events that occurred before the law that created them or increased their rates became enforceable.

Clearly, the general rules of tax law, which are impossible to elucidate in the Constitution, take greater priority in being represented in a complementary law. In other words, the establishment of general rules of tax law, by means of a complementary law, represents a guarantee of taxpayers and the certainty that the tax collection authorities, through their legislative bodies, will not embark upon destabilizing legal adventures.

MONETARY INDEXATION IN BRAZIL, supra note 146, at 33-35.

150. See Novelli, supra note 80, at 51.
151. See id. at 63-68.
152. See C.F. art. 150(I). The Constitution created some exceptions regarding certain taxes such as import duties, export duties, tax on industrialized goods, tax on credit and exchange transactions, on insurance and on securities, all of which may have their rates increased by an act of the executive power. See id.
153. See id. art. 150(II).
154. See id. art. 150(III)(a).
The rule of previousness—in accordance with which tributes cannot be collected in the same fiscal year in which the law that created them or increased their rates was published.\textsuperscript{155} In this case, a few exceptions also exist under the Constitution, such as: import duties, export duties, tax on industrialized goods, tax on credit and exchange transactions, on insurance and securities that may assess events in the same fiscal year in which the law that created them or increased their rates was published and Social Contributions, which may assess events that occur 90 days after its publication.\textsuperscript{156}

The rule of non-confiscation—in accordance with which tributes cannot be confiscatory.\textsuperscript{157}

\textbf{B. Tax Reform under the 1988 Constitution}

Since 1946, Brazil has grown politically and economically. From 1968 to 1980, Brazil's gross national product (GNP) has increased steadily every year.\textsuperscript{158}

The Brazilian people when drafting the new Constitution, called for the complete reform of the tax system. This change stemmed from the fall of the authoritarian regime, and mirrored the growing complexity of the Brazilian economy. The people, however, had a unique opportunity to constitutionally guarantee the modifications found in the CTN.

Consequently, the Constitution introduced a number of changes when compared to Brazil's former constitutions. The tax system adopted by the Constitution is incomparable with the previous systems. A complete reform was necessary in order to adapt the system to the changed conditions of the late 1980s.

The new constitutional system duly maintained and secured the Federal Principle.\textsuperscript{159} Because people still suffered from the effects of former authoritarian regimes, Brazil chose a different system. Under the new administrative system, the Legislature was independent. The Union, State, Municipality and the Federal District each had different powers, rights and obligations. Whenever possible, the new Constitution established no hierarchy between

\begin{itemize}
\item \textsuperscript{155} See id. art. 150(III)(b).
\item \textsuperscript{156} See id. art. 150, § 1.
\item \textsuperscript{157} See id. art. 150(IV).
\item \textsuperscript{158} See NYROP, supra note 1, at 159.
\item \textsuperscript{159} See C.F. art. 1.
\end{itemize}
these governmental entities.

The tax scheme also shared this autonomous structure. The Federal Government, the States, the Federal District and the Municipalities directly shared the tributary revenue formerly collected only by the Federal Government. Each sphere of government, however, had its own form of financing through tax collection. Those taxes collected by the Municipalities could not coincide with those collected by States. Therefore each governmental sphere retained its own sovereignty.

1. The Constitution’s New Tax System

Articles 145 to 162 of Brazil’s Constitution contain the rules for the newly introduced tax system. Under this system, Federal, State, Municipal and the Federal District governments may raise revenue through the use of taxes, fees and contributions for improvements resulting from public works. In other words, tributes in Brazil are subdivided into taxes, which are collected without regard to any specific service rendered, regulatory fees, service fees, and betterment fees. The state levies regulatory fees based on police power. Service fees are levied for specific and divisible public services actually rendered or made available to citizens. Betterment fees are collected from real estate owners

160. See Novelli, supra note 80, at 69.
161. See id. at 68-69.
162. See id.
163. Article 145 of the Brazilian Constitution states:
   The Federal Government, the States, the Federal District and the Counties may levy the following tributes:
   I. taxes;
   II. fees, by virtue of the exercise of police power or for effective or potential use of specific and divisible public services, rendered to taxpayers placed at their disposition; and
   III. assessments for public works.
   § 1 Whenever possible, taxes shall be personal and shall vary with the economic capacity of the taxpayer. To make these objectives effective, the tax administration may identify the patrimony, income and economic activities of the taxpayer, respecting individual rights and the terms of the law.
   § 2 Fees may not be calculated on the same basis as taxes.

C.F. art. 145.
164. Tribute and tributary refer to “paying or yielding tribute, taxed, taxed or assessed by tribute.” BLACK’S LAW DICTIONARY 1506 (6th ed. 1990).
165. See Novelli, supra note 80, at 69.
166. See id.
167. See id.
who benefit from public works and social contributions.¹⁶⁸

The Constitution lists the specific taxes allotted to each governmental sphere. Taxes not listed can only be levied by the Federal Government. Such taxes must be approved by a special quorum, cannot be cumulative, and must have a different assessment basis than those applicable to listed taxes.¹⁶⁹

Service fees are the counterpart of public service. Other services rendered by the government, of an industrial or commercial nature, are remunerated by non-tribute public prices.¹⁷⁰ Fees may not be assessed when adequate because taxes could be assessed instead.¹⁷¹

Constitutional principles mandated that taxes should be personal and progressive whenever possible.¹⁷² Consequently, taxing entities are therefore permitted to identify the assets, income and economic activity of the taxpayer, and levy a tax which takes into account each individual taxpayer’s rights.¹⁷³

2. The Government’s Levy Power

The Federal Government is the only entity that can levy social contributions from the public at large.¹⁷⁴ These contributions are levied (i) as a means to intervene in the economic domain, (ii) in the interest of professional or economic categories, and (iii) to finance social security.¹⁷⁵

¹⁶⁸. Social contributions are collected to fund social security.
¹⁶⁹. Article 154 of the Brazilian Constitution states: “The Federal Government may impose: . . . by means of a complementary law, taxes not instituted in the preceding article, provided that they are noncumulative and have a specific taxable event or basis of assessment other than those specified in this Constitution . . . .” C.F. art. 154.
¹⁷⁰. See Novelli, supra note 80, at 68.
¹⁷¹. See id. at 61.
¹⁷². See art. 145, § 1.
¹⁷³. Article 3 of the CTN, adopted by the Constitution as a complementary law, defines a permitted assessment (tribute) as “any compulsory payment in species or which [sic] can be expressed as such, which is not a punishment for an illegal act, foreseen by law collected by the government.” CTN art. 3. Additionally, a tax obligation arises upon the occurrence of the taxable event. Article 114 of the CTN defines a taxable event as “a situation necessary and sufficient to give rise to a tax.” Examples of taxable events include circulation of goods, purchase and sale of real estate, and ownership of an automobile.
¹⁷⁵. Article 195 of the Brazilian Constitution states:

Social security shall be financed by the entire society, either directly or indirectly, in terms of the law, through funds derived from the budgets of the Fed-
The Federal Government is also the only entity that can levy compulsory loans. The issue whether compulsory loans are a species of tribute is controversial. The Federal Government can only collect compulsory loans in cases of urgent public investment, relevant national interest, or to defray extraordinary expenses resulting from an actual or an imminent public calamity, or war.

The Federal Government can levy taxes import duties, export duties, income and capital gains, industrialized goods, credit and exchange transactions, insurance and securities, rural land, large fortunes, and financial operations. It may also levy war taxes and non-listed taxes as provided in the Constitution.

In accordance with Article 195, the Federal Government may also levy social contributions to fund social programs such as contributions for the social integration program, social contributions on corporate profits, social security contributions (COFINS), and social security contributions on payroll.

3. The States and the Municipalities Levy Power

States and the Federal District can levy taxes on inheritance and donations, on transactions related to the circulation of goods, on interstate and county transportation, on communications, and

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176. See Novelli, supra note 80, at 68.
177. See C.F. art. 154(I). Article 154 states that the Federal Government may impose "in the case of foreign war or its imminent threat, extraordinary taxes, whether or not in its taxing power, which shall be gradually repealed when the causes for their creation ceased." Id.
178. Article 153 of the Brazilian Constitution states:

- The Federal Government has the power to levy taxes on:
  - I. importation of foreign products;
  - II. exportation abroad of national or nationalized products;
  - III. income and benefits of any nature;
  - IV. industrialized products;
  - V. credit transactions, foreign exchange operations, insurance or transactions relating to negotiable instruments or securities;
  - VI. rural property; and
  - VII. large fortunes, according to a complementary law.

 Id. art. 153.
179. See C.F. art. 154.
180. See id. art. 195.
on the ownership of motor vehicles.\textsuperscript{181}

4. Problems with the Tax System

Previous Brazilian tax systems appeared unfair due to the seemingly arbitrary nature of the taxes imposed combined with the disproportionate amount of taxes levied.\textsuperscript{182} The Constitution sought to solve this problem by limiting the government's taxing ability to its constitutionally enumerated powers. In strict accordance with the CTN's intentions, Article 150 establishes the main constitutional tax principles.\textsuperscript{183}

\begin{itemize}
  \item \textsuperscript{181} See id. art. 155. Article 155 of the Brazilian Constitution states:
    
    The States and the Federal District have the power to impose taxes on:
    
    I. transfers causa mortis and donations of any property or rights;
    
    II. transactions relating to circulation of goods and the performance of services of interstate and county transportation and communications, even if the transactions begin abroad;
    
    III. ownership of automotive vehicles.

  \item \textsuperscript{182} See C.F. art. 156. Article 156 states that the Counties have the power to levy taxes on:
    
    I. urban land and buildings;
    
    II. any type of non-gratuitous inter vivos transfers, of real property, whether natural or by physical accession, and any in rem rights to real property, except for guarantees, as well as the assignment of rights to its acquisition; and
    
    III. services of any nature not included in Art. 155, II, as defined in a complementary law.

  \item \textsuperscript{183} Article 150 states:
    
    Without prejudice to other guarantees assured the taxpayer, the Federal Government, the States, the Federal District and the Counties are prohibited from:
    
    I. exacting or increasing a tax without a law that does so;
    
    II. instituting unequal treatment among taxpayers that are similarly situated, prohibiting the making of any distinction because of professional occupation or job performed by them, regardless of the legal denomination of income, securities or rights;
    
    III. collecting taxes:
        
        (a) for taxable events that occurred before the law that instituted or increased them went into force;
        
        (b) in the same fiscal year in which the law that instituted or increased them was published;

    IV. using taxes for purposes of confiscation;
    
    V. establishing limitations on the movement of persons or goods by means of interstate or inter-county taxes, except for the collection of tolls for the use of highways maintained by the Government;
    
    VI. levying taxes on:
        
        (a) patrimony, income or services of one another;
        
        (b) temples of any religion;
        
        (c) patrimony, income or services of political parties, including their foundations, labor unions and non-profit educational and social assis-
5. Comments on Some Practical Aspects of the New Tax System

Scholars, practitioners, authorities and lawmakers involved in drafting the new tax system agree that combining those principles contained in the CTN with the new tax system has created a harmonious system that is far more developed and efficient than previous tax systems.

The most positive aspect of the new system is its ability to address the needs of the taxing authorities, through provisions for adequate revenue streams, while also providing fundamental guarantees to taxpayers. A well established and secure tax system for both the government and taxpayers is now firmly in place, ten years after the new system was introduced. Problems contained in prior systems, such as the variability of the taxable event, taxing entity, taxpayer, or a fair trial in the case of litigation, have been addressed.

Many believe, however, that the number of taxes, fees, tariffs, contributions and betterment remain excessive and unnecessary.

184. Estimated at being of at least 58 different types. See Kathleen Matthews, U.S. IFA Branch Explores Capital Flows to and from Argentina, 7 TAX NOTES INT'L 1611
The practice of raising taxes, instead of eliminating or reducing public spending, survives. Therefore, a maze of taxes, tariffs, fees, contributions and betterment perpetuate Brazil's growing public deficit at all governmental levels.

Brazil's implementation of the federal system of governance has created a structure under which all levels of government are granted autonomous and independent taxing powers. This grant of power has increased the overall tax burden, and prompted internal government quarreling over more revenue.

This has consequently led to so-called "tax wars" between taxing entities. In some instances, the "tax war" reduced tax rates for some individuals. Municipalities and States have granted tax reductions or exemptions to potential investors, to entice investment capital to a particular region. In the end, depending on the investor's financial power, the investment's location is auctioned off to the highest bidding governmental entities.

Despite more revenue from annually collected tributes, undisciplined public spending has created a huge public deficit. Brazil has tried to reduce this deficit by increasing taxes. Currently, however, Brazil's overall tax burden is one of the highest in the world. Taxpayers, moreover, are unsympathetic to the government's plight because most of the revenue goes to reducing the public deficit. The remaining revenue barely covers the government's main expenses. No new funds have been invested in vital areas such as public health, education and security. As a result, tax evasion is common in Brazil.

Not surprisingly, many believe that the current tax system must again be reformed. Jurists, scholars, tax attorneys and authorities are joining forces to develop a simpler and more efficient tax model for Brazil.

V. CONCLUSION

The Constitution represents an important step for the future of Brazil. Its creation was the first step towards building a democratic and free country. The Constitution, designed by legislators weary of governmental abuses, was a democratic rallying cry for a
nation which had just survived a cruel military regime.

According to the 1969 Constitution, the Executive Branch was the strongest power, with the Legislative Branch completely subservient to its powers. The Executive Branch could remove members of the National Congress for resisting the status quo. The President could send legal projects to the Congress, which if not timely discussed and approved, automatically became law. The Judiciary Branch was weak and not constitutionally well supported. Moreover, the fundamental rights and constitutional guarantees were suspended, although textually guaranteed by the Constitution.

Political oppression became barbaric, with illegal prisons, tortures, illegal executions, and corpse hiding. The cruelty of the military regime was revealed to the world in July 24, 1970. Yet nothing stopped the violation of human rights in Brazil.

Time slowly brought changes to the country because the military regime slowly lost power and more humane laws were enacted. The military regime ended when the people elected their President.

Exiled persons returned to Brazil to participate in the proceedings. A thirst for change and a disgust for the past influenced the design of the final constitutional text. The emotional atmosphere unnecessarily extended the constitutional text, regulating unconstitutional issues. References to the public administration, public servants regime, and social security system exemplify the text's overreaching.

Nationalism similarly induced legislators to protect their economies from foreign plunder. The definitions of a national company of foreign capital, a national company of national capital, and the limitation of foreign investments in Brazil express the economic xenophobia that influenced the Constitution.

One must recognize, however, that although the Constitution brought new hope to Brazil, changes are still needed, particularly regarding the social security and tributary systems. Some changes are taking place during the current mandate of President Fernando Henrique Cardoso. But changes are difficult to make, especially those involving powerful people and individual interests of congressional members. The fight against the mistakes committed in Brazil's past, and once again repeated in the Constitution, is the hope for justice; and the Brazilian people must win this battle.