

**A FOCUS ON THE CERTAINTY OF PROVISIONAL PRESIDENTIAL DECREES
OF CUSTOMS LOGISTICS AND INDUSTRIAL CENTERS AND JUDICIAL
POSTPOSITIVISM**

*UM FOCO NA CERTEZA DOS DECRETOS PRESIDENCIAIS PROVISÓRIOS DE
LOGÍSTICA ADUANEIRA E CENTROS INDUSTRIAIS E O PÓS-POSITIVISMO
JUDICIAL*

Carmem Grasielle da Silva¹

RESUMO

O presente artigo objetiva contribuir para reduzir a insegurança jurídica na logística de comércio exterior, in casu, a atividade dos Centros Logístico e Industriais Aduaneiros (CLIA) por meio da análise do impacto da insegurança jurídica das medidas provisórias desses centros. A pesquisa abrange a análise da criação dos CLIAS, as características principais das medidas provisórias, os reflexos destes atos normativos no que se refere a segurança jurídica, especialmente em matéria de direito aduaneiro e comércio exterior e análise do papel do poder judiciário frente à celeuma administrativa instalada com a perda da vigência das medidas provisórias nº 320/2006 e nº 612/2013. O método de pesquisa aplicado foi o indutivo. O tema abordado é bastante atual, visto que os CLIAS existentes no Brasil precisam encontrar alternativas jurídicas para continuar operando, além da necessária alteração do modelo de recintos alfandegados de zona secundária no Brasil.

PALAVRAS-CHAVE: CLIA; Recintos Alfandegados; Medidas Provisórias; Segurança Jurídica.

ABSTRACT:

This article aims to reduce legal uncertainty in foreign trade logistics, in particular, the activities of the Customs Logistics and Industrial Centers (CLICs), by analyzing the impact of the legal uncertainty of the provisional presidential decrees of these centers. The investigation covers the analysis of the creation of CLICs, the main characteristics of the provisional presidential decrees, the consequences of these normative acts with regard to legal certainty, especially in matters of customs and foreign trade, and the analysis of the role of the judiciary over this heated administrative debate installed with the loss of the validity of provisional

¹ Mestranda em Ciências Jurídicas pelo Programa de Pós-Graduação em Ciência Jurídica - PPCJ/UNIVALI, Itajaí, Santa Catarina, Brasil e pelo Curso de Mestrado em Direito pela Delaware Law School, Wilmington, Delaware, Estados Unidos. Graduada em Direito e Comércio Exterior pela UNIVALI. Advogada. E-mail: carmemgrasi@yahoo.com.br.

presidential decrees 320/2006 and 612/2013. The research method applied was the inductive one. The subject covered is quite current, since the existing CLICs in Brazil need to find legal alternatives to continue operating, what is added to the necessary alteration of the secondary zone customs station model in Brazil.

KEYWORDS: CLIC; Customs Stations; Provisional Presidential Decrees; Legal Certainty.

INTRODUCTION

Traders have repeatedly encountered challenges in international trade, since the speed with which the exchange of goods and services occurs between countries worldwide is not necessarily accompanied by the advancement of standards regulations.

Currently, Brazil is facing a severe crisis in the model of customs stations in a secondary zone, places required to guarantee the logistical flow and to allow for better access to the actors in the logistics chain and customs and control of Brazilian foreign trade. Among the many reasons is the need for a bidding process for the opening of a customs station in Brazil, a procedure that carries with it slowness and legal uncertainty.

The present article appears as a consideration on the regulation of the Logistics and Industrial Customs Centers (CLICs), as a proposal of a new juridical model of organization of customs stations, through the institute of licenses.

In Brazil, currently, twenty-nine CLICs are operating, constituted under the provisions of provisional presidential decrees, which have not been transformed into law. That is, there are twenty-nine CLICs legally constituted, but that operate with serious difficulties, without the protection of legal norms to guarantee the continuity of the public services rendered.

This work has the general objective of presenting (without wearing the matter out) the principle of legal certainty in the norms that regulate foreign and logistic trade matters, especially in the CLICs regime. The specific objective of the research is to demonstrate to the reader who acts in the area of Customs and Port Law (whether in the private or public sector) that it is necessary that positive norms

and judicial decisions accompany the dynamism and pragmatism of international trade, putting away legal uncertainty and the reduction of logistical investments required for the competitiveness of Brazilian foreign trade.

Finally, the method adopted will be the inductive one, operationalized by the research in bibliographical and jurisprudential sources coming from physical or digital means.

1 RELEVANT CONCEPTS

1.1 CUSTOMS LAW

Customs Law is a relevant concept to be highlighted in relation to CLICs, since the customs stations in a secondary zone allow customs control of imported and exported goods, object of movement, storage and customs clearance.²

Customs Law is considered the legal branch for the study of (positive) customs law, which deals with the rights and duties of both customs and customs agents, procedural matters related to customs clearance, as well as transport and storage, customs taxes and other restrictions on foreign trade, common or special customs procedures, customs offenses and penalties, and customs procedures.³

² Article 9. Customs stations shall be declared by the competent customs authority, in the primary or in the secondary zone, so that, in these premises, there is customs control involved in the movement, storage and customs clearance of: I - goods originated from abroad, or destined for it, including the ones under special customs regime; II - baggage of travelers from abroad, or destined for it; and III - international postal consignments. Single paragraph. There may also be bonded, in primary zone, premises destined to the installation of duty-free shops (Decree 6,759 of February 5, 2009). Article 2. The customs territory comprises the entire national territory. **Article 3.** The jurisdiction of the customs services extends throughout the customs territory and covers (Decree-Law 37 of November 18, 1966, article 33, caput): I - the primary zone, consisting of the following areas delimited by the local customs authority: a) the land area or aquatic, continuous or discontinuous, in the customs ports; b) the land area, at customs airports; and c) the land area, which comprises the customs border checkpoints; and II - the secondary zone, which comprises the remaining part of the customs territory, including territorial waters and airspace (Decree 6,759 of February 5, 2009).

³ TREVISAN, R. **A internacionalização da disciplina do imposto de importação**: contornos para uma regulação internacional da incidência. Doctorate theses presented at Universidade Federal do Paraná. Curitiba, 2016, p. 36-37.

SILVA, Carmem Grasiela da. A focus on the certainty of provisional presidential decrees of customs logistics and industrial centers and judicial postpositivism. *Revista Eletrônica Direito e Política*, Programa de Pós-Graduação *Stricto Sensu* em Ciência Jurídica da UNIVALI, Itajaí, v.14, n.3, 3º quadrimestre de 2019. Disponível em: www.univali.br/direitoepolitica - ISSN 1980-7791.

By force of article 237 of the Brazilian Federal Constitution, inspection and customs control over Brazilian foreign trade are in the responsibility of the Ministry of Finance.⁴

It means that state participation will take the form of legislator, administrator and inspector from the point of view of Brazilian foreign trade, and, from the external point of view, the same state will act as a facilitator of the country's interests on international trade.

1.2 CUSTOMS LOGISTICS AND INDUSTRIAL CENTER (CLIC)

The CLICs are modalities of customs stations, located in a secondary zone, created through provisional presidential decrees 320/2006⁵ and 612/2013,⁶ to facilitate the procedures for import and export of goods, presenting themselves as important and efficient alternatives to ports and airports.

Pursuant to these laws, as pointed out by Paula Gonçalves F. Santos,⁷ CLICs used to require a license to operate, which was granted to the establishment of a legal entity incorporated in the country, with the operation of general station services, with fiscal regularity, compliance to technical and operational requirements for customs clearance and a shareholders' equity equal to or greater than R\$ 2,000,000.00 (two million reais). The legal entity should also own or demonstrate

⁴ FC/88, art. 237. The inspection and control over foreign trade, essential to the defense of National Treasury interests, will be exercised by the Ministry of Finance.

⁵ BRASIL. **Medida Provisória No. 320, de 24 de Agosto de 2006**. Provides for the handling and storage of places and premises, the license to operate goods handling and storage services in the Customs Logistics and Industrial Center, changes customs legislation and other measures. Brasília, August 25, 2006. Available at: http://www.planalto.gov.br/ccivil_03/_ato2004-2006/2006/Mpv/320.htm. Accessed on: April 25, 2018.

⁶ BRASIL. **Medida Provisória No. 612, de 04 de Abril de 2013**. Restructures the legal model for the organization of secondary customs areas, amends Law 10,865, of April 30, 2004, and Provisional Presidential Decree 601, of December 28, 2012; reduces to zero the rates of the Contribution to PIS / PASEP and COFINS incident on the indemnities referred to in Law 12,783, of January 11, 2013; amends Law 12,715, of September 17, 2012, to dispose on pecuniary fines for noncompliance with the Program for Incentives to Technological Innovation and Strengthening of the Automotive Vehicle Production Chain INOVAR AUTO; and makes other arrangements. Brasília, April 04, 2013. Available at: http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2013/Mpv/mpv612.htm. Accessed on: April 25, 2018.

⁷ SANTOS, P. G. F. O Porto Seco no Contexto Brasileiro. **Revista da Receita Federal: Estudos Tributários e Aduaneiros**, v. 2, p. 291-291, 2015.

to hold direct ownership of the property for the CLIC operation and to present a preliminary project or project of CLIC previously approved by the municipal authority, when located in an urban area, and by the body responsible for the environment, in the form of specific legislation.

Therefore, once the requirements were met, the license was granted, characterizing, in theory, a nondiscretionary act of the public administration.

The explanatory memorandum of provisional presidential decree 612 of April 4, 2013⁸ made clear the recognition of the Brazilian government itself regarding the inefficiency and deep crisis of the legal regime of Dry Port Customs Stations.

In Brazil, currently, there are twenty-nine CLICs,⁹ as it can be seen in the information extracted from the website of the Brazilian Federal Revenue Service.

However, Brazilian companies that have licenses or even those that seek to apply for such regime, due to their efficiency and agility offered in the foreign trade operating procedures, face serious legal uncertainty.

⁸ This Provisional Presidential Decree proposes the restructuring of the juridical model of organization of secondary customs zones, especially of the so-called Dry Ports, and of the customs inspection costing form executed by the Brazilian Federal Revenue Service.

Currently, Dry Ports are subordinate to the system of permission and concession of public services, even though their services are not listed on section XII of art. 21 of the Federal Constitution. The legal basis of the current model is found in section VI of art. 1 of Law 9,074 of July 7, 1995, which revocation is required. This legal model is in deep crisis, making it difficult to expand the offer of goods handling and storage services in a secondary zone for importers and exporters.

This model, based on concessions and public service permits, does not conform to the nature of those activities, which require rapid modifications in the operational capacity of the facilities and also requires locational changes to meet the demand, requirements which are incompatible with the current legal model.

In addition to these aspects, at the boarder points with less cargo movement, the current model is not able to attract interested parties in the biddings, leaving the Brazilian Revenue Service in precarious conditions to operate the customs control.

For these reasons, the present provisional presidential decree draft abandons the model based on public service concession / permission, proposing a model based on the institution of license, which according to Brazilian legal scholars, is the unilateral and bound administrative act by which the Administration allows all those who fulfill the legal requirements the exercise of certain activity. In the license model, there is freedom of entry and exit of service providers, allowing greater economic efficiency of the system [emphasis added]. BRASIL. **Medida Provisória No. 612 de 04 de Abril 2013**: Exposição de Motivos.

⁹ BRASIL. **Receita Federal**. Available at: <http://idg.receita.fazenda.gov.br/orientacao/aduaneira/importacao-e-exportacao/recinto-alfandegados/clias-centros-logisticos-e-industriais-aduaneiros>. Accessed on: Aug 13, 2018.

This is so because the mentioned Provisional Presidential Decrees have not been converted into law, as provided by Article 62, Paragraph 11¹⁰ of the Federal Constitution of 1988, being rejected by the National Congress.

In practice, the CLICs currently in operation face the most serious legal uncertainty in the logistics sector, because although they have been established under the aegis of a valid regulation, and indeed exist in the world of facts, they are prevented from carrying out administrative acts, such as relocation, due to the absence of a current regulation.

2 LEGAL CERTAINTY VERSUS PROVISIONAL PRESIDENTIAL DECREE

2.1. LEGAL CERTAINTY, LEGAL POSITIVISM AND POSTPOSITIVISM

Legal certainty is considered one of the fundamental law principles present in the Federal Constitution,¹¹ which aims to achieve predictability of future and past legal effects of the regulation of social conduct.¹²

In that regard, Hans Kelsen, in his "Pure Theory of Law", deals with legal certainty given by the courts as a principle that binding the decision of real cases to general norms, which must be created in advance by a central legislative body.¹³

This idea, derived from judicial legal positivism,¹⁴ which represented the first stage of the legal positivism movement, revealed that legal decisions should be based

¹⁰ Article 62. In case of relevance and urgency, the President of the Republic may adopt Provisional Presidential Decrees, with force of law, and must immediately submit them to the National Congress. (...) Paragraph 11. If the legislative decree referred to in paragraph 3 is not issued until sixty days after the rejection or loss of effectiveness of the Provisional Presidential Decree, the legal relations established and resulting from acts practiced during its validity shall be governed by it (BRASIL. **Constituição (1988)**. 48ª ed. atual. e ampl. São Paulo: Saraiva, 2015. p. 36).

¹¹ We, the representatives of the Brazilian people, assembled [...] to establish a Democratic State, destined to ensure the exercise of social and individual rights, freedom, and security (BRASIL. **Constituição (1988)**. p. 2).

¹² SORMANI, A. A proteção constitucional à coisa julgada no Brasil. **Revista Consultor Jurídico**. 2003. Available at: https://www.conjur.com.br/2003-jun-21/exegese_inciso_xxxvi_artigo_constituicao. Accessed on: Aug 30, 2018.

¹³ KELSEN, H. **Pure Theory of Law**. Berkeley: University of California Press, 1967. 356 pp.

¹⁴ "In the first stage of this movement, called Exegetical or Legalistic Legal Positivism (or Paleopositivism), it was believed that it would be possible to construct a positive right so complete and perfect that the judge could only be a "mouth of the law" (Bouche de la loi), applying the rule democratically put by the legislator without subjective and insecure interferences. It is the time of

on what the law says in order to avoid a judgment that goes against legal expectations. That is, for positivism, it is the law that needs to be observed.¹⁵

It follows that this stage did not prosper since it was recognized that the norm is not always clear nor provides legal support for specific case resolution, as Zanon¹⁶ teaches:

[...] Hence came the second phase, inaugurated by Kelsen and Hart and later improved by Bobbio, which can be called Normativist Positivism. In this new stage, it was recognized that it was impossible to have a "Bouche de la loi" judge because the positive rule was not always clear (ambiguity) and also sometimes presented contradictory texts (antinomy) or even did not offer legal support to the resolution of a specific case (anomaly or gap), hypotheses in which the judge would have to create the Legal Norm as if he was the legislator. There has also been a proliferation of numerous legal texts, published by various state bodies, what created the need for the establishment of a hierarchy of legal rules.

In this sense, "[...] Positivists hold that when a case is not covered by a clear rule, a judge must exercise his discretion to decide that case by what amounts to a fresh piece of legislation".¹⁷ However, this discretion was criticized because of the broad decision-making power of the magistrate.¹⁸

Thus, Postpositivism arises as a model of overcoming Legal Positivism with an important group of thinkers such as Robert Alexy, Ronald Myles Dworkin, among others.

the Code of Napoleon and the School of Exegesis (école de l'exegese). This model surpassed the idea that there would be a Natural Law extracted from the Moral, and from such aversion that one had the possibility of moral judgments surpassing the security made possible by positive legislation, it was proposed that the law simply had no relation with Moral. Juridicality would be another social product different from and external to morality" (ZANON JUNIOR, O. L. **Curso de filosofia jurídica**. 1ª ed. Florianópolis: Empório do Direito, 2016. p 126).

¹⁵ SANTOS, E. R. dos. **Uma leitura pós-positivista do princípio da segurança jurídica**. *Diritto Brasiliano*. Available at: <https://www.diritto.it/uma-leitura-pos-positivista-do-principio-da-seguranca-juridica>. Accessed on: Aug 31, 2018.

¹⁶ ZANON JUNIOR, O. L. **Curso de filosofia jurídica**. p.125.

¹⁷ CULVER, K. C. (Ed). **Readings in the Philosophy of Law**. 2ª ed. Toronto: Broadview, 2008. p. 159.

¹⁸ "The criticism is that, in order to increase predictability as to correct conduct and, consequently, to promote legal certainty, it is necessary to further reduce this gray and dubious area" (ZANON JUNIOR, O. L. **Curso de filosofia jurídica**. p. 189).

For Postpositivism, the principles refer to a legal norm as is the rule of law.

In the book *Taking Rights Seriously*, Ronald Dworkin asserts that principles have normative imperativeness. However, this is different from rules that are based on an all-or-nothing criterion:

The difference between legal principles and legal rules is a logical distinction. Both sets of standards point to particular decisions about legal obligation in particular circumstances, but they differ in the character of the direction they give. Rules are applicable in an all-or-nothing fashion. If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision.¹⁹

This first difference between rules and principles entails another. Principles have a dimension that rules do not — the dimension of weight or importance. When principles intersect (the policy of protecting automobile consumers intersecting with principles of freedom of contract, for example), one who must resolve the conflict has to take into account the relative weight of each [...].²⁰

For Robert Alexy, the principles dictate that something be done within the existing legal and factual possibilities, in the sense of reaching the best solution of each case, with maximum predictability, but limited to the concrete case, that, in addition to legal arguments, the factual situation refers to.²¹

2.2 THE LEGAL UNCERTAINTY PROMOTED BY PROVISIONAL PRESIDENTIAL DECREES 320/2006 AND 612/2013

Provisional Presidential Decrees are considered normative acts established in article 59 of the Federal Constitution of 1988 and disciplined in its article 62 and in the Constitutional Amendment number 32/2001.²²

¹⁹ DWORKIN, R. **Taking rights seriously**. Cambridge: Harvard University Press, 1978. p. 24.

²⁰ DWORKIN, R. **Taking rights seriously**. p. 26.

²¹ ALEXY, R. **Teoria dos Direitos Fundamentais**. São Paulo: Malheiros, 2008.

²² Article 62. In case of relevance and urgency, the President of the Republic may adopt provisional measures, with force of law, and must immediately submit them to the National Congress (BRASIL. **Constituição (1988)**. p. 36).

It is not excessive to affirm that the issuance of Provisional Presidential Decrees constitutes an exceptional exercise of the power to legislate on the part of the President of the Republic expressed in article 84, caput, subsection XXVI²³ of the Magna Carta. To this end, the Constitution provides for the formal validity of the provisional presidential decrees, which are of relevance and urgency.

These presuppositions indicate that Provisional Presidential Decrees would only be issued by the President of the Republic in extraordinary circumstances, that is, only when the ordinary legislation may not be applied.

The role of the judiciary would rest on this point, in order to ensure that the essential values of the legal order are preserved and protected against the issue of provisional presidential decrees.²⁴

Regarding the issue of Provisional Presidential Decrees 320/2006 and 612/2013 that created the CLICs, it is important to reflect whether the assumptions were actually met by the executive branch, in the discussion of such a relevant subject to Brazilian foreign trade.

In this regard, first of all, we must highlight the explanatory memorandum of Provisional Presidential Decree 612/2013, which presents the need to restructure the legal model for the organization of secondary zone customs stations, the so-called Dry Ports:

This Provisional Presidential Decree proposes the restructuring of the legal model for the organization of customs stations in secondary zones, especially the so-called Dry Ports, and of the form of costing of customs inspection carried out by the Brazilian Federal Revenue Service.

Currently, Dry Ports are subordinated to the system of permission and concession of public services, with their services not even being listed in item XII of article 21 of the Federal Constitution. The legal basis of the current model is

²³ Article 84. It is the exclusive responsibility of the President of the Republic: [...] XXVI - to issue provisional measures with force of law, under the terms of art. 62. (BRASIL. **Constituição (1988)**. p. 40)

²⁴ O art. 5º, inciso XXXV, da Constituição Federal expressa o Princípio da Inafastabilidade do Controle Jurisdicional, instante em que foi convencionada a admissão do Poder Judiciário nas circunstâncias de lesão ou ainda ameaça de lesão a direito. (BRASIL. Constituição (1988). Constituição da República Federativa do Brasil. Brasília, DF: Senado Federal: Centro Gráfico, 1988).

found in section VI of article 1 of Law 9,074 of July 7, 1995, the repeal of which is required.

This legal model is in deep crisis, making it difficult to expand the supply of goods handling and storage services in a secondary zone for importers and exporters. This model, based on concessions and public service permits, does not conform to the nature of those activities, which require rapid modifications in the operational capacity of the stations and also require locational changes to meet the demand, requirements which are incompatible with the current legal model.

In addition to these aspects, in border areas with less cargo movement, the current model is not able to attract interested parties in the bids, leaving the Brazilian Federal Revenue Service in precarious conditions to operate the customs controls.

For these reasons, this Provisional Presidential Decree draft abandons the model based on a public service concession / permit, proposing a model based on the institution of license, which, according to Brazilian scholars, is the unilateral and bound administrative act by which the Administration allows all those who meet the legal requirements to exercise a certain activity. In the license model, there is freedom of entry and exit of service providers, allowing greater economic efficiency of the system (emphasis added).²⁵

Such Dry Ports were subordinate to the permit and concession regimes, which in the legislator's view were not even covered by the Federal Constitution in its article 21, subsection XII.²⁶

As it can be seen from the explanatory memorandum, the legal models of permits and concessions granted to Dry Ports were in deep crisis, since it made it difficult to expand customs stations in the country and, consequently, the provision of services in handling and storage of goods in a secondary zone.

Thus, the license model, linked to CLICs, was the ideal alternative to accompany and respond to the rapid changes in the operational capacity of the stations due to a clear increase in the demand for services.

²⁵ BRASIL. **Medida Provisória No. 612, de 04 de Abril de 2013**: Exposição de Motivos nº 00065/2013 MF/MDIC/MCTI.

²⁶ Article 21. The Union shall: [...] XII - to explore, directly or through authorization, concession or permission (BRASIL. **Constituição da República Federativa do Brasil (1988)**. p. 12)

That is to say, by means of said legislation, the greater freedom of entry and exit of suppliers from the services of movement and storage of goods in a secondary zone to importers and exporters was sought in order to allow greater economic efficiency of the system.

With the entry into force of the Provisional Presidential Decrees 320/2006 and 612/2013, respectively, the CLIC was created and the legal regulation for the creation of new secondary zone customs posts was amended.

In the case of CLICs established under the auspices of PPD 612/2013, according to information from the Federal Revenue Service,²⁷ 53 (fifty-three) applications for CLICs were filed throughout the country, 25 (twenty-five) of which being petitions for the conversion of already bonded Dry Ports and 28 (twenty-eight) for the establishment of new facilities.

However, the failure to convert the Provisional Presidential Decrees into law, in particular the last Provisional Presidential Decree, PPD 612/2013, has destabilized the CLICs legal model as regards the organization of secondary zone customs stations.

In practice, what is currently the situation is the legal existence of CLICs versus the lack of legal recognition of CLICs by the Brazilian Federal Government.

This situation denotes the legal uncertainty introduced through the use of Provisional Presidential Decrees, as normative acts to regulate such a relevant sector for the Brazilian economy.

Considering the complexity for implementing a CLIC, given all structural aspects and licenses to be obtained from the competent bodies, it seems clear that although it is possible to define relevance and urgency, the short validity would not achieve the objective of an effective regulation.

That is to say, the conversion of Provisional Presidential Decrees into law was clearly necessary in order to ensure the insertion of more companies interested in

²⁷ Analysis made within the Brazilian Internal Revenue Service. Available at: http://www.receita.fazenda.gov.br/automaticoSRFSinot/2013/08/13/2013_08_13_18_42_42_3_05642020.html. Accessed on: Aug 12, 2018.

the sector and to guarantee the legal recognition of CLICs, which currently face serious difficulties in operating in the market.

2.3 THE CONSTITUTIONALITY CONTROL OF PROVISIONAL PRESIDENTIAL DECREES AS A GUARANTEE OF LEGAL CERTAINTY

It should be recalled that Provisional Presidential Decrees can only be issued by the President of the Republic, under extraordinary circumstances, and under clear criteria of relevance and urgency. In the absence of such assumptions, it is necessary to make use of ordinary law, delegated law and complementary law.

In the case of Provisional Presidential Decrees 320/2006 and 612/2013, the role of the Judiciary with regard to the constitutionality control of such normative acts is well-known.

What is observed is that a subject of such importance could not be the object of a Provisional Presidential Decree, but rather of an ordinary law. The non-conversion of such Provisional Presidential Decrees into law denoted that the Executive Branch made use of normative acts as a political strategy to meet the demand of specific groups, disregarding the legitimate interest of expansion and opening of customs stations in the country.

Article 5, item XXXV, of the Federal Constitution expresses the Principle of Judicial Protection of Jurisdictional Control, at which time the admission of the Judiciary in the circumstances of injury or even threat of injury to the right was agreed.

In this context, it is incumbent upon the Federal Supreme Court to exercise such judicial control:²⁸

The provisional presidential decree, as a normative act with force of law, is a primary legal norm, what authorizes judicial control of constitutionality in order to verify the compatibility with the Constitution, including in relation to the fulfillment of the assumptions of relevance and urgency. It is up to the

²⁸ GONZAGA, B. Controle jurisdicional das medidas provisórias possibilidade de análise da inconstitucionalidade formal pelo STF. *Jus Navigandi, Teresina*, 20, n. 4383, 2 Jul. 2015. Available at: <https://jus.com.br/artigos/40038/controle-jurisdicional-dasmedidas-provisorias>. Accessed on: Sep 02, 2018.

Federal Supreme Court to perform such exercise, assuming its function as a constitutional guardian. The FSC [Federal Supreme Court] understands that the PPDs are subject to constitutionality control through a Direct Action of Unconstitutionality. The controversy concerns the possibility of a DAU in relation to the formal requirements for admissibility of the provisional presidential decree (relevance and urgency). There are legal scholars who understand that these presuppositions have a political nature, being subject to the discretionary analysis of the Chief Executive, and that the possibility of interference by the Judiciary would affect the independence between the branches. Others, based on the Judicial Protection and on the constitutional supremacy principles, understand that the Judiciary should express its opinion on the unconstitutionality of the PPD, when provoked.

In the specific case, the Supreme Federal Court (SFC), on March 14, 2018, accepted a request formulated in Argument of Breach of Basic Precept (ABBP 216) to prevent the processing of license applications to customs centers provided for by Provisional Presidential Decree 320/2006, rejected by the Senate in December 2006. A majority of the Justices accepted the terms of the request, understanding that the case involved offense to the text of the Constitution and to the principles of separation of branches and legal certainty:²⁹

The lawsuit was filed by customs agencies and terminal and dry-ports operators on the grounds that, despite the rejection of the provisional presidential decree by the Senate, some companies have obtained in the courts the right to process the license applications of the "Customs Logistics and Industrial Center" (CLIC), provided for in the Provisional Presidential Decree, by the Federal Revenue Service, once they were filed under the PPD. For the authors of the action, the decisions constitute a misinterpretation of article 62 of the Federal Constitution.

According to paragraph 3 of Article 62, in the event that provisional presidential decrees are not converted into law within the prescribed validity, the National Congress shall discipline the legal relations resulting from the norm by legislative decree. Paragraph 11 of the article, for its part, states that if the legislative decree is not published within 60 days, legal relations established and arising from acts

²⁹ BRASIL. Supremo Tribunal Federal. **Supremo impede novos terminais aduaneiros previstos em medida provisória rejeitada.** Available at: <http://portal.stf.jus.br/noticias/verNoticiaDetalhe.asp?idConteudo=372323>. Accessed on: Sep 02, 2018.

performed during the PPDs term will remain governed by it. In the case of PPD 320, there was no legislative decree.

The action requested that the rejected PPD be applied only in those cases in which the application for a permit had already been assessed and approved by the competent authority during its validity, but not for those cases only filed but not appraised. The sustained understanding was that the mere request protocol does not constitute a "constituted legal relationship".

A majority of the justices followed the vote of the Rapporteur of the ABBP, the Chief of the SFC, Justice Carmen Lúcia, for the merits of the action to remove the application of paragraph 11 of Article 62 of the Constitution to request for license to operate CLICs not examined during the validity of PPD 320. "There was no constituted legal relationship that would make it possible to invoke paragraph 11 of article 62 of the Federal Constitution to justify the application of the PPD rejected after the term of its validity," said the justice in her vote. For her, a different interpretation would indefinitely postpone the validity and the production of effects of the provisional presidential decree rejected by the National Congress, "which would offend not only Article 11 of the Federal Constitution, but also the principle of separation of branches and the principle of legal certainty".

Justices Luis Roberto Barroso, Rosa Weber, Luiz Fux and Ricardo Lewandowski arguments were defeated. According to the divergence, those interested who requested the license within the period of validity of the provisional presidential decree have ensured the right at least to have their application appraised under the terms provided in the PPD, otherwise there would be differential treatment between companies with applications appraised or not within the prescribed period. "Guaranteeing the right to license only for those who had the request appraised is discriminatory," said Luís Roberto Barroso, who started the divergence.

It follows from the decision that there was a strictly pure analysis of the rule, without taking into account aspects relating to the particular case. The complexity and level of investment required to prepare the infrastructure of a customs station, i.e., of a CLIC, under the validity of the Provisional Presidential Decree, are assumptions that should be considered to link the public administration to the analysis of the licensing process.

The very pleas put forward by the Justices, as it stands, support the reasons necessary to ensure that those interested, who have applied for a license within the period of validity of the Provisional Presidential Decree have the right at least to have the application appraised under the terms provided for in the normative act, under the risks of companies with applications appraised or not appraised in the valid period receiving an unequal treatment.

It is not excessive to say that the decision creates serious legal uncertainty and mismatches to the industry, first because it tends to benefit isolated and specific groups, not interested in expanding the installation of new CLICs and improving competitiveness in the logistics sector. Second, because the companies that invested all the economic, financial and administrative efforts to obtain the license, under the force of a normative act, did not even have the right to have their action analyzed. Moreover, such a decision tends to become a negative reference for investors in the sector, since regulation is thorny and judicial decisions do not serve as reparatory instruments regarding the irresponsible use of Provisional Presidential Decrees.

In this context, it is necessary and urgent to observe at least two premises: (i) responsibility for regulating matters of foreign trade and logistics, through perennial normative acts; ii) the responsibility of the judiciary to analyze existing factual aspects in order to achieve the best solution, with maximum predictability, fulfilling the important role in the control of the norms, which are often edited by the executive branch without due observation of the constitutional assumptions.

3 JUDICIAL DECISIONS IN THE ABSENCE OF CLICS RULES IN FORCE

3.1 JUDICIAL DECISIONS

The failure to convert the Provisional Presidential Decrees as set forth established a serious administrative burden on the current CLICs and did not resolve the necessary alteration of the legal model of customs stations in the country.

On the one hand, the public administration, in the figure of the Brazilian Federal Revenue Services, has rejected requests necessary for the continuity of the CLICs

activities, on the grounds that there is no current legal norm. On the other hand, interested companies intending to invest in the expansion of customs stations in Brazil, in order to meet the demand for the flow of products and merchandise, in the view of the vast territorial extension of the country, also do not find a valid legal device to obtain a license to operate CLICs.

Most logistics companies follow the external market and, as a consequence, there are situations, for example, of companies that need to change the CLIC address, due to the increase and / or decrease in foreign trade operations, which requires larger and more modern spaces or even cost reduction to guarantee the continuity of its commercial activity in times of economic crisis.

Regarding these requests for relocation, the Federal Revenue Service has rejected them, under the same argument of lack of legal basis;³⁰ therefore, in the case of CLICs in operation wishing to relocate, there would be a need of requesting a new license.

Such an alternative proves to be impractical, since from the economic and financial points of view all the requirements and investments have been previously fulfilled by the company, and it must be emphasized, under relevant amount. In addition, there is no current legislation for request of new CLICs. That is, the legislation of CLIC, proposed to create a model of Customs Stations, more efficient and

³⁰ SUBJECT: IMPORTATION TAX – II. CUSTOMS LOGISTICS AND INDUSTRIAL CENTERS. POSSIBILITY OF TRANSFER FROM CUSTOMS STATION TO ANOTHER LOCALITY. According to the legislation that regulated the creation of the Customs Logistics and Industrial Centers - CLIC, the licenses to operate them were granted to specific establishments and determined by the legal entity, according to the projects presented at the time of the application and approved, which would be bonded, not considering the possibility of changing a CLIC from the customs station originally bonded to another locality by using the license already granted. In the event that the licensee wishes to transfer the center to another location, it is understood that, in accordance with that legislation, the procedure to be adopted would be to apply for a license to operate a CLIC in the new station / premises in which it would carry out its activity, in compliance with the legal norms and conditions, and, if such license were obtained, then request the cancellation of the previous license, granted to the station / premises that would no longer be explored as CLIC. However, with the rejection of Provisional Measure 320 of 2006, there is no longer any legal basis for the creation of the Customs Logistics and Industrial Centers, and it is not therefore possible to issue licenses to new centers or to bound new premises in this modality, making this procedure impracticable. Legal devices: Provisional Presidential Decree 320, of 2006, article 1, paragraph 1, subsection III, articles 6, 7, 9, 12, 16, 17 and 18; Declaratory Act of the National Senate 1, of 2006; Regulation FRS 967, of 2006, articles 1, 2, 3 and 8; Regulation FRS 968, of 2006, articles 2, 3 and 5. (BRASIL. Secretaria da Receita Federal do Brasil. **Solução de Consulta nº100 SRRF / 8ª RF** / Disit, de 16 de abril de 2008.)

competitive in Brazil, besides not being embodied in law, has become a nightmare to those companies that have invested huge amounts for their operation.

In this regard, the holders of this CLIC regime will tend to seek in the Judiciary the path to the solution of this administrative disagreement, and this is when we resume to the postpositivist current approach. It means that it will be up to the judge to reach the best solution to the case, ignoring legal rules and arguments in the light of factual aspects and principles guaranteeing legal certainty.

The ABBP 216 decision, which did not recognize the legal relationships constituted under the Provisional Presidential Decree 320/2006, which created CLIC, is at least reckless to the legal certainty of the sector.

There will still be unfoldings about PPD 612/2013 in search of the same object, in addition to the operational aspects that the existing CLICs are beginning to face, such as the possibility of relocation.

As noted, the Federal Revenue Service does not recognize any administrative request regarding the CLICs, so it will be for the judiciary to examine the effects of the unreflective use of Provisional Presidential Decrees as a tool to regulate a large and complex sector.

FINAL CONSIDERATIONS

The objective of this paper was to analyze the principle of legal certainty in the light of Provisional Presidential Decrees 320/2006 and 612/2013, as normative acts in the regulation of CLICs. The specific goal was to demonstrate, through the evolution of the movements that governed legal science, the importance of the existence of positive norms and judicial decisions in the compass and dynamics of international trade.

The method adopted was the inductive one, operationalized by the research in bibliographical and jurisprudential sources available in physical or digital means.

The research has shown that CLICs in Brazil are models of legal customs stations, since they were established under the Provisional Presidential Decrees 320/2006

SILVA, Carmem Grasielle da. A focus on the certainty of provisional presidential decrees of customs logistics and industrial centers and judicial postpositivism. *Revista Eletrônica Direito e Política*, Programa de Pós-Graduação *Stricto Sensu* em Ciência Jurídica da UNIVALI, Itajaí, v.14, n.3, 3º quadrimestre de 2019. Disponível em: www.univali.br/direitoepolitica - ISSN 1980-7791.

and 612/2013, but are not legally recognized, having in mind both of these legal devices have not been converted into law.

Considering the complexity and relevance of the matter for the country's logistics and economic sectors, the use of a Provisional Presidential Decree by the Federal Government to regulate CLICs is questionable. It is also questionable the fact that these normative acts have not been converted into law and thus, jeopardize the legal security of existing CLICs, as well as the possibility of opening new CLICs.

The study concluded that it will be up to the Judiciary Branch to analyze and apply the appropriate solution to the administrative disagreement established in the logistics sector.

In this sense, with the support of the postpositivist current, under careful analysis of existing legal and factual possibilities, it will be on the judge to present the best solution to the case, guaranteeing the legal certainty that the topic deserves.

Legal, foreign trade, and logistics operators will have the task of monitoring the evolution of the legal analysis, as well as maintaining firm proposals for discussions, through public hearings with the Federal Government, in order to achieve the best customs station model to the country – more efficient, agile, practical, and internationally competitive.

REFERENCES OF CITED SOURCES

ALEXY, R. **Teoria dos Direitos Fundamentais**. São Paulo: Malheiros, 2008.

BRASIL. **Constituição (1988)**. Constituição da República Federativa do Brasil de 1988. 48. ed. atual. e ampl. São Paulo: Saraiva, 2015.

BRASIL. **Medida Provisória Nº 320, de 24 de agosto de 2006**. Dispõe sobre a movimentação e armazenagem de locais e recintos, a licença para explorar serviços de movimentação e armazenagem de mercadorias em Centro Logístico e Industrial Aduaneiro, altera a legislação aduaneira e dá outras providências. Brasília, 25 de agosto 2006. Available from: <http://www.planalto.gov.br/ccivil_03/_ato2004-2006/2006/Mpv/320.htm>. Accessed on: Apr 13, 2018.

SILVA, Carmem Grasielle da. A focus on the certainty of provisional presidential decrees of customs logistics and industrial centers and judicial postpositivism. *Revista Eletrônica Direito e Política*, Programa de Pós-Graduação *Stricto Sensu* em Ciência Jurídica da UNIVALI, Itajaí, v.14, n.3, 3º quadrimestre de 2019. Disponível em: www.univali.br/direitoepolitica - ISSN 1980-7791.

BRASIL. **Medida Provisória nº 612, de 04 de abril de 2013.** Reestrutura o modelo jurídico de organização dos recintos aduaneiros de zona secundária, altera a Lei nº 10.865, de 30 de abril de 2004, e a medida Provisória nº 601, de 28 de dezembro de 2012; reduz a zero as alíquotas da Contribuição para o PIS/PASEP e da COFINS incidentes sobre as indenizações a que se refere a Lei nº 12.783, de 11 de janeiro de 2013; altera a Lei nº 12.715, de 17 de setembro de 2012, para dispor sobre multa pecuniária pelo descumprimento do Programa de Incentivo à Inovação Tecnológica e Adensamento da Cadeia Produtiva de Veículos Automotores INOVAR AUTO; e dá outras providências. Brasília, 04 de abril 2013. Available from: http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2013/Mpv/mpv612.htm. Accessed on: Apr 14, 2018.

BRASIL. **Secretaria da Receita Federal do Brasil. CLIA's - Centros Logísticos e Industriais Aduaneiros.** Available from: <http://idg.receita.fazenda.gov.br/orientacao/aduaneira/importacao-e-exportacao/recinto-alfandegados/clias-centros-logisticos-e-industriais-aduaneiros>. Accessed on: Aug 13, 2018.

CULVER, K. C. **Readings in the Philosophy of Law.** 2ª ed. Toronto: Broadview, 2008. p. 159.

DWORKIN, R. **Taking rights seriously.** Cambridge: Harvard University Press, 1978.

GONZAGA, B. Controle jurisdicional das medidas provisórias possibilidade de análise da inconstitucionalidade formal pelo STF. **Revista Jus Navigandi, Teresina**, ano 20, n. 4383, 2 jul. 2015. Available from: <https://jus.com.br/artigos/40038/controle-jurisdicional-dasmedidas-provisorias> Accessed on: Sep 02, 2018.

KELSEN, H. **Teoria pura do direito.** Tradução de João Baptista Machado. 7ª ed. São Paulo: Martins Fontes, 2006.

SANTOS, E. R. dos. **Uma leitura pós-positivista do princípio da segurança jurídica.** *Diritto Brasiliano*. Available from: <https://www.diritto.it/uma-leitura-pos-positivista-do-principio-da-seguranca-juridica>. Accessed on: Aug 31, 2018.

SANTOS, P. G. F. O Porto Seco no Contexto Brasileiro. **Revista da Receita Federal: Estudos Tributários e Aduaneiros**, v. 2, p. 291-291, 2015.

SORMANI, A. A proteção constitucional à coisa julgada no Brasil. **Revista Consultor Jurídico**. 2003. Available from: https://www.conjur.com.br/2003-jun-21/exegese_inciso_xxxvi_artigo_constituicao. Accessed on: Aug 30, 2018.

TREVISAN, R. **A internacionalização da disciplina do imposto de importação: contornos para uma regulação internacional da incidência.** Tese de doutorado apresentada na Universidade Federal do Paraná. Curitiba, 2016.

ZANON JUNIOR, O. L. **Curso De Filosofia Jurídica.** 1º ed. Florianópolis: Empório do Direito, 2016.

Recebido em: 15/10/2018

Aprovado em: 01/11/2019