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Brazil

LEGAL MEMORANDA

EDITOR'S NOTE

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BRAZIL

LETTER OF OCTOBER 1995

1. Financing of Construction and Acquisition of Real Estate

On September 5, 1995, the Central Bank of Brazil issued Letter Circular No. 2575, setting forth the operating procedures for obtaining funds overseas by Brazilian financial institutions for the financing of the acquisition and construction of new real estate by legal entities or individuals in Brazil (please refer to item 9(b) of our July 1995 Legal Letter).

According to Letter Circular 2575/95, financial institutions interested in obtaining funds overseas will have to obtain the Central Bank's preliminary approval. After funds have entered this country, the financial institution will have thirty days to register the transaction with the Central Bank. The latter will grant a certificate of registration that will allow the financial

institution to remit the interest and principal overseas (DOU-I, Sept. 6, 1995).

2. Repression of Drug Traffic

By means of Decree No. 1625 of September 8, 1995, President Fernando Henrique Cardoso sanctioned the Accord for Reduction of Procurement, Combat, Manufacture and Repression of the Traffic in Illicit Drugs and Psychotropic Substances, entered into by and between Portugal and Brazil (the Accord), which was approved by Congress in Legislative Decree No. 34 of April 5, 1995.

Under the Accord, Brazil and Portugal will join forces to check drug trade and use by:

(a) an exchange of information, including information regarding apprehension of goods bought with monies from drug dealing/traffic;

(b) technical and scientific assistance; and

(c) training of personnel.

Both nations will expend their best efforts to control the production, import, export, storage, distribution and sale of any substances that can be used directly and indirectly in the manufacture of illegal drugs or the like.

Representatives in each nation will be selected to interface with Portugal and Brazil in this joint effort (DOU-I, September 11, 1995).

3. Advances on Exchange Contracts

On September 12, 1995, President Cardoso adopted Provisional Measure No. 1113, including a new article in Law No. 4728 of July 14, 1965 (the Securities Market Law).

Under Provisional Measure 1113/95, monies furnished under Exchange Advance Contract transactions will be used exclusively for payment of any credit line that has given rise to these transactions in the events of bankruptcy, extrajudicial liquidation or intervention. Previously, these funds would be incorporated into the bankrupt estate and only be paid if and when all other privileged debts were paid (DOU-I, November 13, 1995).

4. TAX ON FINANCIAL TRANSACTIONS — IOF

On September 15, 1995, the Ministry of Finance issued Ordinance No. 228, altering the rates of IOF withheld at the closing of exchange transactions for entry of foreign currency into Brazil with respect to loans and other specific investments on the Brazilian market:

(a) foreign loans that were IOF tax-free before now have the following rates:

  (i) 5% if the loan transaction has an average period of two years;

  (ii) 4% if the loan transaction has an average period of three years;

  (iii) 2% if the loan transaction has an average period of four years;

  (iv) 1% if the loan transaction has an average period of two years; and

  (v) 0% if the loan transaction has an average period of six years.

(b) fixed-yield investments are now taxed at the rate of 7%, not 5% as they were prior to issuance of Ordinance 228;

(c) the IOF rate assessed on investments on the Brazilian securities market continues to be 0%; and

(d) interbank transactions entered into by and between foreign financial institutions anddomestic banks authorized to deal on the exchange market are now taxed at the rate of 7%.

The IOF rate for loan transactions will be 0% in the following cases:

(i) when the exchange transaction is performed by the Administration, states, municipalities, Federal District, and their instrumentalities;

(ii) the exchange transaction is performed with governmental/international entities, agencies and bodies; and

(iii) when the exchange transaction is related to

loans linked to export transactions (DOU-I, September 18, 1995).

5. ANTIDUMPING

On August 23, 1995, President Cardoso issued Decree No. 1602, setting forth the rules regulating administrative proceedings for antidumping measures, including procedures for (i) proof of dumping, (ii) administrative investigation requirements, (iii) provisional antidumping measures, and (iv) definitive antidumping measures and price settlements (please refer to item 2 of our April 1995 Legal Letter).

Based on article 18 of Decree 1602/95, any interested party may request (via the proper petition addressed to the Foreign Trade Office) the instatement of a dumping investigation. On September 12, 1995, the Secretary of Foreign Trade of the Ministry of Industry, Commerce and Tourism issued Circular No. 73, setting forth the rules and conditions for such dumping petition.

The dumping petition will have to mention, *inter alia*, the charge of dumping, the damage related thereto and information regarding the petitioner, the agent causing the dumping and proof of damage (DOU-I, September 13, 1995).

6. BRAZILIAN DENATIONALIZATION PROGRAM

On September 12, 1995, the federal Attorney General issued Opinion GQ - 82, allowing the use of credits from judicial decisions against the Treasury as currency to acquire securities issued by companies that are to be privatized.

Under this Opinion, this transaction should be considered an exchange of credits of the Administration for securitized debts (i.e., credits that can be used as money to acquire stock in companies under privatization proceedings) (DOU-I, September 13, 1995).

7. CHEMICAL PRODUCTS AND INPUTS

On September 26, 1995, President Cardoso signed Decree No. 1646, spelling out the rules for control and monitoring of the manufacture, transport, import, export, sale and purchase of

chemical products and inputs that can be used or intended for the manufacture or production of cocaine and any other drug substances that cause physical or psychological dependence (DOU-I, September 27, 1995).

8. Brazilian Denationalization Program — Conversion into Foreign Investment

On September 28, 1995, the Central Bank of Brazil issued Resolution No. 2203, providing that certain federal public debt instruments and bonds, and their corresponding charges are eligible for conversion into foreign investments in Brazil under the Brazilian Denationalization Program. Resolution 2203/95 expressly repealed Resolution No. 2062 of April 12, 1994, regarding this subject (please refer to item 5 of our August 1994 Legal Letter) (DOU-I, September 29, 1995).

9. Buenos Aires Protocol — International Jurisdiction of Contracts

On October 5, 1995, the Senate approved the Buenos Aires Protocol (Protocol) regarding the international jurisdiction of contracts in the Common Market of the Southern Cone — MERCOSUL.

This Protocol was signed by representatives of the Governments of Argentina, Brazil, Paraguay and Uruguay with the main scope of harmonizing MERCOSUL member states' regulations and promoting the development of the economic relationship between private sector entities and individuals in each member state.

The Protocol will apply to international (commercial and civil) contracts entered into by private parties (individuals and legal entities):

(a) headquartered or domiciled in one member state; or

(b) when at least one of the parties to the agreement is headquartered in a member state, and has elected the governing law of such member state as being competent to resolve any doubts or disputes.

The Protocol, however, does not apply to:

(a) the relationship between the bankrupt entity and its

creditors;

(b) accords governing family and succession law;

(c) social security agreements;

(d) administrative agreements;

(e) labor agreements;

(f) agreements for the sale of goods to consumers;

(g) transport agreements;

(h) insurance agreements; and

(i) rights in rem.

In conflicts involving any agreements other than those mentioned above, the courts of a member state will be considered competent if expressly agreed to or decided on by the parties that executed the agreement.

If the court of jurisdiction was not mentioned in the agreement, at the plaintiff's discretion one of the following courts will be competent:

(a) the courts where the contract is to be performed; or

(b) the courts of domicile of the respondent; or

(c) the courts of domicile or corporate headquarters, when the plaintiff can demonstrate that it has complied with its obligations (DCN-I, October 6, 1995).

10. *Real* Plan — Elimination of Monetary Correction

On June 30, 1995, President Cardoso issued Provisional Measure No. 1053, mandating supplementary measures for the economic stabilization program. According to Provisional Measure 1053/95, contracts and other obligations must be denominated in *reais*, and cannot (with few exceptions) be expressed in or linked to foreign currencies or any monetary correction indices. Also, monetary correction indices can only be utilized in agreements with a minimum one-year term (please refer to item 8 of our July 1995 Legal Letter).

Provisional Measure 1053/95 was republished as No. 1138 on September 28, 1995, clarifying that the one-year minimum term for the adoption of monetary correction indices does not apply to debts (i) that are labor and judicial by nature, (ii) relat-

ed to defaults of contractual obligations, and (iii) owed by bankrupt entities, or those under *concordata*, intervention or extrajudicial liquidation.

Also, Provisional Measure 1138/95 altered the provisions of article 54 of Law No. 884 of June 11, 1994 (the Antitrust Law) (please refer to item 4 of our June 1994 Legal Letter).

Under the Antitrust Law, in order to avoid economic monopoly and hindrance of free competition, the following acts must be approved buy the Administrative Council for Economic Defense - CADE: amalgamation, merger, purchase and sale of companies or any other form of corporate grouping, whenever the company or group of companies resulting from these transactions holds a 30% stake in the relevant market, or whenever any of the parties has posted annual gross billings of approximately U.S. $50 million on the last balance sheet.

Provisional Measure 1138/95 increased this U.S. $50 million cap to approximately U.S. $400 million (DOU-I, September 29, 1995).

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