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Brazil

BRAZIL

The following memorandum summarizes recent legislative and administrative rulings with respect to the Brazilian Denationalization Program.

The Brazilian Denationalization Program ("PND") was created by Law No. 8031 on April 12, 1990, as part of an economic stabilization plan which became known as the "New Brazil Plan." The main purpose of PND is to reorganize the state's role in the Brazilian economy through a transfer of state activities to the private sector to: reduce the government deficit, encourage productive investments, modernize the Brazilian industry plants, and strengthen the stock market.

A directive committee was established to coordinate PND. According to Law No. 8031/90, the Directive Committee is charged with selecting the companies eligible for privatization, and is also authorized to issue rulings regarding the privatization process.

I. Participation of State Entities in the Privatization Process

On August 19, 1991, the Directive Committee issued Resolution No. 15, setting forth the guidelines for the participation of state entities in the privatization process. As the PND objective is to transfer state-owned companies to the private sector, state entities are allowed to acquire a total of no more than fifteen percent of the shares of companies being privatized. One reason for the Resolution No. 15 authorization for the participation of state entities in the privatization process is that certain entities (such as state-owned banks like Banco do Brazil S.A. and pension funds related to state-owned companies) own eligible credits that can be used as a means of payment for the shares of companies privatized under PND (DOU-I, September, 12, 1991).

On September 9, 1991, the Directive Committee issued Declaratory Act No. 5, stating that state entities participating indirectly in the privatization process (*e.g.* through privatization funds or holding companies) are not allowed to directly acquire shares in companies to be privatized. The purpose of this measure is to ensure that the fifteen percent ceiling established by Resolution No.

15 will be observed (DOU-I, September 12, 1991).

II. Nationality of Privatization Fund

Law No. 8031/90 establishes in article 13, item IV that foreign participation in privatized companies will not exceed forty percent of the company's voting capital. For purposes of Law No. 8031/90, a company is considered foreign if it is controlled by foreigners. Accordingly, on August 26, 1991, the Directive Committee issue Resolution No. 17, establishing that for the purposes of Law No. 8031/90 the nationality of the funds formed for the purpose of acquiring participation in companies under privatization (Privatization Funds) will be determined according to the origin of the majority of the capital investment in the fund (DOU-I, September 4, 1991).

III. Privatization Certificates

Privatization Certificates (CPs) were created by Law No. 8018 of April 11, 1990 to be used for payment of shares in state-owned companies privatized under PND. According to Law No. 8018/90, banks, insurance companies and other entities were obliged to acquire CPs under the conditions set forth by the Central Bank of Brazil.

Article 1 of Law No. 8018/90 establishes that CPs are nominal and not negotiable unless expressly authorized by the Ministry of the Economy. Authorization was given on October 10, 1990, by means of Ordinance No. 683, which allowed CPs to be traded exclusively on the stock exchanges.

As the date marked for the inaugural auction of the first company to be privatized came closer, however, the Brazilian government authorities noticed that many groups interested in acquiring participation in the companies to be privatized had formed holding companies capitalized with credits eligible for use as payment for shares in the companies to be privatized. Since CPs could only be negotiated on the stock exchanges, CP holders could not capitalize these holding companies using CPs.

In order to allow CP holders to capitalize holding companies formed for the purpose of participating in the privatization auctions, the Minister of the Economy issued Ordinance No. 860 on September 6, 1991 to allow the private trading of CPs subject to

actual CP use for payment of shares in companies privatized under PND (DOU-I, September 9, 1991).

IV. Trading of Securities and Bonds Under PND

Law No. 8031 of April 12, 1990, which regulates PND, established that shares in companies to be privatized could be paid for with past due credits with federal government, and also with blocked funds on deposit with the Central Bank. Based on its powers under Law No. 8031/90, the PND Directive Committee specified the credits eligible for use in payment for shares in companies to be privatized under PND ("Eligible Credits"). Ordinance No. 263, issued by the Minister of the Economy on April 22, 1991, established that the Central Bank of Brazil and the Securities Commission would regulate the trading of the bonds and securities classified as Eligible Credits.

Based on Ordinance No. 263, the Central Bank of Brazil and the Securities Commission issued Joint Communique No. 41 on September 5, 1991. This ordinance regulates the trading of bonds and securities classified as above. Specifically, the ordinance regulates the following bonds and securities: federal government Agrarian Debt Notes (TDA), federal government Brazilian Development Fund Bonds (OFND), and debentures issued by Siderurgia Brasileira S.A. (sidebrás).

According to Joint Communique No. 41, these bonds and securities can only be traded in the stock exchanges or the over-the-counter markets regulated by the Central Bank of Brazil or by the Securities Commission (DOU-I, September 9, 1991).

The following legal memorandum discusses recent developments in the Brazilian law respecting Informatics Goods.

I. Import of Informatics Goods

On October 29, 1984 Brazil enacted Law No. 7232 (the Informatics Law), which regulates the Brazilian Informatics Policy and establishes a number of restrictions on foreign investment in the Brazilian informatics market, as well as on import of informatic goods. Under article 9 of the Informatics Law, the Executive Branch has the authority to adopt temporary restrictions on the production, operation, sale, and import of informatics goods to

ensure adequate protection of domestic companies until they are capable of competing on the international market. These protectional measures became known as "market reserve."

Since President Collor's election campaign, debate has grown regarding the opening of the informatics market and the end of the market reserve. The President has frequently stated that his political platform included both goals. Heated discussions on the market reserve culminated in the issuance of Decree No. 99541 on September 21, 1990. This decree set forth clearer guidelines for the import and production of computer science goods in Brazil. According to Decree No. 99541/90, the Brazilian Informatics and Automation Council (CONIN) must list the informatics goods whose import requires preliminary governmental approval by the Science and Technology office (SCT).

On October 26, 1990, CONIN issued Resolution No. 20, making public a list of informatics goods whose import and production in Brazil require preliminary SCT approval. Products not included on the list can be freely imported and produced in Brazil.

On May 10, 1991, in keeping with the objectives established in his election campaign (especially the opening up of the Brazilian informatics market), SCT issued Ordinance No. 223, exempting imports of informatics goods in CONIN Resolution No. 20 from the need to obtain SCT approval, provided such goods are brought into Brazil by travelers returning from abroad, and do not exceed $1,500.00 in value.

In a further effort to open up the Brazilian informatics market, as well as in keeping with the objectives of the Brazilian Deregulation Program created by Decree No. 99179 (March 15, 1990), SCT issued Ordinance Nos. 534 and 544 on September 5, 1991, extending exemption from the requirement for SCT approval granted by Ordinance No. 223 for the following cases:

(a) import of informatics goods to be sold in duty-free shops, up to $500.00 in value;

(b) import of software by travelers returning to Brazil from neighboring countries, up to $500.00;

(c) import of software by travelers coming to Brazil from abroad, up to $1,500.00, and

(d) import of software enrolled with SCT sent on behalf of the registration holder, when this software is to be used exclusively by one person or company; or software which is integrated into ma-

chinery or software equipment; or software which is earmarked for exhibition in commercial or industrial fairs, regardless of its value (DOU-I, September 6, 1991).

II. Alterations in Informatics Law

On October 23, 1991, President Collor sanctioned Law No. 8248, which introduced significant alterations in informatics legislation, the most important being a redefinition of the domestic company concept, the reduction in tax incentives, and the end of the Brazilian Informatics and Automation Council (CONIN).

The first alteration was the revision of the original concept of "domestic company" as defined in Law No. 7232, article 12 (October 12, 1984—the Informatics Law). This article, revoked under Law No. 8248, defined a "domestic company" as a company whose technology and capital decision-making were controlled by individuals resident and domiciled in Brazil. Capital control was defined as the direct or indirect control of the entire capital—including actual or potential voting rights as well as ownership of at least seventy percent of the corporate capital.

For many years, the stand of the defunct Special Informatics Office (SEI) was that a foreign company could not have more than a thirty-percent holding in a domestic company to which it supplied technology, subject to disqualification as a domestic company due to "technology control" no longer being in the hands of the Brazilian Nationals.

On October 11, 1990, CONIN gave a new interpretation to article 12 of the Informatics Law, by way of Resolution No. 19, pursuant to which the participation of a nondomestic company in a domestic company would not prevent the existence of technology transfer agreement between them.

Although this resolution is a supplementary ruling not resulting from a legislative process, it was an attempt to adjust—and even to update—the stringent and narrow interpretation that was being given to article 12 of the Informatics Law.

Law No. 8248 sought to bring the concept of Brazilian company with domestic capital into keeping with the definition in the Federal Constitution, article 171, item II. The result was that the definition has been simplified, and is now compatible with the definitions used for other segments that receive foreign investments:

under Law No. 8248, a Brazilian company with domestic capital is a legal entity in fact and permanently controlled, directly or indirectly, by individuals who are resident and domiciled in Brazil, or by entities of internal public law.

Company control, under the new law, is defined as the direct or indirect holding of at least fifty-one percent of the voting capital, as well as the *de facto* and *de jure* decision-making authority to manage corporate activities, including those related to technology.

Another significant alteration was the reduction in tax incentives, since the new law revoked articles 13, 14, 15, 16, 18, 19, and 21 of the Informatics Law. Pursuant to Law No. 8248/91, the following incentives apply:

(a) a maximum fifty-percent income tax deduction on research and development expenses paid out by companies which have the sole or principal objective of production of informatics goods and services;

(b) a maximum one-percent deduction on the income tax owed by legal entities that invest in new shares (nontransferable for two years) in private Brazilian companies with domestic capital which have the sole or principal objective of production of informatics goods and services, provided said companies do not belong to the same economic conglomerate; and

(c) an exemption from the Tax on Manufactured Products (IPI), and an IPI credit on the purchase, by the National Technology and Science Development Council (CNPq) or other nonprofit organizations accredited by CNPq, of machinery, equipment, parts, components, accessories, raw materials, apparatus and instruments produced in Brazil.

The President's veto of article 10, sole paragraph of the law approved by Congress, which prohibited the cumulative use of any tax incentives, now permits companies in the informatics sector that take advantage of the previously mentioned tax incentives also to make use of other incentives. These incentives may be local incentives, especially those granted by the Amazon Development Office (SUDAM) and the Northeastern Brazil Development Office (SUDENE).

Another presidential veto of the text approved by Congress should bring significant changes in the informatics policy. By vetoing article 13—which gave CONIN its structure—and maintaining

the express revocation of article 6 of the Informatics Law, which also establishes the CONIN structure, the President left CONIN structureless.

The Informatics Law, as well as the text vetoed by the President, provides for a CONIN structure which actually makes it unfeasible for it to meet: approximately eleven Ministers of State and several class representatives, twenty-four members in all.

Besides the operational problems encountered in bringing this committee together—even if represented by their legal alternates—the greatest problem is on a practical level, where decisions must be made by such a heterogeneous group. These factors hinder the expeditiousness required to handle decisions under its authority. It is now expected that the CONIN structure will be established by statutory law.

Finally, at no point does Law No. 8248 mention the expression "market reserve," which will end on October 29, 1992, when the authority of the Science and Technology Office (SCT) to study and decide on projects regarding the development and production of informatics goods, as well as prior approval of import and goods and services, will terminate. (DOU-I, October 24, 1991).

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