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Brazil

BRAZIL

The following is a brief summary of recent legislative and judicial developments in Brazil.

Science and Technology Office

With a view to the reorganization of the informatics sector, President Collor issued Provisional Measure No. 222, on September 11, 1990, restructuring the Science and Technology Office (SCT). SCT comprises various bodies, including the Brazilian Informatics and Automation Council (CONIN) and the Informatics and Automation Council Policy Department, which superseded the Special Informatics Office (SEI). Several responsibilities accorded to SEI have been transferred to SCT for redistribution. Because Provisional Measure No. 222 was not examined by Congress within thirty days of its publication, the executive branch republished it as Provisional Measure No. 245 on October 12, 1990 (DOU-I, October 15, 1990).

Importation of Informatics Goods

Law No. 7232 of October 29, 1984 (the Informatics Law), which regulates Brazil's informatics policy, established a number of restrictions on foreign investment in the Brazilian informatics market, as well as on the importation of informatics goods. Under article 9 of the Informatics Law, the executive branch has the authority to adopt temporary restrictions on the production, operation, sale, and importation of informatics goods to ensure adequate protection of domestic companies until they are capable of competing in the international market.

On September 21, 1990, the executive branch issued Decree No. 99541, setting forth clearer guidelines for the import and production of informatics goods in Brazil. Pursuant to Decree No. 99541, CONIN must list informatics goods whose import and production in Brazil require SCT approval, as well as those considered relevant to national interests but for which Brazilian industry does not yet have sufficient technical qualifications. These goods can be produced in Brazil by foreign companies, provided they submit to

SCT annual reports with evidence of technological research and development, export projections, and a local-supplier developed program. These lists will be revised from time to time by CONIN (DOU-I, September 24, 1990).

On October 26, 1990, CONIN issued Resolution No. 20, approving the list of informatics goods whose importation and production in Brazil require SCT approval (products not included on the list can be freely imported and produced in Brazil).

Technological Joint Ventures

Article 12 of the Informatics Law defines a domestic company as a legal entity with its principal place of business in Brazil, whose technological, decision-making, and capital (100% of the voting shares and at least 70% of the share capital) control is permanently, exclusively, and unconditionally held by individuals residing and domiciled in Brazil. According to the extinguished SEI, a foreign company contributing to the capital of a domestic company could not assign to such company its technology on informatics, because the foreign company would then exercise technological control over the domestic company; such a result is prohibited under article 12 of the Informatics Law.

As a result of the meeting held by its members on October 4, 1990, CONIN approved Resolution No. 19 of October 11, 1990, which permits the formation of technological joint ventures. These associations between domestic and foreign companies operate within the limits of article 12 of the Informatics Law to effectuate participation in the informatics area under market reserve using technology from the foreign company. Resolution No. 19 put an end to the biased SEI interpretation of article 12 of the Informatics Law (DOU-I, October 12, 1990).

Import Duty

Pursuant to article 153, paragraph 1 of the Brazilian Constitution, the executive branch is empowered to set import duty rates. Article 8 of Law No. 8032 of April 12, 1990 authorized the Customs Policy Commission (CPA) to determine import duty rates, repeating the provisions of Law No. 3244 of August 14, 1957, which created the CPA. This Commission was subsequently extinguished, and Provisional Measure No. 233 of September 21, 1990 estab-

lished that the import duty will be determined directly by the executive branch. Other CPA responsibilities were accorded to the National Economy Office of the Ministry of Economy. Provisional Measure No. 233 was approved by Congress as Law No. 8085 on October 23, 1990 (DOU-I, October 24, 1990).

The new law lists several fuel products whose "ad valorem" import duty rates were reduced to zero percent because of the present shortage of such products on the world market due to the Middle East crisis. Based on Provisional Measure No. 2333, President Collor issued Decree No. 99546 on September 24, 1990, authorizing the Minister of Economy to determine the rates of import duties (DOU-I, September 26, 1990).

Under Decree-law No. 666 of July 2, 1969, any imported goods given favorable tax treatment from the Government must be shipped in vessels flying the Brazilian flag. Previously, tax incentives granted to the importation of goods were considered favorable governmental treatment, and therefore the product being imported had to be shipped in Brazilian vessels. On September 28, 1990, the Tax System Coordinator issued Declaratory and Normative Act No. 11, establishing that the drawback importation system was in fact an export incentive and not a governmental "favor" for the purposes set forth in the 1969 Decree-law. Therefore, goods imported under the drawback system were no longer required to be shipped only under the Brazilian flag (DOU-I, October 2, 1990).

ALIENS

On August 17, 1990, the head of the Maritime, Air, and Border Police Division of the Federal Police Department issued Service Instruction No. 3, which concerns registration of aliens and procedures to be taken as a result of misdemeanors committed by aliens. The Instruction also addresses control over monitoring of and detailed procedures for notification to leave the country, repatriation, deportation, expulsion, extradition, and naturalization of aliens in Brazil (DOU-I, October 1, 1990).

The legal status of aliens in Brazil is regulated by Law No. 6815 of August 19, 1980, as amended by Law No. 6964 of December 9, 1981. These statutes grant one of the following visas: a transit visa, a tourist visa, a temporary visa, a permanent visa, a courtesy visa, an official visa, or a diplomatic visa.

Only permanent or temporary visas allow an alien to engage in

remunerated activities in Brazil. An alien holding any other visa can neither be hired by a Brazilian employer nor perform any professional activity. Diplomatic or official visas are exempt for their specific purpose.

In addition, aliens who wish to work must obtain a work permit issued by the Ministry of Labor. To obtain a permit, an application must be completed and several documents provided to the Ministry of Labor with information on the employer and the person seeking the permit. To simplify this process, the Minister of Labor, Antonio Magri, issued Ordinance No. 3721, on October 31, 1990. The Ordinance consolidated all the rules regarding work permits and reduced the number of documents required (DOU-I, November 1, 1990).

On November 29, 1990, the Foreign Department of the Ministry of Justice published in the Official Gazette a draft bill amending the laws regulating the status of aliens (Law Nos. 6815 and 6964). This draft was made public to permit comments and suggestions from interested parties. The bill adapts the existing law to the 1988 Brazilian Constitution. It also creates, for groups of at least fifty persons, a collective tourist visa, which was formerly limited to ninety days but is now valid up to 120 days (DOU-I, November 29, 1990).

DUMPING

The new Brazilian Government, in accordance with its plan to integrate Brazil back into the international market, lowered some of its customs barriers. As a consequence, the number of goods that can be imported into the country has increased substantially.

Two Brazilian cement industries alleged — based on a comparison between the domestic price prevailing in Argentina and Uruguay and the price for sale in Brazil — that dumping was involved in one such import. On October 9, 1990, the Director of the Foreign Trade Department of the Ministry of Economy issued Circular No. 99 opening an investigation to verify the existence of dumping in the importation of cement from Argentina and Uruguay.

SECURITIES COMMISSION

The President of the Republic issued Decree No. 99609, on

October 13, 1990, transferring the main office of the Securities Commission to Brasília, the federal capital. The office was previously located in Rio de Janeiro (DOU-I, October 15, 1990).

Judicial Cooperation between Spain and Brazil

The President of the Brazilian Senate signed Legislative Decree No. 31, on October 16, 1990, thereby approving the text of the Judiciary Cooperation Agreement for Civil Matters entered into on April 13, 1989 between Spain and Brazil (DOU-I, October 17, 1990).

Telecommunications

In keeping with the objectives of the Brazilian Deregulation Program created by President Collor, Ozires Silva, Minister of the Infrastructure, on November 7, 1990, his first day in office, announced a series of deregulatory measures to be taken in the telecommunications area. The principles underlying the deregulation program are the fortification of private enterprise and the rules of free market, the reduction of state intervention, and the search for greater efficiency and less costly services on the part of the public administration. One measure taken under the deregulation program was the repeal of Ordinance No. 109/79 of the extinguished Ministry of Communications. Under Ordinance No. 109/79, Embratel held absolute control over the operation and use of data communications services.

After the repeal of Ordinance No. 109/79 by the issuance of Ordinance No. 882 on November 8, 1990, by Ozires Silva, users were afforded the option of establishing, operating, and maintaining their own network as well as providing third-party services. The Brazilian Communications Secretary now has sixty days to review the guidelines and regulations applicable to these services.

Ordinance No. 882 set a thirty-day term for the Brazilian Communications Secretary to conclude the studies necessary for the establishment of the criteria and procedures for granting cellular services to private enterprise through public tenders. There have been indications that two frequency bands will be created, one band will be utilized commercially by public utility companies and the other by private companies selected by a bid process.

Currently, only Rio de Janeiro and Brasília have, in fact, set

up cellular telephone systems after public tenders between various companies. NEC do Brasil and Elegbra Telecon, respectively, won these bids. In Sao Paulo and six other major cities, the process is still in the initial qualification stage and may be discontinued in light of the new regulations (DOU-I, November 9, 1990).

AIRLINES

President Collor continued his deregulation program by issuing Decree No. 99677 on November 8, 1990, which repealed Decree No. 72898 of October 9, 1973. Decree 72898 regulated the concession or the authorization of regular air transportation services. The airlines currently operating (VARIG, Cruzeiro, Transbrasil, and VASP) have lost their exclusivity in this field and new companies may now be formed, since the restrictions that prevailed up to now were in clear disharmony with the freedom of enterprise assured under the 1988 Constitution.

The justification that accompanied this new Decree explained the history of air transportation authorization and concluded that the best solution would be to put an end to the regulations then existing in the area. Since 1946, airlines have been the object of separate contracts that were valid for five years and extendable for another five years, but lacked any limit on the number of possible extensions. Since 1966, however, the Ministry of Aeronautics did not extend the contracts, thereby putting an end to the system that had prevailed for two decades.

For seven years, the airlines operated, in effect, without contracts and concessions were not documented. This resulted in the strange situation of the government granting concessions without corresponding documentation. In 1973, this situation was remedied, and the four concession-holders mentioned above were consolidated in their position. The then Minister of Aeronautics proposed that the President enact a legislative bill regulating the concessions made and ratifying the status quo. In response, the President enacted Decree No. 72898 of October 9, 1973, granting a fifteen-year concession to VARIG, Cruzeiro, VASP, and Transbrasil, with the possibility of renewal for an additional fifteen-year period. Decree No. 72898 completely eliminated the possibility of new competitors appearing on the scene.

In 1988, the fifteen-year concession period expired, and the extension period began. Seventeen years after Decree No. 72898's en-

actment, however, the experience illustrated the difficulty of admitting new concession-holders. Due to economic changes over the past few years, there is no longer any reason to maintain the restrictions of Decree No. 72898. A new Decree, No. 99677, was issued in conjunction with the Brazilian Air Code, Law No. 7565 of December 19, 1986. Under the new Decree, the Minister of Aeronautics will issue instructions as provided for in the Brazilian Air Code, for future commercial exploitation of regular air services, and for organization of the new companies needed (DOU-I, November 9, 1990).

Assignment of Credits — Export Notes

Export notes are very often assigned in the Brazilian market, especially when inflation is high, since they are a way of hedging against the devaluation of the cruzeiro. The transaction basically consists of an assignment of future export credit rights made by a Brazilian exporter in favor of a bank, with the assignment of credit being guaranteed by the export notes. The export notes are then endorsed over to the bank, and the bank negotiates the export note with companies wanting to hedge against the devaluation of the cruzeiro. On the maturity date, the exporter receives foreign currency in payment for its exports, exchanges the foreign currency for cruzeiros, and pays the bank. The bank then pays the hedger an amount in cruzeiros equal to the value of the export note.

The National Monetary Council, acting in accordance with the Brazilian Deregulation Program established by Decree No. 99179 of March 15, 1990, adopted Resolution No. 1762, on October 31, 1990, which consolidated the rulings regarding the assignment of credits by and between financial institutions. As a general rule, financial institutions can only assign credits to other financial institutions. Article 12 of Resolution No. 1762, however, made an exception regarding the assignment of credits from export transactions, which became known in the Brazilian financial market as export notes. The National Monetary Council allowed this exception because export notes are usually evidenced by promissory notes denominated in U.S. dollars and payable in Brazilian currency (DOU-I, November 1, 1990). On November 20, 1990, the Central Bank of Brazil issued Circular No. 1846, regulating article 12 of Resolution No. 1762 (DOU-I, November 22, 1990).

COMMERCIAL PAPER

On June 29, 1990, the Central Bank of Brazil issued Resolution No. 1723, announcing the decision of the National Monetary Council to allow the issuance of commercial paper in Brazil. This was previously not possible, since commercial paper was not recognized as a security in Brazil. The matter, however, required further regulation by the Securities Commission (CVM). Such regulation was only brought to the public by means of Instruction No. 134 of November 1, 1990.

Instruction No. 134 basically establishes the following rules regarding the supply of commercial paper on the market: the commercial paper must be in the form of promissory notes with a minimum term of thirty days and a maximum term of 180 days; the minimum value for each promissory note is 180,000 Fiscal National Treasury Bonds (BTNF) (one BTNF is equal to approximately US$0.65); the company must have a net worth equal to at least 10 million BTNF's or give a bank security guarantee; and the issue of commercial paper must be authorized by the CVM (DOU-I, November 13, 1990).

CONCORDATAS

The Brazilian Bankruptcy Law (Decree-law No. 7661 of June 21, 1945) allows a debtor engaged in trade or business to avoid bankruptcy by having recourse to *concordata* (similar to reorganization under Chapter 11 in the United States). The debtor must be temporarily unable to meet its obligations because of misfortune. A company that meets certain prerequisites may obtain debt relief by extending the maturity date of its obligations and by making partial payment of the total amount due on its debt.

On November 19, 1990, the President of Brazil issued Provisional Measure No. 266, establishing full and automatic monetary correction of the liabilities of a *concordatária* company and establishing further that the interest rate applicable to the debt would be agreed on by the creditors. When not specifically stipulated by the parties, the credits legally proven will be monetarily updated according to the variation in the National Treasury Bonds (BTNs), and the interest rate will be twelve percent per annum, from the date the *concordata* request is filed with the court. The Provisional Measure further requires full public disclosure in the financial

statements of companies resorting to *concordata*, in order to discourage fraudulent practices. Prior to the Provisional Measure, several companies resorted to *concordata* not as a means of avoiding bankruptcy, but as a means of imposing compulsory settlement with their creditors, availing themselves of the benefits created by the law in favor of the *concordatária* company. The Bankruptcy Law dates back to 1945 and does not provide for monetary correction of debts of companies under *concordata* proceedings. When a *concordata* is granted, unsecured debts remain frozen (without monetary correction) for a period of one or two years, causing the debt to become relatively insignificant over the course of time due to the high inflation rate in Brazil.

The threat of economic recession in Brazil caused the number of *concordata* and bankruptcy requests to soar in recent months. In addition, the number of companies availing themselves of *concordata* privileges inappropriately prompted the Government to take remedial action. One of the most noteworthy features of the Brazilian economic policy has been recognition of the effects of inflation on the monetary system and the resulting implementation of an indexing system, literally translated as "monetary correction." Pursuant to Provisional Measure No. 266, monetary correction will henceforth be applied to debts of companies under *concordata*. The Provisional Measure is effective as from the date of publication and will become ineffective within thirty days should it not be approved by Congress (DOU-I, November 20, 1990).

Industrial Technology Development Program

Decree-law No. 2433 of May 19, 1988 created the Industrial Technology Development Program (PDTI) with the objective of stimulating the creation of new technologies and manufacturing processes in order to reduce the costs of manufactured products. The Decree established that companies which act according to the PDTI rulings would be entitled to certain tax benefits, such as a reduction of ninety percent in the import duty due on the import of PDTI-related machinery and equipment and the refund of fifty percent of the income tax paid on amounts remitted abroad to pay for technical assistance services and royalties. However, on December 28, 1989, Law No. 7988 reduced the tax benefits mentioned above to forty-five percent and twenty-five percent, respectively. Further, on April 12, 1990, Law No. 8032 put an end to the reduction in the import duty for such cases. On November 6, 1990, the

Minister of Economy issued Ordinance No. 633, establishing that companies whose PDTI was approved before Law No. 7988 are entitled to receive fifty percent of the income tax paid on amounts remitted abroad on payment of royalties and technical, specialized or scientific assistance services, and companies whose PDTI was approved after Law No. 7988 are entitled to receive only twenty-five percent of the amounts paid by way of income tax on such remittances abroad (DOU-I, November 7, 1990).

Domestic and Foreign Credit Transactions

Article 52 of the Federal Constitution enacted October 5, 1988 requires the Federal Senate to give approval prior to contracting for foreign financial transactions by the federal government, the states, the federal district, the federal territories, and the municipalities. Article 52 further mandates that the Federal Senate determine the limits and the conditions under which foreign and domestic financial operations should be contracted by governmental bodies and their agencies. The Federal Senate has been exercising its constitutional powers to control the public debt. The goal is to eliminate the public deficit. On December 13, 1990, the Federal Senate passed Resolution No. 58, establishing the general conditions and limits applicable to domestic and foreign credit agreements involving the states, the federal district, the municipalities, and their agencies. Resolution No. 58/90 requires that such government bodies seek approval from the Senate to contract for credit transactions with foreign and domestic creditors. The Central Bank controls these transactions. Resolution No. 58/90 provides for authorization only if the debtor demonstrates, among other requisites, that the debt amount is within the established limits and that the debtor owes nothing to Social Security and other federal institutions. The limits and conditions created by Resolution No. 58/90 apply not only to contracts for credit transactions, but also to guaranties and to the issuance of treasury bonds by the states, the federal district, the municipalities, and their agencies (DOU-I, December 14, 1990).

State Government Finances

The public deficit will increase and inflation will be fueled if the chief executives from Brazilian states finance their expenses with state bank loans as advances on future income. Therefore, the

President of the Central Bank of Brazil issued Resolution No. 1775 on December 6, 1990, which prohibits the renewal of loans taken as advances on future income by state governments from their respective state banks, without prior authorization. The Resolution requires existing loans be liquidated on their maturity dates or by December 31, 1994, whichever is earlier (DOU-I, December 10, 1990).

Import/Export Control

In the early 1970s, as a reaction to the oil crisis, the Brazilian government launched a nationwide campaign to replace gasoline with alcohol. The Brazilian Alcohol Program has expanded successfully over the past two decades. Currently, about half of the private vehicles in Brazil run on alcohol. Public interest in overcoming the problems generated by the oil crisis led to subsidies for the newly founded alcohol industry.

More recently, the alcohol industry has had to confront two serious problems: the government reduction of subsidies and tax incentives for alcohol producers. The resulting increases in alcohol production costs and the decreasing cost of oil on the international market make the use of alcohol for vehicles economically unfeasible. As a result, the Brazilian market has suffered seasonal shortages of fuel alcohol which has become a serious problem for the government. Throughout 1990, substantial quantities of ethanol had to be imported by the government to safeguard and regularize the supply of alcohol, which is mixed with ethanol.

On December 13, 1990, the President of Brazil sanctioned Law No. 8117, which governs the export/import of these products, in an attempt to guarantee the domestic supply and the maintenance of an emergency stock of sugar, alcohol, and molasses. Law No. 8117/90 provides that the issuance of an export/import license, or an equivalent document, by the Department of Foreign Trade of the Ministry of Economy for sugar, alcohol, and molasses, may be subject to preliminary review by the Regional Development Office of the Presidency of the Republic until May 31, 1995 (DOU-I, December 14, 1990).

Exchange Brokerage Companies

Exchange brokerage companies can operate only on the ex-

change market, while brokerage companies can operate on the stock market as well as the commodities exchange. Until recently, the rulings regarding exchange brokerage companies were scattered within resolutions, circulars, and letter circulars issued by the Central Bank that date back to 1966.

On November 28, 1990, the Central Bank of Brazil issued Resolution No. 1770, consolidating the rulings regarding exchange brokerage companies. In addition, this Resolution also establishes certain modifications concerning the minimum net worth of such companies. Before Resolution No. 1770, the minimum net worth for these companies was 61,700 BTNs, and for each branch opened, they had to add ten percent of this amount to their capital. Under the system established by Resolution No. 1770, the minimum net worth is 100,000 BTNs (or roughly US$60,000), but exchange brokerage companies can open up to ten branches without having to raise their capital. Companies wishing to open more than ten branches must add ten percent to the minimum capital for each extra branch (DOU-I, November 19, 1990).

LEASING

Leasing transactions are basically governed by Resolution No. 980, issued by the Central Bank of Brazil on December 13, 1984. According to Resolution No. 980, only Brazilian-made products can be leased, except under certain circumstances. Foreign goods can be leased when the foreign goods are part of but represent less than twenty-five percent of the cost of the goods under the lease, when the foreign goods are to be used for the Brazilian Program of Agroindustrial Assistance (PRONAGRI), and when there is no similar item produced in Brazil and the lessee is a Brazilian leasing company that will then sublease the item to a Brazilian company or person, subject to prior approval by the Central Bank of Brazil.

On November 28, 1990, the Central Bank of Brazil issued Resolution No. 1769, allowing leasing companies to lease foreign goods without any restrictions and extinguishing the need for the preliminary approval of the Central Bank of Brazil for any subsequent subleasing transactions (DOU-I, November 29, 1990).

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