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## BRAZIL

*The following is a summary of recent legislative, judicial and administrative changes in Brazil.*

### I. LEGISLATIVE AND ADMINISTRATIVE DECISIONS

#### *Presidential Decisions*

1. *National Development Fund.* The President of the Republic signed Executive Decree No. 93.538, on November 6, 1986, regulating the National Development Fund. The Fund, which will invest in shares of stock of certain companies directly or indirectly controlled by the federal government, will function as an investment fund and aims at raising funds for a target plan prepared by the federal administration last July. In an attempt to curb the public deficit, the Decree prohibits the hiring of personnel by the Fund, which is to be managed by a board of officials of the Ministry of Finance, and provides for the transfer to the Fund of the shares of public companies to be privatized (DOU-I, November 7, 1986).

2. *Taxes.* In Decree-law No. 2.313 of December 23, 1986, the President exempted interest, dividends and income from savings accounts and mortgage bonds, from income tax, when paid or credited to individuals before December 31, 1986 by financial institutions authorized to receive savings deposits or issue mortgage bonds. The Decree also retains the 50% withholding tax on income from financial transactions of purchase and subsequent transfers or short-term redemptions of bills and securities. The National Monetary Council defines the concept of short-term, the kinds of financial transactions affected by the decree-law, and the conditions for issuance of mortgage bills (DOU-I, December 24, 1986).

Decree-law No. 2.308, dated December 19, 1986, established that in the base period ending on December 31, 1986, monetary correction would be applied to financial statements based on the value of the National Treasury Bond (OTN) pro-rata to its value on February 28, 1986 (Cz\$ 99,50). Article 2 of the same decree-law provided that, except for cases for which specific taxation is provided, income and capital gains earned by resident parties or foreign domiciliaries shall be taxed at source at the same rate appli-

cable to residents of Brazil when above 25% (DOU-I, December 22, 1986).

Decree-law No. 2.311 of December 23, 1986, states that in updating the face value of the National Treasury Bond (OTN) as of March 1, 1987 the following shall be computed: (a) the variations in the Consumer Price Index (IPC) up to November 30, 1986; and (b) the variations in the IPC or in the earnings of Central Bank Bills from December 1, 1986 to February 28, 1987, whichever is greater in each month. Further, the balances of savings accounts of the Unemployment Compensation Fund and of the PIS/PASEP Participation Fund shall be monetarily corrected according to the earnings of Central Bank Bills or other index established by the National Monetary Council (DOU-I, December 24, 1986).

Decree No. 93.939 of January 15, 1987, indicates that the table used to calculate income tax to be withheld at source from income for salaried or nonsalaried work shall be corrected by 12.3%. The deductions made in calculating the net monthly income subject to withholding tax are adjusted by the same percentage applied to the figures in effect in 1986 (DOU-I, January 16, 1987). Subsequently, the Secretary of Federal Revenue issued Normative Instruction No. 12/87, regarding the determination of net income and gross earnings for purposes of assessment of withholding income tax as from January 1, 1987 (DOU-I, January 16, 1987).

Executive Decree No. 93,335 signed on October 3, 1986, approved the regulations regarding tax incentives for contributions to cultural activities established in Law No. 7.505, dated July 2, 1986. Law No. 7.505 allowed as a deduction from gross income 100% of any donation, 80% of any sponsoring contribution, or up to 50% of any investment made in an entity previously registered with the Ministry of Culture. For an individual, the deduction cannot exceed ten percent of gross income in each fiscal year, although excess contributions may be carried over to the following five fiscal years. In the case of an entity, Law No. 7.505 allows as a business expense deduction the total amount of any donation or sponsoring contribution made to or through a previously registered entity. Moreover, 100% of the donation, up to 80% of the sponsoring contribution and up to 50% of the investment is also allowed as a deduction from the annual tax liability, provided any such deduction does not exceed two percent of the tax liability. In the case of an entity that does not make any sponsoring contribution, donation or investment within its taxable year, the new law provides for

a year-end option to contribute up to five percent of its income tax liability to a fund for the promotion of cultural activities to be managed by the Ministry of Culture. For purposes of the regulations, a donation is defined as a definite transfer of asset or cash, in favor of or through entities of a cultural nature, without any benefit to the donor. A contribution is defined as the realization by the taxpayer of expenses incurred in the promotion or publicity of cultural activities, without any direct cash benefit to the sponsor. An investment is defined as the application of assets or cash with benefit to the investor, which can be made in any entity registered with the Ministry of Culture, under direct or indirect control of individuals resident in Brazil, and involved in any of the following activities: (i) publishing houses of which at least thirty percent of published titles are by Brazilian authors; (ii) movie, video, record, theater, musical or any other cultural product companies; (iii) distribution or marketing of cultural products; or (iv) manufacturing of musical instruments, materials or equipment for plastic arts, photography and cinematography, as listed by the Ministry of Culture.

Any investment acquired for purposes of Law No. 7.505 cannot be sold or used as collateral for a period of five years. The Ministry of Culture may include any other activity in the definition of an investment. Brokerage services in regard to the listed investments are prohibited, as well as donations, sponsoring contributions or investments made by a taxpayer to related persons or affiliates. The regulations also establish the procedures and criteria to be followed for the registration of an entity as a cultural entity with the Ministry of Culture (DOU-I, October 7, 1986).

3. *Labor.* Law No. 7.543, dated October 2, 1986, amending Article 543, paragraph 3 of the Consolidated Labor Laws prohibits the lay-off of workers who belong to a professional association and who seek a leadership or representative position from the date of registration for candidacy until one year after the end of term of office, if elected. Previously, only unionized workers were protected (DOU-I, October 3, 1986).

Executive Decree No. 93.413 signed on October 15, 1986, adopts Convention No. 184 of the International Labor Organization (OIT) on the Protection of Workers Against Professional Risks due to Air Contamination, Noise and Vibrations at the Work Place, signed in Geneva on June 1, 1977. This executive decree addresses the Convention's provisions regarding preventive and re-

strictive measures against contamination of the air, noise, and vibrations, and set forth the principles and steps to be observed in enacting rules and regulations on the subject matter (DOU-I, October 16, 1986).

4. *Disposal of State Company Assets.* Following Executive Decree No. 93.216, the Secretary of the Office for Control of State Companies released Instruction Number One, dated October 16, 1986. This instruction required all state companies, their subsidiaries and branches, and all other companies under direct or indirect control of the federal government to submit a plan for the disposal of any equity participation, real property and any other asset not directly involved in the respective entity's activities prior to December 3, 1986. The proceeds from the disposal of any such assets shall be used primarily in replacement of third-party equity participation, or in new investments (DOU-I, October 22, 1986).

5. *Textile Trade.* Executive Decree No. 93.452, dated October 23, 1986, approved the agreement between the Federative Republic of Brazil and the European Economic Community on the Trade of Textile Products. The agreement with the EEC is a result of the GATT Agreement on International Textile Trade, approved by Legislative Decree No. 80, dated October 31, 1974. It sets forth the principles and rules applicable to the trade of textile products between Brazil and the EEC (DOU-I, October 24, 1986).

6. *Brazilian Consulates Closed Down.* The President signed Executive Decrees Nos. 93.370, 93.371 and 93.372 on October 9, 1986, abolishing the offices of Brazilian Consulates-General in Madrid, Tokyo, and Duesseldorf (DOU-I, October 10, 1986).

7. *Daylight Saving Time.* On October 1, 1986, the President signed Executive Decree No. 93.316 providing for the introduction of daylight saving time beginning October 25, 1986. Daylight saving time, which sets clocks one hour forward, shall last until February 14, 1987 (DOU-I, October 2, 1986).

8. *Defense of Rights of the Citizen.* Executive Decree No. 93.714 on December 15, 1986, addressed citizens' rights against federal government abuse, errors, and omissions. The Decree created a special committee within the Presidency to coordinate and carry out this objective. The activities of federal administrative agencies are subject to question if any citizen submits a petition to the Executive Branch, at any time and under any circumstances, to defend his right to contest errors, omissions or abuses of such ad-

ministrative authorities (DOU-I, December 16, 1986).

9. *Science and Technology Council.* On January 16, 1987, the President signed Executive Decree No. 93.944, establishing the Science and Technology Council (CCT) within the Science and Technology Ministry. The CCT will establish policies for the federal government's Science and Technology Plan, set forth the National Development Plan's section on Science and Technology, prepare budget proposals for plans and programs in the area, and create funds for use by domestic industry for scientific and technological development. (DOU-I, January 19, 1987).

10. *Aircraft Industry.* On January 7, 1987, the President signed Decree-law No. 2.319 authorizing MBRAER, a very successful state-owned aircraft manufacturer created in 1969, to participate in two companies, one to be incorporated in Brazil and the other to be incorporated abroad. The future Brazilian company will be in charge of aeronautical activities, while the foreign company will be involved in the promotion and marketing of the AMX, a jet fighter project resulting from a joint venture between EMBRAER and an Italian aircraft company (DOU-I, January 8, 1987).

11. *Executive Privilege.* In a case in which a federal court requested that the National Intelligence Service (SNI) disclose record data on certain individuals, the Counsellor-General issued an opinion on October 17, 1986, holding that executive privilege exempted the Executive from disclosure requirements applicable to ordinary citizens or organizations. The SNI is the federal agency in charge of implementing and coordinating intelligence and counter-intelligence activities, especially those related to national security, and is directly subordinate to the Chief of the Executive. According to the opinion, the data it collects only constitutes nonbinding preliminary information that may or may not support presidential decisions, and is objectively immune to free access by any person, entity or branch of the State by operation of Article 4 of Law No. 4.341 dated June 13, 1964. This opinion defends the position that the constitutional right to petition state authorities for information assumes that there is no secrecy as to the information requested, and only applies to those activities which have been published. The opinion was approved by the Chief of the Executive, and is to be submitted to the federal court where the case is pending (DOU-I, October 20, 1986).

12. *Seizure of Cattle by the Federal Government.* On October

9, 1986, the National Supplies Office (SUNAB), issued several ordinances in an attempt to resolve the increasing meat shortage on the domestic market. The following is a brief summary of each of the ordinances: (i) Ordinance No. 65, prohibits for a period of thirty days, the physical transfer of any cattle, except for sale or slaughtering. Any individual or company owning more than 500 head of cattle shall submit to the local SUNAB branch a certificate specifying the total number of breeding stock, milk cows, beef cattle and feeders. Any change in such data must be disclosed to SUNAB; (ii) Ordinance No. 66 establishes at Cz\$ 215 per *arroba* (a Brazilian measure corresponding to approximately 15 kilos), the sale price of cattle to stockyards. The ordinance allows for different prices, as long as retail prices remain unchanged; (iii) Ordinance No. 67, provides for the seizure of all cattle necessary to supply the domestic market. It also allows SUNAB officers to request help from federal, state or local authorities, if necessary, for the seizure to take place; (iv) Ordinance No. 68, provides for the requisitioning of the services of stockyards and slaughterhouses, including personnel and transportation vehicles, for the seizure operations determined by Ordinance No. 67. The ordinance also allows free access to the officers in charge of the seizure operations to properties where the seized cattle are kept, as well as to the books and ownership records pertaining to the cattle. It also outlines the procedures for such an operation and the procedure for any challenge thereto (DOU-I, October 9, 1986).

13. *Export Exchange Contracts.* On November 5, 1986, the Coordinator of the Tax System issued Declaratory Act No. 105. It stated that the monetary variation resulting from fluctuations in the exchange rate earned by exporters in connection with dollar deposits under export exchange contracts closed with Brazilian banks for simultaneous transfer to the Central Bank under Resolution No. 1.208, dated October 30, 1986, shall be afforded the same treatment as an export draft premium, and shall be included in the exporters' gross export income (DOU-I, November 6, 1986).

14. *Protection of Intellectual Property.* The President forwarded to Congress a bill of law on the protection of software as intellectual property. According to the bill, the production and sale of Brazilian or foreign software shall be free, while full protection is assured to the owners of the respective rights under the conditions established in the law. The bill indicates that when reproduction and sale of software has been authorized, the owner of the

software cannot withdraw it from the market nor object to technological changes, improvements or variations made by third parties authorized to reproduce or sell the software. The rights to such technological changes and derivations shall belong to the authorized party. Article 3 of the bill provides for the mandatory registration, with the Special Informatics Office of any software to be marketed, which shall be classified as foreign or domestic according to its origin. Foreign software will only be registered upon evidence of the non-existence of similar domestic software. Article 16, however, establishes that only domestic companies may distribute and market software. Distribution and marketing by foreign-controlled companies is restricted to their own software provided it can be used on equipment also manufactured by foreign-controlled companies. Moreover, Article 7, item I provides that it is not a breach of copyright law to copy software, legally acquired, as long as it is necessary for the adequate use of the software. Due to these restrictions on foreign software and their manufacturers, the bill has been the object of severe criticism in the press and is expected to draw much attention to its debate in Congress (DOU-I, December 10, 1986).

15. *Copyright Regulations.* The National Copyright Council (CNDA) issued Resolution No. 47 on February 25, 1987, regulating the procedures for registration of intellectual property as defined in Law No. 5.998 of December 14, 1973. Under Article 17 of Law No. 5.998, intellectual property is any book, brochure, letter, speech, theater play, choreography, music, film, photograph, design, picture, illustration, project, draft, applied art work, adaptation, translation or other transformation of an original work, as well as collections, compilations, encyclopedias, and certain other works within this category, which may constitute intellectual property based on their criteria of selection and organization. Resolution No. 47 specifies the documents and procedures for the registration of such property with the respective agencies listed in Law No. 5.988 (DOU-I, March 6, 1987).

On the same date, CNDA also issued Resolution No. 50, outlining the rules for the registration of recordings produced in Brazil, for the purpose of collecting and distributing the revenue from copyrights arising from the lyric use of such intellectual property. Resolution No. 50 states that the Central Collection and Distribution Office shall identify and register all recordings in accordance with technical information provided for in the resolution. Record-



ing producers shall fill out and submit an application for registration of each recording (DOU-I, March 6, 1987).

16. *Sunken Ships*. On September 26, 1986, the President of signed Law No. 7.542 regulating the research, exploration, removal and emolition of sunken, lost, submerged, or grounded ships in waters under Brazilian jurisdiction. The new law, which revokes several regulations dealing with the same subject matter, including provisions of the 136 year old Brazilian Commercial Code, covers any and all goods sunken, submerged, lost or grounded for coordinating, controlling and monitoring operations and activities regarding such assets. Items or assets shall be considered lost when the person responsible for them: (i) declares to the naval authority that they are lost; or (ii) is not known, is absent or does not express any intent of providing for a salvage or rescue operation. Assets lost or abandoned for more than five years will be considered the property of the federal government.

The naval authorities are also in charge of granting permits for research, exploration, removal or demolition of any such goods. No authorization for research, exploration, removal or demolition can be granted or subcontracted to foreign individuals or entities. This law also provides for:

(i) the immediate delivery of any assets considered federal property so recovered to the naval authorities, regardless of their value;

(ii) the preservation of any location with historical interest; and

(iii) the transfer of any property sunk, lost, submerged or grounded for more than twenty years to the federal government, provided the owners do not apply for the above mentioned authorization within one year of the publication of Law No. 7.542. Any ship sunken during the XVI, XVII and XVIII centuries shall be automatically considered federal property (DOU-I, September 29, 1986).

17. *Anti-Dumping Regulations*. On January 16, 1987, the President signed Executive Decree No. 93.941, ordering the observance of the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade (GATT). The Agreement on Article IV regulates dumping practices, broadly defined as the sale of a product in a foreign market for a price below its original market value, and regulates damages caused by such practice

(DOU-I, January 19, 1987). Executive Decree No. 93.962, signed on January 22, 1987, orders the observance of the Agreement on the Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade, executed in Geneva on April 12, 1979. The Agreement basically provides lengthy rules and procedures to be observed by each GATT member. Part One of the Agreement is a subsidy code and establishes the internal investigation and consultation procedures to be followed before anti-dumping duties are created. Part Two regulates subsidies granted by member states. Part Three permits developing countries certain exceptions to the rules applicable to the creation of subsidies. Part Four deals with situations arising from imports from countries listed in the General Agreement, which may trigger action based on this Agreement or on the Agreement on the Implementation of Article VI referred to above. Part Five regulates the Committee on Subsidies and Anti-Dumping duties. Part Six provides for the offices of the Committee on Aiding Member States to resolve their disputes. Part Seven contains the final provisions as regards acceptance, adherence and reservations to the Agreement (DOU-I, January 23, 1987).

### *Central Bank Resolutions*

1. *Investment Funds.* The President of the National Monetary Council (CMN) released two new decisions of the CMN, issued as Central Bank Resolutions on October 10, 1986: (i) Resolution No. 1.198 amends provisions of Resolution No. 1.022, dated June 5, 1985, which regulated the incorporation, management and operation of mutual investment funds organized as publicly-held condominiums. These amendments refer to the possibility of stock mutual funds having quotas in registered, endorsable or bearer form, and exclusively in registered form in the case of fixed-income mutual funds. Quotas of stock mutual funds can be issued as certificates of investment or kept in accounts on behalf of their owners. Quotas of fixed-income mutual funds shall be kept in accounts on behalf of their owners. Resolution No. 1.198 also provides that the quotas of stock mutual funds can only be redeemed 180 days after their issuance. In the case of fixed-income mutual funds, a minimum of thirty and a maximum of 180 days can elapse prior to redemption; (ii) Resolution No. 1.199 regulates short-term investment funds. A short-term investment fund is defined as a publicly-held condominium managed by a commercial or investment bank

whose funds are invested in certain twenty-eight day securities, federal and state bonds, Central Bank bills, certificates of deposit, bills of exchange and other securities authorized by the Central Bank. A short-term investment fund investment in any specific securities cannot exceed ten percent of its total funds, and cannot be made in securities other than those authorized by the Central Bank which can, at any time, determine the pro-rata distribution of invested funds per category of securities. Quotas of short-term funds can be in registered, endorsable or bearer form, and are redeemable at any time after issuance (DOU-I, October 13, 1986).

2. *Commodities Contracts Regulations.* The National Monetary Council (CMN) issued Resolution No. 1.197 on September 25, 1986, authorizing the Central Bank of Brazil to establish the conditions for the negotiation of contracts traded on the commodities and futures exchanges relating to feeders and beef cattle. The Central Bank has the authority to: (i) establish limitations as to contracts that can be kept open for a client or group of clients; (ii) limit the number of months any contract can be kept open; (iii) determine the minimum guarantees required for any trading; and (iv) adopt any other measure that may become necessary. The resolution followed Central Bank intervention in the commodities and futures exchanges earlier in September, which suspended all trading in feeders and beef cattle, and which aimed at avoiding speculation with meat and livestock future quotations (DOU-I, September 26, 1986).

3. *Foreign Debt — Phase III.* On October 24, 1986, the Central Bank of Brazil released Circular Letter No. 1.492, establishing the rules applicable to Phase III of the Brazilian foreign debt rescheduling. Phase III involves all accounts that matured during 1985 and were deposited with the Central Bank of Brazil on behalf of the foreign creditors in foreign currency denominated accounts. Accordingly, the amounts deposited with the Central Bank can be lent again or converted into investment on or before September 4, 1987. Circular Letter No. 1.492 provides that in relending transactions a minimum period of seven years with a sixty-month grace period is observed. The conversion of debt into equity can be made provided requests include an effort to: (i) maintain the funds in Brazil for a minimum period of time to be established; (ii) not repatriate any other investment by the same company, and (iii) not transfer the investment during the same period. Circular Letter No. 1.492 did not revoke Circular Letter No. 1.125 which provided

that credits acquired abroad at a discount can only be converted into equity up to the amount actually paid for the credit (DOU-I, October 28, 1986).

4. *Foreign Debt Relending.* The Central Bank issued Circular No. 1.089, dated November 13, 1986, which established a ceiling of US\$ 50 million for relending transactions to private borrowers, during the month of November 1986, of the amounts matured during 1985 and deposited with the Central Bank of Brazil (DOU-I, November 14, 1986).

The Central Bank then issued Circular No. 1.121, dated January 30, 1987, which established a ceiling of US\$100 million for relending transactions to private borrowers, during the months of January and February, of the amounts matured during 1985 and deposited with the Central Bank . (DOU-I, February 2, 1987).

Finally, the Central Bank issued Circular No. 1.145 on March 20, 1987, which established a ceiling of US\$300 million for relending transactions to private borrowers, during the months of March and April, of amounts matured during 1985 and deposited with the Central Bank (DOU-I, March 23, 1987).

5. *Foreign Investment on Brazilian Stock Exchanges.* Circular Letter No. 1.519, instructs the managers of foreign capital investment funds or portfolios on the procedure for registration with the Department of Control and Registration of Foreign Capital. Different documents must be submitted for each type of investment to be registered. Foreign investments in the Brazilian securities markets were granted tax incentives last July, when the Executive, by means of Decree-law No. 2.285, dated July 23, 1986, exempted from income, tax income earned by foreign capital investment funds and portfolios maintained in Brazil. Distributions by any such fund or portfolio to foreign investors are subject only to withholding income tax at the rate of fifteen percent (DOU-I, December 5, 1986).

6. *Dealings in Foreign Exchange.* On January 28, 1987, the Central Bank released Resolution No. 1.250, providing that investment banks may deal in foreign exchange, provided the conditions established in Resolution No. 663 of December 17, 1980 are met. It states that if an investment bank is under the common control of a commercial bank, the controlling shareholder shall opt for only one institution to deal in foreign exchange. However, if an investment bank has minority shareholders, double authorization may be

granted. The Central Bank shall issue rules regarding minimum capital and net worth required for dealing in foreign exchange (DOU-I, January 29, 1987).

7. *Tax Rates on Short-Term Transactions.* On January 14, 1987, the Central Bank issued Resolution No. 1.246, amending the provisions of Resolution No. 1.242 which had established new rates of withholding income tax as of January 1, 1987. Resolution No. 1.246 provides that forward transactions with certificates of deposit and bills of exchange issued by credit, finance and investment companies are not short-term transactions for purposes of determining the applicable withholding income tax rate. Last year, high tax rates on short-term transactions with liquidity instruments were introduced. These tax rates were aimed at creating incentives for long-term investment but have now been dropped, as inflation grows and government debt instruments are rapidly being issued to the market. For monetary policy and deficit reasons, item II of Resolution No. 1.246 designates a thirty-five percent rate for all registered or book-entry liquidity instruments traded through the Special Settlement and Custody System. Until now, the thirty-five percent rate was only applicable to private liquidity instruments. In the case of bearer liquidity instruments, Resolution No. 1.246 establishes a rate of forty-five percent (DOU-I, January 1, 1987).

8. *Central Bank Resolutions on Tax.* The Central Bank issued several resolutions at the end of the year, the most important of which are the following:

(a) Resolution No. 1.232, dated December 9, 1986, reduced the rate of tax on financial transactions applicable to the acquisition of foreign exchange for remittances abroad in case of payments due to (1) differences of weight, type, quality and/or price of exported goods, when the amount thereof has already been received by the exporter, (2) liabilities arising from court or arbitration awards or out-of-court settlements in connection with Brazilian exports, (3) expenses resulting from guarantees for forward transactions made on foreign commodity exchanges when linked to draw-back imports authorized by the Foreign Trade Department (CACEX), and (4) returns of foreign exchange for reimported Brazilian products (DOU-I, December 22, 1986);

(b) Resolution No. 1.234, dated December 30, 1986, reduced to zero the rate of the tax on financial transactions with stock market indices (DOU-I, December 31, 1986);

(c) Resolution No. 1.242, dated December 30, 1986, set forth new rates of withholding income taxes from January 1, 1987. For purposes of taxation of transactions subject to monetary updating, any income in excess of the earnings of the Central Bank Bill will be taxed. In pre-established income transactions, the taxable income will be eighty percent of the total nominal income. Central Bank Bills will not be included in the balance sheet of companies and in the income tax return. Certificates of Deposit with post-established income shall be subject to a rate of thirty-five percent at source for registered certificates, and of forty-five percent for bearer certificates. In the case of bills with pre-established income, the real income from the bill is determined at twenty percent, to which withholding tax will apply at rates depending on whether the beneficiary is or is not identified. The definition of short term for financial investments is reduced to twenty-eight days and the rate of income tax from sixty to forty percent (DOU-I, December 31, 1986).

9. *Appointment of Officers in Financial Institutions.* The Central Bank released Circular Letter No. 1.105 on January 8, 1987 regulating item XIII of Resolution No. 1.021, dated June 6, 1985. Resolution No. 1.021 fully regulated certain requirements for the filling of managerial positions. Circular Letter No. 1.105 provides that:

(i) financial institutions shall submit to the Central Bank, prior to their election or appointment, the names of the persons to be elected or appointed to the various management positions established in the institution's by-laws;

(ii) both the institution and its management shall fully disclose to the persons to be elected or appointed to managerial positions, the provisions of article 147 of the Brazilian Corporation Law;

(iii) due compliance with items (i) and (ii) above shall be registered in the corporate act of election of such officers. In the case of an appointment, due compliance with the requisites set forth above shall be made in a signed statement to be submitted to the Central Bank together with other required documents; and

(iv) the Central Bank may refuse to grant authorization if the above conditions are not met (DOU-I, January 9, 1987).

10. *Central Bank Resolutions on Foreign Exchange.* At a meeting held on October 30, 1986, the National Monetary Council

adopted several decisions which were then issued as resolutions of the Central Bank.

(i) Resolution No. 1.203 allows banks to enter into foreign exchange arbitrage transactions with their clients to allow protection, as regards their future payments and receivables, against the risk of fluctuation in the parity between foreign currencies;

(ii) Resolution No. 1.208 allows exporters to make U.S. dollar deposits with Brazilian banks in connection with export exchange contracts for simultaneous transfer to the Central Bank of Brazil;

(iii) Resolution No. 1.209 extends the possibility of making deposits in foreign currencies according to limits and conditions to be established by the Central Bank to: (a) borrowers of import financing; and (b) companies located in Brazil that receive foreign capital investment (DOU-I, October 31, 1986).

The Central Bank also issued Resolution No. 1.223, dated November 27, 1986, reducing to zero the withholding income tax rate for all income earned by exporters, importers and subsidiaries of multinational companies as a result of deposits in foreign currency made at the Central Bank (DOU-I, November 28, 1986).

The above resolutions represent an attempt to create incentives for Brazilian exporters not to trade foreign currencies, especially U.S. dollars, on the parallel market, where exchange rates are usually far above the official exchange rate. The foreign currency deposits will earn interest based on LIBOR.

11. *Investment Funds.* Since its creation in December 1976, the Securities Commission (CVM) has shared with the Central Bank of Brazil the role of monitoring and regulating the Brazilian capital and equity markets. Law No. 6.385, dated December 7, 1976, provided that the CVM would be in charge of regulating publicly-held companies and the securities issued by them, leaving to the Central Bank the regulation of other instrument markets and financial institutions. Doubts arose as to whether such apportionment favored an efficient regulation of the market.

A change occurred in March 1987 when the National Monetary Council (CMN) decided that the CVM would be responsible for regulating certain equity investment funds. The following CMN decisions were released.

(i) Resolution No. 1.280 of March 20, 1987, gave the CVM the authority to regulate investment funds, with the exception of limits on prices and commissions, and consolidated the regulations ap-

plicable to such funds.

(ii) Resolution No. 1.289, of March 20, 1987, consolidated all the rules applicable to foreign portfolio investment on the Brazilian capital markets. CVM is now in charge of regulating most practices related to foreign portfolio investment.

The Central Bank also released Resolution No. 1.286 on March 20, 1987, which regulated fixed-income investment funds, which remain subject to full Central Bank regulation. These measures increase the CVM role on the market and signal a possible future restriction of the Central Bank's regulatory powers in the area (DOU-I, March 23, 1987).

12. *Foreign Investment in the Stock Market.* On November 29, 1986, the President of the National Monetary Council (CMN) approved, by means of Resolution No. 1.224, the regulations applicable to foreign investments in the Brazilian stock markets. Foreign investments can be made in two ways: the foreign capital investment fund, and the managed portfolio. A third mechanism existing since 1975 — the foreign capital investment company — is no longer available.

Resolution No. 1.224 extends to investment funds and other entities determined by the CMN, the tax treatment applicable to foreign capital investment companies, and exempts from income tax, any income earned in connection with securities.

The foreign capital investment fund is a securities condominium organized in Brazil with the participation of individuals or legal entities. The legal structure is basically the same as that of mutual funds available on the Brazilian market. The foreign investor acquires quotas of the investment fund and his investment is registered at the Central Bank of Brazil. This investment must remain in Brazil for at least ninety days, after which the proceeds from the liquidation of the investment (by redemption of the quota) may be repatriated. The Resolution requires that at least seventy percent of the fund's aggregate value consists of shares of publicly-held companies acquired on the stock exchanges, on the over-the-counter market or by subscription. Further, the income earned by the investment fund is tax-free, but the proceeds of such income are subject to a fifteen percent income tax upon distribution in cash to foreign investors. Any capital gain made upon redemption of the fund's quotas also benefits from income tax exemption.

The managed portfolio is a major innovation in terms of for-



eign investment on the Brazilian capital market. The managed portfolio can now be made directly by the foreign investor. The investor must be a collective investment entity established abroad, whose own securities are traded on the over-the-counter market or stock exchange in its country of origin. It is thus the foreign collective investment entity which raises the necessary funds on the foreign markets by means of public issues of its own shares. Once these funds have been raised abroad, the entity can make the investments on the Brazilian capital market by maintaining a diversified portfolio of bonds and securities in Brazil. This structure has been called the "Brazil Fund".

The portfolio is managed by two managers: one foreign and the other Brazilian. The latter may be an investment bank, a brokerage house or a securities dealer. The following are exempt from withholding income tax: (a) the income paid or credited to the portfolio by the issuers of the portfolio's bonds and securities; and (b) the capital gain made on the transaction. The income distributed to the foreign investor will be subject to income tax at the rate of fifteen percent. The capital gain made on the liquidation of the foreign investment is also tax-free.

### *Securities Regulations*

Decree-law No. 2.298, dated November 21, 1986, gave the Securities Commission (CVM) the specific authority to monitor and regulate companies benefitting from funds derived from fiscal incentives, and to regulate the negotiation and intermediation of securities issued by such companies. This step is taken to ensure market access to securities issued in connection with incentives and to protect investors against irregularities as to issuance and trading performed by officers and controlling shareholders. CVM shall further ensure investors full corporate disclosure by monitoring and regulating both the distribution and trading of tax-incentive stocks and bonds.

The CVM issued Instruction No. 56, dated December 1, 1986, which established a minimum par value, and the grouping of shares. It also created a standard form for share certificates issued by publicly-held companies. As from June 1, 1987, the shares of publicly-held companies may not have a par value of less than Cz\$ 1.00. The grouping of shares is a consequence of the February 28, 1986, monetary reform which created a new currency, the cruzado.

The minimum par value deters stock splitting after grouping under Instruction No. 56 (DOU-I, December 12, 1986).

On December 17, 1986, the CVM issued Instruction No. 57 which provides the rules for updating the financial statements of publicly held companies. Such updating shall be based on the variation of the National Treasury Bond (OTN) on a pro-rata basis. This measure signals the return of inflation on the Brazilian corporate scene (DOU-I, December 18, 1986).

The CVM released Instruction No. 59 on December 22, 1987. It provides the rules for the preparation and publication, of changes in the net worth of publicly held companies. Under the Brazilian law, publicly held companies must annually publish accounting and financial statements, disclosing a balance sheet, profit or loss statement, income statement for the respective fiscal year, statement on the origin and allocation of funds and statement on changes in their net worth (DOU-I, December 30, 1986).

Pursuant to Instruction No. 59, CVM Release No. 309, dated December 17, 1986, provides an explanation of each financial statement or balance sheet account required by law to be included in the financial statements and establishes the safe-harbor rules and standards to be observed (DOU-I, December 30, 1986).

The Commission also released Instruction No. 60, dated January 14, 1987, regulating the registration procedures applicable to companies interested in having their securities traded on the stock exchanges and on the over-the-counter market. Instruction No. 60 consolidates all regulations so far enacted by the Commission on the subject; it revokes Instructions No. 32, dated March 16, 1984, No. 39, dated November 7, 1984, and No. 41 of January 3, 1985. Only securities issued by companies registered with the Commission can be traded on the stock exchanges and on the over-the-counter market. Any request for registration not answered by the Commission within thirty days of its filing shall be considered approved. This thirty-day period may be interrupted once by the Commission to request further documents.

#### *Foreign Trade Department*

1. *Suspension of Imports.* The Foreign Trade Department (CACEX) issued Communiqué No. 172/87, containing a list of products for which import licenses are temporarily suspended. The list includes animals, several food products, beverages, chemicals,

dyes, rubber products, paper, fibers, glass products, tools, household appliances, automotive and other vehicles and parts, toys and photographic equipment (DOU-I, January 23, 1987).

2. *Exporter and Importer Register*. Communiqué No. 168, issued on October 28, 1986, informed importers and exporters that they could not engage in business unless registered with the Exporter and Importer Register except in certain situations (DOU-I, November 4, 1986).

3. *Reform of the Cruzado Plan*. On February 28, 1986 the federal government took drastic action against inflation by creating a new currency, the cruzado, to replace the cruzeiro, and by establishing a total price freeze for a period of one year. The monetary reform is known as the Cruzado Plan. Inflation has stabilized at a monthly rate of around two percent, compared to a fourteen percent monthly inflation rate before the Plan. Now almost ten months old, the Plan has caused a tremendous surge in consumer and industrial demand, which, in turn, has increased employment. However, the Plan also led to a shortage of certain products on the market. The Executive Branch has now announced the enactment of a full reform of the Cruzado Plan, which includes the correction of certain basic prices, increases in indirect taxes and the value-added tax, reorganization of the federal administration, extinction of certain state companies and offices, and new regulations for the financial markets.

4. *Tax Regulations Applicable to Compulsory Loans*. In an attempt to reduce consumption, the federal administration enacted a tax reform in July 1986 which established a mandatory contribution by the public in the form of a compulsory loan on sale of alcohol, passenger automobiles, and gasoline for automotive vehicles. The loan, included in the purchase price of the respective product, adds twenty-eight percent to the price of alcohol and gasoline; thirty-five percent to the price of new vehicles; twenty percent to the price of vehicles up to two years old; and ten percent to the price of vehicles more than two years old and up to four years old. The loan is redeemable in the third year after payment. The Secretary of the Federal Revenue Office has released Normative Instruction No. 142 clarifying that the compulsory loan payable on the acquisition of alcohol and gasoline cannot be considered a business expense, and is not deductible. Upon announcement by the federal administration of the national average consumption per vehicle, any difference between amounts actually paid and the national av-

erage is to be considered an operating gain or loss (DOU-I, December 31, 1986).

5. *Income Tax on Services.* On October 8, 1986, the Minister of Finance issued Ordinance No. 314 reducing to three percent the withholding income tax rate applicable to payments for professional services rendered to entities. The rate had been five percent (DOU-I, October 9, 1986).

6. *Trade Barrier Office.* The Minister of Finance issued Ordinance No. 339 on November 11, 1986, creating a Trade Barrier Office within the Office of Coordination of International Affairs of the Ministry of Finance. The Trade Barrier Office will assist in matters of interest concerning barriers to Brazilian exports as a result of anti-subsidy/dumping proceedings brought against Brazil. The Office shall also take part in any negotiations and assume the defense of Brazilian exporters in the respective legal proceedings (DOU-I, November 13, 1986).

7. *Importation of Used Equipment.* On October 27, 1987, the National Council on Foreign Trade, issued Resolution No. 148, authorizing the Foreign Trade Office (CACEX), to approve import applications for used machinery, equipment or instruments. For approval, the machinery, equipment and/or instruments have to: (i) be used by the importer directly in the production process; (ii) not be produced in Brazil, nor be satisfactorily replaced by any domestic counterpart; (iii) be of interest to the national economy, and aim at accelerating expansion programs of domestic production or exports; (iv) not be older than ten years, as of the date of the application, in the case of precision equipment to be used in serial production or tooling, and in the case of work usually done under conditions that accelerate physical deterioration by corrosion, shock or vibration; (v) not be older than twenty years, as of the date of the application, in the case of heavy equipment and of equipment of exceptional volume to be used in machining but not in serial production. The Resolution No. 148 also also requires that certain data on the machinery, equipment or instruments be disclosed by the importer, but allows for a waiver under certain circumstances (DOU-I, January 23, 1987).

8. *Trade Registration.* The National Trade Registration Department (DNRC) issued the following normative instructions: (a) Normative Instruction No. 10, dated October 29, 1986, deals with the notarization of signatures on documents submitted to the Trade Registry. According to the instruction, the local Trade Reg-

istry will only receive powers of attorney granted by private instrument and documents originating abroad if the signatures have been previously certified by a Notary Public. This certification will not be required for documents originating abroad if this formality has already been met by the Brazilian Consulate; (b) Normative Instruction No. 12, dated October 29, 1986, deals with the registration of the corporate acts of *limitada* companies and other commercial companies. Accordingly, the ordinary registration procedure shall apply to *limitada* companies, limited partnerships, general partnerships and capital and industry partnerships, if a legal entity or a non-resident participates in the capital of the company or partnership (DOU-I, October 30, 1986).

9. *Commercial Registry Regulations.* The National Trade Registration Department (DNRC) issued on October 2, 1986, several rules and regulations for registering corporations with the state commercial registries. The most important regulations are: (i) Normative Instruction No. 7, authorizing the filing of amendments to articles of incorporation which are not signed by all partners in the following cases: (a) where the articles of incorporation provide for decisions to be taken by a majority vote; (b) where a managing partner is excluded from the management of the company by a majority vote; (c) where partners are excluded as allowed by law, independently of the terms of the articles of incorporation. In the case of exclusion of a partner, the respective documentation shall only be filed if it indicates the facts and the cause for the exclusion, the legal provision supporting it and the action to be taken as regards the excluded partner's participation in the capital; and (ii) Normative Instruction No. 8, waives the filing of mandatory publications of corporate acts required under corporation law, provided the minutes submitted for filing specify the name, page and date of the newspaper where the act was published. It requires that acts published in official papers shall also be published in the Official Gazette of the state where the corporation's head office is located. All such documents must be certified by an attorney duly registered with the Bar (DOU-I, October 8, 1986).

### *Miscellaneous*

1. *Informatics.* The Special Informatics Office (SEI) issued the following ordinances dated November 3, 1986: (i) Ordinance No. 364, creating Special Commission No. 24 on Crossborder Data Flow, for the purposes of identifying and evaluating relevant mat-

ters regarding crossborder data flow and for proposing recommendations on the subject; (ii) Ordinance No. 365, creating Special Commission No. 25 on Technical Informatics Services, for the purposes of suggesting and evaluating relevant matters regarding technical informatics services and of proposing recommendations on the subject; and (iii) Ordinance No. 366, creating Special Commission No. 26 on Integration of Digital Treatment of Data, for the purposes of identifying and evaluating relevant matters regarding the integration of digital treatment of data and of proposing recommendations on the subject (DOU-I, November 5, 1986).

2. *Re-enrollment of Foreigners.* The Minister of Justice issued Ordinance No. 559 dated November 7, 1986, which regulates the legal status of foreigners in Brazil and requires one form for the identity of foreigners having a temporary or permanent visa or enjoying asylum in Brazil. All foreigners must re-enroll at the Federal Police Department within ninety days from January 2, 1987 (DOU-I, November 10, 1986).

3. *Offsetting of Credits.* The Secretary of Federal Revenue also issued Normative Instruction No. 5/87, which allows individual and corporate taxpayers, who owe taxes to the National Treasury, to use any federal tax refund or reimbursement to which they are entitled to offset their tax liability (DOU-I, January 14, 1987).

4. *Technical Cooperation between Canada and Brazil.* By exchange of notes on October 22, 1986, the Government of the Federative Republic of Brazil and the Government of Canada entered into a Supplementary Agreement with the Project for Technical Cooperation to instruct Brazilian tax auditors regarding computerized tax auditing (DOU-I, November 20, 1986).

5. *Cooperation between Argentina and Brazil.* In Ordinance No. 967, dated October 30, 1986, the Secretary of Federal Revenue established a work group to: (i) study the procedures and regulations of Argentine customs services for purposes of making them conform to Brazilian customs services; (ii) define and propose topics for such studies, including the adoption of common bilingual forms; and (iii) enter into negotiations with other entities intervening in the passenger, baggage and imported or exported products clearance process, for the purpose of clarifying procedures and rules to expedite custom clearance (DOU-I, November 3, 1986).

6. *Brazil/Uruguay Customs Service.* The Secretary of Federal Revenue issued Ordinance No. 1.075 on December 4, 1986, institut-

ing a work group within the Federal Revenue Office to: (i) study the procedures and regulations of Brazilian and Uruguayan customs services; (ii) define and propose topics for such studies, including the adoption of common bilingual forms; and (iii) enter into negotiations with other entities intervening in the passenger, baggage and imported or exported products clearance process, for the purpose of clarifying procedures and rules. This action, which follows the signing of bilateral trade agreements between the two countries and an identical approach to Brazilian/Argentine customs procedures last October, is part of the Brazilian attempt to increase and facilitate trade relations between Argentina and Uruguay (DOU-I, December 5, 1986).

7. *Agreement on Economic Complementation with Argentina.* On July 29, 1986 the Presidents of Brazil and Argentina signed an Act for Brazilian-Argentine Integration and twelve other protocols dealing with capital goods, wheat, food supply, trade expansion, binational companies, financial matters, investment funds, energy, biotechnology, economic studies, reciprocal information and assistance in case of nuclear accidents and emergencies, and aeronautical cooperation. The Act was followed by the establishment of work groups to study and propose new rules and procedures to facilitate trade between the two countries. Further, an Agreement on Economic Complementation between both countries has now been signed. The agreement, executed within the structure of the Montevideo Agreement, was enacted by Executive Decree No. 94.017 dated February 11, 1987. Its provisions deal with the production, trade and technological development of capital goods, and provide for the duty-free importation of certain products to be considered as domestic products by both countries, as well as the elimination of all non-trade barriers for any such imports. Article Four establishes a trade volume equivalent to US\$4 billion for the next four years. The agreement also provides for a surplus limitation to avoid excessive trade deficits by any of the signatories and a list of products which may benefit from its provisions (DOU-I, February 12, 1987).

8. *Economic Cooperation between Brazil and Argentina.* On December 10, 1986, the governments of Brazil and Argentina signed reports issued by the Commission for Execution of the Program of Integration and Economic Cooperation between both countries, containing decisions and regulations applicable to the Protocols signed in July of last year (DOU-I, March 11, 1987).

9. *Cooperation Agreement with Belgium.* Considering that Congress had approved a Scientific, Technological and Industrial Cooperation Agreement with the Government of the Kingdom of Belgium, the President signed Executive Decree No. 94.010, on February 10, 1987, ordering the observance of the Agreement's provisions. The Agreement provides for mutual cooperation in the scientific, technological and industrial areas through the exchange of knowledge, information and documentation, the organization of visits and delegations of specialists or any other form of cooperation determined by mutual agreement of the two countries. It also provides for the mutual granting of administrative, customs and tax benefits for imports of materials to be used in projects under the Agreement (DOU-I, February 11, 1987).

10. *Disposal of Public Land.* The Minister of Development and Agrarian Reform issued Ordinance No. 213, on September 26, 1986, establishing rules applicable to the disposal of government lands occupied by farmers. The federal administration shall dispose of the land to create family or condominium properties, but only for individuals or families that: (i) do not own any rural property; and (ii) depend on agriculture or cattle raising for their support. The Ordinance requires prospective "acquirors" to reside on the property. This Ordinance also provides for a minimum area to be sold to each prospective acquiror, according to the respective activity so as to avoid creating properties that are either too large or too small. The disposal regulated by the Ordinance is to be made at market value, and the financing shall take into account the economic capacity of the acquiror and the return on the investment to be made in the property. An initial period of five years must elapse before final title to the property can be granted. The Ordinance is another step in the regulation of the agrarian reform now being implemented by the federal administration (DOU-I, September 29, 1986).

11. *Pension Funds.* Decree-Law No. 2.296, dated November 21, 1986, establishes a special ruling for transformation or merger of non-profit public pension funds into corporations. Companies can deduct from their income tax liability an amount equal to their respective tax rate to  $\frac{2}{3}$  of the amounts spent in the fiscal year in a private pension fund program contracted with an open pension fund, in favor of their employees and managers. This incentive shall also apply to stockholders in a civil or commercial company.

Contributions paid by companies will not be considered part



of the remuneration of employees, for labor, social security or union contribution purposes, nor will they be an integral part of the basis of calculation for the Unemployment Compensation Fund. Employees will not be required to include such corporate contributions in their taxable income.

Contributions by individuals to private pension plans may be deducted from their taxable income up to Cz\$ 100.000,00 per year. The same limit will be observed for subscription to private pension plans. If the individual participating in the private pension plan exercises his redemption right within five years, the amounts withdrawn must be included in his income tax return.

Decree-Law No. 2.296 also sets forth the rules applicable to merger and transformation of non-profit, open, private pension funds into corporations, when effected on or before December 31, 1992. Any companies that invest in non-profit private pension funds in order to transform them into corporations can deduct these expenses for income tax purposes, up to the amount of the minimum capital set by the National Private Insurance Council for non-profit open pension funds.

12. *Sliding Scale for Wages.* Decree-Law No. 2.302, dated November 21, 1986, provides that all salaries, labor compensation, pensions, retirement income and remuneration will be automatically adjusted by the accrued variation in the Consumer Price Index (IPC), whenever such accrual reaches twenty percent over a twelve-month period. Under Article One, this adjustment will not exceed twenty percent. If the accrued IPC variation in the period were to exceed this percentage, any excess would be computed in subsequent calculations.

The Decree restricts application of the sliding scale to a determined and known twelve-month period, and provides that the automatic adjustment will be considered as an anticipation of the subsequent salary review. A progressive countdown will be initiated with regard to the sliding salary scale. If the twenty percent accrual is not attained, the salary review will be carried out in accordance with the indices reached to that point. Since the February 28 monetary reform, workers are entitled to an automatic adjustment equal to sixty percent of the IPC, the other forty percent being subject to negotiation.

13. *Deindexation of the Economy.* Decree-Law No. 2.290 of November 21, 1986, established guidelines for the deindexation of

the Brazilian economy. These new provisions are summarized below.

OTNs issued after March 1986 will keep their value of Cz\$ 106,40 until February 28, 1987. Commencing March 1987, the National Monetary Council (CMN) will establish the criteria for adjustment of the OTN.

Balances in savings accounts will be corrected in accordance with Central Bank Bill; interest rates set forth under the corresponding legislation will remain in effect. Interest rates on savings account deposits will be at least six percent per annum, and may be increased at the discretion of the CMN.

Only contractual obligations with a term of twelve months or more may have a clause for free adjustment by the parties, linked to sectorial price and cost indices that may not include exchange variation. Contractual obligations on the financial markets will be regulated by the CMN.

Lease agreements for a period of twelve or more months may contain a rental review clause. The semi-annual correction usually adopted is now prohibited.

The CMN shall regulate time deposits at financial institutions and other companies authorized to operate by the Central Bank of Brazil, including companies subject to the same shareholding control, or associated companies. Financial institutions that do not receive deposits from the public may issue debentures, provided that prior authorization of the Central Bank of Brazil has been obtained.

The wording of Article 15 of Decree-Law No. 2.284, dated March 10, 1986, has been amended. The new text provides that the Central Bank will establish the minimum periods to be observed by authorized institutions for receipt of fixed term deposits and issuance of bills of exchange.

Debts resulting from claims proven in extrajudicial liquidation proceedings will be adjusted pursuant to the OTN variation. Financial institutions closing their respective liquidation proceedings on or before March 1, 1987 shall have their liabilities updated according to the variation in the OTN index.

14. *Reindexation of the Economy.* Almost three months after enacting extensive deindexing legislation, the President signed Decree-Law No. 2.322, which establishes that contracts may be adjusted according to the indices of the National Treasury Bond

(OTN). Article 2 freezes the cruziero-cruzado conversion rate at Cr\$ 5.057,42 to each cruzado. This measure has become an absolute necessity as inflation has reached the monthly rate of fifteen percent and the economy virtually has stopped due to the impossibility of adjusting contractual relations (DOU-I, February 27, 1987).

Following the general reindexation rules set forth above, the President signed Decree-law No. 2.323 of February 26, 1987, providing for the monetary updating of tax obligations as from their payment dates. The Decree also provides rules for the determination of corporate income tax in OTNs, the monetary adjustment of penalties under tax laws, and the rules applicable to taxes due and not paid (DOU-I, March 5, 1987).

The President also enacted Executive Decree No. 94.042 on February 18, 1987, which establishes the rules applicable to the monetary adjustment of contracts entered into with the federal administration. Accordingly, adjustment clauses can be made as from January 1, 1987. Contracts without adjustment clauses may be amended to provide for monetary updating in accordance with the OTN index (DOU-I, February 20, 1987).

On February 26, 1987, the Central Bank released Resolution No. 1.265, establishing that the value of National Treasury Bonds would be updated monthly. From July onward, the OTN value will be updated monthly in accordance with the rate of return of the Central Bank bills. The same indexation rules apply to the balances in savings accounts, in the Unemployment Guarantee Fund and in the PIS/PASEP Participation Fund (DOU-I, February 27, 1987).

## II. JUDICIAL AND ADMINISTRATIVE DECISIONS

### *Out-of-Court Settlements by the Federal Administration*

On December 26, 1984, the Brazilian Navy torpedo-boat destroyer *Sergipe* and the Italian liner *Eugenio C* collided off the coast of the State of Rio de Janeiro. The collision which resulted in damages to both ships estimated at US \$3,000,000 for the liner and US \$500,000 for the destroyer. Investigating committees determined concurrent fault by both ships. Consequently, the lawyers for the Italian liner proposed an out-of-court settlement to the Ministry of Navy that each party should bear its own damages.

The question then arose as to whether the federal government could settle reciprocal damages out of court without any legislative authorization. The proposed settlement would involve waiving the jurisdiction of the Maritime Court to adjudicate the case and waiving the participation of a federal public attorney. The settlement was refused by the Ministry of Navy based on the argument that the conclusions of both investigation committees were not legally final to determine fault and that the jurisdiction of the Maritime Court could not be waived by the Navy. A member of the Office of the Counsellor General dissented from argument of the Ministry of Navy alleging, *inter alia*, that the public administration could not dispose of public assets without legal permission to do so. The case was then brought to the Counsellor-General who issued an opinion, dated December 22, 1987, holding that the general principle of the supremacy of law, does not allow for settlements without express legal permission. However, the opinion stated that the federal administration was expressly authorized to settle its cases with third parties. Article 5 of Law No. 6.825 provides that settlements can only be made *in judicio*, once a case had been filed. Under Brazilian law, the federal administration can not waive the judicial review of settlements in disputes in which it is involved. Therefore, any settlement in the case would have to be made under the supervision of a court (DOU-I, December 24, 1987).

#### *Sale by Ascendent to Descendent*

The express consent of the other descendent to validate a sale by an ascendent to a descendent, as required under Article 1.132 of the Civil Code, is of a personal nature and does not require the authorization of the descendent's spouse, even if the marriage is under the universal common property ruling. (Decision of the First Panel of the Federal Supreme Court on Extraordinary Appeal No. 109.789-2 - DJU of November 21, 1986).

#### *Contract in Foreign Currency*

The "aval" guarantor of a company in "concordata" is liable for the foreign currency debt until actual payment thereof (Decision of the First Panel of the Federal Supreme Court on Extraordinary Appeal No. 110.593 - DJU of November 14, 1986).

*Collateral Estoppel in Antitrust Cases*

In three cases in which the federal administration appealed decisions that overruled decisions by the federal antitrust regulatory agency, the Fourth Panel of the Federal Court of Appeals ruled that the decisions by the federal antitrust agency were only administrative acts and therefore, subject to full judicial review. The Court held that the Judiciary does not act *ultra vires* when verifying the propriety and legal basis for the regulatory agency's decisions. In all three cases, the Court denied the federal administration's appeal (DJ, December 4, 1986).

*Services Agreement*

In Resolution No. 4/86, the Higher Labor Court unanimously approved Precedent No. 256, which established that "except in the case defined in Laws No. 6.019/74 and 7.102/83, it is illegal to employ workers through an intermediary company because the employment relationship is established directly with the party receiving the services" (DJU, September 30, 1986).

*Transfer Tax on Spin-off*

The Federal Supreme Court did not accept an extraordinary appeal filed against a decision requiring the payment of transfer tax on the transfer of real property as a result of partial spin-off (Decision of the Second Panel of the Federal Supreme Court on Extraordinary Appeal No. 111.027-9 - DJU of December 5, 1986).

*Possession of Foreign Currency*

False information given in the income tax and property returns and attempts to secretly take large sums of foreign currency to another country, if are not proven to be owned by the passenger or a third party, constitutes fraud subject to the maximum penalty (Decision of the Fourth Panel of the Federal Court of Appeals on Civil Appeal No. 66.496, DJU of August 7, 1986).

*Income Tax-Expropriation*

Indemnity for expropriation is not subject to income tax because the phrase "including by expropriation" in Article 31 of De-

cree-law No. 1.598/77 is unconstitutional (Decision of the Fourth Panel of the Federal Court of Appeals on Civil Appeal No. 105.972, DJU of February 5, 1987).

For tax purposes, goods are deemed to be lost if they are missing upon entry into Brazilian territory, whereupon the party considered liable by the customs authority shall indemnify the National Treasury for the taxes that were not paid. The maritime agent that performs its specific duties is liable for the taxes and is not held equivalent to the carrier for the purposes of Decree-law No. 27/66. Any tax exemption enjoyed by the importer cannot be extended to the carrier if it is liable for the tax obligation resulting from average or loss. In cases of average or loss of imported goods, the currency conversion rate is the rate prevailing on the date on which the loss of the goods is determined (Decision of the Fifth Panel of the Federal Court of Appeals on Civil Appeal No. 93.006, DJU of February 12, 1987).

#### *Supreme Court Decision on Breach of Price Freeze*

Early last year, during the Cruzado Plan, the manager and the owners of a retail outlet were accused of breach of the price freeze established by Decree-law No. 2.283 of February 28, 1986. A *habeas corpus* was filed to avoid their identification as criminals at the local police department. A police investigation was also initiated to determine liability for a crime against the public economy. The case was similar to thousands of criminal cases brought against businesses throughout the country during the price freeze. The defendants denied the breach of the price freeze and alleged that the State Public Attorney did not have jurisdiction since the National Supplies Agency was in charge of monitoring the application of the price freeze rules. The *habeas corpus* was denied by the State Court of Appeals, and an appeal was filed with the Supreme Court.

After hearing the arguments on appeal, the Second Panel of the Supreme Court held that a price freeze is only a deterrent and that breach of such a freeze requires only administrative sanctions. Only a breach of an official price list can be considered a criminal act. According to the Court, when a public authority freezes prices, it merely restrains further price increases, which must remain at their previous market level. Notwithstanding the fact that Article 35 of Decree-law 2.284 had provided the price freeze equivalent to

an official price listing, there was no way to identify the point at which the transgression occurred. Therefore, no criminal act was committed by the defendants. The appeal was granted by the Supreme Court. *Antonio L.R. de Oloveira et al. v. Court of Appeals of the State of Parana* R.H.C. 64-802-9, slip op. (Supreme Court, February 17, 1987) (Sec. Panel), *over'd*.

### *Registration of Trademarks*

The following are not eligible for registration as a trademark: the name of a literary, artistic or scientific work; theater play, movie film, official sports competition or game or the like, if it can be transmitted by means of communication; or a printed artistic design, except goods, products or services with the express consent of the respective owner or author. The protection afforded to intellectual works also extends to their title (Decision of the Fifth Panel of the Federal Court of Appeals on Appeal in Writ of Mandamus No. 112.053, published in DJU on February 26, 1987).

### *Operating Expenses*

The expenses incurred in the base period in which the company begins operating cannot be treated as pre-operating expenses for purposes of deferral to subsequent fiscal years, even if such expenses refer to months prior to the date of first operation (Decision of the First Chamber of the First Taxpayers Council on Judgment No. 101-036, published in DOU-I of March 12, 1987).

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