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BRAZIL

The following is a review of legal and economic developments in Brazil.

INDUSTRIAL AND FOREIGN TRADE POLICIES

Since the 1930s, Brazil has taken several measures to develop its national industry. These measures involve restrictions on imports and the creation of tax incentives for local industries. The goal for industrial development was the replacement of foreign goods with locally produced goods. On August 27, 1945, in accordance with the industrial policy then prevailing, Decree-law No. 7903 prohibited the concession of patents for pharmaceutical products and products resulting from chemical processes, as a way to stimulate the development of the chemical and pharmaceutical industries in Brazil without the payment of royalties.

Today, the Brazilian gross national product is the eighth highest in the world, but the protection of domestic industry from foreign products by means of import restrictions still exists. In addition to stimulating the development of the Brazilian industrial complex, this protectionism has reduced the competitiveness of Brazilian products in the international market. Thus, Brazilian products are of lower quality with higher prices than their foreign counterparts.

On June 26, 1990, the Minister of Economy, Zélia Cardoso de Mello, announced the new guidelines for the industrial and foreign trade policies of the new administration. These guidelines are based on the idea of opening up the market to foreign products, thereby stimulating market competition and the development of local industries. As a result of this new policy, several Brazilian statutes regarding foreign trade will be reformulated, especially Law No. 7232 of October 10, 1984 (the Informatics Law), which created a market reserve for the domestic informatics industry; Law No. 7646 of December 18, 1987, which regulates software protection; and Law No. 5772 of December 21, 1971 (the Industrial Property Code), which regulates the concession and protection of trademarks and patents.

Also on June 26, 1990, the Ministers of Justice, Foreign Af-

fairs, and Economy, along with the National Secretary for Science and Technology, issued Joint Ordinance No. 370 which created a committee to draft a bill adapting the Industrial Property Code to these new guidelines. The draft is due before March 20, 1991.

INTERNATIONAL TREATIES

Under Articles 49 and 84 of the Brazilian Constitution, international treaties must be approved by the Congress and ratified by the President before becoming effective. Recently, a double taxation treaty and an extradition treaty, respectively, have been approved by Congress and ratified by the President.

Brazil and Hungary signed a double taxation treaty on June 22, 1986. On June 22, 1990, the Brazilian Congress issued Legislative Decree No. 13, approving that treaty. To become effective, the treaty must now be ratified by the President. The treaty is designed to avoid double taxation and tax evasion. Among other countries, Germany, Japan, France, Spain, Austria, Portugal, Canada, and Italy each now have double taxation treaties with Brazil.

According to Brazilian law, a person can be extradited from Brazil only if there is an extradition treaty between Brazil and the interested country or if there is a specific agreement for that purpose, which is entered into between the two countries on a case-by-case basis. On February 2, 1988, Brazil signed an extradition treaty with Spain, which was approved by Congress in Legislative Decree No. 75 of November 29, 1989. On June 22, 1990, President Collor issued Decree No. 99340 ratifying and thus bringing into effect the provisions of the extradition treaty.

FOREIGN TRADE DEPARTMENT (DECEX)

After his inauguration on March 15, 1990, President Fernando Collor issued Provisional Measure No. 150 which changed the structure of the Presidency of the Republic and of the Ministries. The Ministry of Economy absorbed the Ministries of Planning and Treasury and was subdivided into twelve specific departments, including the National Monetary Council, the National Private Insurance Council, and the National Secretary of Economy.

Also on March 15, the President issued Decree No. 99180, detailing the new structure of the presidency and of the ministries introduced by Provisional Measure No. 150. Article 161 of Decree

No. 99180 created the Foreign Trade Department (DECEX) which is a federal agency in the Department of the National Secretary of Economy. On May 10, 1990, Decree No. 99180 was partially revoked by Decree No. 99244, but DECEX remained as originally conceived.

Pursuant to Article 165 of Decree No. 99244, DECEX and CACEX have the same authority. DECEX's powers include issuing import and export licenses, monitoring Brazilian customs, and establishing foreign trade guidelines. DECEX will gradually assume all of the functions previously performed by CACEX, which will be discontinued. On June 26, 1990, the Minister of Economy issued Ordinance No. 354, which transferred from CACEX to DECEX the responsibility for maintaining the lists of exporters and importers created by Law No. 4557 of December 12, 1964 and Decree-law No. 1427 of December 2, 1975. The purpose of the lists is to identify individuals, companies, and entities who are qualified and permitted to take part in foreign trade and can provide useful information to improve Brazilian foreign trade.

FUTURES, OPTION, AND FORWARD MARKETS

On June 6, 1990, the Securities Commission (CVM) issued three instructions. First, Instruction No. 120 revoked Instruction No. 104. Instruction No. 104's main objective was to establish regulations designed to restrain any manipulation of futures, option, and forward markets. These rules were so severe that they effectively paralyzed market negotiations. Instruction No. 120 was designed to reactivate the market by providing for a reduction of about thirty percent of the minimum margin that must be deposited with the stock exchange to guarantee these transactions and allowing the deposit to be made in gold, certificates, unconditional letters of guarantee, or federal bonds, in addition to legal tender, the only form allowed under Instruction No. 104. Instruction No. 120 also mandates that futures and option transactions must be liquidated on the day following the closing day of the transaction.

Second, Instruction No. 121 allows brokerage companies dealing with the shares of certain companies to register with the stock exchange. These brokerage companies will be called "special brokers" and will be subject to specific rules issued by the Securities Commission.

Third, Instruction No. 122 requires brokerage companies and

the superintendent general of stock exchanges to identify investors trading on the stock exchanges. Any transaction made without the identification of the investor is an infraction punishable by a fine of up to 3,000 National Treasury Bonds, BTNs (one BTN is currently equivalent to approximately US\$0.72).

PRIVATIZATION CERTIFICATES

Privatization Certificates (CPs) were created by Law No. 8018 of April 11, 1990, as a mechanism for private entities to acquire state-owned companies. CPs must be acquired by financial institutions and insurance companies and are to be used to pay for shares of state-owned companies. The conditions for the compulsory acquisition of CPs were established by Resolutions Nos. 1709 and 1710, issued by the Central Bank of Brazil on May 14, 1990. Financial institutions must acquire CPs in an amount equal to at least three percent of their current assets and long-term realizable assets posted on the balance sheet on December 31, 1990 or equal to eighteen percent of their net worth, whichever is lower. Insurance companies must acquire CPs in an amount equivalent to at least ten percent of their technical reserves. Institutions wholly-owned by the states are not obliged to purchase CPs.

Immediately after publication of Resolutions Nos. 1709 and 1710, financial institutions and insurance companies raised concerns regarding the terms and conditions for the acquisition of CPs. As a result of this reaction, the Central Bank of Brazil issued Resolution No. 1721 on June 29, 1990, revoking Resolutions Nos. 1709 and 1710 and establishing new conditions for the compulsory acquisition of CPs. In practical terms, very little was changed by the new resolution. Then, on September 17, 1990, the Minister of Economy issued Ordinance No. 550 authorizing institutions required to acquire CPs to pay the acquisition price for such CPs through the conversion of existing credits with the federal government, according to the following percentage limits:

- 1) up to ten percent of the installments due in September and October 1990;
- 2) up to fifteen percent of the installments due in November and December 1990;
- 3) up to twenty percent of the installments due in January and February 1991; and

4) up to twenty-five percent of the installments due in March through June 1991 (DOU-I, September 18, 1990).

On July 13, 1990 the Central Bank issued Resolution No. 1730 extending the compulsory acquisition of CPs to closed private pension plan entities, insurance companies, capitalization companies, and open private pension plan entities.

COMMERCIAL PAPER

Commercial paper is short-term, negotiable credit instruments used in business transactions, such as bills of exchange, drafts, and notes. Commercial paper is used by companies to obtain funds in the market at costs lower than the cost of the money in the financial market. In the past, Brazil did not allow the use of commercial paper because commercial paper was not recognized as a security by the Securities Commission. However, some Brazilian companies have already issued commercial paper in foreign markets as an alternative to foreign financing.

Pursuant to Article 2, Item III of Law No. 6385 of December 7, 1976 (which created the Securities Commission), the National Monetary Council has the authority to decide whether a paper is a security or not. On June 29, 1990, the Central Bank of Brazil issued Resolution No. 1723, announcing the decision of the National Monetary Council to consider as a security the promissory notes issued by corporations for sale in public offers, provided that such promissory notes are not issued by financial institutions. Therefore, commercial paper can now be issued on the Brazilian market under the supervision of the Securities Commission, which will issue supplementary rulings on this matter.

OPENING-UP OF FUEL PRICE CONTROL

Automobiles in Brazil run mainly on hydrated ethyl alcohol and gasoline. To encourage consumers to buy cars that run on alcohol, the executive branch issued Decree No. 97450 of January 13, 1989 mandating that alcohol, which gives less mileage per liter than gasoline, cost twenty-five percent less than gasoline. Moreover, the prices of oil by-product fuels have been under strict government control. Since 1973, the sale of fuels at prices other than those stipulated by the National Petroleum Council have been strictly forbidden.

The Brazilian economy has been under government control for so long that Brazilians are accustomed to the situation. The role of the government—federal and state—in all aspects of the Brazilian economy is very significant. It is estimated that the government is directly or indirectly responsible for more than sixty percent of Brazil's gross national product. In an attempt to modernize the Brazilian economy through strengthening free enterprise by reducing government intervention, the Minister of Economy, Zélia Cardoso de Mello, and the Minister of Infrastructure, Ozires Silva, issued Joint Ordinance No. 712 of July 2, 1990, which allows the government to set the maximum price for alcohol and gasoline and allows retailers to sell them to consumers at prices under the limit, as they deem appropriate.

LIBERALIZATION OF AUTOMOBILE IMPORTS

For quite some time, imports have been subject to strict restrictions. Import controls were intended to stabilize Brazil's balance of payments during times of economic crisis and to stimulate the growth of Brazilian industry. The restrictions ranged from a total prohibition on specific goods, to temporary prohibitions on other goods and the imposition of heavy taxes on importation of superfluous goods. Foreign products with domestic counterparts either were prohibited or made subject to prohibitive taxation and were not eligible for tax or fiscal incentives.

In an attempt to open up the Brazilian market to foreign trade, the Foreign Trade Department of the Ministry of the Economy issued Ordinance No. 2 of July 3, 1990. The purpose was to stimulate competition and thereby to force the revitalization of Brazilian industry. New rules were established for the importation of tractors, trucks, cars, and motorcycles. Long prohibited, these products could now be imported subject to the following limitations:

- 1) only new vehicles can be imported, provided they have been directly exported by their manufacturers from their country of origin;
- 2) only legal entities duly registered with the Foreign Trade Department will be admitted as importers;
- 3) entities importing diesel engine vehicles must comply with the existing legislation regulating the use of diesel fuel;

4) automobile manufacturers are permitted to import components up to ten percent of the total F.O.B. value of their exported vehicles in the previous fiscal year; and

5) the price subject to the import duty shall appear on the original manufacturer's invoice and may not be less than that on the F.O.B. updated price list for export.

Unfortunately, there exists criticism that bureaucratic procedures for the registration of imported vehicles with the appropriate government agency are complex, and it will be difficult to derive much benefit from these new measures.

DEPOSIT OF FOREIGN CURRENCY IN THE CENTRAL BANK OF BRAZIL

Law No. 4131, enacted in 1962, established the legal system of foreign capital registration and controlled exchange in Brazil. This law covers virtually all forms of investment, including loans, equity capital, and property investments. The law created a sliding scale for income taxation, permitted the government to establish priorities for new investments, and established guidelines for the use of hard currency reserves. The law specifically recognizes the right of the Brazilian government in times of severe balance-of-payment crises to restrict the amount of profits from foreign investments in Brazil remitted abroad.

Withholding tax is levied at the standard rate of twenty-five percent. However, remittances in excess of an average of twelve percent per annum of registered capital over a three-year period are subject to additional withholding tax.

In the past, because economic activity in Brazil increased and inflation was relatively moderate, foreign investors had no interest in remitting the greater part of their profits abroad, choosing instead to reinvest them in Brazil. For quite some time, the remittance abroad of profits, royalties, repayment of short-term debt, or other types of remittances could be arranged through private institutions authorized to deal in exchange transactions. In the eighties, as a consequence of economic crises and huge foreign debt, Brazil suffered a massive outflow of capital and the current account deficit. In January 1989, the Central Bank of Brazil issued Resolution No. 1564, which centralized currency exchange in the Central Bank of Brazil. All remittances abroad, except for payment for imports with terms of less than 360 days and payment for tourism services, would have to be made through the Central Bank of Brazil, which

would approve such remittances within 180 days on a case-by case basis.

On April 20, 1990, to stem the outflow of foreign currency through financial institutions dealing in exchange transactions, the Exchange and International Affairs Department of the Central Bank of Brazil issued Circular No. 1684. The Circular mandates that institutions authorized to deal in exchanges are obliged to deposit with the Central Bank any foreign currency exceeding US\$1,000,000 as verified by their daily purchase position.

On May 10, 1990, the Central Bank established through Circular No. 1725 that funds already deposited with the Central Bank would be remitted in twelve equal monthly installments starting on September 16, 1991. Simultaneously, the Central Bank of Brazil issued Communiqué No. 1099, which excludes from this centralization of exchange all remittances made after the date of issuance of the Communiqué related to dividends on shares of Brazilian companies, profits on investments in the securities market, profits on foreign financial institutions, repatriation of investments, and subsidiary and branch profits.

These foreign exchange control measures conflicted with the government's new economic policy to open up the Brazilian economy thereby generating much controversy. In response, the Exchange and International Affairs Department of the Central Bank of Brazil issued Circular No. 1768 of July 4, 1990 mandating that funds deposited with the Central Bank prior to May 10, 1990, relating to foreign investors' profits, cash and stock dividends, and return on investments, would be released weekly until December 1990, within a limit to be periodically established by the Central Bank and following the chronological order in which the requests were filed. Finally, on July 20, 1990, the Central Bank of Brazil issued Communiqués Nos. 2144 and 2145, determining that all remittances abroad related to payment of interest and principal of loans duly registered with the Central Bank will be subject to the above-mentioned exchange centralization.

Alternatively, however, Circular No. 1785 of July 27, 1990, as regulated by Circular Letter No. 2105 of the same date, authorizes the Central Bank of Brazil to accelerate settlement of these exchange transactions, provided that two conditions are met:

a) the funds in question are being used for risk investment in Brazil in keeping with foreign capital legislation (Law No. 4131/62,

as amended) and

b) the foreign investor assumes a commitment to keep the new investment in Brazil until at least June 30, 1991.

Release may be authorized for either an increase in capital of the Brazilian company that gave rise to the remittance overseas or the incorporation of a Brazilian company. It is also feasible to assign the investment credit to another foreign investor, if the foreign investor makes a commitment to keep the investment in Brazil until June 30, 1991. The corresponding funds will be released by actual settlement of the exchange transaction for remittance abroad and simultaneous making of a new exchange transaction that corresponds to the actual entry of the foreign currency for the new investment.

The remittance of profits and dividends and of capital returns relating to the new investment will be subject to deposit under either Resolution No. 1564/89 or Circular No. 1768/90. As a result, exchange transactions of this type contracted henceforth will be liquidated in two days for payment abroad in foreign currency.

CHILD AND ADOLESCENT STATUTE

On July 13, 1990, the President of the Republic signed Law No. 8069 creating a new statute pertaining to children and adolescents. The statute consolidates several administrative, civil, and criminal legal provisions and revokes the Minors Code (Law No. 6697 of October 10, 1979) and other legislation. The new statute is comprised of 267 articles that contain protections for children (defined as individuals under 12 years of age) and for adolescents (individuals between 12 and 18 years of age).

The statute also contains provisions concerning the guardianship and curatorship of minors, criminal infractions and misdemeanors committed by children or adolescents, procedural rules for adoption and the determination of parental authority, the role of the public prosecutor, and other related issues. For instance, adoption by foreigners domiciled abroad is governed by the statute. It requires prospective adoptive parents to live with the adopted child in Brazil for a minimum period of time, so the court can observe the child's adaptation to the new family. If the child is under two years of age, the minimum time is fifteen days. If the child is over two years of age, the time period is thirty days.

INFORMATICS POLICY

As repeatedly promised by President Collor during his election campaign, several measures of international significance have been passed to open up the Brazilian informatics market. The first positive consequence of opening the informatics market was the recognition by the United States Trade Department (USTD), which deleted Brazil from its Super 301 blacklist.

On September 11, 1990, President Collor issued Provisional Measure No. 222, that established and created a new structure for the Science and Technology Office. The office will plan, coordinate, supervise, and control all activities related to science, technology, research, and development in specific areas, as well as draft and implement the informatics and automation policy. This office includes, among others, the Brazilian Informatics and Automation Council (CONIN) and the Department of Informatics and Automation Policy. Recently, several changes have been made in the Informatics and Software Law which regulate the informatics industries and the software market.

On September 13, 1990, the Minister of Economy issued Ordinance No. 536 creating a Special Commission that will have thirty days to present the guidelines for the revision of the Software Law, eliminating the similarity examination for computer programs, cutting the exclusivity of domestic companies in software trading, and reevaluating the actual registration and software enrollment system.

COURT INJUNCTIONS

On March 18, 1990, the executive branch issued Provisional Measure No. 173, which established that the courts could not grant preliminary injunctions, writs of mandamus, or any precautionary measures of any kind filed against the rules created by the New Brazil Plan. Because Provisional Measure No. 173 was not examined by the Congress within thirty days of its publication, therefore losing its force, the executive branch republished it as Provisional Measure No. 182 on April 23, 1990. For the same reason, the executive branch issued Provisional Measures Nos. 186 on May 23, 1990; 192 on June 22, 1990; and 198 on July 26, 1990. Finally, on August 23, 1990, the Congress approved Provisional Measure No. 198 as Law No. 8076 (DOU-I, August 24, 1990).

IMPORT FINANCING

With the objective of opening up the Brazilian market to foreign trade and thereby stimulating competition and fostering the modernization of the Brazilian industrial park, the Minister of Economy reduced the "ad valorem" import duty on more than 1,500 products, from raw materials to machinery. In some cases, the rate was reduced to zero. In a further attempt to facilitate imports, the Central Bank of Brazil issued the following resolutions regarding import financing:

1) Resolution No. 1740 of August 30, 1990, repealing Circular No. 787 issued on June 22, 1983, which prohibited import financing by Brazilian finance companies;

2) Resolution No. 1749 of September 13, 1990, suspending the need for external financing for imports of more than US\$200,000 established by Resolution No. 1537, when such imports involve machinery, equipment, and instruments to be used by the importer with an "ad valorem" import duty of zero; and

3) Resolution No. 1751 of September 21, 1990, suspending the need for external financing established by Resolution No. 1537 for all imports with import licenses issued after September 24, 1990, provided that the exchange contract for payment of such imports is executed before March 31, 1991.

Resolution No. 1537 mandates that imports that exceed the annual total of US\$200,000 are subject to minimum financing periods under the following basic conditions:

<u>Type of Import</u>	<u>Up to US\$200,000</u>	<u>Over US\$200,000</u>
Machinery, equipment vehicles, and aircraft	Free	2 years
Components, parts, etc.	Free	181 days
Raw materials	Free	90 days

FEDERAL DEREGULATION PROGRAM

The Federal Deregulation Program, established by Decree No. 99179 issued on March 15, 1990, intends to strengthen free enterprise and reduce government intervention in the economy, thereby reducing the costs of public services. Pursuant to this program, President Collor signed two decrees on August 24, 1990. Decree

No. 99472 created the Special Export Document to replace all the various documents involved in the export of jewelry and precious stones, such as the export license and the export declaration. The Special Export Document will be issued by the seller of the goods when making the sale. Decree No. 99476 specifies all cases when tax and contribution clearances are required and simplifies the procedures.

MISDEMEANORS BY CORPORATE OFFICERS

The Brazilian Corporation Law (Law No. 6404 of December 15, 1976) refers to a number of wrongful acts by managers or officers of corporations. However, no penalties were provided in the law. This oversight was resolved when the Securities Commission (CVM) released Instruction No. 131 on August 17, 1990, which stated that such misdemeanors would be punishable by the suspension of the officers that perpetrated the acts from trading on the securities market. In addition, infractors would be held liable for any damages suffered by third parties. The law is directed to abuses of power by the controlling shareholder, nonobservance of the duties of diligence and loyalty and the duty to inform, the misuse of power by officers of the company and members of the audit committee, irregular payment of dividends, and the transfer of control of a publicly-held company without preliminary authorization from CVM.

CONSUMER PROTECTION CODE

In a determined effort to promote free enterprise by modernization of the producer/consumer relationship and to encourage competition in order to fortify the consumer market, President Collor signed Law No. 8078 on September 11, 1990 creating the Consumer Protection Code. The Code is the first of its kind in Brazil, and it establishes the guidelines for consumer protection in keeping with the 1988 Federal Constitution.

The new Code—which will take effect 180 days after publication (March 10, 1991)—comprises 119 articles and deals with a broad range of topics. These include basic consumer rights, health and consumer safety protection, producer's liability and obligations, misleading advertising, abusive practices, and contractual protection.

In the event of infractions, the Code provides for sanctions varying from imprisonment to fines, the possibility of temporary suspension of the violator's rights, publication at the violator's expense of news on the facts and the sentencing of the violator, and the rendering of services to the community. The bail bond for infractions of the Code will be set by the court, or by the authorities making the investigation, at between 100 and 200,000 National Treasury Bonds (BTNs) (approximately US\$70 to US\$140,000).

EXPORT FINANCING

On August 16, 1990, the Central Bank of Brazil issued Circular No. 1803 establishing that financial institutions located overseas could make foreign currency advances directly to Brazilian exporters for the purpose of financing the export of agricultural and agro-industrial products. This would be considered a pre-shipment settlement of the exchange contract, a document necessarily issued when an import or export takes place in Brazil.

On September 11, 1990, the Exchange Department of the Central Bank clarified the above circular by its Letter Circular No. 2113, which contains the following guidelines:

- 1) if there is such financing, the exporter has 360 days to actually ship the goods sold;
- 2) if shipment is to be made after 360 days, then special authorization from the Foreign Trade Department (DECEX) will be required and given on a case-by-case basis;
- 3) payment of interest on the advance will have to comply with the ceilings indicated in Letter Circular No. 2113;
- 4) if the export does not in fact take place for reasons of *force majeure*, the Central Bank will consider the return of the amount of financing but without interest; and
- 5) failure to comply with the provisions of Letter Circular No. 2113 will subject the Brazilian exporter to penalties, which include the possibility of DECEX's not allowing any further receipt of pre-shipment financing.

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