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LEGAL MEMORANDUM

BRAZIL

The following is a brief summary of several legislative and administrative rulings, and several judicial and administrative decisions of the Brazilian government which may affect foreign trade and investments in Brazil.

I. LEGISLATIVE AND ADMINISTRATIVE RULINGS

New "Package" of Economic Measures

The Federal Government, following approval by the national Monetary Council, has announced a series of economic measures which are designed to improve Brazil's economic situation. The following is a summary of the major items in the "package", all of which were published in the Official Gazette on June 10, 1983:

(a) Decree-Law No. 2027, amends the income tax legislation to provide that, beginning July 1, 1983, earnings of individuals or companies from transactions on the open market will be subject to a withholding tax of 4% as an advance payment of the tax which will be due when the recipient files his income tax return;

(b) Decree-Law No. 2028, amends the income tax laws regarding wage and salary income and income from other work. Now, wage and salary earnings are exempt from taxes up to Cr\$ 144,000 per month net; above that level the taxation will be progressive, from 12% to 45% — the latter rate applying to net earnings above Cr\$ 2,552,000 per month. Income from other work will be exempt up to the level of Cr\$ 48,000 per month; thereafter the tax is progressive from 10% to 45%, the highest rate applying to earnings above Cr\$ 2,552,000 per month;

(c) Decree-Law No. 2029, amends the income tax laws to establish that the taxable profit of companies is to take into account the exchange variation of obligations which have an exchange parity clause insofar as such changes exceed the variation in the par value of Readjustable National Treasure Bonds (ORTINs). The excess may be (i) calculated fully or partially as a business expense, (ii) computed, fully or partially, as an increase in the cost of

fixed assets, or (iii) deferred for later repayment. The new Decree-Law also contains other provisions dealing with the repercussions of the recent maxi-devaluation of the cruzeiro;

(d) Decree-Law No. 2030, amends the income tax laws to increase the amount of the withholding on earnings that would be taxed on an income tax return by 10% during the period from July 1, 1983 through December 31, 1983. The measure also creates a 3% withholding tax on payments by companies for services rendered by professional (civil) companies. The additional 10% withholding tax does not apply to wages and salaries, interest paid on passbook savings accounts or on interest obtained from short-term purchases or transfers of securities;

(e) Decree-Law No. 2031, provides that financial institutions shall pay their income tax in twelve monthly installments. The installments for the months of July-December will be paid as prepayments, those from January to April as twelfths of the estimated tax due, and those for May and June as quotas covering the balance of the tax actually due according to the completed income tax return. Prepayments of tax due in 1984 on 1983 income will be made beginning in July, 1983;

(f) Decree-Law No. 2032, provides for compensation of up to 50% of the investments made in the semiarid regions of Northeastern Brazil by the national treasury;

(g) Ordinance No. 135 of the Ministry of Finance sets the dates on which the banks that are part of the federal revenue collection system must turn over the federal taxes they have collected to Banco do Brasil;

(h) Ordinance No. 136 of the Ministry of Finance, revokes Ordinance No. 29/81 and establishes new deadlines for the payment of income tax withheld by the payor source. In cases where any kind of equity-in-interest is transferred, payment is to be made at the time of the transfer. In the other types of cases listed in the ordinance, payment is to be made no later than the last day of the subsequent fifteen-day period. The ordinance also lists certain instances in which the payment will be made at intervals other than the one described above;

(i) Resolution No. 827 of the Central Bank increases the interest rates and monetary correction factors on rural and agro-industrial credit;

(j) Resolution No. 828 of the Central Bank raises the percent-

ages of interest charged on rural and agro-industrial credits that were granted under terms that call for such periodic readjustment of the interest rates;

(k) Resolution No. 829 of the Central Bank extends the term of rural financing in certain areas affected by drought;

(l) Resolution No. 830 of the Central Bank reduces the Tax on Financial Transactions and on credit transactions, except on those consumer or final user credits given by credit, financing and investment companies and by the Caixa Econômica Federal;

(m) Resolution No. 831 of the Central Bank provides that the Bank will periodically establish ceilings on the expansion of the operations of financial institutions and leasing companies and will apply significant monetary and operating penalties on companies which do not observe such limits;

(n) Resolution No. 832 of the Central Bank sets new percentages for the total costs of the program for financing production for export, and for the special rediscount lines granted to banks authorized to deal in exchange;

(o) Resolution No. 833 of the Central Bank orders commercial banks, and development and investment banks to deposit an amount equivalent to 20% of the increase in the value of their time deposits over their value on the base date, (i.e., June 30, 1983) with the Central Bank until they have paid an amount equal to 10% of the balances of such deposits;

(p) Resolution No. 834 of the Central Bank amends Resolution No. 695/81 which set interest rates on the financing of working capital for micro, small and medium-sized businesses. The new resolution provides for a monetary correction on these transactions, as well as interest at rates ranging from 3% to 5% per annum, depending on the region where the companies are located;

(q) Resolution No. 835 of the Central Bank abolishes the limit on credit to which the financial institutions in Brazil had been subject;

(r) Resolution No. 836 of the Central Bank revokes Resolution No. 744/82 in order to establish new criteria for determining the cost of Resolution No. 374/76 transactions (revolving lines of credit made available by Central Bank to assist credit, financing and investment companies with their liquidity needs). As a general rule, the rate of credit granted within the Resolution 374/76 limits will be 9% per annum, while the rate on credit granted outside those

limits will be 18%. Monetary correction will apply in both cases. Monetary correction equivalent to 85% of the change in the value of the ORTN will be incorporated into transactions involving demobilization of the financial institution's assets;

(s) Resolution No. 839 of the Central Bank establishes the commission to be credited to Banco do Brasil and Caixa Econômica Federal in order to cover the costs of collecting and controlling the contributions and distributing the earnings under the Profits Participation Program (PIS);

(t) Circular No. 783 of the Central Bank explains that the assessment of the IOF tax at a zero rate in cases where there is a liquidation of exchange transactions in payment for imports or services connected with the promotion or defense of Brazilian exports (Resolution No. 823/83) is conditioned on the submission, by the purchaser of the foreign currency, of a document issued by the Central Bank expressly recognizing that the transaction meets the requisites of that Resolution.

Waiver of Examination of "Similarity" on Imports

The President of the Republic has signed Decree-Law No. 2033 of June 15, 1983 which provides that the examination of "similarity" to Brazilian goods may be waived for imports of equipment, machinery, apparatus, instruments, parts, accessories and tools which have previously been imported for use in projects approved by SUDENE or SUDAM (respectively, the Development Authorities for the Northeast and for Amazonia). The following conditions must be met, however: (a) the items must appear in project approved on the basis of legislation prior to Decree-Law No. 1428/75 or in projects submitted to SUDENE or SUDAM previous to that date and subsequently approved for tax exemption or reduction in taxes; and (b) they must have been cleared through customs under guarantee of liability commitment or surety that was formalized before the recent Decree-Law took effect (DOU-I, June 16, 1983).

Financing of Imported Goods

The Central Bank of Brazil, through Circular No. 787/83, has explained that the financial institutions known as "credit financing and investment companies" may not grant any type of financing to

purchase goods of foreign origin (DOU-I, June 23, 1983).

Additional Restrictions on Manufacture of Informatics Equipment by Foreign Firms

A new normative Act (No. 24/83) from the Office of the Special Secretary for Informatics serves to lengthen the list of informatics equipment items which may be manufactured only by companies whose capital and effective control is in the hands of Brazilians. The recent act includes digital apparatus and equipment for testing and measuring instrumentation systems, all of which are used to treat data concerning physical dimensions, such as testing and measuring instrumentation, analytical instrumentation and biomedical equipment (DOU-I May 31, 1983).

Disposal of Real Estate and Corporate Stockholdings

In Decree-Law No. 2.041 of June 30, 1983, the President of the Republic extended the period in which companies shall enjoy income tax exemption on capital gains earned as a result of sales of real property or of corporate stockholdings from June 30, 1983 to December 31, 1983. This exemption was granted under Decree-law No. 1.892/81, as amended by Decree-Law No. 1.978/82. The exemption will amount to 100% if the property is sold or the stockholding assigned before December 31, 1983 (DOU-I, July 1, 1983).

Reduction of INPC Index

The President of the Republic signed Decree No. 88.482 of July 5, 1983 authorizing the Brazilian Institute of Geography and Statistics (IBGE) to determine the National Consumer Price Index (INPC) without considering any increases caused by the elimination of government subsidies on the prices of oil, wheat and their respective by-products (DOU-I, July 6, 1983).

Change of IPI Tax Rates

The President of the Republic signed Decree No. 88.505 of July 12, 1983 to alter the rates of the Tax on Manufactured Products (IPI) to 25% for diesel-powered vehicles and to 10% for alcohol-powered vehicles (DOU-I, July 13, 1983). The President then signed Decree No. 88.539 on July 29, 1983 to increase the IPI tax

rates on soft drinks, refreshments and nectars to 40% and on beer to 80% (DOU-I, July 21, 1983).

Government Guarantees for Foreign Loans

The President of the Republic signed Decree-law No. 2.048 of July 26, 1983 which increases the limits within which the federal government may guarantee foreign loans taken to finance government programs for works and public services by 40%. It also provides for the same increase in the limits within which the National Treasury may guarantee credits granted by international organizations to the states and municipalities of Brazil. These limits are subject to monetary correction at the beginning of each month based on the indices for correction of the Readjustable National Treasury Bonds (ORTNs). The 30% limit established in article 8 of Decree-Law No. 1.312/74 was increased to 40% of the annual average of Brazilian exports over the three years preceding the year of the financing (DOU-I, July 27, 1983).

Remittances Abroad Centralized

The Central Bank of Brazil issued Resolution No. 851 of July 29, 1983, determining that all remittances of foreign currency abroad which liquidate exchange contracts closed as of August 1, 1983 by banks authorized to deal in exchange in Brazil, shall be made in the manner and under the conditions established by the Central Bank of Brazil. The Central Bank also issued Circular No. 804 on July 29, 1983 which stipulates that all transactions for the sale of foreign currency, with or without certificates or authorizations, shall be deposited at the Central Bank on the date of their liquidation. Excluded from this deposit requirement are the following transactions: (a) sales of exchange on the interbank market; (b) cover of personal and representation expenses on travel abroad; (c) payment of credit transactions with countries with which Brazil has reciprocal credit conventions; (d) payment of amounts subject to deposit at the Central Bank; (e) payment of arbitration transactions of banks authorized to deal in exchange in Brazil; (f) payment of fees of correspondents of banks abroad; (g) payment of imports made by shops located in tax-free zones; and (h) payment of interest for delays in the seven cases of remittance that banks are authorized to make (DOU-I, August 1, 1983).

Further, according to Resolution No. 851 and Circular No.

804, the Central Bank issued Circular No. 806/83 to include among those transactions which are not subject to compulsory deposit at the Central Bank, any sale of exchange made by an authorized establishment for: (a) payment of interest due on credit facilities in foreign currencies, when used to finance Brazilian exports; (b) payment of information, press and financial services, authors' rights and other expenses of acquiring news paper material, including printing paper, copyrights and broadcasting rights, by entities of the written, spoken and televised media, with due regard for the provisions of DECAM Communiqué No. 442/82; (c) payment of commitments under foreign loans granted against the issue of bonds registered at the Central Bank; (d) the constitution of initial and/or additional guarantee margins and cover of the daily adjustments in futures transactions on foreign commodities exchanges (hedging); (e) payment of freight, chartering, demurrage, container rental and other related expenses; and (f) payment of agency commissions in connection with Brazilian exports, with due regard for the applicable limitations (DOU-I, August 8, 1983).

Commercial Agreement

The acting President of the Republic signed Decree No. 88.606 of August 9, 1983 to regulate the implementation of Commercial Agreement No. 19, signed between Brazil, Argentina, Mexico and Uruguay for the electronics and electric communications industry (DOU-I, August 10, 1983).

Special Customs Treatment for Luggage

The Secretary of Federal Revenue issued Normative Instruction No. 90/83 to authorize the application of a special customs ruling of temporary admission, without the need for an import license, for goods contained in the baggage of a foreigner who enters Brazil on a temporary or official visa where the following requirements are met: (a) the visitor is committed to remain in Brazil for at least six months; (b) the visitor must submit a list of the goods, legalized by the proper Brazilian consulate; and (c) the baggage arrives in Brazil within one hundred twenty days of the foreigner's arrival. This authorization applies to professional and household articles but not to automotive vehicles (DOU-I, August 22, 1983).

II. JUDICIAL AND ADMINISTRATIVE RULINGS

Inclusion of Domestic Transportation Cost in Price of Imported Goods

Transportation costs incurred in the country of origin for coastwise shipping becomes part of the FOB price of the imported merchandise since it constitutes an expense necessary to place the shipment at the port of embarkation for Brazil. Therefore, the sum must be taken into consideration in the calculation of both the import duties and the Tax on Manufactured Products (IPI) (4th Panel of the Federal Court of Appeals, in civil appeal No. 75.804).

Confiscation of Goods Abandoned in Customs

Merchandise which has been considered abandoned due to expiration of the deadline for its clearance from customs areas cannot be confiscated automatically, but only after following appropriate administrative procedure, described in article 27 of Decree-Law No. 1.455/76 (Federal Court of Appeals, ruling on writ of mandamus No. 94.232).

Storage Fees for Imported Goods

Imported goods retained by the tax authorities as a result of litigation between the interested party and the tax authorities may be released before final disposition of the litigation by any of the following methods: posting a bond, making a deposit in cash or pledging federal government bonds in the equivalent of the claim. Even if the final decision of the litigation favors the interested party, he shall be liable for the payment of the respective storage fees and removal expenses if he has not provided for release of the goods (Decision of the 5th Panel of the Federal Court of Appeals on Appeal in writ of mandamus No. 86.235).

Storage Fee on Release of Imported Goods

If the delay in the clearance of imported merchandise occurred only because the goods bore no identifying marks, then the importer is responsible for paying any storage charge that may be levied (5th Panel of the Federal Court of Appeals, ruling on writ of mandamus No. 85.122).

Alienação Fiduciária of Fungible Goods

Both panels of the Federal Supreme Court have established case law to the effect that, in view of paragraph 3 of article 66 of Law No. 4728/65, as reworded by Decree-Law No. 911/68, fungible goods may be the object of *alienação fiduciária* - a Brazilian concept involving the transfer of the ownership of a purchased good in order to guarantee the financing of the purchase of that good (2nd Panel of the Federal Supreme Court, ruling on extraordinary appeal No. 99.629).

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COLOMBIA

The following is a brief summary of recent legislation and judicial decisions affecting the activity of foreign enterprises and individuals in Colombia:

New Income Tax Law

Law 009/83 adopted by Congress in May, 1983 has amended the income tax law in several important respects. Some of the changes enacted by Congress simply confirm measures which the government adopted in late 1982 and early 1983 as part of its economic emergency program. Many of the emergency decrees imposing new taxes were declared unconstitutional by the Supreme Court.

With respect to income from foreign investment the new law provides as follows:

- i) Where dividends are paid by Colombian *sociedades anónimas* (S.A.) to non-resident shareholders,¹ a 40% withhold-

1. For tax purposes a company is "foreign" if it has been incorporated outside Colombia and is "national" if incorporated in Colombia, regardless of the extent of foreign shareholder participation. However, according to the foreign investment law (decree 1900/73) an enterprise is "foreign" if more than 51% of its shares are owned by non-nationals; or is otherwise controlled to the same extent by such investors; and is "national" only if a minimum of 80% of its shares, or other means of control are held by nationals. Where nationals hold between 51% and 80% of shares or other means of control, the enterprise is considered to be "mixed." It is, therefore, possible for a company to be "national" for tax purposes while being "foreign" or "mixed" for investment law purposes.

The investment law determines the extent to which profits and capital can be remitted