10-1-1982

Brazil

LEGAL MEMORANDUM

I. Legislative and Administrative Rulings

The following is a brief summary of recent legislative and administrative rulings enacted by the Brazilian government which may affect foreign investments in Brazil.

Certain Capital Goods Imports Exempt from Import Duties

The President of Brazil has signed Decree-Law No. 1938 of May 10, 1982 exempting from import duties machinery, equipment and apparatus (also their parts, components and accessories) imported by companies that are implementing industrial or basic services projects, and are purchasing these goods with funds obtained from long-term foreign loans, foreign government entities, and international bidding competitions in which Brazilian capital goods manufacturers are assured access (DOU-I, May 11, 1982).

Deduction of Directors' Salaries as Business Expense

Normative Opinion No. 14/82 issued by the Coordinator of the Tax System explains that a company which pays income tax on the basis of taxable profit may, in fact, pay salaries to more than seven directors, provided that the individual and collective remuneration of those directors does not exceed the limits given in applicable law regarding the deduction of such payments as a business expense (DOU-I, May 19, 1982).

Reduction in IOF Tax Rates

In order to reduce the tax burden on certain transactions considered of economic importance to the nation, the Central Bank of Brazil, in Resolution No. 737/82, has reduced to zero the IOF (Tax on Financial Transactions) tax rate applicable to exchange transactions effected to pay for import of equipment to be installed in cement factories in the North and Northeast regions. The licenses covering the eligible imports would be those issued not later than May 1, 1982 and the projects involved must have been approved by SUDAM (The Development Authority for the Amazon) or SUDENE (The Development Authority for the Northeast). By

Resolution No. 738/82, the Central Bank has also reduced to zero the IOF tax rate applicable to imports of soybean oil in bulk (DOU-I, May 20, 1982).

Currency Conversion Method for Computing Value of Export Sales

According to Ordinance No. 81/82 of the Minister of Finance, the gross receipts from export sales of domestic manufactures are to be determined by converting the foreign currency value of these sales into cruzeiros, at the rate of exchange set by the Central Bank of Brazil for purchases of tht currency in force on the date that the goods were shipped (DOU-I, May 25, 1982).

New Levy Designed to Fund Social Assistance Programs

A contribution of 0.5% of the gross receipts of public and private enterprises engaged in the sale of goods, and on the gross income of financial institutions and insurance companies will be required as of June 1, 1982 under Decree-law No. 1.940 of May 25, 1982 issued by the President of the Republic. Companies that render only services will be subject to a levy of 5% on their income tax liability. Income from export sales will be exempt from the new charge. The proceeds will be used to fund social assistance in the areas of food and nutrition, public housing, health, education, and aid to the small farmer. In this connection, the Fund for Social Investment (FINSOCIAL) has been created and the National Economic Development Bank (BNDE) will not be known as the National Economic and Social Development Bank (BNDES).

However, suit has been filed in the 6th Federal Court of São Paulo to have the new levy designed to fund social assistance programs declared unconstitutional. The Judge granted a writ of mandamus on a preliminary basis in return for the deposit, with the court, of funds equivalent to the amount the plaintiff firm would have had to pay under the new scheme. The principal grounds on which the suit is based are: (i) the unconstitutionality of the "Decree-Law" (promulgated by the Executive Branch acting alone) as a means of instituting a tax, as well as for the creation of the commitment of revenues; (ii) the principal of precedence among laws; and (iii) the characterization of the "contribution" as being, in fact, a tax. Moreover, in the case of companies which only render services, the FINSOCIAL would be an additional charge on the in-

come tax which could only be collected in 1983 due to the constitutional principle that no new tax may be collected during the year in which it is first created (Case No. 4.744.845).

Regulations on Supplying of Taxpayer Status Information to Foreign Tax Authorities

Administrative rules for the furnishing of information on a taxpayer's tax status, when of interest to the tax authorities of a nation with which Brazil has signed a treaty to avoid double taxation, have been issued as Normative Ruling No. 25/82 by the Secretary of the Federal Revenue (DOU-I, June 3, 1982).

Restriction on Government Contracting of Foreign Informatics Services

Normative Act No. 21/82 of the Special Secretariat for Informatics provides that agencies and entities in the direct and indirect federal administration and foundations established or maintained by the government may only contract with foreign companies for technical informatics services when no Brazilian company is qualified and able to perform these services. For the purposes of such contracts, a Brazalian company is considered to be one that (a) has been duly organized in Brazil and has its head office and legal jurisdiction here; (b) is controlled, in matters of policy, technology and capital, by individuals resident and domiciled in Brazil; and (c) has a technical staff that is at least two-thirds Brazilian (DOU-I, June 7, 1982).

On-Lending of Foreign Loan Proceeds

The following Central Bank of Brazil circulars were published in the Official Gazette of the Federal Executive on June 28, 1982:

(a) NO. 707/82, permitting the cruzeiro equivalent of Resolution 63 foreign funds that are not used in on-lending ("repasse") operations to be invested in one of the following ways: (i) in short-term Treasury bonds as provided in item X of Circular No. 180/72; (ii) in deposits with the Central Bank under Circular No. 230/74; or (iii) in Readjustable National Treasury Bonds that are not tied to any other type of transaction (with the sole exception of investments made in compliance with provisions of item 3 of Circular No. 77/82);

(b) No. 708/82, permitting interbank on-lending of funds obtained abroad under Resolution 63 for at least 90 days, in order that they may be simultaneously on-lended to companies in Brazil for periods coincident with those of the interbank transaction. The on-lending of such funds may take place as follows: (i) at the time of entry into Brazil, for the 25% portion not subject to deposit; (ii) upon liberation of each portion desposited according to Resolution No. 595/80; (iii) upon liberation of the deposit for on-lending in Brazil, as provided in sub-part "b" of part IV of Circular No. . . 230/72, reworded by Resolution No. 686/81; (iv) upon receipt of sums previously re-lent to banks or clients; and (v) upon sale of the Treasury Bonds or Readjustable National Treasury Bonds referred to in Circulars Nos. 180/82 and 707/82.

Taxes Applicable to Importation of Goods Leased from Abroad

The entry into Brazilian territory of goods which are the object of leasing agreements contracted with lessors based outside Brazil is subject to payment in full of the import duties and Tax on Manufactured Products (IPI) at time of Customs clearance and on a basis to be determined in accordance with Ministry of Finance Ordinance No. 355/69 and Normative Act No. 7/82 issued by the Coordinator of the Tax System (DOU-I, July 9, 1982).

Clarifications on Calculation of Supplementary Income Tax

The Secretary of the Federal Revenue, in Normative Ruling No. 49/82, has explained that the supplementary income tax is to be calculated on the basis of the foreign currency sums which are actually remitted and which appear on the exchange contracts covering the remittance of profits, or of amounts considered as equivalent to profits. The conversion is to be made at the exchange in effect on December 31 of the last year of the three-year period in which the taxable excess remittances took place. The amount of the tax paid should be debited to the overseas beneficiary of the remittance and must be discounted for the remittable profits or dividends, according to current law, when and as they are distributed, credited, paid, or utilized (DOU-I, July 19, 1982).

Export Tax Rasied on Footwear

The Central Bank of Brazil has issued three resolutions effecting an 8% increase in the export tax on footwear and on certain

textile, leather, rubber and plastic goods with a view to blocking possible imposition, by the United States, of a surcharge on imports of such items from Brazil. Authority for Resolutions Nos. 749, 750 and 751 is based on Law No. 4595 of December 13, 1964. The increased tax rate will be levied on the FOB value of shipments exported under licenses issued on or after July 26, 1982 (DOU-I, July 26, 1982).

Procedure for Replacing Defective Imported Goods

Due to the number of instances in which imported goods, after Customs clearance, prove to be defective or unsuitable for the intended purpose and cannot be repaired or restored, the Ministry of Finance has issued Ordinance No. 150 to facilitate their replacement. An equivalent quantity or volume of goods identical to the defective goods may be imported when (a) the transaction is effected without exchange cover under a CACEX-issued export license linked to an import license; (b) the defect or unsuitability is proven by technical report of an institution deemed reputable by CACEX; (c) the products are returned before the replacements clear Customs. CACEX will issue the export-and-import licenses only after receiving the technical report and a copy of the import declaration covering the defective goods, and within 90 days of the clearance of the original shipment (DOU-I, July 27, 1982).

Foreign Loan Agreements Involving the Federal Government Need Not be Registered

The Office of the Attorney-General of National Finance has issued an Opinion regarding the necessity for foreign loan agreements in which the Federal Government appears as borrower or guarantor to be registered with the Registry of Deeds and Documents. The question arose because Law No. 6015 of December 13, 1973 requires that documents of foreign origin be registered in order to be effective in government offices and in court. However, the Attorney-General for the National Treasury stated three reasons why the contracts in question need not be so registered: (a) they are governed by Law No. 4131 of September 3, 1962 (Foreign Capital Law) which subjects them to registration with the former Superintendency of Money and Credit—now the Central Bank of Brazil, (b) because the Federal Government itself is a party and therefore the agreement is amply publicized by other means and (c) they have been authenticated by Brazilian consular authority

abroad, which classifies them under the type of documents excluded from the registration requirement by Supreme Court Precedent No. 259 (DOU-I, August 18, 1982).

Abandonment of Imported Goods

When imported merchandise has been considered abandoned due to the passage of time, its owner loses the right to it in compensation for damage to the public treasury. However this penalty may not automatically be imposed; an administrative proceeding must be instituted so that the importer is given every chance to submit a defense (5th Panel of the Federal Appeals Court, ruling on writ of mandamus No. 87.181 and ex-officio remittance No. 89.241).

II. Normative Acts

Under the Industrial Property Code, all specialized technical services agreements contracted abroad must be approved by the Institute of Industrial Property (INPI). Normative Act No. 15 was enacted by the INPI to establish principles and to issue norms for the registration of such agreements, and any other agreement related to the transfer of technology.

The following is an explanation of INPI Normative Act No. 60/82 (AN 60), published on April 13, 1982 which revokes item 6 of Normative Act No. 15/75 (AN 15), and establishes new rules for the contracting of foreign specialized technical services by Brazilian companies. This explanation is followed by a discussion of INPI Normative Act No. 61 (AN 61), also published on April 13, 1982. AN 61 establishes new rules for the licensing of trademarks owned by parties domiciled outside Brazil, and which constitute mere variations of trademarks already registered or applied for in Brazil.

Contracting Abroad for Specialized Technical Sevices

1. AN 60 lists all the kinds of services that are considered to be "specialized technical services", the contracting of which is subject to approval by the INPI. The new act includes two types of services which are not covered by AN 15, namely: (i) laboratory research and experiments, industrial or semi-industrial production research and tests performed to order; and (ii) the development and use of computer systems or programs for the processing of

data related to the services listed in AN 60. From the phrase "use of computer systems and programs" one can infer that agreements for the leasing of software have been classified as agreements covering specialized technical services and should therefore be submitted for approval under the rules of AN 60.

2. The new Act stipulates, even more incisively than did AN 15, that the importation of specialized technical services is conditional upon the absence of domestic technical capabilities for providing those services. AN 60 states that in order for the INPI to be able to evaluate the proposed importation, the draft agreement that is submitted for prior consultation must clearly describe the services to be performed by the foreign company, those which are to be performed by Brazilian consulting and/or engineering firms, and those which will be the responsibility of the Brazilian company that proposes to contract for the services.

3. Maintaining the spirit of AN 15, the new Act provides that the importation of design technology is always to be carried out in conjunction with a Brazilian engineering firm. AN 60 thus requires that an Engineering and Design Agreement contain a provision that the technical specifications of the project be oriented toward the characteristics of Brazil's industry so that the machinery and components may, in the short run, be produced in Brazil.

4. AN 60 introduces some new requirements regarding those services which are contracted via invoices. Previously, the requirements for prior submission of a formal agreement was waived when the services were performed on an urgent basis and the remuneration involved was less than US $20,000.00. In those cases, the agreement was made formal by the simple presentation of invoices and was not subject to prior consultation. The new Act raised the ceiling to US $35,000.00 and, for the first time, defines "urgent" services. Under item 2.4.2.1, AN 60 describes these as services intended to overcome the problem created by the breakdown of a machine or of a production unit or sub-unit, and similar events.

5. AN 60 also dispenses with the submission of draft agreements in instances involving (i) any specialized technical services valued at less than US $35,000.00; (ii) engineering services relating to supply, installation, assembly, inspection, and performance tests of equipment and industrial units regardless of their value. In such cases the transaction may be formalized via an invoice which is, nevertheless, subject to the requirement for prior consultation.

6. AN 60 did not make any change as regards remuneration, form of payment, and term of validity for specialized technical services agreements. Furthermore, it maintains the requirements of AN 15 as regards those clauses which are mandatory in such agreements, and those which are absolutely prohibited.

7. Lastly, in its general provisions section, AN 60 revoked items 1 and 2, part "a", of Normative Act No. 30/78. We gather from this that the contracting of specialized technical services for the automotive vehicle sector will now be examined by the INPI within the context of AN 60. It will now be possible to contract, and pay for, services rendered abroad that relate to the design of new vehicle models and new production methods. The regulatory items which have now been revoked, prohibited payment for such services.

New Rules on the Licensing of Trademarks

Under the Industrial Property Code (CPI), one of the conditions for trademarks owned by parties domiciled abroad to be licensed in Brazil with provision for payment of royalties, is that the trademark must have been filed in Brazil within the priority period set in Article 4 of the Paris Convention (not later than six months following the date of filing for registration of the trademark in its country of origin).

AN 61 states that the payment of royalties for the licensing of trademarks owned by parties domiciled abroad will not be permitted when the licensed trademark is a mere variation of another trademark already registered or filed in Brazil. This prohibition applies even when the trademarks that are considered to be mere variations of existing marks are filed in Brazil within the priority period established in Art. 4 of the Paris Convention. AN 61 also provides that trademark licensing agreements that are entered into for an indefinite period of time, or which do not individually identify the marks included in the agreement but mention them only generically, are to remain valid only until October 10, 1982.

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