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# Brazil

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## LEGAL MEMORANDA

### *EDITOR'S NOTE*

*"Legal Memoranda" is a regular section of the Review devoted to reports from corresponding law firms throughout the Hemisphere. The reports are compiled by the Review, but their accuracy is represented by the corresponding firms, to which all inquiries should be directed.*

*We appreciate the contributions of the corresponding law firms and invite other firms interested in participating in this section to contact the Review.*

## BRAZIL

### LEGAL LETTER OF JULY 1996

#### OFFSHORE CREDIT TRANSACTIONS

On May 28, 1996, the Central Bank of Brazil issued Resolution No. 2280, setting forth the procedures for registration of offshore credit transactions to be entered into by the states, the Federal District, municipalities, and their respective quasi-governmental entities without the guarantee of the federal government. The scope of this measure is to allow these entities to reschedule their internal debts, thereby replacing high interest rates and costs and short maturity with a reduced cost and better overall conditions (DOU-I, May 29, 1996).

#### SALE OF TRANSPORT TICKETS IN LOCAL CURRENCY

On June 7, 1996, the Central Bank of Brazil issued Letter Circular No. 2654, authorizing the sale of local and international air and ground tickets in local currency to Brazilian or foreign individuals and legal entities.

Previously, tickets for a trip between Brazil and any destination located outside Brazil could be purchased with only for-

eign currency. Now, a tourist in Brazil can acquire a ticket for a trip between two cities abroad in Brazilian currency. Until the issuance of Letter Circular No. 2654, the same tourist would have been forced to acquire foreign currency (e.g., U.S. dollars) and then purchase this ticket.

This measure is a part of the Central Bank of Brazil policy to gradually ease out existing tight exchange controls and to transform the Brazilian currency into an international currency accepted worldwide (DOU-I, June 11, 1996).

#### InterAmerican Convention of Proof and Information Regarding Foreign Law

On June 10, 1996, President Fernando Henrique Cardoso issued Decree No. 1925, adopting the InterAmerican Convention of Proof and Information Regarding Foreign Law (Convention) signed in Montevideo on May 8, 1979. This Convention establishes the rules for international cooperation of member nations regarding elements of proof and information on the law of other member nations.

Each member nation will be obliged to answer the consultation of other member nations through a central authority. Information will be provided through documents and opinions of experts. Requests for information will include the following data:

- (a) the origin of the request and the nature of the subject;
- (b) precise determination of the elements of proof that are required; and
- (c) detailed explanation of the reason for the request.

The member nations must always exert their best efforts to answer all inquiries in the most complete and clear way (DOU-I, June 11, 1996).

#### FOREIGN CAPITAL AND INSURANCE COMPANIES

Brazilian Constitution Article 192 establishes that the Brazilian financial system is to be structured to promote the balanced development of Brazil and serve the collective interests of its citizens. Article 192 also determines that the Brazilian financial system will be regulated by a supplemental law, which will also provide (among others) for:

- (i) authorization for the operation of financial institutions,

ensuring official private bank access to all instruments of the banking financial market, with such institutions being prohibited from engaging in activities not set out in the authorization;

(ii) authorization and operation of insurance, social security and capitalization companies, as well as of the official supervisory agency and the official reinsurance agency; and

(iii) conditions for the participation of foreign capital in the institutions referred to in items (i) and (ii) above, with special regard for the national interest and international agreements.

Article 52 of the Temporary Constitutional Provisions establishes that until such time as the conditions referred to in Article 192, Item III of the Constitution are established, (i) the installation in Brazil of new branches of financial institutions domiciled abroad; and (ii) the increase in the percentage participation of individuals and legal entities resident or domiciled abroad in the capital of financial institutions headquartered in Brazil are both prohibited. The prohibition contained in Article 52, however, does not apply to authorizations resulting from international agreements, reciprocity agreements, or agreements of interest to the Brazilian Government.

Brazilian insurance authorities have always interpreted the provisions of Article 52 to be applicable to insurance companies by analogy. Therefore, from the Brazilian insurance authorities' viewpoint, insurance companies already established in Brazil with foreign capital ownership cannot open new branches in Brazil until proper regulations have been issued.

This interpretation was recently contested and modified by the Attorney General of the Government Attorney's Office. He concluded in an opinion (Opinion GQ - 104 of June 5, 1996) directed to a specific insurance company that wanted to open a new branch due to spin-off of its office headquartered in Brazil, that the restrictions contained in Article 52 are only applicable to financial institutions, not to insurance companies. Therefore, such insurance company could open a new branch as a result of its spin-off. As stated in the opinion, the constitutional limitation on insurance companies is only applicable to the increase in foreign participation in the capital of insurance companies or setting up of new insurance companies held by aliens.

This decision evidences the Administration's tendency to phase out restrictions against the participation of foreign capital in vital areas such as insurance, social security, and banking (DOU-I, June 10, 1996).

### OFFSHORE SECURITIES ISSUE

On June 13, 1996, the Federal Senate passed Resolution No. 41, authorizing the municipality of Rio de Janeiro to issue fixed rate notes up to U.S. \$150 million abroad. The thrust of this measure is to allow the municipality of Rio de Janeiro to re-schedule and reduce its internal debt, replacing high interest rates and costs and short maturity with a lesser cost and better overall conditions.

This credit transaction will have no guarantor. The period of maturity for the fixed rate notes will be three years. The notes will bear interest (coupon) of up to 10.125% per year (equivalent to 400 basis points over the U.S. Government Treasury Bond for three years) (DOU-I, June 14, 1996).

### BRAZILIAN DEPARTMENT OF COMMERCIAL REGISTRATION

On June 13, 1996, the Brazilian Department of Commercial Registration issued the following Normative Instructions of note:

(i) No. 58 establishes new procedures for the filing of corporate documents of commercial companies with foreign participation (company) in commercial registries throughout Brazil. The ground rules are the following:

(a) before filing a corporate act or resolution of a company whose foreign partner is resident or domiciled in Brazil (for individuals only), commercial registries will require proof of regular entry into this country of such foreign partners;

(b) such companies can only be managed by an individual (Brazilian or foreigner) with residency established in Brazil; and

(c) companies with foreign partners not resident in Brazil will have to file with the commercial registry a power of attorney granting powers to an individual resident in Brazil in order to allow him or her to receive service of process.

(ii) No. 59 sets forth the procedures for opening of foreign

branches in Brazil. The basic rules are the following:

(a) foreign commercial company that want to open branches in Brazil will submit the proper application to the federal government. The application will contain the information spelled out in Normative Instruction 59; and

(b) the foreign commercial company will have to appoint a person resident in Brazil (Brazilian or foreigner) to act as representative of such foreign commercial company, and will grant a power of attorney to such person to receive service of process on its behalf.

(iii) No. 60 determines that commercial companies located in Brazil will have to present to the commercial registries proof of payment of federal taxes before filing any corporate decision regarding the winding-up of the company, reduction of corporate capital, merger, incorporation, corporate transformation, and division (DOU-I, June 20, 1996).

#### CENTRAL BANK REGULATIONS

On June 19 and 20, 1996, the Central Bank of Brazil issued the following Circulars of note:

(i) No. 2690 dated June 19, 1996, eliminates all restrictions on granting of credit by financial institutions to credit card companies in order to allow them to offer their cardholders revolving credit. The scope of this measure was to avoid economic recession and to adjust the internal economic growth. Before the issuance of Circular 2690, revolving credit was limited to fifty percent of the cardholders' outstanding balance;

(ii) No. 2692 dated June 20, 1996, informs that the Central Bank of Brazil will effect a census on foreign capital in Brazil. All entities which: (a) have a direct or indirect foreign participation in their corporate capital greater than ten percent; or (b) are debtors to foreign companies; or (c) both, must inform the Central Bank of Brazil on or before August 16, 1996;

(iii) No. 2693 allows the anticipation of payment of Brazilian imports that are not subject to Central Bank registration, by means of liquidation of the import exchange contract before shipment of the goods abroad (DOU-I, June 21, 1996); and

(iv) No. 2694 establishes the conditions for registration of

foreign capital invested in Real Estate Investment Funds regulated by Brazilian Securities Commission Instruction (DOU-I, June 21, 1996).

#### IDENTITY CARDS FOR ALIENS

On May 12, 1995, the Ministry of Justice issued Ordinance No. 526, determining the new model to be used for identity cards for alien with temporary or permanent visas or both. The Ministry of Justice also determined a deadline for replacement of the old identity cards by the new models. On June 19, 1996, the Federal Police Department issued Ordinance No. 603, extending for another 120 days the deadline for replacement of identity card mentioned herein (DOU-I, June 21, 1996).

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## BRAZIL

### LEGAL LETTER OF AUGUST 1996

#### MONEY LAUNDERING

On July 4, 1996, the Ministry of Justice submitted for public comment a bill dealing with money laundering in Brazil that creates the Financial Activities Oversight Council (FAOC). Under this bill, the explicit or implicit concealment or dissimulation as to the true nature, origin, location, availability, transaction or ownership of assets, rights or valuables knowingly arising from the crimes of: (i) illicit trafficking of narcotic substances or related drugs; (ii) unlawful activities performed by criminal organizations; (iii) terrorism; (iv) weaponry or ammunition trafficking or smuggling; and (v) crimes against the Public Administration will be subject to imprisonment of two to five years and a fine.

The bill also provides that this same penalty will apply to whoever:

(i) acquires, receives, exchanges, trades, gives or receives in guarantee or safekeeping, holds in storage, transacts or transfers assets, rights or valuables while knowing that they resulted from any of the crimes referred to above, for the purpose of concealing or dissimulating the illicit origin thereof;

(ii) imports or exports valuables of uncertain values, with an intention to conceal or dissimulate the use of currency or valuables originating from any of the crimes dealt with above; or

(iii) participates in group, association, or office knowingly established to conceal or dissimulate assets, rights, or valuables as set forth above.

Attempts at the above practices are also punishable, but penalties are reduced by one-third to two-thirds. The penalty will also be reduced by one-third to two-thirds if the coprinciple or participant voluntarily assists the authorities in the investigation of the above criminal practices, their perpetration, or cooperates in the location of such assets, rights, or valuables.

At the request of the police or a Public Prosecutor's staff



member, the court may order the seizure or impounding—during the investigation or court proceedings—of any assets, rights, or valuables held by the accused or in his name that are connected with the crimes hereunder. These preventive measures, however, will be discontinued if no criminal action is instated within 180 days after the corresponding investigations are completed. The release of any assets, rights, or valuables seized or impounded will be conditioned to the accused's evidencing the lawful origin of any such items.

If there are any international treaties or conventions to this effect and at the request of a foreign authority, the court will order the seizure or impounding of assets, rights, or valuables arising from crimes committed abroad, provided they are as listed above. These provisions will apply, irrespective of international treaties or conventions to this effect, whenever the respective government of the requesting authority undertakes to offer reciprocal treatment to Brazil.

If there is no convention in this respect, the assets, rights, or valuables seized or impounded at the request of a foreign authority or the proceeds from disposal thereof will be equally shared by the requesting foreign state and Brazil, with due regard for the rights of any aggrieved party or bona fide third parties.

Legal entities and their foreign or Brazilian representatives permanently or temporarily engaged in any activities such as:

(i) raising, intermediation and investment of third-party funds denominated in Brazilian or foreign currency;

(ii) purchase and sale of foreign currency, gold (as a financial asset), or trade bills; or

(iii) custody, issuance, placement, trading, intermediation, or management of securities, will:

(a) identify their clients and keep updated records thereon, in keeping with the instructions laid down by the proper authorities;

(b) keep specific and separate records of every transaction in Brazilian or foreign currency, securities, instruments of credit, metals or other assets convertible into cash, in excess of the limits set out by the proper authorities and in keeping with any instructions laid down by the latter; and

(c) meet for the period set out by the competent court authority any requirements made by the FAOC to maintain secrecy.

The records and registrations will be kept on file at least five years from closing of the account or completion of the transaction. This period may be extended by the proper authorities. When there is any suspicion that a transaction may be regarded as a crime under the bill, the legal entities and their representatives have twenty-four hours to disclose any such fact to the proper authorities, and will abstain from communicating this to the underlying clients. These legal entities, their controlling parties, managers, and employees will not be held liable in the civil or administrative spheres for any disclosure made in good faith.

The legal entities, their representatives, or attorneys engaged in these activities, as well as the managers and Audit Committee members of such legal entities, that fail to comply with the safekeeping and disclosure obligations will be subjected to any or all of the following penalties imposed by the proper authorities:

(a) a warning;

(b) a pecuniary fine ranging from one percent through twice the transaction amount, or up to 200% of the profit actually or purportedly obtained from the transaction, or a fine up to approximately U.S. \$200,000.00;

(c) temporary stay (up to ten years) on acting as manager of the legal entities referred to above; and

(d) suspension of authorization or license to operate.

The FAOC reports to the Ministry of Finance and was created for the purpose of regulating, receiving, reviewing, identifying, and investigating the suspected occurrence of illicit activities under this law, without prejudice to the spheres of authority of other agencies and entities. The FAOC will also coordinate and propose cooperation and information exchange mechanisms to facilitate the adoption of fast, effective action against money laundering. The FAOC will communicate to the proper authorities upon conclusion of either the existence of crimes mentioned in the bill or the existence of substantiated indicia of these or other crimes so that these authorities may take proper action.

The FAOC will be composed of public officers of recognized competence and unblemished reputation, duly appointed by an act of the Minister of Finance, and selected from among the staff of the Central Bank of Brazil, the Securities Commission, the Private Insurance Authority, the Attorney-General's Office of the National Treasury, the Federal Revenue Office, the Executive Branch Intelligence Agency, the Federal Police Department, and the Ministry of Foreign Affairs. In the latter three cases, the indication of the respective Ministries will be respected.

The Council will be chaired by a General Officer, appointed by the President of the Republic at the indication of the Ministry of Finance. The FAOC's organization and operations will be set in the bylaws approved by executive decree.

All parties interested in commenting on the bill had until August 5, 1996, to forward their comments and suggestions to the Ministry of Justice. This bill represents an important step in the adoption of regulations intended to curb money laundering, which are in line with similar measures adopted by other countries (DOU-I, July 5, 1996).

#### TELECOMMUNICATIONS SERVICES

On July 19, 1996, President Fernando Henrique Cardoso sanctioned Law No. 9295, defining the guidelines for commercial offer of mobile cellular, limited and telecommunications satellite signal transport services. Law No. 9295 establishes a term of fifteen years (renewable for similar terms) for concessions for mobile cellular and satellite signal transport services and ten years for limited services.

Under Law No. 9295, limited services are defined as being for the personal use of the executor or for rendering to third parties, provided that they entail just one person or group involved in realization of a specific activity. Article 3 establishes the obligations of those offering public services to make their networks available for interconnection on adequate, equitable, and nondiscretionary conditions.

Article 11 determines that, for the first three years from July 20, 1996, the Executive Branch will have the right to impose limits on the capital composition of the concessionaire company, both for cellular services and transport and satellite signal services, assuring them of at least fifty-one percent of the voting

capital directly or indirectly in Brazilian hands. The law conditions the adoption of this temporary restriction to further the national interest.

On the same date, the Minister of Communications issued Ordinance No. 911, thereby submitting for public comment the following rulings:

- (a) mobile cellular services;
- (b) criteria and technical requirements to be utilized in bids for the concession of mobile cellular services;
- (c) criteria for adjustment and review of the fees for mobile cellular services;
- (d) criteria for the creation and use of the service plan for mobile cellular services;
- (e) criteria for determination of the fees between subscribers of the public telephone system and the mobile cellular services charged by the concessionaire of the services;
- (f) remuneration for use of mobile phone and public telephone services;
- (g) criteria and procedures for the determination of the fees for the use of mobile cellular service and public telephone service network;
- (h) information on the rendering of mobile cellular services; and
- (i) general requirements for numbering of mobile cellular services networks (DOU-I, July 20, 1996).

#### TOBACCO AND ALCOHOL RESTRICTIONS

On July 15, 1996, President Cardoso sanctioned Law No. 9294, which contains restrictions on the use and related advertising of tobacco products, alcoholic beverages, medicines, therapies, and agricultural pesticides (Products).

Under Law No. 9294, alcoholic beverages are defined as potable beverages with alcoholic content greater than thirteen degrees on the Gay-Lussac scale. The use of tobacco-related products is forbidden in public or private areas, with the exception of restricted areas duly marked and ventilated for such purposes. The Products advertising will have to abide by the following

principles:

(a) not suggest exaggerated use or suggest that the Products will afford well-being or health, or link such Products to civic or religious events;

(b) not suggest to the consumers that the Products have calming or stimulating features, or both;

(c) not promise an increased masculinity, virility, or femininity; and

(d) not include adolescents or their statements or ideas.

Law No. 9294 also imposes time limits on the advertising for such Products on TV or radio. It also determines what medical advice statements should be included in the advertising for such Products (DOU-I, July 16, 1996).

#### EQUITY PARTICIPATION OF FINANCIAL INSTITUTIONS ABROAD

On July 25, 1996, the Central Bank of Brazil issued Resolution No. 2302, setting forth the procedures and norms for opening of branches and direct or indirect equity participations held abroad by financial institutions and other entities authorized to operate by the Central Bank of Brazil.

Under Resolution No. 2302, branches are defined as any and all branches, agencies, subsidiaries, or representation offices. The opening of branches abroad will require the preliminary approval of the Central Bank of Brazil and must comply with the following additional requirements:

(a) the Brazilian financial entity must have been operating for at least six years; and

(b) the corporate capital and net worth of the financial entity will have to observe the conditions for capital requirements set forth in the relevant regulations (DOU-I, July 26, 1996).

#### FOREST AREAS

In order to preserve forested areas in Brazil, on July 25, 1996, President Cardoso signed Decree No. 1963, interrupting the authorizations and concessions for the commercial exploitation of mahogany and virola tree species in the Amazon region for two years. On the same date, President Cardoso also adopted

Provisional Measure No. 1511, prohibiting the use of forest areas located in the North and Midwest of Brazil for agriculture (DOU-I, July 26, 1996).

#### INTERCEPTION OF TELEPHONE COMMUNICATIONS

The Brazilian Constitution's Article 5, Item XII establishes that postal and telephone communications are inviolable, unless such confidentiality is protected by a judicial order granted in accordance with the law. The relevant law, however, was never issued.

On July 24, 1996, President Cardoso issued Law No. 9296, establishing the rules for the confidentiality breach referred to in Article 5, Item XII of the Constitution. Under Law No. 9296, interception of communications can only be implemented after proper issuance of a court order, which can only be granted if:

- (a) there are considerable indicia of crime;
- (b) proof of facts cannot be obtained by other means; and
- (c) the fact under investigation is considered a criminal infraction punishable by imprisonment.

All information collected as a result of such interception will be held under court seal and will be kept in separate file records. Finally, under Law No. 9296, breach of confidentiality and unauthorized interceptions are considered crimes punishable by imprisonment of two to four years plus a fine (DOU-I, July 25, 1996).

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